The State Vs. Vali Mohammad

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Court : Mumbai

Decided On : Sep-06-1968

Reported in : AIR1969Bom294; (1969)71BOMLR1; 1969CriLJ1101; ILR1969Bom422; 1969MhLJ208

Judge : Kotval, C.J., ;Chandrachud and ;Vaidya, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898; Criminal Procedure (Amendment) Code, 1955 - Sections 367(5); Constitution of India - Article 141

Appeal No. : Confirmation Case No. 13 of 1968 (with Criminal Appeal No. 899 of 1968)

Appellant : The State

Respondent : Vali Mohammad

Advocate for Def. : R.W. Adik (Sr.) and ;M.L. Pendse (Jr), Advs.

Advocate for Pet/Ap. : V.H. Gumsate, Govt. Pleader and ;C.R. Dalvi, Asstt. Govt. Pleader

Judgement :

Kotval, C.J.

1. Vali Mohammad Jan Mohammad was tried before the additional Sessions Judge, Aurangabad, for the murder of the Mohammad and was convicted under

Section 302 I.P.C. and sentenced to death. When the papers were submitted to this Court for confirmation of the sentence to death. When the papers were submitted to this Court for confirmation of the sentence of death, the case was heard along with the appeal filed by the accused, Criminal Appeal No. 899 of 1968 A division Bench of this Court (Tarkunde and Gatne, JJ.) have confirmed the conviction in appeal but have referred a question of law as regards the sentence to be imposed in such cases. The question arises in view of a conflict of decisions in this Counts, the question referred is as follows:-

After the amendment of sub-section (5) of Section 367 of the Code of Criminal Procedure by Central Act XXVI of 1955, is it correct to hold that the normal penalty for an offence under Section 302 of the Indian Penal Code is death, and that the lesser penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence?'

The Division Bench considered in necessary to refer this question because in its view there is a conflict between the decision of the Division Bench in State of Maharashtra V. Gourishankar Kawadu, : AIR1966 Bom179 on the one hand and the decision of Division Benches of this Court in Confirmation Cases No. 13 of 1958, No. 36 of 1962 and No. 8 of 1966 (Bom) , on the other.

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2. The difference of view arises form the amendment of Section 367 of the Code of Criminal Procedure by Central Act XXVI of 1955 which came into force on the 1st of January 1956. The present Sub-section (5) of Section 367 is radically different and does not concern itself with the subject with which we are dealing. When the amendment was made the entire sub-section (5) as it then stood was dropped by the Amending Act and a new sub-section (5) on an entirely different subject was substituted.

3. Sub-section (5) of Section 367 as it originally stood was as follows;-

' If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reasons why sentence of death was not passed. Section 302 of the Indian Penal Code which was affected by the amendment remains the same as it was when enacted. It says 'whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.' The section, therefore, gives the Court a discretion as to the punishment to be imposed for an offence of murder and that discretion is to be exercised between the two alternatives mentioned namely the sentence of death and the sentence of imprisonment for life.

4. The question which arises in the present reference is what was the effect of the old sub-section (5) of Section 367 upon this provision of the substantive law. Some of the decisions to which we will presently refer have taken the view that sub-section (5) of Section 367 was merely procedural in its effect. It only meant to prescribe that reasons should be given and did not affect the discretion conferred by section 302 in the matter of imposition of the sentence. On the other hand, there are several decisions in which the view has been taken that sub-section(5) as it stood prior to the amendment clearly indicated that the normal sentence to be imposed for an offence of murder was the sentence of death. The Section prescribed that where the Court sentences such a person to any punishment other than death, the Court shall in its judgment state the reason why the sentence of death was not imposed thereby clearly implying that in the case of murder (which is punishable with death) the normal sentence would be death and it is only in exceptional cases that a sentence of imprisonment for life should be passed. It is said that the well settled principle of law, (for which there is ample authority prior to the amendment) that where a person is convicted of an offence of murder, the Court is normally bound to sentence him to death unless there are extenuating or mitigating circumstances, is based only on this view. The law thus understood implies that before passing a sentence of death it is the duty of the Court to ask itself the question, 'are there any mitigating circumstances?' and if there are, to pass the lesser sentence.

