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INCONSISTENT APPLICABILITY OF DOCTRINE OF RAREST OF RARE

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Abstract

In the Report made by NLU, Delhi, Matters of Judgment – A Judges' Opinion Study on the Death Penalty and the Criminal Justice System,[1], the judges interviewed for this report have expressed their concern about the inconsistent use of the doctrine of rarest of rare by the judges. This doctrine was articulated in Bachan Singh's case. The doctrine relates to the fact that the court should consider certain circumstances while deciding if the accused is to awarded a death penalty. the death penalty should be awarded only in those cases which are rarest of rare. however, there if no fixed formulae that has been given by the court to decide which case will fall into rarest o rare category. The court needs to decide the same on the basis of the facts and circumstances of each case if the death penalty can be awarded in that particular case. The court may look into the manner of the commission of crime, that is to say, the court may look into if the murder committed by the accused is brutal, grotesque, inhumane, whether such murder shocks the morality of the society. As every case is to be judged on its own facts and circumstances, therefore, the court have to look into the aggravating circumstances and mitigating circumstances in each case. This depends on the opinion of the judges therefore; in this paper the author will try to establish how this doctrine has been used subjectively by the judges and is judge centric.

Introduction

The concept of death penalty has always been in limelight in context to Indian judiciary. It has been the most debatable one even and what makes it more debatable is as to under what cases the death penalty should serve the adequate sentence is not clear. Section 302, IPC provides the punishment for murder. That is if the accused commits murder, the extreme punishment that can be awarded to him is the death penalty. However, there has always been a conflicting opinion as to under what cases the death sentence should be awarded. For example, in the case of Rajendra Prasad v. State of Uttar Pradesh[2], Justice Krishna Iyer has suggested that the death penalty should be awarded only in three cases:[3]

1. White collar crime
2. For anti-social offences
3. Habitual offender that is the person who is a menace to the society.

According to him, the death penalty should only be awarded in these cases. However, in the dissenting judgment, Justice Sen has said that IPC does not provide for death penalty for white collar crimes or anti-social offences. Section 302 rather gives a discretion to the judge that he may award the highest punishment to the accused on the basis of facts and circumstances of the case. The main aim of the section is to give discretion to the judges so as to make them decide if the accused deserves death penalty or he deserves the lesser punishment.

One of the doctrines that is followed by the judges in awarding the capital punishment to the accused id the doctrine of rarest of rare which was propounded by the constitutional bench in the case of Bachan singh v. State of Punjab.

Doctrine of Rarest of Rare

The main case which settled this confusion was Bachan Singh v. State of Punjab[4]. It is a five-judge bench decision headed by Chandrachud CJI, Sarkaria, A. C. Gupta, N. L. Untwalia, P. N. Bhagwati, JJ in which the majority decision upheld the constitutionality of the death sentence. While upholding the constitutionality of the death sentence, the court also looked into the meaning of special reasons which are mandatory to be written as per section 354(3)[5], CrPC. The court even referred to Section 235(2),

[1] Surendranath Anup Dr., Matters of Judgment – A Judges' Opinion Study on the Death Penalty and the Criminal Justice System, NLU Delhi, Press, 2017
[2] AIR 1979 SC 916
[3] ibid also available at https://indiankanoon.org/doc/1309719/ visited on March11, 2021
[4] (1980) 2 SCC 684
[5] (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. Also available at https://indiankanoon.org/doc/324405/ visited on March 5, 2021

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CrPC[6], which provides that at the time when there is a conviction of the accused, the court while deciding the quantum of sentence must hear the accused.

This doctrine was articulated in Bachan Singh's case. The doctrine relates to the fact that the court should consider certain circumstances while deciding if the accused is to awarded a death penalty. In this case the court dealt with the constitutionality of the Section 302, IPC, 1860 wherein the death penalty may be awarded by the court for the crime of murder. The facts were that the accused kill the three deceased victims in an inhumane manner and the Sessions Court awarded him the death penalty which was confirmed by the High Court. Then the accused filed a special appeal and the main issue of this appeal was whether the facts found by the court below would be considered as 'special reasons' which is required under section 354(3), CrPC. Section 354(3), CrPC provides that wherein the court awards death penalty to the accused, it is mandatory for the judge to write special reasons as to why he thinks that in this case, death penalty should be awarded and there is no other alternative punishment that will be proportional to the crime committed by the accused.

