

CASE NO.:
Appeal (crl.) 454 of 2006

PETITIONER:
Swamy Sharaddananda @ Murali Monahar Mishra

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 18/05/2007

BENCH:
Markandey Katju

JUDGMENT:
J U D G M E N T

MARKANDEY KATJU, J.

1. I have perused the judgment of my learned brother Hon'ble S.B. Sinha, J. in this case. The facts of the case have been narrated in the judgment of my learned brother and hence I am not referring to them except where necessary.

2. While I entirely agree with my learned brother that the conviction of the appellant under Section 302 and other provisions of IPC imposed by the Trial Court and High Court deserves to be upheld, I express my inability with my learned brother that the death sentence imposed by the Trial Court and confirmed by the High Court should be reduced to life sentence. In my opinion this case falls within the category of rarest of rare cases and hence the appellant deserves death sentence.

3. In Alope Nath Dutta & Ors. vs. State of West Bengal 2006(13) SCALE 467 a Division Bench of this Court referred to the Constitution Bench judgment of this Court in Bachan Singh vs. State of Punjab AIR 1980 SC 898 in which it is laid down that death penalty should only be imposed in the rarest of rare cases. In Machi Singh vs. State of Punjab 1983 (3) SCC 470 (vide paragraphs 32 to 37) a 3 Judge Bench of this Court gave the following illustrations of murders which fall within the category of 'rarest of rare cases' and hence deserved death penalty.

(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; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

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

4. In Bachan Singh's case (supra), the Constitution bench observed that the death penalty contemplated by Section 302 IPC is not unreasonable or against the public interest, and it does not violate Articles 19 or 21 of the Constitution. In the same decision it was also observed (vide para 201) that judicial discretion cannot be fettered by attempting to make an exhaustive enumeration one way or the other. Hence, it follows that the 5 principles referred to in Alok Nath Dutta's case (supra) justifying award of death penalty can only be treated as illustrative and not exhaustive.

5. In Holiram Bordoloi vs. State of Assam 2005 (3) SCC 793 this Court observed that pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. A murder diabolically conceived and cruelly executed would justify the imposition of the death penalty on the murderer.

6. In my opinion the facts of the present case clearly fall within the category of rarest of rare cases as laid down by the Constitution Bench Judgment in Bachan Singh's case and in Machi Singh's case (supra). It clearly comes within the first, second and fifth categories mentioned above, and it falls under the category of rarest of rare cases deserving death sentence.

7. No doubt as observed in paragraph 173 of the judgment in Alok Nath Dutta's case (Supra) there has been a growing demand in the international fora that the death penalty should be abolished. However, in my opinion, in India the death penalty cannot be abolished by a judicial verdict as death sentence is contemplated by the Constitution and the I.P.C. Thus Article 72(1)(c) of the Constitution specifically mentions that the President of India has the power to grant pardons, reprieves or suspension of any death sentence. Similarly Article 72(3) also contemplates the power in the Governor of the State to suspend, remit or commute a death sentence. Hence if we hold that the Courts have no power to impose a death sentence we will really be amending the Constitution by a judicial verdict. Again, if we hold that the Courts have no power to impose death sentence merely because the death sentence has been abolished in some foreign countries in Europe or because there is a demand in the international fora that death sentence should be abolished, we will be really amending the Constitution by a judicial verdict. In my opinion this Court has no power to amend the Constitution by a judicial verdict. The Constitution can only be amended by Parliament in the manner prescribed by Article 368 of the Constitution. This Court cannot arrogate to itself the power of Parliament under the Constitution and must maintain self-restraint. Moreover, what has happened in foreign countries cannot be automatically applied to our country where the situation is different.

8. No doubt Parliament can abolish the death sentence by deleting it as one of the punishments prescribed in the I.P.C or other statutes, but this Court cannot do so. The Court cannot legislate or amend the law. There is broad separation of powers under the Constitution and this Court must not

ordinarily encroach into the legislative or executive domain as held by us in Indian Drugs & Pharmaceuticals Ltd. Vs. The Workman of Indian Drugs & Pharmaceuticals Ltd. 2007(1) SCC 408.