5. Now in order to understand the nature of the amendment effected by the dropping of the old sub-section (5) it is necessary not only to understand what the principle was prior to the amendment but the rationale behind that principle. The principle as it stood prior to the amendment was clear beyond doubt. It was thus expressed in one of the earliest cases on the point in Nga Tha Sin (1902) 1 LBR 216 (FB) as quoted in Ratanlal's Law of Crimes, 21st Editon, page 813: (the original report is nowhere available and Counsel were unable to make one available) 'The extreme sentence is the normal sentence: the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.' In most of the cases which followed, the same principle of law was applied, though in very few of them was any reference made to sub-section(5) of Section 367 or the rationale behind the principle explained. The reason probably was that sub-section (5) was no more than a re-statement of the law as it stood in England at that time where till 1965 the only penalty for murder was death, except in two specific cases.

6. The general rule is stated in a number of cases. We may refer to only two of them; The decision of this Court in State v. Pandurang Shinde, reported in : AIR1956 Bom711 and the decision of the Supreme Court in Dalip Singh v. State of Punjab : [1954]1SCR145 . In paragraph 39 of their judgment the Supreme Court stated the principle as follows.:-

'On the question of sentence, it would have been necessary for us to interfere in any event because a question of principle is involved. In a case of murder, the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be recorded considers it proper to award the lesser penalty.'

The principle thus stated was considered by this Court and the supreme Court as well settled and, therefore, we do not find any reference to the reasons which impelled that principle.

7. The reasons are, however, found stated in two of the earliest cases . We have already referred to the Full Bench decision in (1902) 1 LBR 216 (FB) . That case

was relied upon in Ma Shwe Yi v. King Emperor ILR 1 Rang 751=AIR 1924 Ran 179. Referring to the decision in the earlier Full Bench case the Rangoon High Court pointed out that

'the Full Bench had laid down that Section k367 , sub-section (5) of the Code of Criminal Procedure contemplated the passing of the extreme sentence as the ordinary rule in cases punishable with death and the passing of a sentence of transportation for life as the exception, and that so far as any rule on the matter could be laid down, a sentence of death should ordinarily be passed unless there are extenuating circumstances; further, that before passing the mitigated sentence a Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances, and that it is not for a Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so:'

In an early decision of the then judicial Commissioner's Court Nagpur Local Government v. Sitrya Arjuna a Division Bench similarly relied upon sub-section (5) of Section 367 in stating the same rule. At page 309 column 2 they said;

'The duty of a Sessions Judge under Section 367 (5) , Criminal P.C., is to pass sentence of death in cases of conviction of murder under Section 302 I. P. C. , unless there are reasons for not passing such sentence. A mistaken view seems somewhat prevalent, namely, that sentence of death should not be passed unless there are aggravating circumstances but this is a wrong view and the correct view is that sentence of death should be passed unless there are reasons to the contrary'.

8. These authorities establish the following propositions; (1) that for the offence of murder under Section 302 I. P. C. the sentence of death was the normal sentence and the sentence of imprisonment for life was the exception; (2) that in order to impose the lesser sentence the Judge must find circumstances of mitigation; (3) that though Section 302 I. P. C. prescribes the penalties of death and imprisonment for life alternatively without saying anything more, the rule was as above because of the provisions of sub-section (5) of Section 367. Thus sub-section (5) of Section 367 as it then stood was a qualification upon Section 302 I.

P. C to this extent that although Section 302 merely conferred a discretionary power upon the Court to impose either the sentence of death or sentence of imprisonment for life, for the offence of murder, the provisions of sub-section (5) of Section 367 required that the sentence of death must normally be imposed unless there are extenuating circumstances. This was by virtue of the words 'the Court shall in its judgment state the reason why sentence of death was not passed' in Section 367 (5).

