Jan Mohammad Vs. State

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Court : Allahabad

Decided On : Jul-31-1962

Reported in : AIR1963All501; 1963CriLJ481

Judge : A.P. Srivastava and ;K.B. Asthana, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 367(5), 374, 376 and 423; Indian Penal Code (IPC), 1860 - Sections 302

Appeal No. : Criminal Appeal No. 571 of 1962 and Refered No. 38 of 1962

Appellant : Jan Mohammad

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : S.N. Mulla, Adv.

Disposition : Appeal partly allowed

Judgement :

Srivastava, J.

1. This is an appeal by Jan Mohammad who has been convicted under Sections 302 and 307, I.P.C. by the Civil and Sessions Judge of Mirzapur. For the former offence he has been sentenced to death and for the latter to undergo seven years'

rigorous imprisonment. The usual reference under Section 374 ofthe Cri. P.C. for the confirmation of the death sentence is also before us.

2. Learned counsel for the appellant did not question before us the correctness of the conviction of the appellant for both the offences. He also did not challenge the main findings recorded by the learned Sessions Judge against he appellant. On a perusal of the record the conviction appears to be perfectly justified. Though an attempt was made at the trial Court to make some of the witnesses to go back on their earlier statements, there can be no doubt that the Sessions Judge was right in his findings that on the 1st May 1961 at about 8 a.m. the appellant Jan Mohammad went to the house of Arshuddin Khan deceased. Smt. Nazbeen, the daughter of the deceased, was also there at the house. There was some talk between the appellant and the deceased. The appellant then struck the deceased with a knife which he carried and hit him on the chest. Smt. Nazbeen, the daughter of the deceased, wanted to intervene and to save her father. She threw a burning piece of wood at the appellant. On her doing so the appellant struck her also the knife which he was carrying. The appellant then left the place. The appellant was later found sitting by a nala nearby. He was caught and taken to the thana with the knife with which he had caused injuries to the deceased and his daughter.

3. The post-mortem examination of Arshuddin Khan disclosed an incised punctured wound 11/4' x 3/4' ex (sic) chest cavity running transversely and obliquely on front of left side chest 31/2' below the nipple. The injury was sufficient in the ordinary course of nature to cause death and had been caused by a knife. The injury found on Smt. Nazbeen was an incised punctured wound measuring 11/4' x 1/2 ex pleural cavity. It was a grievous injury and had also been caused by a sharp-edged weapon like a knife.

4. According to the prosecution both the appellant and Arshuddin were Afghans who were working as labourers for breaking stones into ballasts. Smt. Nurjahan was the wife of Arshuddin, Smt. Nazbeen was the daughter of Smt. Nurjahan by her previous husband. Smt. Nazbeen was married to Karim Khan. Differences had, however, arisen between Smt. Nazbeen and Karim Khan and the former was on account of those, differences living with her mother and step-father Arshuddin.

There had been some proceedings about divorce between Karim Khan and Smt. Nazbeen. According to the latter she had been divorced by Karim Khan but this allegation was not accepted by Karim Khan. The case of the prosecution was that the appellant was an aspirant for the hand of Smt. Nazbeen and had approached Arshuddin for that purpose, but Arshuddin had not accepted his request on the ground that the matter of divorce between Smt. Nazbeen and her husband had not been finally settled. The appellant resented this. It was also urged that on the date of the occurrence the appellant had gone to the house of Arshuddin armed with a knife. Arshuddin was sitting at his door waiting for the bus to go to Chopan. The appellant told him that he too was going to Chopan and requested Arshuddin to go with him on foot to that place . Arshuddin, however, said that he was not well and did not want to go on foot and that he was waiting for the bus. Some hot words were then exchanged and the appellant struck Arshuddin with his knife. When Smt. Nazbeen wanted to intervene he struck her also. The learned Sessions Judge has held all these allegations to be proved.

5. Before Arshuddin died his dying declaration had also been recorded. The dying declaration was in these words:

'Today at about 8 A.M. I was preparing to come to Chopan dispensary for treatment of fever. Jan Mohd. who does the work of breaking stones under Wahab Shah Thekedar came to my house. I also do the work of breaking Gitti at the place of the said Thekedar. I was sitting at my house. He called and asked, 'why are you sitting at your house?' I said, 'It is my house. I am sitting here. I have to go to the dispensary. I am waiting for the bus.' He said, 'Come along. I too shall go to Chopan.' I said, 'I am not feeling well. 1 cannot go on foot. I shall go by bus on its arrival.' Saying this I turned to go towards the house from the place where I had been siting outside the house. Then he attacked me with a knife from behind. When my daughter Nazbeen challenged him saying 'Why have you assaulted my father?' he attacked my daughter also with a knife. He ran away after causing injuries to both of us. All this has been done to the mischief and instigation of Wali Ahmad Khan Thekedar'

This dying declaration has also been accepted by the Sessions Judge and appears to be substantially in accord with, the evidence produced by the prosecution.

