

PETITIONER:
JAI KUMAR

Vs.

RESPONDENT:
STATE OF M.P.

DATE OF JUDGMENT: 11/05/1999

BENCH:
Umesh C Banerjee, M.Srinivasan

JUDGMENT:

BANERJEE, J.

Leave granted.

This appeal by the grant of special leave is directed against the order of confirmation of death sentence by the Division Bench of the High Court of Madhya Pradesh at Jabalpur. Since the appeal pertains to confirmation of death sentence by the High Court and the submission in support of the appeal is restricted to the question of sentence, it would be convenient to note at this juncture that it is only in the rarest of rare cases that this punishment is to be inflicted and it is on this score that Mr. Muralidhar, the amicus curiae appointed in the matter with his usual ability strongly contended that the punishment awarded by the Sessions Judge and as confirmed by the High Court, runs counter to the basic concept of law and justice of the situation. As a part of the submission, Mr. Muralidhar placed strong reliance on Sections 235 (2) and 354 (3) of the Code of Criminal Procedure. But before consideration of the submissions on legal issue as above, it would be convenient to advert to the factual matrix of the matter in issue, in order to assess the situation as to whether the matter in issue in fact falls squarely and evenly on the category of rarest of the rare cases. The factual score depicts that the appellant was charged under Section 302 read with Section 201 for committing murder of deceased Dev Vati, aged 30 years and a girl child Renu aged 8 years, on the night of 7th January, 1997. Both the lady and the girl child, however, were related to the accused, being the sister-in-law (brother's wife) and the niece respectively. Apart from the evidence tendered before the court by the mother and the nephew respectively of the accused, the latter himself in his examination under Section 313 of the Code categorically stated and admitted the factum of murder - the situation, therefore, is that the accused admits of murdering his sister-in-law and the niece- and the reason put forth- the sister-in-law has not been giving him enough food and as such on being enraged therewith, this offence was committed - but what about the child? Significantly there is no whisper pertaining thereto - is it because that the child witnessed the gruesome murder of the mother and as such the child shall also have to be

eliminated - may be, but let us not proceed on any hypothesis, the fact remains however, that both the Sessions Judge and the High Court disbelieved this version of the accused. The mother in her evidence in no uncertain terms stated that there was an attempt to commit rape on the sister-in-law and by reason of resistance, the rapist committed the offence and on the same being put forth to the accused - the answer comes that all the children of the sister-in-law were illegitimate children and her visit to her father's place and affinity with friends in that area had brought about this situation of having two children: Incidentally, however, the lady murdered was at an advanced stage pregnancy at the time of her death. The evidence on record depicts that on the fateful night of 7th January, 1997, at village Rakri Tola, Tikuri, District Rewa, Madhya Pradesh, the accused entered the house and bolted from outside the mother's room and thereafter removed certain bricks from the wall and 'choukat' thus facilitating the entry into the room where the deceased sister-in-law was sleeping with the child and had to face this gruesome death in the hands of the brother-in-law. The evidence on record depicts that the accused committed the murder of his sister-in-law at about 11.00 p.m. by Parsul blows and then kulhadi (tanga) blows on her neck severing her head from the body and taking away her 8 years old daughter Renu and killing her in a jungle by Axe blows said to be by offering sacrifice to Mahuva Mahraj and burying her in the sand covered with stones and it is thereafter that the accused comes back home and carry the body of the deceased sister-in-law tied in a cloth to the jungle and hung the head being tied on a branch with the hairs and put the body, on the trunk of the Mahua tree. As regards the injuries suffered, P.W.11, Dr. RR Misra stated:-

(1) Rigor mortis was present over the body and clotted blood was present all over the body. Head was separated from the body. Whole face, head and hair were stained with blood. Clothes, saree, blouse, petticoat were also stained with blood. Left eye was damaged. Lacerated wound at the bridge of nose size 3x2x1 cm. Length, width and depth and bone of nose fractures. (2) Incised wound on occipital region of head, size was 13 cm. x 4 cm. x. 4 cm. length, width and depth,. Bone at the place of injury was cut, brain matter was visible at that place and damaged. (3) Incised wound on upper part of neck. Head is separated from the body. All structure of neck, muscles, veins were cut due to this injury. (4) Incised wound on middle finger of left, ring finger and index finger and injury of size was 3x2x1 cm. was present on last vein.