9. That being the true reason for the rule, one thing is clear that it is not a correct reading of sub-section (5) of Section 367 to say that it is merely procedural and all that it prescribed was that in imposing a sentence of punishment other than death, reasons should be stated. We may also say that this view commends itself to us for another reason. Where a Court of Session tries a person for an offence of murder and imposes any sentence, practice as well as propriety require that reasons should be stated. The elementary requirements of a Judicial decision are that the Court must give its reasons for what it decides. If so, it is hardly to be supposed that what was an elementary requirement of Criminal practice and a judicial decision was alone crystallised in sub-section (5) of Section 367. Yet that would be the only conclusion if we were to accept the contention that sub-section (5) only dealt with procedure and all that it required was that the Judge should state his reasons when imposing the sentence indicated in the sub-section. On the other hand, it is clear that the sub-section was intended to lay down a rule that the normal sentence for the offence of murder would be the sentence of death unless for reasons to be stated the Court found extenuating circumstances, that is to say, the reason why a sentence of death should not be passed.

10. Once the reasons underlying the rule are understood, the true effect of the dropping of sub-section (5) of Section 367 becomes clear. The effect of the dropping of sub-section (5) would clearly be to restore the discretion conferred by Section 302.

11. Therefore, apart form authority and purely upon a consideration of the provisions of law, it appears to us clear, that after the amendment of Section 367 omitting sub-section (5) thereof, the rule in the matter of imposition of sentence for

the offence of murder would be that the Court may punish the offender with death or imprisonment for life as stated in Section 302 I. P. C. Of course this is a discretion conferred upon the Court and the discretion must normally be exercised upon judicial considerations and taking into account all the circumstances of the case, that is to say, taking into account both circumstances of aggravation as well as circumstances of mitigation. The Sessions Court must taking into account the totality of circumstances, come to a decision as to whether the case requires that sentence of death should be imposed or the sentence of imprisonment for life. As to what sentence should be imposed in a given case is to be decided upon the facts and circumstances of each case.

12. Though this is the view which in our opinion is the correct view to take of the amendment of Section 367 , we must guard ourselves upon one point. Though sub-section (5) of Section 367 , has now been deleted and though the sub-section enjoined giving of reasons why sentence of death was not passed, it does not mean that since it is now deleted from the law the Court is exonerated from giving any reason at all. Whatever sentence the Court imposes in its discretion under Section 302 must still be supported by reasons. The dropping of the old sub-section(5) does not exempt courts from giving reasons why a particular sentence is being imposed.

13. We next proceed to consider some of the authorities and the arguments against the view which we have taken. On behalf of the State it has been urged that the former rule which was so well established that the normal penalty for an offence of murder is death and it is only when extenuating circumstances are found that the lesser penalty should be imposed, has in no way been affected by the omission of sub-section (5) of Section 367. The sheet-anchor of this contention is the decision of the Supreme Court in Vadivelu Thevar v. State of Madras : 1957 CriLJ1000 . The other is the decision of this court in : AIR1966 Bom179 which followed Vadivelu Thevar's case : 1957 CriLJ1000 . In the former case the point taken on behalf of the accused before the Supreme Court was that the whole case against the accused depended upon the testimony of one witness and though the Court had accepted the evidence of the witness a girl of about 10 or 12 years at the time of occurrence that very fact should be taken into account in the imposition

of the sentence on the first appellant. The first appellant had been sentenced to death and it was argued on his behalf that where the whole case depended on the testimony of one witness, a minor girl, the death sentence should not be imposed. It was while considering this contention that the Supreme Court made the remarks which have been so strongly relied on by the Government Pleader (see page 619 paragraph 13).

'Lastly, it was urged that assuming that the Court was inclined to act upon the testimony of the first witness and to record a conviction for murder as against the fist appellant, the court should not impose the extreme penalty of law and in the state of the record as it is, the lesser punishment provided by law should be deemed to meet the ends of justice. We cannot accede to this line of argument. The first question which the court has to consider in a case like this, is whether the accused has been proved, to the satisfaction of the Court, to have committed the crime . If the Court is convinced about the truth of the prosecution story, conviction has to follow. 'The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the persecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the Court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law.' In other words, the nature of the proof has nothing to do with the character of the punishment. The nature of the proof can only bear upon the question of conviction - whether or not the accused has been proved to be guilty.....The question as to what punishment should be imposed is for the Court to decide in all the circumstances of the case with particular reference to any extenuating circumstances'. (The underlining (here into) is ours).