6. As has already been observed, the correctness of the conviction of the appellant under Section 307, I.P.C. for attempting to kill Smt. Nazbeen, and the sentence imposed for that offence have not been challenged. The correctness of the conviction of the appellant under Section 302, I.P.C. for causing the death of Arshuddin is also not disputed. The only prayer made is that the sentence of death imposed on him by the learned Sessions Judge should not be confirmed and should be substituted by a sentence of imprisonment for life.

7. Two submissions have been made in support of this prayer. It is urged in the first place that with the amendment of Sub-section (5) of Section 367 of the Criminal Procedure Code a change has been effected in the law relating to the sentence to be imposed in murder cases. The amendment has been made by the Legislature in view of the growing public opinion that death sentences should be imposed only in exceptional cases. In ordinary cases the sentence of imprisonment for life will suffice.

8. Secondly, it is urged that in view of three circumstances the murder committed by the appellant cannot be described as a preplanned coldblooded murder. These circumstances provide grounds for extenuation and in view of them a sentence of imprisonment for life would meet the ends of justice. The circumstances pointed out are:

(1) That the prosecution case about the alleged motive for the murder is not acceptable. There is no reliable evidence to prove that the appellant really wanted to marry Smt. Nazbeen and that his request in that regard had been rejected by the deceased. It cannot, therefore, be said that he resented the rejection of his offer and killed Arshuddin on that account.

(2) Some of the prosecution witnesses themselves admitted that the assault on Arshuddin was preceded by a quarrel or exchange of hot words. The appellant, therefore, had some provocation and had in a fit of rage caused the injury which

had proved fatal in the case of Arshuddin. The attack was made on the impulse of the moment and was not premeditated.

(3) After hitting the deceased the appellant did not run away. He went to a neighbouring nala and sat down there. He was caught there by the contractor and did not resist his being taken to the thana.

9. Section 367 of the Criminal Procedure Code, as it formerly stood, required the Sessions Judge to give reasons if instead of imposing the, death penalty the lesser penalty was being imposed. This provision has now been deleted By the amending Act of 1955 and it is not necessary now to give reasons for inflicting the lesser penalty. The question is whether the deletion of this clause of Section 367, Cri. P.C. has effected a change in the law relating to sentences in murder cases.

10. Section 302, I.P.C. enacts that an offence of murder shall be punishable with death or imprisonment for life. The section does not state in which cases the death penalty shall be imposed and in which imprisonment for life is to be awarded. It was, however, laid down by the Supreme Court in Dalip Singh v. State of Punjab : [1954]1SCR145 that:

'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. But the discretion is his and if he gives reasons on which a judicial mind could properly found an appellate Court should not interfere.'

The question is whether this rule has been affected by the change in Section 367, Cri. P.C. This question was considered by this Court first in Satya Vir v. State : AIR1958 All746 where it was observed:

'Since the omission of that Sub-section (Sub-section (5) of Section 367, Cri . P.C.) 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 (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), 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.'

11. In Khanzadey Singh v. State : AIR1960 All190 the conviction had been recorded under Section 396 and death sentence had been awarded. It was argued by the appellant in this Court that death sentence was not the normal penalty for an offence under Section 396 and that in any case on account of the amendment in Section 367, Cri. P.C. the obligation to award the death sentence had been removed. Mukherji, J., who delivered the judgment of the Bench, quoted Sections 302 and 396 and then observed:

'The obligation in the matter of imposing the sentence is, in our judgment, in the same sequence in the two sections, only that in Section 395, I.P.C. the scope of the discretion is larger in so far as there is the possibility of imposing a sentence lesser than death or transportation for life (now imprisonment for life) for an offence punishable under this section.