2. All the above mentioned injuries appeared to be caused with hard and blunt object."

On the same date, the same constable had brought before me the dead body of deceased Renu, daughter of Gulab Prasad, aged 7 years for the post-mortem. I started post-mortem on the dead body at 2.30 p.m. and found following in the examination:-

External examination:-

Rigor mortis was present all over the body and dust particles were attached all over the body, clotted blood was

present all over the body. All the clothes were blood stained.

(1) Incised wound on front of chest on right side, size was 4.5 cm. x 1-1/2x1 cm.

(2) Incised wound on left side of neck, middle part of back of neck size was 7 cm. x 6 cm. x 2 cm. At the place of wound muscles, and veins were cut. Vertebra of neck 3rd and 4th were fractured.

(3) Incised wound on left side of cheek. Size was 6x3x3 cm. and mandible bone was fractured and it was in the left side.

(4) Incised wound on right index finger and middle finger. Size was 2x1x1 cm. Middle finger of left hand was found cut and separated means upper portion was separate."

It is on this evidentiary backdrop that the learned Sessions Judge thought it fit to pass death sentence in the matter and which stands confirmed by the High Court and it is on this perspective that the basic issue of punishment ought to be assessed. Turning attention on to the issue as regards non-compliance of Section 235 (2) of the Code Mr. Muralidhar contended that there has been a violation of the mandatory legal requirement of an effective and substantial opportunity to be given to the accused for being heard on the question of sentence. It has been submitted that requirement of hearing of the accused on the question of sentence, upon a plain reading of Sections 235(2) is not an empty formality but a mandatory requirement and in support of his contention placed strong reliance on the decision of this Court in the case of Muniappan v. State of TamilNadu [1981 (3) SCC 11] wherein this Court at page 13 observed:- "We are also not satisfied that the learned Session's Judge made any serious effort to elicit from the accused what he wanted to say on the question of sentence. All that the learned Judge says is that "when the accused was asked on the question of sentence, he did not say anything". The obligation to hear the accused on the question of sentence which is imposed by Section 235 (2) of the Cr.P.C. is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence... question which the judge can put to the accused under section 235 (2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The court, while on the question of sentence is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction"

Mr. Muralidhar contended that there are certain other factors which shall also have to be taken into account by the Court in deciding upon the appropriate sentence to wit: his education, his home life, social adjustments and the emotional and mental conditions of the offender and it is in this context reliance was placed on the decision of this Court in Santa Singh v. State of Punjab [1976 (4) SCC 190]

wherein this Court observed:- "The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances - extenuating or aggravating - of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender, as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of 'the offender', the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence and therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused. Hence, the new provision in Section 235(2)."

Mr. Muralidhar contended further that the constitutional basis for recognising this inviolable right of the accused has also been very lucidly elucidated by this Court in *Allaudin Mian v. State of Bihar* (1989) 3 SCC (5) wherein this Court at page 20 of the report observed: "The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice.. And at the same time helps the court to choose the sentence to be awarded.. There can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality... In case of life or death.. The presiding officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality... We think as a general rule the trial court should after recording the conviction adjourn the matter to a future date and call upon the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender...."

Before launching a discussion on the merits of the submissions, it would be convenient to note the true purport of Section 302 for ascertainment of the legislative perspective. Section 302 of the Indian Penal Code authorises the Court to punish the offender of murder with death or imprisonment for life - the statute therefore has provided a discretion to the court to sentence the offender either with death or with imprisonment for life: Obviously, a serious decision and a heavy burden imposed on the Court -