These remarks were made after the amendment of Section 367 (5) and therefore it is urged that the principle still remains the same, namely, that the normal punishment for the offence of murder is death unless there are mitigating or extenuating circumstances in which case alone can the lesser punishment be imposed.

14. No doubt, in the passage quoted the Supreme Court referred to mitigating or extenuating circumstances thus showing that it had in mind the principle operating prior to the amendment of Section 367 , but the point of substance which the Supreme Court was called upon to deal was a totally different point from the one before us. The real point urged before the Supreme Court was that since there was only one eye-witness the lesser penalty should be imposed and it was while repelling that contention that the Supreme Court said that only if the Court is satisfied that there are mitigating circumstances would it be justified in imposing the lesser of the two sentences provided by law. We do not think that the point which is before us was at all canvassed before or was being dealt with by the Supreme Court in that case. The point before us is whether the 1956 amendment of Section 367 has affected the principle in the matter of imposition of the sentence for murder as it existed prior to the amendment or not and that was not the point with which the Supreme Court was dealing. Every observation in a judgment of the Supreme Court does not make law : AIR1955 Bom113 . Apart from that, we may also say that the case before the Supreme Court was one where the offence had taken place prior to the amendment with which we are concerned (vide paragraph 2 of their judgment). The offence had taken place on 10th November 1955; the penalty if any was incurred on that date and so would not be affected by the subsequent amendment of Section 367, sub-section (5). The Amending Act XXVI of 1955 came into force on the 1st of January, 1956 after the offences which the Supreme Court were considering had taken place. We do not think, therefore, that the decision of the Supreme Court would affect the question before us.

15. So far as the decision of this Court in : AIR1966 Bom179 Gaurishankar's case is concerned the Division Bench considered this point at page 243 (of Bom LR) = (at p. 185 of AIR). It noticed the earlier view of this Court in : AIR1956 Bom231 , State v. Airarsing and : AIR1956 Bom711 . Both these cases were decided on the basis of the law as it stood prior to the amendment. Then it stated the point as follows;

'Mr. Kamlakar urged that in 1956 this particular provision of sub-section (5) of Section 367 Criminal Procedure Code, was omitted form the Cr. P.C., and this

would only be the result of the legislature having intended that there was no obligation upon the Court to consider capital sentence as the primary punishment for murder. In other words, the two sentences one of death and the other of imprisonment for life were co-ordinate sentences and that either could be given without giving any reasons. The question is whether the amendment of Section 367 (5) was intended for this reason and it has to be so carried out.'

The Division bench referred to two decisions of the Allahabad High Court : AIR1958 All746 , Satya Vir v. State and : AIR1960 All748 , Ram Singh v. State, the decision of the Madras High Court in In Re: Veluchami AIR 1965 Mad 48 and of the Supreme Court in : 1957 CriLJ1000 .

16. The decision in : AIR1958 All746 no doubt did not expressly decide the question before us thought it adverted to it. In paragraph 32, it posed the very point which has been argued before us, but since the Court found an extenuating circumstance which enabled it to reduce the sentence from death to imprisonment for life, the question which was before us was not decided. Nevertheless that Court stated the position in these terms;

'The assumption that the sentence of death was the normal penalty for murder and imprisonment for life, the exception which had to be justified by some reason was based on the law as embodied in sub-section (5) of Section 367 Cr. P. C. before its repeal by the Code of Criminal Procedure Amendment Act XXVI of 1955 with effect form 1-1-1956. Since the omission of that sub-section, the question of proper sentence where the accused is convicted of an offence punishable with death is to be decided not on any assumption of that nature, but like any other point for determination with the decision thereon and the reasons for the decision as provided by sub-section (1) of that section.'