Section 367, Cri. P.C., as it stood before the amendment of 1955, by Clause (5) cast a duty on the Court to record its reasons for not inflicting a death penalty on a conviction for an offence which was punishable with death. That obligation was not confined to the awarding of a sentence under Section 302, I.P.C. only, for death was a punishment prescribed and awardable for a conviction under Section 396, I.P.C. also. Therefore, in our opinion -- and express it with respect -- the distinction that was seen by the learned Judge in Lal Singh v. Emperor : AIR1938 All625 was an unsubstantial distinction: at any rate, the wordings of the relevant sections, which we have quoted above, did not justify that view. After the amendment to Section 367, Cri. P.C. in 1955 it is no longer obligatory for the trial Judge to give reasons for imposing the lesser penalty, but that amendment has nothing to do with the point that has cropped up for our decision; what we have to decide is whether, as we said before, the sentence that had been imposed by the trial Judge on Khanzadey Singh was an appropriate sentence. In our opinion, it certainly was, for we have found that Khanzadey Singh not only participated in the dacoity but also used his gun and there is no presumption that a gun when fired misses its mark.'

12. The latest case in which the point came up for consideration is Ram Singh v. State : AIR1960 All748 . Dhavan, J., who was speaking for the Bench in that case, observed:

'Mr. Mulla also contended that youth by itself can be a sufficient reason for not imposing a sentence of death after a conviction for murder. He relied, inter alia, on a recent amendment of Section 367 of the Cri. P.C. which deleted the clause requiring the Court to state its reasons whenever it decides not to impose the sentence of death imposed by law. He suggested that the removal of the condition shows that the Court now has a wider latitude in the matter of awarding or not awarding the death penalty and it may impose the lesser punishment on the ground of age even if it could not do so before the amendment of the section.

We do not think that the amendment of Section 367, Cri. P.C. affects the law regulating punishment under the Penal Code. This amendment related to procedure, and now Courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations in preferring the lesser punishment. A Court may record no reason for not passing the death sentence, but if it awards life imprisonment for a cold-blooded and revolting murder the absence of reasons will not save its preference from being unjudicial.'

13. With the deletion of Sub-section (5) of Section 367 of the Cri. P.C. the Legislature did not make any change in Section 302 of the I.P.C. The order in which the punishments for an offence of murder were mentioned in the section were left unaltered. The change made in Section 367, Cri. P.C. was purely procedural. The only amendment made was that it was not obligatory for the Courts to state their reasons if in their discretion they were imposing the lesser penalty. Had it been the intention to change the substantial law relating to the imposition of sentences for offences punishable alternatively with death or transportation for life some change would have been made in the substantive law also. The Legislature must be presumed to have known that the rule as laid down by the Supreme Court was that normally an offence under Section 302, I.P.C. should be punishable with death but for judicial reasons the lesser penalty could

be inflicted if circumstances of the case justified that course. The omission to make a change in the rule indicates a clear intention that the rule was intended to continue in force. By the amendment in Section 367. Cri. P.C. the obligation to state reasons for imposing the lesser penalty may have been withdrawn but there appears no justification for the contention that that change in procedure enlarged in any way the discretion vested in the Sessions Judge in choosing the penalty to be inflicted and permitted him to inflict the lesser penalty even in cases which deserved the extreme sentence and in which the lesser sentence would not be commensurate with the gravity of the offence committed. After the amendment of Section 367, Cri. P.C. it is no longer obligatory on the Sessions Judge to give his reasons for choosing the lesser penalty but if there are, in fact, judicial reasons which have led him to exercise his discretion in favour of the lesser penalty he can still State those reasons to enable the appellate Court to appreciate those reasons and to decide whether his discretion has been properly exercised. Simply because he is not required to state his reasons it does not mean that he need not have any reasons and can inflict the lesser penalty only to satisfy his whim or caprice or because he happens to be allergic to death sentences. The sentence to be imposed for each offence which is established to have been committed has to be fixed judicially keeping in view the circumstances of the case including the gravity of the offence, the conduct of the offender and the interest of society in general. The Court is certainly vested with the discretion in the matter but the discretion has to be exercised on judicial grounds. This discretion has, in my opinion, not been affected at all by the change in Section 367 of the Criminal Procedure Code. On the basis of that change, therefore, the appellant cannot expect that he should be given the lesser sentence even though he deserves the extreme penalty.

14. Out of the three circumstances which have been relied upon as extenuating, the first relates to the alleged motive of the murder.