This discretion conferred however, shall have to be thus exercised in a manner and in consonance with the concept of law so as to sub-serve the ends of justice and it is on this aspect of the matter that in a long catena of cases this Court in no uncertain terms laid down that award of death sentence though within the ambit of jurisdiction of the courts, but that does not clothe the courts to exercise the same in a manner indiscriminate - This Court has been candid enough to record on more occasions than one that it is only in the rarest of the rare cases that this discretion as regards capital punishment ought to be exercised. Ours is a civilised society - tooth for a tooth and eye for an eye ought not to be the criteria; the civilisation and the due process of law coupled with social order ought not to permit us to be hasty in regard to the award of capital punishment and as a matter of fact the Courts ought to be rather slow in that direction. Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to sub-serve the basic requirement of the society. It is a requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In the present day society, crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the punishment is concerned. One school of thought on this score propagates the function of the law court is that of a social reformer and as such in its endeavour to act as such, question of deterring punishment would not arise since the society would otherwise be further prone to such violent acts or activities by reason of the fact that with the advancement of the age the mental frame of boys of tender age also go on changing and in the event of any arrogance being developed or a sense of revenge creeps the society, the society would perish to the detriment of its people. The other school, however, expressly recorded and rather emphatically that unless severest of the severe punishments are inflicted on an offender (obviously depending upon the nature of the crime) the society would perish. The other school professes that since one has taken the life of another that does not mean that his life shall have to be taken but during the trial if it transpires the method and manner or the nature of the activities which has resulted in the elimination of a human being from this world, there should not be any laxity on the part of the law courts, otherwise people will and in turn the society will be engulfed in false sense of security of life in the event of there being most heinous crime of the earth. The law courts as a matter of fact have been rather consistent in the approach that a reasonable proportion has to be maintained between the seriousness of the crime and the punishment. While it is true that a sentence disproportionately severe, ought not to be passed but that does not even clothe the law courts with an option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would fail to produce a deterrent effect on the society at large. Punishments are awarded not because of the fact that it has to be an eye for an eye or a tooth for tooth, rather having its due impact on the society: while undue harshness is not required but inadequate punishment

may lead to sufferance of the community at large. Having dealt with the matter as above, it would be convenient to note the finding of learned Sessions Judge as regards the compliance of Section 235 (2) of the Code. At page 22 of the judgment the learned Sessions Judge records:- "26. From the appreciation of the above mentioned all the evidences, the charge against the accused Jai Kumar is found proved under Section 302 and Section 201 IPC beyond any doubt. Therefore, the judgment is adjourned for hearing on the question of order of sentence in the crime."

Sd/- R.C. Chandel Sessions Judge, Rewa M.P.

27. Learned counsel of both the parties were heard on the question of sentence. Both the parties do not want to give any documentary oral verbal evidence with regard to the above. It is the request of the learned defence counsel that the age of the accused is 22 years and he has not any past criminal history and this is not such a case in which the accused may be awarded the maximum sentence i.e. sentence of death. Learned counsel cited the reference of the 1996 (1) Crimes-137 (S.C.) Ravender Trimbak Chothmal vs. State of Maharashtra. Learned Public Prosecutor pleads that the accused has committed efforts to commit rape with his motherlike Bhabhi-deceased Dev Vati and on being failed in this, caused her brutal death, severed her head from the body and hanged her head on the tree and put her dead body on the tree. Along with this, the accused after taking the minor child deceased Kumari Renu to the jungle merely for the reason that she had seen the accused committing murder. Firstly he offered prayers in the jungle and then he committed her murder with the axe. The above act of the accused being brutal is such a case where it is necessary to award the accused the sentence of death. Learned Public Prosecutor has given the reference of 1996 CrL.L.J. 4158 Kamta Tiwari vs. State of M.P., 1995 Na.Ni.Sa.? 18, Amritlal Someshwar Joshi versus State of Maharashtra. I have carefully perused the legal illustrations referred by the learned counsel and I am agree with the principals which are propounded in the judicial illustrations.

28. As is clear from the evidences come up in the case that the accused tried to commit rape on the deceased Dev Vati who was his bhabhi and on being protested by her against him, he committed her murder. Not to talk of this, he severed the head with kulhari and after tying the dead body in a dhoti took it in the jungle at the Hardia Pahari and there the head of the deceased was hanged with the tree and put the dead body of the deceased on the tree. Because the deceased Kumari Renu had seen the above accused committing the murder of the deceased Dev Vati. For this reason, the accused offered the nine years minor child (female) deceased Kumari Renu who was the daughter of the deceased Dev Vati, in the jungle and further offered the broken mirror, oil of Awala Mustard oil, Guvava, onion, Bindia to Mahua Maharaj (see thereby question No. 25 under Section 313 CrL.P.C.) and then after causing the blow with kulhari on the head of the deceased Kumari Renu committed her murder and after putting her dead body under the Balu sand suppressed her dead body but keeping the stones on her foot and head.