9. In my opinion the facts of the present case clearly fall within the principle of the first, second and fifth category mentioned earlier in this judgment and thus this case falls within the category of the rarest of rare cases. It is a case of a pre-planned and cold blooded murder diabolically conceived and cruelly executed.

10. Before coming to the facts of the case I would also like to say that there cannot be an absolute principle of law that merely because there has been a long lapse of the time from the commission of the offence and the final conviction and sentence by this Court the death penalty can never be imposed. It all depends on the facts of each case. It is well known that now-a-days a long interval of time frequently occurs between the commission of the offence and the final conviction by this Court (because of the delays in the trial, appeals, etc.), and hence if we lay down any absolute principle of law that merely because of this long interval death penalty cannot be imposed then in all such cases merely because of lapse of time death penalty cannot be imposed even though the murder was cold blooded, diabolical and heinous. This again would be amending the Constitution by a judicial verdict. Moreover this would give encouragement to the accused and their lawyers to delay proceedings in Court (by unnecessary adjournments, interlocutory applications, etc.) to avoid the death penalty. I, therefore, cannot agree with the view that merely because a long lapse of time has occurred between the commission of the offence and the final decision of this Court the death penalty cannot be imposed.

11. I also do not agree with the observations in paragraph 173 of the Alok Nath Dutta's case (Supra) that in cases of circumstantial evidence ordinarily the death penalty should not be awarded. In my opinion no such absolute proposition of the law can be laid down. It all depends on the facts of each case. Criminals have been hanged even on the basis of circumstantial evidence. Hence I cannot agree that we can lay down any such absolute proposition as was laid down in Alok Nath Dutta's case (Supra). There is no principle of law that only direct evidence is strong and reliable while circumstantial evidence is weak and unreliable. Circumstantial evidence can be as strong and reliable as direct evidence, but the only requirement is that the prosecution must establish beyond reasonable doubt that there is a chain of links which connects the accused with the crime.

12. I may now deal with the facts of the present case which clearly shows the diabolical, cold blooded, evil mind of the appellant who has acted in a most depraved, malevolent and condemnable manner, taking advantage of a lady's innocence.

13. The deceased Smt. Shakereh was married to one Mr. Akbar Khaleeli who was in the Indian Foreign Service. They had four daughters. In 1983 the deceased along with her children visited the Nawab of Rampur who was evidently a friend of the deceased and her husband. The accused was at that time assisting the Rampur royal family in the management of their landed properties and he was introduced to the Khaleeli family. After getting acquainted with them the accused gained their confidence. Since certain matters relating to the properties of the deceased at Bangalore needed to be sorted out she sought assistance of the accused having regard to his alleged expertise in dealing with property matters. The deceased Smt. Shakereh who comes from a good family had inherited huge properties including House No.81, Richmond Road, Bangalore, and other properties.

14. Since, Mr. Akbar Khaleeli had to go to Iran on his posting as a diplomat, Smt. Shakereh came to Bangalore. The accused also came to Bangalore and was provided accommodation in the same house. It is stated that Shakereh had only daughters and she longed for a son. The accused

made her believe that he could bless her with a son. In 1985, Akbar Khaleeli and Smt. Shakereh divorced, and a few months thereafter the deceased married the accused and both started living together in House No.81, Richmond Road, Bangalore.

15. However, even after divorce and second marriage of Smt. Shakereh her relationship with her parents and daughters remained unaffected and she was in regular touch with her daughter Sabah, P.W. 5 by talking with her over telephone or meeting her personally. Sabah was a model and publisher of a fashion magazine in Mumbai, and she would regularly telephone her mother, sometimes twice a day. She would also get telephone calls regularly from her mother. However, from May 1991, the deceased became unavailable and when Sabah tried to contact her on telephone, the accused informed her that her mother had gone to Hyderabad for the marriage of a relative. Telephone calls from the deceased to Sabah also stopped coming from May 1991. After four or five days Sabah again telephoned to her mother's house at Bangalore, and this time she was told by the accused that Shakereh had gone to Kutch for a marriage of a big diamond merchant. Again after four or five days Sabah telephoned to her mother's house. This time the accused told her that her mother was facing income tax problems and hence she was not in a position to talk to anyone.