14.-18. (His Lordship after discussing the evidence pointed out that the prosecution had proved the motive. He then proceeded:)

19. Let us, however, assume for the sake of argument that the motive suggested by the prosecution has not been proved. The murder then becomes a murder the

motive of which is not known. It is not always possible for the prosecution to suggest a motive for each crime that is committed. If the motive is known and established it is a strong piece of evidence against the accused. The absence of a motive may be a circumstance to be used in favour of the accused so far as the conviction is concerned. But if the commission of the offence is proved by satisfactory evidence no importance can be attached to the inability of the prosecution to suggest a motive for the crime. The absence of a motive or any other piece of evidence is relevant only for deciding whether the commission of the offence is proved. Once it is established by other evidence that the offence was committed the absence of motive becomes entirely immaterial and cannot be used as a mitigating circumstance in connection with the measure of sentence to be imposed. As was observed by the Supreme Court in Yadivelu Thevar v. State of Madras : 1957 CriLJ1000 :

'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 prosecution 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 bejustified in imposing the lesser of the two sentences provided by law. In other words, the nature ofthe proof can only bear upon the question of conviction--whether or not the accused has been proved to be guilty. If the Court comes to the conclusion that the guilt has been brought home to the accused, and conviction follows, the process of proof is at an end. The question as to what punishment should be imposed is for the Court to decide in all the circumstances of the case with particularreference to any extenuating circumstances. But the nature of proof, as we have indicated, has nothing to do with the question of punishment.'

The inability of the prosecution to prove the motive which led the appellant to commit the murder cannot, therefore, in my opinion, be used as a mitigating circumstance so far as the sentence is concerned.

20. It is urged that the appellant must have been provoked in the quarrel that took place before he used his knife and that that should be considered to be an extenuating circumstance. The first thing to be noted in this connection is that the appellant never set up the case that he had been provoked in any manner. In the committing Court as well as in the trial he denied all the prosecution allegations and set up a case which is now admitted to be untrue. Secondly, the evidence on record does not show that any provocation was given to the appellant which could lead him to kill Arshuddin.

(After discussing the evidence in the rest of this para and para 21 His Lordship proceeded):

22. From this evidence, in my opinion. It is impossible to conclude that the deceased had given any provocation to the accused which could lead the accused to attack the deceased. The appellant appears to have charged the deceased with having abused him but the deceased denied' the charge. He even offeied tea to the appellant and requested him to keep a cool mind. The deceased was sitting at his own house waiting for the truck to go to the hospital at Chopan. The appellant had gone to the place and had started the talk. Even if it be conceded' that in course of the talk some hot words were exchanged when it is not proved that the deceased used any provocative language which could arouse anger in the appellant it cannot be said that there was any provocation given to the appellant which could lead him to the attack and which could be considered to be a mitigating circumstance. The only kind of provocation which the deceased can be said to have given is the provocation which the lamb had given to the wolf in Aesop's fable.

22a. After the appellant had injured both Arshuddin and his daughter he went to a neighbouring nala and sat down there. There is evidence to show that he had with him a round piece of stone and nobody dared approach him because every one was afraid that he will be hit with the stone. When the thekedar under whom the appellant was working came he caught the appellant and took him on a truck to the police station along with the knife. This conduct of the appellant too cannot, in my opinion, be used as an extenuating circumstance. Immediately after he had

attacked the deceased and Smt. Nazbeer the appellant must have realised the seriousness of what he had done. He must also have realised that he could not escape the hands of the law and there was no use running away. He, therefore, went and sat down near the nala. He remained there till the thekedar came and took him away. I fail to see how this omission to run away can mitigate in any way the enormity of the offence which the appellant had committed.

23. In this connection it has to be remembered that the appellant had gone to the house of the deceased armed with a knife. There is no suggestion that the appellant habitually carried a knife, with him. There is not an iota of evidence to show that he was generally armed in that manner. No explanation has been offered by the appellant as to why he went to the house of Arshuddin armed with a knife. On reaching there the appellant tried to persuade Arshuddin to accompany him on foot towards Chopan. This conduct too has not been explained. Arshuddin was ill and, therefore, he refused to accompany the appellant on foot. If the appellant was nursing a grievance against Arshuddin and had gone there armed with a knife it is apparent that he tried to persuade the deceased to go with him on foot towards Chopan because he wanted to kill him at some lonely place in such circumstances that the offence could not be discovered or easily brought home to him. Arshuddin, however, refused to oblige him and said that he was not feeling well he would not go on foot but would go on truck. The appellant thus found that his plan had not succeeded. He therefore, picked up a quarrel with the deceased and wrongly accused him of having abused him. Arshuddin denied the charge and offered tea to the appellant so that he may feel cool. The appellant at that stage as soon as Arshuddin turned back to go inside his house attacked him with the knife. The attack was directed not at a non-vital part of the body but at the chest in the heart region. One single blow was given with sufficient severity and resulted in death. It cannot be said that the blow was accidental or that it was not premeditated. There is nothing to show that anything had happened before the attack on account of which the appellant had lost his temper and had acted at the impulse of the moment in a sudden fit of rage. The man attacked was old, defenceless, unarmed and not feeling well. He was going inside his own house and could not even have dreamt that the appellant, who was a fellow labourer and an aspirant for his daughter's hand, would kill him in that manner. In these

circumstances if the learned Sessions Judge considered that the murder which the appellant committed was 'deliberate, atrocious, cold-blooded, heartless and treacherous', I am unable to say that he was unjustified in his view. For a murder committed in these circumstances the proper sentence appears to be the sentence of death.