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Before arriving at the conclusion, I seriously discussed over this for so many times but in the circumstances of the case and keeping in view the brutal act of the accused Jai Kumar, it would not be sufficient to award him the sentence of life imprisonment and with this there would not be any proper effect on the society. Therefore keeping in view the entire circumstances, the accused Jai Kumar is sentenced to death for the offence punishable under Section 302 IPC for committing the murder of the deceased Dev Vati and the deceased Kumari Renu. Beside this, the accused is sentenced to undergo 7 years rigorous imprisonment for the crime punishable under Section 201 of the Indian Penal Code. The accused Jai Kumar has been in judicial custody since 8.1.97 in this case".

The order of the learned Sessions Judge as recorded above unmistakably depicts that both the parties were heard and none of the parties wanted to give any documentary or oral evidence with regard to sentence. But the factum of submissions and considerations thereof as appears from paragraphs 27 and 28 leads us to a definite conclusion that there has been no miscarriage of justice. Be it noted that the statute has engrafted in the statute book the provisions of Sections 235 (2) so as to see that proper appreciation of the evidence takes place and proper opportunity of hearing as regards punishment be afforded, but if there is no taker of such an opportunity inspite of there being lawyers appearing for the accused as well, question of further adjournment of the matter would not arise. It is true that the obligation is not discharged by putting formal questions to the accused -The Judge is supposed to elicit materials from the accused which will have a bearing on the question of sentence and it is on this requirement of law, let us consider as to whether there was in fact such a genuine attempt to elicit materials-but as the record depicts there was no taker of this opportunity and the defence lawyer pleaded two facts to be considered in the matter for award of punishment viz. (a) The accused is aged 22 years and (b) No other past Criminal Record: We wish to put on record that trying Judge has shown utmost concern and after much deliberation came to the conclusion as above in the matter of the grant of punishment. The ratio divedendi of the cases noticed is to see that there is no statutory mockery resulting in a total miscarriage of justice. The judgment was adjourned and the lawyer was asked - and prompt came the reply that the sentence ought to be considered by reason of the age and no past record: Both these aspects have duly been considered by the Sessions Judge and we do not see any infirmity therein. Incidentally the High Court on the issue of punishment did rely upon the decision of this Court in Bachan singh vs. State of Punjab [1980 (2) SCC 684] and a long catena of cases and upon reliance thereon, the High Court observed: "Absence of proof of motive and youth of the accused are two factors urged here and also that he pleaded guilty. Let us ignore the statement of the mother of the accused that he wanted to violate the chastity of the deceased Dev Vati as no other overt-act of the accused about it is established. It makes no difference whatsoever. His ruthlessness as indicated by the fact that he is not content with slaying Dev Vati into two pieces and hung her head and trunk on a Mahua tree, but he is now murdering her reputation by totally false assertion that she was unchaste

and all her children were illegitimate. The fact that even his mother deposed against him (of course, the truth), goes to show what type of living danger, he is to the family and to society. Absence of proof of motive has not been held to be so relevant factor in reaching the conclusion about a case being rarest of rare or not. As we have seen in above precedents, absence of motive loses its mitigating weight if the crime is concluded with extreme cruelty on innocent child and hapless lady. In this case, help to the lady was foreclosed by the accused by bolting his mother in the room. He broke into the room of the victim by dismantling the bricks of wall around the door. We have found it as a fact that the plea taken by him about suspicion for the last five years against the chastity of the deceased is deliberately false and an after-thought. Similarly, his plea that the deceased child was born by illicit connections with somebody at her matrimonial home is also deliberately false. His plea that he was not being given food for the last 3 days is certainly false and an after-thought as already discussed. The deceased was his brother's wife and he had no grievance against his brother. He broke into the room of the lady, dragged her out and killed her and chopped off her head. He was not content with this. It was not sudden rage. He was acting in a calculated manner. He took away his 7 year old niece and chopped off her neck, but for slander attachment of the neck with the rest of the body. Some of her fingers were chopped off and the body was buried. He had offered 'Puja' to Mahuva Tree and hung the head of Dev Vati there, separately. So, that shows the type of the man he is. All these factors are corroborated by various photographs of the scenes of killing, the scenes of body placed on Mahuva tree and the scene of the girl buried in sand and below stones. The mere fact that the accused admits to have killed the lady and the daughter does not amount to remorse on his part. He is justifying it on false and indecent pleas. Such calculated ghastly and cruel murder of hapless lady who was pregnant of about 22-30 weeks and hapless innocent child is bound to send shock waves in the society. It creates feeling of revolt in the conscience."