16. Since Sabah was not able to speak to her mother despite repeated endeavours and since telephone calls from her mother stopped coming to her, she came from Mumbai to Bangalore and went to House No.81, Richmond Road. She asked the accused as to where her mother was. The accused told her that since her mother was longing for a male baby she had become pregnant and wanted a peaceful atmosphere for nine months. When Sabah asked where her mother had gone, the accused told her she was admitted in Roosevelt Hospital, New York, since it was the best hospital. Sabah then asked the accused to give the telephone number and address of the hospital where her mother was admitted, but the accused refused to give her the address or telephone number saying that since her mother wanted a peaceful atmosphere the telephone number and address were unnecessary. Later Sabah contacted the Roosevelt hospital at New York through a friend and came to know that no woman of the name Shakereh was admitted in the hospital. Sabah then confronted the accused and told him that there was no one in the name of her mother in the hospital and asked the accused to tell her where her mother was. The accused told Sabah that since her mother was pregnant and wanted to keep it a secret and rest for nine months so he could not give her the correct address. Sabah then asked the accused to at least allow her to speak with her mother on telephone so that she could hear her mother's voice, but the accused did not do that. Sabah came to Bangalore but did not find her mother there. At Bangalore whenever any telephone rang the accused used to lift the receiver and tell Sabah that the telephone was from her mother, but before Sabah could go near the telephone, the telephone used to get disconnected and the accused told her that the call was from her mother.

17. Sabah then returned to Mumbai. Thereafter, the accused visited Mumbai two or three times where he used to stay at Taj hotel, which is a very costly hotel with two or three persons. These two or three persons were women. In December 1991, the accused came to Mumbai and stayed at Sea Rock hotel (which is also a very expensive hotel). The accused told Sabah that he had come to attend a marriage. Sabah went to the room of the accused in the hotel and saw her mother's passport there which showed that her mother had not left India for any foreign country since 1989. The accused told Sabah that her mother was in India and asked her to be patient for some more months. In March 1992, Sabah rang the accused and told him that it was already nine months since the time the accused told her that Shakereh was pregnant and now he had to tell her the whereabouts of her mother otherwise she would lodge a police complaint. To that, the accused told Sabah to remain patient and he would inform her in a day or two. After two or three days the accused informed her that her mother had given birth to a male child. When Sabah asked him to give the address of her mother

the accused evaded the question and told her to wait for some more time. The accused then asked Sabah to come to Bangalore where she could meet Shakereh and the child. Accordingly, Sabah informed the accused the date of her journey and came to Bangalore by air but did not find either the accused, her mother or the child at house No. 81, Richmond Road. After four hours of her arrival in the house, the accused came to the house and told Sabah that he along with Shakereh were waiting for her at the airport and when they did not find Sabah there, the accused left Shakereh in the farm house. The accused then told Sabah that her mother would be coming the next day and there was no need to lodge any complaint.

18. Since the accused did not produce Shakereh and did not give Sabah the whereabouts of her mother, Sabah returned to Mumbai and then again came to Bangalore and lodged an FIR in Ashoknagar police station on 10.6.1992 stating that her mother had been missing.

19. The investigation was entrusted to the Central Crime Branch (CCB), Bangalore on 26.3.1994 since the Ashok Nagar police did not make serious efforts in the matter. The Central Crime Branch suspecting the role of the accused in the disappearance of Smt. Shakereh arrested the accused on 28.3.1994 and interrogated him thoroughly. It is stated that during interrogation the accused broke down and made the voluntary statement as per Ex. P.175 disclosing that he had drugged Smt. Shakereh, put her in a coffin like big box and had buried the box in the backyard of the house i.e. House No. 81, Richmond Road, Bangalore.

20. The Investigating Officer then sought for necessary permission from the Sub-Divisional Magistrate for exhumation and on 30.3.1994 exhumation proceedings were conducted at 81, Richmond Road, Bangalore as pointed out by the accused. At the exhumation, apart from the Taluka Executive Magistrate, Mahazar witnesses, investigating team, a doctor trained in forensic medicine were present. After the exact place was marked by a chalk indicating the place as the place of burial of the box containing the body of Smt. Shakereh, the marked area was dug up after removal of some stone slabs and after considerable digging, a big wooden box lying inside was noticed. On removing the planks of the lid, it was noticed that the box contained a foam bed and a bed-sheet on the top. The same were removed and underneath it, skeletal remains with nightie, long hair and feminine articles like bangles, rings etc. were noticed. The skeletal remains were subjected to autopsy.