24. The question of sentence is a matter of discretion and the discretion lies primarily with the trial Judge. The Appellate Court should interfere with that discretion only if there are strong grounds justifying that course; e.g. some important consideration or circumstance has been overlooked or some judicial principle disregarded. In the present case the Sessions Judge exercised his discretion in favour of the death penalty and the reasons he has given appear to be quite unexceptionable. No case has, therefore, been made out for interference with that discretion.

25. My learned brother is, however, of opinion that the sentence in this case should be reduced to imprisonment for life. Though reluctantly, in deference to his opinion, I agree that while maintaining the conviction of the appellant under Section 302 I.P.C. the sentence should be reduced to imprisonment for life. In doing so I am only following the practice adopted by Mr. Justice Raghubar Dayal in Mool Chand V. State : AIR1953 All220 and referred to by their Lordships of the Supreme Court in Pandurang v. State of Hyderabad : 1955 CriLJ572 where it was observed :

'..... .we are of opinion that the sentenceshould be reduced to transportation in these two cases mainly because of the difference of opinion in the High Court, not only on the question of guilt, but also on that of sentence. In saying this we do not intend to fetter the discretion of Judges in this matter, for a question of sentence is, andmust always remain, a matter of discretion, unless the law directs otherwise. But when appellate Judges, who agree on the question of guilt, differon that of sentence, it is usual not to impose thedeath penalty unless there are compelling reasons.'

Asthana, J.

26. Jan Mohammad, an Afghani Tribal, has appealed against his conviction and sentence of death for the murder of Arshuddin Khan, another Afghani tribal and also against his conviction for an offence under Section 307, I.P.C. for the attempted murder of Smt. Nazbeen for which he has been sentenced to undergo rigorous imprisonment for seven years by the learned Sessions Judge of Mirzapur. The appeal before us has been pressed on the question of sentence only and the conviction recorded by the learned Sessions Judge for both the offences has not been questioned.

(After setting out the prosecution case (paras27-30) and the circumstances which led to the conviction and sentence of the accused by the Sessions Judge, His Lordship proceeded :)

31. While awarding the extreme penalty to the accused the learned Sessions Judge has observed as follows:

'A word now remains to be said on the question of sentences for murder as well as attempted murder. I find absolutely no extenuating circumstance so far as the commission of murder by the accused is concerned. The only fault of the deceased was that he had failed to pay any heed to the overtures of the accused for a connubial alliancewith his daughter who was still, in the eye of law, the married wife of another person, namely, Karim Khan. He appears to have reached the scene that morning with a determination to do to death the father of Nazbeen in order to remove the only obstacle in his way in gratifying his lust by unlawfully marrying the deceased's daughter Nazbeen. His conduct in picking up a quarrel with the deceased without any rhyme or reason speaks for itself. It was a deliberate, atrocious, cold blooded, heartless and treacherous murder. The only sentence that can. and must, with judicial propriety, be passed on him under Section 302 of the I.P.C. is therefore the sentence of death.'

32. The learned counsel for the appellant Sri S. N. Mulla in the course of his careful argumentshas contended that on the facts alleged and proved in the case against the appellant the punishment of death was not called for and the ends of justice required the lesser penalty, namely, the imprisonment for life. He has submitted that no motive has been established by the prosecution as to why the

accused committed the murder of Ashruddin. He has challenged the finding of the learned Judge as to the move, namely, that the accused nursed a grievance against Ashurddin for the refusal by him to marry his daughter, Nazbeen, to the accused and submitted that there was no sufficient material on record to support that finding. It is further submitted that there being no premeditation on the part of the accused and the murder havingtaken place in the course of a sudden quarrel in the heat of the moment and the subsequent conduct of the accused that he did not run away but continued sitting very near the spot where theoccurrence took place in a dazed condition and his surrendering without any opposition are circumstances which ought to be taken into considerationon the question of sentence. On the other hand the learned Additional Government. Advocate hassubmitted that in all cases of cold blooded murder the normal sentence ought to be the sentence of death and the lesser sentence of life imprisonmentought not to be awarded unless there are extenuating circumstances. He further submits that on the facts of the present case there are absolutely no extenuating circumstances and the murder being a deliberate one the learned Sessions Judge was justified in inflicting the extreme penalty and he having done so this Court ought not to interfere merely on a question of sentence unless it is found that the learned Judge's estimate as regards the nature of the crime is erroneous and he has awarded the sentence of death on non-judicial considerations.