17. In Gaurishankar's case, : AIR1966 Bom179 the Division Bench quoted the above passage but did not follow it because it found that the Allahabad High Court itself had in a in a subsequent decision in : AIR1960 All748 repelled that argument. In the decision in : AIR1960 All748 repelled that argument. In the decision in in : AIR1960 All748 repelled that argument. In the decision in AIR 1960 Al 784 (Ram Singh's case) the Division Bench held (see para 10 at page 751 Column 1) that

the amendment of Section k367 Cr. P. C does not j affect the law regulating the punishment under the Penal Code and that the 1956 amendment of Section 367 Cr. P. C. does not affect the law regulating the punishment under the Penal Code and that the 1956 amendment of Section 367 was merely related to procedure and the requirement as to giving reasons have been given for the view taken nor was the earlier decision of the same High Court to the contrary even noticed. For the reasons which we have already given we are not in agreement with that decision of the same High Court to the contrary even noticed. For the reasons which we have already given we are not in agreement with that decision. With respect we prefer the view taken in Satya Vir's case, : AIR1958 All746 . In a later decision of the Allahabad High Court in Jan Mohammad v. State : AIR1963 All501 , one Judge (Shrivastava J.) merely followed Ram Singh's case, : AIR1960 All748 but the other learned Judge (Asthana J.) doubted the correctness of the view taken in Ram Singh's case : AIR1960 All748 . We are in respectful agreement with the remarks of Asthana J. in paragraph 35 of his judgment.

18. The decision in In re, A. Koteswara Rao : AIR 1963 AP249 , was brought to our notice on behalf of the appellant. The decision as reported is only so far as the sentence in that case is concerned. After referring to the principle that where there were not extenuating or mitigating circumstances, it was incumbent upon the Court to impose the sentence of death, the Andhra Pradesh High Court considered the effect of the omission of sub-section (5) of Section 367 and they held that .

'the result of the amendment is that by virtue of the provisions of Section 302 of the Indian Penal Code the Court is now allowed full discretion to award the sentence of death or the lesser sentence of imprisonment for life for the offence of murder' and they observed that

'that being the legal position now, the view that the extreme penalty is the normal sentence and the mitigated sentence is the exception, does not hold water. It cannot longer be said that death is the normal punishment for murder, and the view formerly held by Courts in India and it is knot for the Judge to ask himself whether there are reasons for imposing the penalty of death but he should ask himself whether there are reasons for abstaining form doing so, has lost it validity'.

For the reasons already stated we are respectfully in agreement with this statement of the law as to the effect the amendment of Section 367.

19. But while we have agreed with the Andhra decision it must not be understood that we are in agreement with all the remarks made in that judgment. After the passage we have quoted above the

Division Bench further went on to say. :-

'It seems to us that the correct approach to this questions that upon a conviction for murder, the Judge should ask himself the question, ' Are there any aggravating circumstances in this case which imperatively call for the exaction of the extreme penalty?' If, in a given case, there are such circumstances, it is his bounden duty to award the capital sentence in the larger interests of society. It is not the province of the Judge to question the wisdom of the policy of the law ..... If, on the other hand, circumstance of an aggravating nature are absent in a give case, the Judge would be justified in imposing the lesser of the two punishments prescribed by law namely the imprisonment for life.

20. The passage which we have quoted above seems to suggest that after the amendment, while undoubtedly it is a matter of discretion with the Judge whether to impose the penalty of death or of imprisonment for life, the Judge must consider whether there are aggravating circumstances in which case he must impose the penalty of death and if, on the other hand, circumstances of an aggravating nature are absent the Judge would be justified in imposing the lesser of the two punishments prescribed by law viz. the imprisonment for life. In our opinion, the choice between the two penalties does not depend only on the question k of the presence or absence of aggravating circumstances. the true ratio would be that the Court must take into account all the circumstances of the case, the aggravating circumstances as well as the mitigating circumstances and exercise its discretion whether having regard to the totality of the circumstances, he would impose one or the other of the two penalties.