21. To confirm whether the skeleton was that of Smt. Shakereh, the skull was sent to a forensic science laboratory along with a photograph of Smt. Shakereh. The Investigating Officer also sought the opinion of the experts through DNA finger printing etc. The experts confirmed that the skeleton indeed was that of Smt. Shakereh. The investigating team not only recorded the statements of witnesses (the servants, relatives etc.) but also the people with whom the accused had dealings about the properties of the deceased, the bank officials etc. as to the financial aspects and transaction of both the accused and the deceased. A large number of documentary records were also collected. The accused was then charged under Sections 302/201 IPC.

22. As many as 39 witnesses were examined by the trial court. The trial court after considering the entire evidence sentenced the accused to death and the death sentence was confirmed by the High Court.

23. It has been submitted by the learned counsel for the appellant that there are no eyewitnesses in the case. In my opinion, there is convincing circumstantial evidence to establish the guilt of the accused.

24. As already stated above, it is not correct to say that only direct evidence is strong evidence while circumstantial evidence is weak evidence. Both kinds of evidence can be strong in a given situation. The only requirement in circumstantial evidence is that the chain of links connecting the accused with the crime should be established beyond

reasonable doubt. In my opinion, in this case the facts clearly establish the chain of circumstances linking the accused with the crime. These circumstances are as follows:

(i) The deceased was living with the accused in house No.81, Richmond Road, at the time when she disappeared. No one else was there as even the servants had left (in the circumstances mentioned below).

(ii) During this period the deceased is alleged to have executed a Will and a General Power of Attorney in favour of the accused, and a large number of bank accounts in different banks were opened in joint names of the accused and the deceased. The bank lockers were also in the joint names. They started a private firm called S.S. Housing Private Limited of which they were the only shareholders. All these facts establish the strong motive of the accused who wanted to grab the property of the deceased.

(iii) Till May 1991 whenever possible PW5 Sabah, daughter of the deceased used to call the deceased over the phone and talk with her or meet her personally whenever she was in Bangalore and the deceased would also telephone Sabah regularly, but after May 1991 she was not allowed to talk to her mother on telephone whenever she called her, nor did the deceased call her. Instead, the accused gave evasive and contradictory replies whenever Sabah used to telephone to try to talk to her mother. The accused said all kinds of lies, e.g. that the deceased had gone to Hyderabad, then on the next occasion that she had gone to Kutch, thereafter that she was pregnant and had gone to Roosevelt Hospital, New York, but on enquiry when Sabah came to know that there was no such lady in the name of Shakereh in the hospital, he admitted that he had given a false statement etc. All these facts point to the guilt of the accused who kept telling lies constantly on every occasion whenever Sabha contacted him.

(iii) It appears that the accused saw an opportunity to kill the deceased when the maid-servant PW19 Josephine and her husband PW18 Raju received a telegram informing them that the sister-in-law of PW18 was sick in Andhra Pradesh and they were required to go to that place. They got leave from Shakereh and went to Andhra Pradesh. Thus, Shakereh was left alone in the house with the accused and he got that opportunity to kill her.

(iv) The dead body of Shakereh was found in the backyard of the house at the pointing out of the deceased. The statement of the accused was made before the Executive Magistrate PW 3. It has come in evidence that the accused had gone to a carpenter to get a box with wheels, which he kept in the guest house. This was the box utilized for burying the body.

(v) During the investigation, it was disclosed that right from 1991 the accused alone had been operating

the joint bank accounts and was not only depositing the sale proceeds of the lands sold by him after May 1991, but also withdrawing large sums of money and had literally cleaned the bank lockers jointly owned by him and the deceased.