33. To appreciate the respective arguments advanced on behalf of either side it is necessary to bear in mind that besides the appeal filed by Jan Mohammad against his conviction and sentence we have before us a reference also under Section 374, Cr. P.C., for confirming the sentence of death. Now in a case submitted under Section 374, Cr. P.C. the High Court has the power either to confirm the sentence or pass any other sentence warranted by law. The sentence which a Court is empowered to inflict on a person convicted for an offence under Section 302, I.P.C. is death or imprisonment for life. Section 302 of the I.P.C. does not itself lay down as to in which cases or class of cases the Court is to inflict death penalty and in what cases or class of cases it should award the sentence of life imprisonment. Both kinds of sentences are warranted by law and it has been left at the discretion of the Court which sentence to inflict.

Sub-section (5) of Section 367, Cr. P.C. as it stood before the amendment of the Cr. P.C. by the Code of Criminal Procedure (Amendment) Act (No. 26 of 1955) required that if the accused was convicted of an offence punishable with death and the Court sentenced him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed. Based on this sub-section there developed a preponderance of judicial opinion that when an accused was convicted under Section 302, I.P.C. normally the sentence of death was to be passed unless there were extenuating circumstances justifying the lesser sentence. By its Section 66, the Code of Criminal Procedure (Amendment) Act (No. 26 of 1955) has substituted an entirely new Sub-section 5 which does not contain any such provision. There is thus now no statutory rule of law which requires a Court to give reasons as to why the Court in its discretion is not passing a sentence of death against an accused. It is open to a Court to award a sentence of imprisonment for life to an accused under Section 302, I.P.C. and it is no longer necessary to give reasons for this course of action. It seems to me that the Parliament when deleting the above mentioned provision absolutely from the body of the Code of Criminal Procedure, intended to make a departure from the rule of law which had evolved as pointed above that sentence of death in case of conviction under Section 302, I.P.C. was the normal sentence and the lesser sentence was called for when there were extenuating circumstances. Even before the amendment in some of the cases eminent Judges did express an opinion that only in cases where there were aggravating circumstances that the sentence of death was called for. But as already said above such opinion was in a minority and preponderance of the opinion was the other way. (See : AIR1953 All220).

34. Whether by deleting the above said provision from the Cri. P.C. the Parliament intended to approve the minority view referred above or the amendment was innocuous and did not bring about any change in respect of the rule which held the field in guiding the exercise of discretion in awarding such a sentence does not, considering the facts of this case, arise for expression of a final opinion. My attention has been drawn to the case in : AIR1960 All748 and relying upon the same it is urged that even after the said amendment no change has been brought about in law and the sentence of death remains the normal punishment. In the case cited a question arose whether youth by itself was sufficient reason for

imposing the lesser punishment even if the murder is brutal and coldblooded and there are no extenuating circumstances or in such a case the law required that the sentence should be death. In the course of his judgment Dhawan, J. who delivered the opinion of the Court made an observation to the effect that their Lordships did not think that the amendment of Section 367, Cri. P.C. affected the law regulating punishment under the Penal Code as that amendment related to procedure and now Courts are no longer required to elaborate the reasons for not awarding the death penalty but they could not depart from the sound judicial considerations in preferring the lesser punishment. Dhawan, J. further added that a Court may record no reason for not passing the death sentence but if it awarded life imprisonment for a cold-blooded and revolting murder the absence of reasons will not save its preference from being unjudicial. The death sentence in that case was confirmed as the learned Judges found that the accused carried out the murder in a callous coldblooded manner and according to plan, and the age alone was not an extenuating circumstance in his favour.

35. I feel some difficulty in agreeing with the observations made by Dhawan, J. in Ram Singh's case : AIR1960 All748 (supra), if those observations of the learned Judge are interpreted to mean that the amendment of Section 367, Cri. P.C. does not affect the legal position which prevailed prior to the amendment, namely, that death was considered as the normal punishment and life imprisonment could only be awarded if there were extenuating circumstances, for it should be borne in mind that the rule of law that death was the normal penalty was evolved by preponderance of judicial opinion based on Sub-section (5) of Section 367 as it stood before the amendment, and it would not matter even if that provision was regarded as procedural. But I do not propose to rest my decision on the question of sentence in the instant case on the basis of the repeal of the abovesaid provisions of Sub-section (5) of Section 367 and would proceed on the basis that the law remained unaffected by the amendment. For the purpose of the instant case, therefore, a reconsideration of Ram Singh's case : AIR1960 All748 (supra) by a larger Bench is not called for.