According to this doctrine, the death penalty should be awarded to the accused only in extraordinary cases. The court should look into if the circumstances of the case warrants life imprisonment as a sentence or not. If the court finds the imprisonment for life will not serve the purpose as the crime committed by the accused demands that the death penalty is only option, then only the court should award death penalty to the accused. Therefore, the death penalty should be awarded only in those cases which are rarest of rare. However, there if no fixed formulae that has been given by the court to decide which case will fall into rarest o rare category. The court needs to decide the same on the basis of the facts and circumstances of each case if the death penalty can be awarded in that particular case. The court may look into the manner of the commission of crime, that is to say, the court may look into if the murder committed by the accused is brutal, grotesque, inhumane, whether such murder shocks the morality of the society. These factors are called as the aggravating factors which are the circumstances of the crime. The court may also look into the circumstances of the criminal that is to say the age of the accused, his education, whether, he has elderly parents, whether he is sole earning member of the society, the peer group of the accused, etc. These are called as mitigating factors. The circumstances of the criminal are also considered by the court while awarding the sentence of the accused. The death penalty is awarded to the accused where there are only aggravating circumstances and no mitigating circumstances. Or in some cases, even though there might be mitigating circumstances but they are not sufficient to offset the aggravating circumstances. From the cases of the Supreme Court one can see that there are variety of aggravating and mitigating factors that can be considered by the court. For example, according to a retired judge, if the accused has committed the rape and murder of a toddler, he would be awarded death penalty, on the other hand, if the accused has murder and raped the female above the age of 18 years, there may be a possibility that he may be awarded imprisonment for life.

However, this doctrine has been criticised in many judgments. In the recent report of NLU, Matter of Judgment- A Judges' opinion Study on the Death Penalty and the criminal Justice System[7] - the judges were asked their opinion about the applicability of the doctrine of rarest of rare. They said –

"Different strands emerged on the wisdom of rarest of rare doctrine as such. One view that emerged quite strongly was that the rarest of rare doctrine was quite hollow, which means it was left open to the judges to subjectivity fill it with content without guiding discretion. A smaller set of formers felt the doctrine was the best that any court could have evolved for choosing between life imprisonment and death sentence, whereas others' felt it failed to acknowledge or award sufficient weight to certain important consideration."[8]

If one analyses the judgments, then once can see that it is very difficult to carve out aggravating and mitigating circumstances in each case. As every case is to be judged on its own facts and circumstances, therefore, the courts have to look into the aggravating circumstances and mitigating circumstances in each case. This depends on the opinion of the judges. There cannot set table or formulae which can be laid down, which may provide for aggravating and mitigating circumstance. This can be understood by way of comparing various case laws in which the doctrine of rarest of rare has been used. For example, in the case of Mohd. Chaman v. State NCT of Delhi[9], the accused committed the rape of one year old girl, but the accused was awarded the imprisonment for life. Similarly

6 (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law. Also available at https://indiankanoon.org/doc/729076/ visited on March 5, 2021

7 Surendranath Dr.Anup, Matter of Judgment, NLU Publications, New Delhi, 2017

8 Ibid, pg.58

9 (2001) 2 SCC 28

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in the case of Bantu v. State of Madhya Pradesh[10], the accused was awarded life imprisonment despite the fact that he has brutally murdered and raped 6-year-old victim. Even in the case of Haresh Mohandas v. State of Maharashtra[11], the accused has horrendously raped and murdered 10-year-old girl. And for this heinous offence, he was awarded life imprisonment. On the other hand, there are many other cases wherein the accused has committed the rape and murder of a victim who was less than 10 years of age but the court has awarded the accused persons death penalty. For instance, in the case of Bantu v. State of Uttar Pradesh[12], the accused brutally raped and murdered 5-year-old girl. The court awarded the accused death penalty. Similarly, in the case of Jumman Khan v. State of Madhya Pradesh[13], the age of the victim was 6 years old and she was ravished and murdered by the accused, he was awarded death penalty. In the case of Kamta Tiwari v. State of Madhya Pradesh[14], the age of the victim was 7 years old and she was raped and murdered by the accused for which the accused was awarded death penalty. Similarly, in the case of Shivaji v. State of Maharashtra[15], the age of the victim was 9 years. In the case of Mohd. Mannan v. State of Bihar[16], the age of the victim was 7 years. And the accused were awarded death penalty in the last two mentioned cases also. In the above-mentioned cases, the rape and the murder of the victim who was less than 10 years of age, in some cases was considered as aggravating factors, on the other hand in some cases, it was not considered a fit case for the award of death penalty.

