Non-Reportable

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

Review Petition (Criminal) No.641 of 2015
In
Criminal Appeal No. 1795 of 2009

Mofil Khan & Anr. **...Petitioner (s)**

Versus

The State of Jharkhand **…. Respondent(s)**

J U D G M E N T

L. NAGESWARA RAO, J.

1. This Petition has been filed under Article 137 of the Constitution of India, seeking review of the judgment dated 09.10.2014 in Criminal Appeal No.1795 of 2009. The Petitioners were convicted for offences under Sections 302 and 449 read with Section 34 of the Indian Penal Code, 1860 (for short, "IPC") and sentenced to death for offence under Section 302 read with Section 34, IPC and 10 years of rigorous imprisonment for offence under Section 449 read with Section 34, IPC. The

conviction and death sentence imposed by the trial court was upheld by the High Court of Jharkhand by an order dated 02.07.2009 and the Criminal Appeal filed by the Petitioners against the said order was dismissed by this Court by its judgment dated 09.10.2014. In ***Mohd. Arif v. Registrar, Supreme Court of India***[1], this Court held that review petitions arising out of appeals affirming the death sentence are required to be heard orally by a three-Judge bench. Pursuant to the said judgment, this Review Petition is listed for open court hearing.

2. At the outset, it is necessary to set out the scope and ambit of the jurisdiction of this Court in hearing review petitions. Article 137 of the Constitution empowers the Supreme Court to review any judgment pronounced by it, subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution of India. Order XLVII, Rule 1 of the Supreme Court Rules, 2013 provides that the Court may review its own judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 and in a criminal proceeding except on the ground of an error apparent on the face of the record. Needless to mention that the Supreme Court Rules, 2013 are framed under Article

1 (2014) 9 SCC 737

145 of the Constitution. Order XLVII, Rule 1 of the Supreme Court Rules, 2013 is materially the same as Order XL, Rule 1 of the Supreme Court Rules, 1966. In ***P.N. Eswara Iyar*** v. ***Registrar, Supreme Court of India***[2], this Court observed that Order XL, Rule 1 of the Supreme Court Rules, 1966 limits the grounds for review in criminal proceedings to "errors apparent on the face of the record". Review is not rehearing of the appeal all over again and to maintain a review petition, it has to be shown that there has been a miscarriage of justice (See: ***Suthendraraja*** v. ***State***[3]). An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review (See: ***Kamlesh Verma*** v. ***Mayavati***[4]). An applicant cannot be allowed to reargue the appeal in an application for review on the grounds that were urged at the time of hearing of the appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record

2 (1980) 4 SCC 680
3 (1999) 9 SCC 323
4 (2013) 8 SCC 320

leading to miscarriage of justice (See: ***Vikram Singh*** v. ***State of Punjab***[5]). Justice Mohan M. Shantanagoudar in ***Sudam*** v. ***State of Maharashtra***[6] held that review petitioners cannot seek re-appreciation of the evidence on record while hearing review petitions.

3. Keeping in view the aforementioned principles laid down by this Court, we refer to the facts that are necessary for adjudication of the present Review Petition. The prosecution case is that there was a dispute relating to property between the Review Petitioners and their brother, Haneef Khan. At 8.30 PM on 06.06.2007, the Petitioners, along with others, assaulted Haneef Khan, who was offering *namaz* in the mosque of village Makandu, with sharp-edged weapons such as sword, *tangi*, *bhujali* and spade. Haneef Khan died on the spot. The Petitioners and others, thereafter, attacked Gufran Khan @ Pala and Imran Khan, who were proceeding to the mosque on hearing their father. Gufran Khan and Imran Khan were attacked in front of their house and they died. The Petitioners and others rushed into the house of Haneef Khan and murdered Kasuman Bibi, wife of Haneef Khan and their four sons, namely, Yusuf Khan (physically disabled and aged about 18 years), Maherban Khan (aged about 12 years), Danish Khan (aged about 8 years) and