(vi) On 30.3.1992 and 31.3.1992 the accused sold 34 plots out of the property belonging to the deceased in the capacity of General Power of Attorney holder to various people under registered sale deeds for valuable considerations

(vii) In meetings/proceedings of the SS Housing Company, he represented the presence of the deceased for each of the meetings and signed himself alone on her behalf as a General Power of Attorney holder and these proceedings were regularly sent to their Chartered Account.

(viii) The accused also replied to the queries of Income Tax Authorities during 1993 one of which purportedly contains his signature and the signature of Smt. Shakereh which is apparently forged.

(ix) The accused suddenly became very rich after May 1991 (the time of disappearance of the deceased) which is evident from the fact that he had done huge property and financial transactions which benefited him, he started staying in very expensive hotels in Bombay etc. with women, etc. (including the then Miss India vide statement of P.W.37 at para 29)

25. From the facts stated above it is evident that the deceased was not seen alive from May 1991 onwards and no one was able to speak to her on telephone, whereas, till May 1991 her daughter Sabah was regularly in contact with her. The accused was living with Shakereh as her husband and when contacted by PW5 Sabah he told all kinds of lies about the whereabouts of Smt. Shakereh.

26. The fact that Shakereh was murdered is indisputable. If she had met a natural death, there was no question of her being buried in the backyard of the house without intimating any of her relatives including her daughter and parents. There is abundant expert evidence to establish that the skeleton discovered in the box in the backyard was that of the deceased Shakereh. There is also uncontroverted evidence that the said box in which her body was kept was got prepared by the accused himself prior to the death of Smt. Shakereh. In my opinion, there is no manner of doubt that the accused killed Shakereh and secretly buried her in the manner mentioned above in the backyard of the house. The fact that he kept the death news of the deceased secret and he told lies repeatedly to her daughter Sabah (as stated above), proves his guilty mind. His act of selling valuable property of the deceased worth crores of rupees within a short time of the death of Shakereh with the help of a defunct General Power of Attorney and the other material on record clearly establish the guilt of the accused beyond reasonable doubt. In my opinion, the prosecution has convincingly succeeded in establishing all the links in the chain of circumstances linking the accused with the crime.

27. In my opinion, this is case of a cold blooded, calculated, diabolical murder by the accused of an innocent lady who came from a good family, but unfortunately due to her infatuation fell into his clutches.

28. Learned counsel for the appellant submitted that there was no reason

for the appellant to murder the deceased since the deceased had executed a will in his favour. In my opinion, this argument is not tenable because it is well settled that a will comes into operation only on the death of the testator. The deceased was only in her forties, and her natural death may have occurred several decades later. The appellant was obviously not willing to wait for so long before he could grab her property and hence he decided to murder her. No doubt no poisonous substance was detected in the skeleton of the deceased and hence the prosecution case that the accused mixed poison in her tea could not be firmly established. However, even if the exact method of murder has not been established by the prosecution, I have no manner of doubt that it was the appellant who murdered the deceased.

29. During the course of hearing of the case we asked learned counsel for the appellant as to what was the profession or qualification of the accused, but he could not give any satisfactory answer. It seems to us that the accused is a cold-blooded, scallywag and rascal who had no proper qualification or profession. Such diabolical and cunning rogues are to be found in abundance nowadays. It is the total commercialization of society which is responsible for this recent phenomenon. People have become greedy and wish to amass wealth by short cuts, even by committing heinous crimes. The appellant had changed his name and had become a 'Swamy'. By some dubious means he had ingratiated himself into the house of the Nawab of Rampur and there he developed contact with the deceased, who was evidently having differences with her husband. The accused pretended to be a very simple and innocent person and this made the deceased start depending on him, particularly for looking after her property matters. The deceased brought the accused to her house in Bangalore where the deceased married her and thereafter he determined to grab all her property after killing her. All the property transactions in this connection and other evidence (narrated above) point only to this conclusion. The accused is an unmitigated and diabolical rogue who could go to any extent, including murder to achieve his object of grabbing huge amount of property of the deceased. He was in a dominating position over the deceased who had become dependant on him, and he took full advantage of this situation. He had motive and opportunity for committing this ghastly crime.

30. In my opinion, this case clearly comes within the category of rarest of rare cases and there will be gross travesty of justice if the death sentence is not affirmed. Hence, I dismiss this appeal and confirm the death sentence on the accused.