36. The learned Sessions Judge has awarded the sentence of death to the appellant as in his opinion in the circumstances of the case and on the evidence

on record not that there was a complete absence of any extenuating circumstance but that there were aggravating circumstances. An argument has been made that he haying exercised his discretion in the matter as a trial Court the High Court should not interfere with the discretion so exercised unless it finds that it was arbitrarily exercised. I do not think this Court while considering a case submitted to it under Section 374, Cri. P.C. is precluded from coming to its own conclusion on the review of evidence on record and on a consideration of the circumstances of the case and then exercising a discretion of its own based on its own inferences and conclusions in respect of the sentence. To my mind it is not the requirement of law that the High Court under Section 376 of the Cri. P.C. cannot award the lesser punishment of life imprisonment and cannot refuse to confirm the sentence of death passed by the Sessions Judge unless it arrives at a finding that the learned Sessions Judge had arbitrarily exercised his discretion on non-judicial grounds.

In the case of Jumman v. State of Punjab : 1957 CriLJ586 their Lordships of the Supreme Court have laid down that on a reference to the High Court under Section 374 the entire case is before the High Court and it is a continuation of the trial of the accused on the same evidence. Their Lordships have further observed that there is a difference when a reference is made under Section 374 and when disposing of an appeal under Section 423 and that is the High Court has to satisfy itself whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death and the proceedings of the High Court are a reappraisal and re-assessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or the innocence of the accused persons and it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials apart from the view expressed by the Sessions Judge, and in so doing the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law it is for the High Court to come to an independent conclusion of its own.

It is clear that the law declared in the above-said case by the Supreme Court is that it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials apart from the view

expressed by the Sessions Judge. A consideration of the question of sentence is one of the aspects of the proceedings and it is the duty of the High Court to come to an independent conclusion on the question of sentence apart from the view expressed by the Sessions Judge. The submission of the learned Additional Government Advocate, if I have understood it correctly, that the conviction of the accused not having been challenged the question of sentence could only be considered on the basis of the findings and opinion arrived at by the Sessions Judge, does not appeal to me. I am of the view that it is open to me to reappraise the evidence on the record and come to an independent conclusion of my own on the materials and the circumstances of the case in considering the question of sentence.

37. In the earlier part of this judgment I have quoted the observations of the learned Sessions Judge which he has made in connection with the question of sentence. It appears that the main circumstance which the learned Judge took into consideration was that as the deceased had failed to pay any heed to the overtures of the accused for a connubial alliance with his daughter who was still in the eye of law the married wife of another person, the accused appears to have reached the scene in the morning of the incident with a determination to do to death the deceased in order to remove the only obstacle in his way in gratifying his lust by unlawfully marrying the deceased's daughter Nazbeen. The learned Judge has been influenced by the fact that it was the accused who picked up a quarrel with the deceased without any rhyme or reason. The learned Sessions Judge has described the murder as a deliberate, atrocious, cold-blooded, heartless and treacherous murder.

Sri Mulla on behalf of the appellant has submitted that there was no warrant for the learnedJudge to come to a conclusion that the murder was premeditated as there was no sufficient evidence on record to establish the case of the prosecution as to motive for the commission of the offence, namely, that the deceased had refused to marry his daughter to the appellant and for that reason the appellant was nursing a grievance and went in the morning of the incident with a determination to commit the murder of the deceased. Sri Mulla has also submitted that there is no proper and sufficient evidence on record to establish that in the morning of the

incident the appellant deliberately picked up a quarrel with the deceased without any rhyme or reason. He has submitted that the learned Judge in finding that the motive was established has wrongly relied upon the evidence of Smt. Noor Jahan, the wife of the deceased and that of Smt. Nazbeen in holding that the deceased had refused to marry his daughter to the appellant and that was the motive which drove the appellant to commit the murder. It has been further submitted that the statement of Shahjahan, the son of the deceased, clearly shows that there was a sudden quarrel in the morning of the incident between the deceased and the appellant which led to hot words and it was at the spur of the moment in a fit of rage that the appellant stabbed the deceased. Reliance has also been, placed on the dying declaration of the deceased wherein the killing is attributed to the mischief and instigation of Wali Ahmad Khan Thekedar and there is a complete absence of any fact in the dying declaration to support the prosecution case as to the alleged motive. In my opinion if on the evidence on record and the circumstances of the case the motive as alleged by the prosecution is not established, the case of the prosecution that the murder was premeditated would fail and since pre-meditation is one of the important circumtance which can be taken into consideration on the question of sentence, I propose to examine the evidence on this point for arriving at my own conclusion.