21. Some reference was made on behalf of the State to the remarks of their Lordships of the Supreme Court in paragraph 16 of their judgment in Babu v. State

of Uttar Pradesh, : 1965 CriLJ539 . In paragraph 16 of their judgment the Supreme Court were considering a plea made on behalf of the appellant who had been sentenced to death, that since a long time had elapsed since the commission of the offence (the offence took place on 11-10-1961 and the judgment of the Supreme j Court was delivered on k21-8-1963) the lesser penalty should be substituted. The Supreme Court declined to reduce the sentence observing each case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of the law should not be imposed. We do not thin that these remarks can at all affect the question before us. In any case those remarks were made with reference to the jurisdiction of the Supreme Court itself sitting in appeal by special leave. The question of law as raised before the Supreme Court.

22. A decision of this Court reported in : AIR1968 Bom127 , Palaniswami v. State was referred to by the learned Government Pleaders. In that case no doubt the Division Bench has taken the view that the deletion of sub-section (5) form Section 367 at best exempts the Court from the obligation of recording the reasons as to why a lesser sentence than death was being imposed; in other words, that the sub-section was only procedural in effect and did not affect the substantive provisions of Section 302 I. P. C we have already pointed out that as Section 367 (5) stood prior to amendment the emphasis was not on the reasons to be stated but on the words 'why sentence of death was passed' which suggested that they sentence of death was normal penalty. No doubt the requirement that reasons should be stated reinforced that view but the requirement of stating reasons was not the main aim or object of that section. Therefore when sub-section (5) was drop penalty for murder was dropped and not the requirement that reasons for the sentence imposed should be stated. That is where Palaniswami's case : AIR1968 Bom127 in our opinion, erred-we say so with the utmost respect. That was also an error which crept into the argument of counsel in Gourishankar's case : AIR1966 Bom179 . Instead of merely saying that the effect of the amendment was to drop the rule that death is the normal penalty of murder counsel unfortunately urged that the giving of reasons was also not longer necessary. We are not surprised that counsel's argument which in substance was correct was rejected by the Division Bench. We need not say anything more about this decision except to say

that we do not approve of it. This decision as also Palaniswami's case : AIR1968 Bom127 moreover are contrary to the decisions of this court in two previous Division Bench decisions namely in Confirmation Case No. 13 of 1958 (Bom) and No. 14 of 1965 (Bom) both of which Palaniswami's Case : AIR1968 Bom127 referred to but did not follow on the short ground that they did knot lay down any precedent which was not correct, and Gourishankar's case : AIR1966 Bom179 did not notice. In our opinion Confirmation Cases No.13 of 1958 (Bom) and 14 of j1965 (Bom) were correctly decided.

23. Having noticed the authorities we turn to consider some of the contentions urged. Upon the view which we have taken we cannot accept the contentions urged on behalf of the State that S. 367, sub-s (5) was merely procedural and did not affect the provisions of Section 302 I. P.C. at all. We have already given our reasons for holding that the view taken in : AIR1963 All501 by Shrivastava J. and other cases is not correct.

24. The imposition of a particular sentence is always a judicial act and a Court acting judicially is normally bound to give its reasons. That is implicit in the judicial process itself and has always been so. We do not suppose that when sub-s. (5) was enacted the Legislature merely put it in order to recognise what was till then the set practice or to merely j restate what was so obvious; Moreover if that was the object we can se no reason why the sub-section should have been limited only to the sentence of imprison- ment for life or that it should have required reasons to be stated only if that sentence is imposed. If the purpose of the sub-section would merely have said 'If the accused is convicted on an offence punishable with death and the Court sentence shim 'to any punishment other than death', the Court shall in its judgment state its reasons for the sentence', but the section did not say that. It said 'If the accused is convicted of an offence punishable with death and the court sentences him 'to any punishment other than death', the Court shall in its judgment state the reason 'why sentence of death was not passed'.' The underlining (here into ' ') is ours). It refers to 'any punishment other than death' and prescribes that only when such a sentence is imposed the Court should state 'the reason why sentence of death was not passed.' In our opinion, it is clear from these words that it was not aiming at the requirement that reasons should be

stated but was really aiming at prescribing that in a case punishable with death the normal sentence was death and that in a case punishable with death the normal sentence was death and that the lesser sentence was the exception. Since it was the exceptional sentence, reasons had to be stated. The main purpose of the sub-section was not to provide merely that reasons should be given in a case punishable with death, as has been understood in several cases including Gaurishankar's : AIR1966 Bom179 and Palaniswami's : AIR1968 Bom127 , cases.