5 (2017) 8 SCC 518
6 (2019) 9 SCC 388

Anish Khan (aged about 5 years). PW-2, Jainub Khatoon, mother of the Petitioners and the deceased-Haneef Khan, and others present were threatened by the Petitioners. PW-1, Gaffar Khan, who reached the village at 6.00 am on the next day, *i.e.*, 07.06.2007, saw the dead bodies of the family and was informed by his wife, PW-2, about the Petitioners and others committing the crime. In the meanwhile, the *chowkidar* of the village informed the police telephonically about the crime. PW-13, Shambhu Nath Singh, rushed to the place of occurrence and recorded the statement of the informant, Gaffar Khan. Inquest of the bodies of the eight deceased persons was prepared and post-mortem was conducted later. The Petitioners and others were charged for offences under Sections 302, 449, 380 read with Section 34 and Section 120B, IPC. Out of the 11 accused, 7 were acquitted and 4 of the accused individuals were convicted by the trial court. The Petitioners as well as Saddam Khan and Wakil Khan were convicted under Sections 302 and 449 read with Section 34, IPC and sentenced to death for offence under Section 302 read with Section 34, IPC and 10 years of rigorous imprisonment for offence under Section 449 read with Section 34, IPC. As stated earlier, the High Court upheld the conviction and sentence of the Petitioners, except the separate sentence of rigorous imprisonment for 10 years under Section 449 read with

Section 34, IPC, which was done away with. However, the High Court converted the sentence of death in respect of Saddam Khan and Wakil Khan to life imprisonment. The Appeal filed by the Petitioners against the conviction and sentence was dismissed by this Court on 09.10.2014. This Petition is filed seeking review of the said judgment.

4. Mr. C.U. Singh, learned Senior Counsel appearing for the Petitioners, submitted that a grave error was committed by the *amicus curiae* appearing for the Petitioners while arguing the Criminal Appeal by restricting his submissions only to the sentence. He submitted that the judgment of this Court in the Criminal Appeal suffers from an error apparent on the face of the record, as it relies upon a charge under Section 380, IPC of which the Petitioners have been acquitted by the trial court. He took us through the evidence and argued that the Petitioners ought not to have been convicted in the first place in view of the glaring errors in the prosecution case. The clothing of the Petitioners was not seized nor were any splatter marks found on the wall of the mosque or the house of Haneef Khan. Except the recovery of *tangi*, no other weapons alleged to have been used by the Petitioners were seized. PW-2 did not, admittedly, witness the murder of five persons in the house as she went into the room and locked her door out of fear. There is no evidence

that the Petitioners had caused the death of the wife and four children of Haneef Khan. Insofar as the death sentence is concerned, Mr. Singh submitted that the Petitioners have no criminal antecedents, did not have proper legal assistance during the entire proceedings so far and there is a possibility of reformation and rehabilitation of the Petitioners. He further stated that shortly after the crime, the Petitioners had sought to record a confessional statement before the Magistrate expressing remorse, which had not been permitted by the Investigating Officer. These incidents are recorded in the police diary. He argued that the conduct of the Petitioners during the period of incarceration has been satisfactory, as is clear from the certificate issued by the Jail Superintendent. The affidavits filed by family and community members of the Petitioners show that they have strong emotional ties with the Petitioners even now, which would demonstrate that the probability of the Petitioners' rehabilitation and reformation is not foreclosed.

5. Ms. Prerna Singh, learned Counsel appearing for the State, countered the submissions of Mr. C.U. Singh and argued that the conviction of the Petitioners should not be interfered with. There is no error, much less an error apparent on the face of the record committed by the trial court, the High Court or this Court. She pointed out that apart from PW-1, the mother of the Petitioners,

there are other independent eye-witnesses whose testimony was consistent during the rigorous cross-examination. PW-3 and PW-6 are natural eye-witnesses, who were performing *namaz* in the mosque when Haneef Khan was attacked and killed by the Petitioners and others. PW-5, the *Imam* of the mosque, also deposed against the Petitioners. The medical evidence of PW-8 is consistent with the ocular testimony of the eye-witnesses. Insofar as the death of Gufran Khan and Imran Khan outside the house is concerned, the evidence of PW-2 and other individual eye-witnesses, PW-7 and PW-12, is consistent and rightly relied on by the courts. PW-7, who is an independent witness, spoke about the forcible entry into the house of Haneef Khan by the Petitioners and other assailants, who carried deadly weapons. PW-2 deposed that she saw the Petitioners entering the house to kill Kasuman Bibi and her children and heard the shouts, though she had locked herself in a room. The chain of events is complete leading to the conclusion that the murder of the persons inside the house were committed by the Petitioners. In view of the nature of the murders committed in the goriest manner in a pre-meditated fashion, the Petitioners are not entitled to seek conversion of the death sentence. The manner of commission of the crime shows that this is the rarest of the rare cases, warranting a death sentence. She argued that the

diabolic and cold-blooded nature of the crime is a factor to be borne in mind to decide the possibility of reformation of the Petitioners.