Similarly, one may also look into mitigating factors that are considered by the court according to their own discretion. For example, the age of the accused has considered by the courts as a mitigating factor in many cases. For instance, in the case of Ramnaresh v. State of Chattisgarh[17], all the accused persons were falling within the group between 21 and 30 years. They had committed the gang rape and murder of the victim; however, the court commuted the death sentence to life imprisonment considering the young age of the accused persons. It is believed by some of the judges that if the age of the accused is less, then there are chances that the accused are not beyond reformation. On the other hand, in the case of Dhananjay Chatterjee v. State of West Bengal[18], the age of the accused at the time of commission of crime was 28 years, he was a married man. Moreover, there was no previous criminal record of the accused. None of these were considered as mitigating factors by the court, the court rather upheld his death sentence. Similarly, in the case of Santosh Kumar Singh v. State (NCT of Delhi)[19], the court did not consider the young age of the accused as a mitigating factor.

One may also look into certain cases wherein the facts of the case are same, however, the benched who decided the case are different. One of the benches has awarded capital punishment and the other has not awarded the same sentence on the basis of the similar facts. For example, in the case of Sushil Murmu v. State of Jharkhand[20], the accused sacrificed a child for the purpose of his personal gains. The court considered the case falling in the category of rarest of rare and awarded the accused death penalty. It was alleged by the defence that the accused acted on the basis of the superstition, but this was not affected by the court as a mitigating factor. On the other hand, there is another judgment that is State of Maharashtra v. Damu[21], in which the accused was held liable for the murder of the three innocent children which he committed for the purpose of sacrifice. The accused believed that if he will commit these murders, he will be rewarded with concealed money. This fact was considered by the court as mitigating factor. Therefore, it can be observed that on the similar facts, the different benches have given different opinion.

The author would like to give more instances in which such discrepancy can be observed with respect to the mitigating circumstances. Generally, the cases of murder are based on circumstantial evidence. In some of the judgments given by the Supreme Court, the court has said that wherein the judgment is based on the circumstantial evidence, it would act as a mitigating factor. For instance, in the case of Sahadeo v. State of Uttar Pradesh[22], the court has considered the circumstantial evidence as a mitigating factor. Similar has been the decision in the case of Alok Nath Dutta v. State of West Bengal[23]. On the other hand, the case of Kamta Tiwari v.

[10] (2001) 9 SCC 615
[11] (2011) 12 SCC 56
[12] (2008) 11 SCC 113,
[13] (1991) 1 SCC 752
[14] (1996) 6 SCC 250
[15] (2008) 15 SCC 269
[16] (2011) 8 SCC 65
[17] (2012) 4 SCC 257
[18] (1994) 2 SCC 220
[19] (2010) 9 SCC 747
[20] (2004) 2 SCC 338, coram – Doraiswamy Raju, A.Pasayat, JJ
[21] (2000) 6 SCC 269, Coram – K.T.Thomas, D.P.Mohapatra, JJ
[22] (2004) 10 SCC 682
[23] (2007) 12 SCC 230

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State of Madhya Pradesh[24], the entire case of rape and murder of the toddler was based on circumstantial evidence, but the same was not considered by the court as a mitigating factor. However, the researcher does not agree with the decision of the Hon'ble court regarding that the wherever the case is decided on the basis of circumstantial evidence, it would be considered as a mitigating factor. Maximum number of the cases of murder, rape and murder, dowry death etc., they all are committed in secrecy; therefore, the court has to rely upon the circumstantial evidence. Therefore, in the opinion of the researcher, the same should not always be considered as a mitigating factor.

In the case of Shankar Kisanrao Khade v. State of Maharashtra[25], an eleven-year-old physically handicapped girl is kidnapped by the accused along with his wife. The girl was raped multiple times by the accused even in the presence of his wife. After that the accused killed her brutally. Even before committing her murder, he raped her. The accused was 52 years of age at the time of commission of offence. The lower courts awarded the accused death penalty. The Supreme Court observed that the death penalty may be awarded only in those cases in which the crime tests, criminal test and rarest of rare test is fulfilled. The crime test states about the manner of commission of crime, that is to say that whether the crime has been committed in brutal or heinous manner. The second test is criminal test which is related to the circumstances of criminal. In this test, the court may look into any circumstances which can be considered by the court to mitigate the sentence of the accused. the third and the last test is rarest of rare, which is to look into the fact that the crime committed by the accused is so shocking that the society demands that death penalty is only option and any other option for imprisonment is foreclosed. The court said, in this case, all the three tests are satisfied but the accused does not deserve death penalty. the court held as follows:

"Remember, the victim was a minor girl aged 11 years, intellectually challenged and elders like the accused have an obligation and duty to take care of such children, but the accused has used her as a tool to satisfy his lust. Society abhors such crimes which shocks the conscience of the society and always attracts intense and extreme indignation of the community. R-R Test is fully satisfied against the accused, so also the Crime Test and the Criminal Test". Even though all the above-mentioned tests have been satisfied in this case, I am of the view that the extreme sentence of Death penalty is not warranted since one of the factors which influenced the High Court to award death sentence was the previous track record of the accused."[26]

The researcher disagrees with the decision awarded by the Hon'ble court. The court said that death penalty cannot be granted unless all the test that is the crime test, the criminal test and the rarest of rare test are fulfilled. But in this case, all the test has been fulfilled but the court still not award the death sentence to the accused. The court observed that the High Court had relied on the previous criminal record of the accused. on this ground the court commuted the death sentence of the accused despite the fact that according to the bench the case fell under the rarest of rare doctrine. In the opinion of the researcher, the accused deserved the death penalty because the aggravating factors clearly outweighed the mitigating factors in this case. The accused was a man of 52 years at the time of commission of crime. He not only one but multiple times raped her at different locations. He kidnapped her only to satisfy his lust. He did not even consider the state of the victim who was merely eleven years of age and was physically handicapped. The accused had proved his pervert mind wherein before murdering her also, the accused committed the rape upon her. The crime is so heinous and shocking that the accused deserves the death sentence.

Moreover, this case also shows the unpredictability in the application of this doctrine of rarest of rare by the judges. The judges award the death penalty on their own discretion. In the case of Shankar Kisanrao Khade v. State of Maharashtra[27], the court has not highlighted any mitigating circumstances on the basis of which the death sentence awarded to the accused has been commuted to life imprisonment. Whenever the court decides the case for death penalty, the court needs to look into the aggravating and the mitigating factors to be considered by the court. There are so many judgments in which the court has not discussed the mitigating circumstances of the accused while awarding the death sentence, whereas as per Bachan Singh's case, the circumstances of the criminal are to be considered by the court in case related to death sentence. In the case of State of Uttar Pradesh v. Satish[28], the court has upheld the death sentence awarded to the accused for brutal rape and murder of the innocent child, however, the court did not discuss the mitigating factors at all in the case. In another case, Lokpal v. State of Madhya Pradesh[29], wherein the accused murdered 6 members of the family, the death sentence was upheld by the Supreme Court. However, the court did not discuss the mitigating circumstances related to the accused. In the other judgment of Ranjeet v. State of

[24] (1996) 6 SCC 250
[25] (2013) 5 SCC 546, Coram – K.S.Radhakrishnan, Madan B.Lokur, JJ
[26] Supra Note 62, Para 35
[27] Supra note 64
[28] (2005) 3 SCC 114
[29] AIR 1985 SC 891

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Rajasthan[30], the accused along with his accomplice, murdered the eight members of a family and the court upheld the death sentence awarded to the accused. The court did not discuss any circumstance relating to the accused while upholding the death sentence:

In the Report made by NLU, Delhi, Matters of Judgment – A Judges' Opinion Study on the Death Penalty and the Criminal Justice System,[31], the judges interviewed for this report have expressed their concern about the inconsistent use of the doctrine of rarest of rare by the judges. One of the judges has quoted the following:

"It can be safely said that the Bachan Singh threshold of rarest of rare cases has been the most variedly and inconsistently applied by the various High Courts as also this court. At this point, we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty, therefore, the gravest penalty arising out of the exercise of extraordinary wide sentencing discretion which is irrevocable in nature. This extremely uneven application of Bachan Singh has given rise to the state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle."[32]
Another example may be seen of discretionary sentencing is of the case of Kunju Kunju Janardhanam v. State of Andhra Pradesh[33] wherein the three-judge bench with the majority opinion commuted the death sentence to life imprisonment for the accused. The facts of the case were that there was accused who was living happily with his wife and two children but he fell in love with another female who rather asked him not to destroy his lovely family. But the accused wanted to continue the illicit relationship with the other women despite her resistance to it. The accused killed his wife and two children while they were asleep at night. The accused was awarded death penalty by the trial court which was confirmed by the High Court. However, the Supreme Court commuted the same to life imprisonment. However, Justice A.P.Sen gave his dissenting opinion in this case. He said,
"The accused who acted as a monster did not even spare his two innocent minor children in order to get rid of his wife and issues through her, if the death sentence was not to be awarded in case like this, I do not see the types of offences which call for death sentence.