In the contextual facts, we have no hesitation to record that as a matter of fact there are no mitigating circumstances and our search in that direction was in vain, on the contrary the aggravating situations are galore to support the finding of the Sessions Judge as confirmed by the High Court. And it is on this count Mr. Muralidhar contended that hearing on the question of sentence is also necessitated by reason of the fact that till then the Judge has no opportunity to ascertain the relevant aggravating and mitigating circumstances bearing upon the question of sentence and many of which may not appear from the record of the case. We are, however, unable to record our concurrence to the submissions of Mr. Muralidhar in the contextual facts as noticed herein before. The guidelines as formulated in Bachan Singh's case (supra) and adopted in two subsequent decisions of this Court in [Machhi Singh v. State of Punjab (AIR 1983 SC 957 and Kamta Tiwari vs. State of M.P. (1996 CrL. Law Journal 4158)] do not lend any assistance to Mr. Muralidhar. This Court in Kamta Tiwari's case as a matter of fact pointedly observed that co-relation of aggravating and mitigating circumstances and a balance be struck on the basis of the factual matrix of the matter in issue, before the exercise of discretion in terms of the provisions of Section 302. In the matter in issue, however, we do not find any balancing factor so as to strike a

balance. As a matter of fact aggravating factors there are aplenty and galore without any mitigating circumstances as noticed above. The age of the accused being of 22 years cannot, in the factual matrix of the matter under consideration, be said to be a mitigating factor. Accused is of 22 years of age while the victim was aged 30 years and at the time of the unfortunate death, she was under pregnancy between 22 to 30 weeks - the other victim was an innocent girl - a child of 8 years: the murders were cold blooded while two victims were in helpless and hapless situation. No amount of perversity would prompt a person to break open the door by removing the bricks from the wall and commit such gruesome murders on failure to satisfy the lust - the human lust ought to know its limits. Imaginations shall have to run wild to consider existence of any mitigating factors in the matter of sentence, having due regard to even the subsequent conduct of the accused in the matter of disposal of the bodies as noticed above. Can there be any mitigating circumstance on account of such a ghastly act - the answer cannot but be in the negative. The mother of the accused was bolted inside the room and she watches as a bewildered spectator from the creeps of the window and it is the mother who had given evidence about the bad characteristics and the reputation of the accused in the locality: the sister-in-law has been murdered along with an innocent child - Is this a man who deserves any sympathy from the society - Is this a man who can correct himself and the law courts ought to permit him to lead a decent life after he serves the sentence: The mother's evidence becomes material and it is on this score that we are unable to record our concurrence with the submissions of Mr. Muralidhar that there are some mitigating circumstance and there is likelihood of the accused being reformed or rehabilitated. Incidentally, the High Court has described the accused as "a living danger" and we cannot agree more therewith in view of the gruesome act as noticed above. A faint attempt has been made by Mr. Murlidhar as regards non-compliance of Section 354 (3) of the Code. We however are not in a position to record our concurrence, thereto, having due regard to the reasonings available in the body of the judgment itself and we need not by reason thereof dilate much on that score. The facts establish the depravity and criminality of the accused in no uncertain terms. - No regard being had for precious life of the young child also. The compassionate ground of the accused being of 22 years of age cannot in the facts of the matter be termed to be at all relevant. The reasons put forth by the learned Sessions Judge cannot but be termed to be unassailable. The learned Judge has considered the matter from all its aspects and there is no infirmity under Section 235 (2) or under 354 (3) of Code and as such we are not in a position to record our concurrence with the submissions of Mr. Muralidhar. In the present case, the savage nature of the crime has shocked our judicial conscience. The murder was cold-blooded and brutal without any provocation. It certainly makes it a rarest of the rare cases in which there are no extenuating or mitigating circumstances. The observations of this Court in Dhananjay Chatterjee alias Dhana v. State of West Bengal [1994 (2) SCC 220], to which one of us (CJI as he then was a party) while confirming the sentence of death lend concurrence to the views expressed above. This Court opined:

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the

conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

We do not see, by reason of the discussion as above, any mistake of justice has taken place and we record our concurrence with the observations and findings of the High Court.

We, therefore, find no infirmity in the sentence awarded by the Sessions Judge and as confirmed by the High Court. This appeal, therefore, fails and is dismissed.