6. Though a valiant effort was made by the learned Senior Counsel of the Petitioners seeking re-appreciation of evidence to interfere with their conviction, in view of the limited jurisdiction of this Court under Article 137 of the Constitution and Order XLVII, Rule 1 of the Supreme Court Rules, 2013, we are not inclined to do so. Even in an appeal by special leave, this Court does not re-appreciate the concurrent findings of fact recorded by the courts below (See: ***Duli Chand*** v. ***Delhi Administration***[7]; ***Dalbir Singh*** v. ***State of Punjab***[8]). It is relevant to deal with a submission made on behalf of the Petitioners that this Court relied upon the theft committed by the Petitioners from the house of the deceased, for which charge they had been acquitted by the trial court. Though such an error appears from the judgment of this Court, it is not an "error apparent on the face of the record" as the impugned judgment of this Court in affirming the death sentence was not rendered on the basis of the said finding.

7 (1975) 4 SCC 649
8 (1976) 4 SCC 158

7. Apart from others, the principal contention of the Petitioners is that the plausibility of reformation and rehabilitation was not taken into account by the trial court, the High Court as well as this Court while sentencing them to death. The trial court convicted the Petitioners and others on 01.08.2008. On hearing the Petitioners on the sentence, the trial court passed an order on 05.08.2008 after balancing the aggregating factors and mitigating circumstances. The brutality of the crime was taken into account by the trial court, which considered it fit to impose capital punishment on the Petitioners. The High Court set aside the death sentence imposed on Gurfan Khan and Imran Khan as there was no evidence to prove that they inflicted injuries on the deceased and also taking into account their young age. However, they were sentenced to life imprisonment after their conviction under Sections 302 and 449 read with Section 34 IPC was upheld. Taking note of the Petitioners' culpability in the gruesome murders which assumed "the proportion of extreme depravity", the High Court refused to interfere with the death sentence imposed by the trial court. This Court dismissed the Criminal Appeal taking note of the manner in which the offence was committed against the helpless children and others and concluded that the Petitioners would be a menace and threat to harmony in the society. Putting an end

to the lives of innocent minors and a physically infirm child, apart from other members of the family, in a pre-planned attack, was taken note of by this Court to hold that the case falls under the category of “rarest of the rare” cases.

8. One of the mitigating circumstances is the probability of the accused being reformed and rehabilitated. The State is under a duty to procure evidence to establish that there is no possibility of reformation and rehabilitation of the accused. Death sentence ought not to be imposed, save in the rarest of the rare cases when the alternative option of a lesser punishment is unquestionably foreclosed (See: ***Bachan Singh*** v. ***State of Punjab***[9]). To satisfy that the sentencing aim of reformation is unachievable, rendering life imprisonment completely futile, the Court will have to highlight clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the Court focuses on the circumstances relating to the criminal, along with other circumstances (See: ***Santosh Kumar Satishbhushan Bariyar*** v. ***State of Maharashtra***[10]). In ***Rajendra Pralhadrao Wasnik*** v. ***State of Maharashtra***[11],

9 (1980) 2 SCC 684
10 (2009) 6 SCC 498
11 (2019) 12 SCC 460

this Court dealt with the review of a judgment of this Court confirming death sentence and observed as under:

> "***45.*** *The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.*"

9. It would be profitable to refer to a judgment of this Court in ***Mohd. Mannan*** v. ***State of Bihar***[12] in which it was held that before imposing the extreme penalty of death sentence, the Court should satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to the society, and that there is no possibility of reform or rehabilitation of the convict,

12 (2019) 16 SCC 584

after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing material. The hearing of sentence should be effective and even if the accused remains silent, the Court would be obliged and duty-bound to elicit relevant factors.

10. It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent. A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime. There is no reference to the possibility of reformation of the Petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the Petitioners.We have examined the socio-economic background of the Petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the

above, it cannot be said that there is no possibility of reformation of the Petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative. Therefore, we convert the sentence imposed on the Petitioners from death to life. However, keeping in mind the gruesome murder of the entire family of their sibling in a pre-planned manner without provocation due to a property dispute, we are of the opinion that the Petitioners deserve a sentence of a period of 30 years.

11. Accordingly, the sentence of death imposed on the Petitioners is converted to life imprisonment for a period of 30 years. The Review Petition is disposed of.

.....J.
[L. NAGESWARA RAO]

.....J.
[B.R. GAVAI]

.....J.
[B. V. NAGARATHNA]

New Delhi,
November 26, 2021.