In retrospect, I venture to say that in these appeals, it cannot be asserted that the award of death sentence to the appellants was 'erroneous in principle'. Nor can it be said that the sentence of death passed on them was arbitrary or excessive or indicative of an improper exercise of discretion. It is the duty of the Court to impose a proper punishment, depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders. Failure to impose a death sentence in such grave cases where it is a crime against the society-particularly in cases of murders committed with extreme brutality, will bring to nought the sentence of death provided by s. 302 of the Indian Penal Code, 1860. To allow the appellants to escape with the lesser punishment after they had committed such intentional, cold-blooded, deliberate and brutal murders will deprive the law of its effectiveness and result in travesty of justice."[34](Pg.68-69)

On the other hand, the majority opinion, commuted the death sentence to life imprisonment stating that that the accused does not deserves the death penalty as he may be reformed, if the life imprisonment is awarded to him. It can be seen that the accused commits a crime in those cases wherein there is motive for him to commit the crime as in this case. Therefore, this motive was the main guidance factor. He has not caused harmed to any other person. Therefore, one cannot say that the accused cannot be reformed. However, the author disagrees with the opinion of the court. The accused did that act for his lust for illicit relationship and for that he murdered his own family. He was the head of the family. He had the duty to protect his family from the outsiders. But he himself murdered them all. In the opinion of the researcher, the accused deserved death punishment.

Therefore, on the similar facts and circumstances there is a difference of opinion in the sentence awarded to the accused. The majority commuted the death penalty and the dissenting opinion has awarded death penalty to the accused.

Similarly in the other judgment of Rajendra Prasad v..State of Uttar Pradesh[35], the court discussed the constitutionality of the death sentence in India and held that the awarding of death sentence is constitutional. But based on the facts of the case, the majority commuted the death sentence to life imprisonment. In this case the accused had already undergone a life sentence and he was released

30 AIR 1988 SC 672
31 Surendranath Anup Dr., Matters of Judgment – A Judges' Opinion Study on the Death Penalty and the Criminal Justice System, NLU Delhi, Press, 2017
32 Ibid Pg.62
33 AIR 1979 SC 916
34 ibid
35 1979 SCC (3) 646,

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from the jail. After his release he went to see one of the victims, and thereby he attacked him brutally with knife and severely injured him. The victim ran away from there and hid in his house and the accused followed him to kill him there. While then accused was banging the door, another victim intruded to stop him from committing the crime but this agitated the accused more and therefore, the accused killed him brutally. The trial court awarded him death penalty and the same was confirmed by the High Court. The Supreme Court in its majority opinion of 2:1 commuted the death penalty to life imprisonment. The majority opinion was delivered by the Justice Krishna Iyer. He observed that there has been a long delay since the time the trial court has awarded him death penalty. The moment the death penalty is awarded by the lower court, there is continuous fear in the mind of the accused that he may be hanger anytime soon. This makes him more in a state of "vegetable", therefore, such person should not be hanged as he is no more alive in a true sense, therefore, what good will it make to hand an already dead person. He also observed that the manner in which the accused behaved was because of the persistent family problem that existed in his family. Therefore, he deserved a chance for his reformation. As generally it appears that this kind of murders are not pre-planned and they occur because of the frustration of the family feuds, therefore, the accused on the humanly approach should be given a chance to reform their lives.

However, Justice A.P.Sen have the dissenting opinion in which he said that death penalty awarded to the accused by the lower courts should be upheld as he believed that the accused was beyond reformation. Justice Sen has expressed his belief in the judgment stating that the punishment awarded to the accused should set an example to the accused as well as others so that similar kind of offence should not be committed. That is others should learn their lesson that if they will commit the similar kind of offence then they would also have to undergo the similar kind of punishment. Justice Sen said

"A humanistic approach should not obscure one's sense of realities. When a man commits a crime against the society by committing a diabolical, cold-blooded, pre-planned murder, of an innocent person the brutality of which shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life. [Para 136][36]"

Therefore, it can be seen that the doctrine of the rarest of rare has its own drawbacks. However, the theory was laid down by the five-judge bench in the case of Bachan Singh v. State of Punjab.[37] This theory gives the ample discretion to the judge to award the death penalty in a particular case. This discretion is being used by the judges in uninformed and in the varying manner. Therefore, certain measures should be considered by the judiciary as well as legislature for the proper application of the doctrine of rarest of rare.

36 https://main.sci.gov.in/judgment/judis/4874.pdf
37 (1980) 2 SCC 684