25. Next it was contended that if this is the view to be taken then it is a very devious way of providing for a modification or limitation of the substantive provisions of Section 302 I.P.C. The Legislature, it was urged, could have directly added a proviso to Section 302 itself. What was the necessity to resort to the indirect mode of amending an admittedly procedural law like the Criminal Procedure Code in order to modify the substantive provisions as to sentence in Section 302 of the Indian Penal Code?

26. There is a two-fold answer to this contention. In the first place, the provisions made in Section 367 (5) were on the border-one between substantive law and procedural law. A discretion had been conferred by Section 302 upon the Court to decide which of the two alternative sentences it should impose, but the Legislature wanted to indicate that the normal punishment should be death and only in exceptional cases should the sentence of imprisonment for life be imposed. The Legislature perpetuated that intention by saying that in such a case the Court must state special reasons. We advisedly use the expression 'special reasons because as we have already said, generally for the imposition of a sentence reasons have always to be given for showing why the lesser sentence reasons have always to be given for showing why the lesser sentence was to be imposed they must of necessity be special . Sub-section (5) required reasons to be specially stated in the particular case where death sentence was not imposed in a case punishable with death. Now the requirement of stating reasons in a judgment was really a matter pertaining to procedural law and since Section 367 generally provided for the language of the judgment and its contents it was a convenient and proper place for inserting such a provision although it affected substantive law.

27. Secondly sub-section (5) speaks of 'an offence punishable with death' and in the Indian Penal Code murder (in Section 302 I. P. C) is not the only offence punishable with death. There are seven other offences crated by the Code which are all punishable with death. They are usefully summarised by Ratanlal in his Law of Crimes, 21st Edition at page 93 and they are Sections 121,132,194,302,303,305,396 and S. 307. The legislature therefore may well have thought that it would be cumbersome to make the same provisions at the foot of each of the sections and therefore it may have decided to put it in one section only in the Criminal Procedure Code at a place which was as we have said a proper and suitable place to fit in the provision because it related to the contents of judgment. Nothing, therefore, turns upon the contention that the provisions of subsection (5) of Section 367 were contained in procedural law like Section 367 of the Criminal Procedure Code and not in the substantive law contained in the Indian Penal Code itself.

28. Our conclusion then is that under the old Section 367 (5) the Court had to record its reasons for not passing death sentence in a case punishable with death. That sub-section being now dropped the Judge is not required to state any special reason (in the sense we have indicated above) for merely passing a sentence of life imprisonment in a case punishable with death. In other words, the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the Court to pass either of the two sentences prescribed in Section 302 I. P. C., but whichever of the two sentences he passes the Judge must still give his reasons for imposing a particular sentence. The dropping of sub-section (5) from Section 367 has not the effect that the Court is absolved form giving any reasons for passes. It is only not necessary any longer to give special reasons for the imposition of the sentence which it passes. It is only not necessary any longer to give special reason justifying the imposition of the lesser sentence in a case punishable with death, though reasons for the sentence imposed must be stated.

29. Subject to what we have stated, we answer the question referred as follows:-

'After the amendment of sub-section (5) of Section 367 of the Code of Criminal Procedure by Central Act XXVI of 1955 , lit is not correct to hold that the normal penalty for an offence under Section 302 of the Indian Penal Code is a sentence of death or that the lesser penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is, after the amendment, left to the discretion of the Court. The Court must, however take into account all the circumstances and state its reason for whichever of the two sentences it imposes in its discretion.'

30. The papers be now returned to the Division Bench very early for disposal of the Confirmation case and the appeal.

D.R.R.

31. Question answered accordingly