(After discussing the evidence in paras 38-43 His Lordship concluded):

44. I, therefore, hold that on the evidence on record and on the probabilities and the circumstances of the case the prosecution has failed to establish the alleged motive on the part of the appellant for committing the murder of Ashruddin.

(After discussing the evidence in paras. 45-49, the judgment proceeded) :

50. It appears that in the morning of the incident for some reason an altercation took place between the accused and the deceased which led to hot-words and exchange of abuse and culminated in stabbing of the deceased by the accused. There cannot be any doubt that the assault was a murderous assault and since the accused stabbed the deceased in a vital part there was clear intention on his part to kill the deceased and he has been rightly convicted under Section 302, I.P.C. for the murder of the deceased Ashruddin. It has come in evidence that the

accused is a native of Kabul and the deceased was a native of Kandhar in Afghanistan. The accused is an Afghani tribal and there is nothing surprising that as a man he would be hotheaded and easily excitable by nature and so would be the deceased. The deceased was a young man and so is the accused and the altercation between them for whatever reason it took place must have naturally developed with extraordinary fury giving rise to a fit of rage and at the spur of the moment the accused stabbed the deceased. The murder cannot be said to be a premeditated or preplanned. The attack was made by a knife described as a Rampuri knife which is a~ sort of common knife usually carried by men and the possession of such a knife by the appellant at the time of the incident would not necessarily lead to the conclusion that he had brought the knife deliberately for the purpose of stabbing and murdering Ashruddin that morning. The accused who is a stone-breaker works in an area which is jungle and his carrying a knife with him ordinarily wherever he went out is nothing abnormal.

51. Sri Mulla has also relied on the conductof the accused immediately after the occurrence. He has shown from the evidence on record that after stabbing the deceased and Nazbeen the accused leaving the knife went out and quietly sat in the open at some distance and did not try to escape which could have been easily possible for him. I think this is a circumstance which would show that the appellant must have got stunned when he realised as to what he had done and continued sitting near the scene of occurrence helplessly in a dazed state not knowing what to do. It has come in evidence that when Wahab Shah came and he asked the accused to accompany the party in the truck the appellant came with them. There is nothing on record to show that any attempt was made to apprehend the appellant who continued to sit at a spot, a few paces away from the place of the occurrence and could be seen by every body present. Nor is there any evidence to show that the attempt could not be made as the accused threatened to retaliate. The appellant had no knife or any weapon with him. Some of the witnesses have said that he was sitting with a big piece of stone in his hand and he would have thrown the same on any body who would have gone to apprehend him and therefore a few minutes later, it is said when Wahab Shah came he made the appellant sit in the truck quietly and took him away to the police station. However, the fact remains that the accused, though he had ample opportunity to escape, did

not make any attempt to escape but remained sitting at the spot in the open under the gaze of every person present and quietly surrendered himself when Wahab Shah came.

52. As a result of the discussion, above, I am of the opinion that the murder was not pre-meditated. It was committed by the appellant in a fit of rage. The appellant after committing the murder did not escape and quietly surrendered himself. Though brutality may be attributed to the appellant yet it cannot be said that in the circumstances of the case the murder was perpetrated in a diabolical or cold-blooded manner. At the spur of the moment one knife blow was given in the vital part of the body of the deceased.

53. For all these reasons above, I am of the opinion the ends of justice would be met if the sentence of death is set aside and a sentence of life imprisonment is substituted. This appeal, therefore, partly succeeds. While the convictions of the appellant for offences under Sections 302 and 307, I.P.C. are maintained the sentence of death passed against the accused under Section 302, I.P.C. is set aside and the appellant is sentenced to imprisonment for fife for that offence. The sentence passed on the appellant under Section 307, I.P.C. is maintained. The two sentences shall run concurrently. The reference for confirmation of the sentence of death is rejected.

54. (By the Court): The appeal is allowed in part. The conviction and sentence of the appellant under Section 307. I.P.C. are upheld. The conviction under Section 302, I.P.C. is also upheld but the sentence of death is set aside and is substituted by a sentence of imprisonment for life. The reference made by the Sessions Judge is rejected. The sentences of imprisonment shall run concurrently.