

State Vs. Shaqila and ors.

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Court : Delhi

Decided On : Oct-20-2000

Reported in : 2000(55)DRJ713

Judge : Arijit Pasayat, C.J. and D.K. Jain, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Murder Reference No. 1 of 2000

Appellant : State

Respondent : Shaqila and ors.

Advocate for Def. : S.P. Pandey, Adv., ; Sanjeev Khanna, amices Curiae and ; Ra

Advocate for Pet/Ap. : Anil Soni, Adv

Judgement :

Arijit Pasayat, C.J.

1. 2nd October Dussthra day of 1987 fell on birthday of Mahatama Gandhi and Lal Bahadur Shastri two of the greatest sons of India and advocated doctrine of 'Ahinsa'. Instead of a joyful day, it turned out to be one of nightmares for the family of Tale Ram. An innocent child who had not even celebrated three birthdays was sacrificed so that a barren woman can get a child; an act of abhorrence difficult to

conceive. This primitive belief is unthinkable in the modern jet set twentieth century; but that is what prosecution alleges happened. The act is to say the least diabolic in its conception and cruel in its execution.

2. Five persons are said to be responsible for the barbaric act and they are appellants in Criminal Appeals and are the respondents in Murder Reference No. 1 of 2000 which has been made to this Court by learned Additional Sessions Judge, Delhi (hereinafter referred to as Trial Judge) who convicted each of the accused for offences punishable under Sections 302, 364, 201 and 120B of the Indian Penal Code, 1860 (in short 'IPC') and awarded them death sentence, 7 years rigorous imprisonment, 5 years rigorous imprisonment and life imprisonment respectively for the aforesaid offences. Reference has been made under Section 366 of the Code of Criminal Procedure, 1973 (in short 'the Code') for confirmation of the death sentence.

3. Prosecution version in a nutshell is as follows:-

While all over the country people were celebrating victory of truth over falsehood, goodness over evil, on 2nd October 1987, Dussehra Day, as aforesaid a child was found missing from her house by the grandfather, Tale Ram, P.W. 7. A dead body was discovered from a pond. Members of Tale Ram family had gone to see Ram Lila, leaving behind the child Kavita (hereinafter referred to as 'the deceased') with her grandfather, Tale Ram. Both Tale Ram and Kavita were sleeping in open on a cot. At about 11.00 p.m. Tale Ram went outside to answer the call of nature. In the meantime, it started drizzling and heavy winds started blowing. After answering the call of nature, Tale Ram wanted to take the child inside, but he did not find her on the cot. He thought that her mother might have returned from Ramlila and might have taken the child with her. He proceeded to enquire from the mother of the child about it and on the way he met his wife Bharpai, P.W.5. On inquiring about the child, Bharpai told that she did not know about her. Other members of the family stated to the same effect. Being apprehensive about her safety, they started searching throughout the village. Finally, one Brij Nepali who was washing his hands near a small water tank (Houdi) told them that a child was laying in the haudi. Tale Ram and his wife went to haudi and saw the child in a dead condition.

This noticed several burns when they brought the child to their home. They noticed several burn marks on her body. They suspected a foul play and lodged FIR at Sultanpuri, Police Station. Investigation was undertaken. Subsequently, accused persons were arrested. On completion of investigation, charge sheet was placed. Twenty one witnesses were examined to further the prosecution case during trial. Accused persons did not choose to examine any witness. Learned Trial Judge placed reliance on the evidence of Jai Kishan, P.W.1, Ram Phal, P.W.2, Surinder Singh, P.W.4, Bharpai, P.W.5 and Tale Ram, P.W.7 to conclude that the circumstantial evidence led by the prosecution was sufficient to find the accused persons guilty and convicted and sentenced them as aforesaid.

4. Accused persons have filed against conviction and sentence while reference has been made for confirmation of death sentence.

5. During the course of hearing of the appeals filed by the accused persons, Shaqila, Babu Lal, Chaman, Muneer, Iqbal and Tabiz Ali it was submitted by learned counsel that no case against them has been made out. Mere suspicion however strong, cannot take the place of evidence. The circumstances highlighted by the prosecution did not complete the chain to exclude possibility of any other conclusion except that of guilt, more particularly, of the accused persons who faced the trial. Plea is taken that examination under Section 313 of the Code as done is extremely vague, guilt pointing material and/or substance of accusations, if any culled out from the evidence of witnesses has not been put to the accused persons. Additionally it was submitted that the case is not one which can be characterized as a case falling to the 'rarest of rare' category to warrant a death sentence. It is submitted that most of the accused persons are young persons, bread earners of the families and this being a case resting on circumstantial evidence death sentence should not have been awarded. Learned counsel for the prosecution, on the other hand, submitted that the manner in which an innocent child was tortured and subsequently faced death leaves no manner of doubt that it was a case where death sentence is a proper one. Merely because the case is based upon circumstantial evidence, it cannot be said that death sentence should not have been awarded, more particularly, when circumstances have been linked together unerringly to find the accused persons guilty.

6. It is to be noted that accused Shaqila is the mother of accused Chaman. 'Shaqila is stated to have masterminded the killing of the child as a sacrifice, commonly known as 'Totka', so that her barren daughter Chaman could get a child. Accused Babu Lal is stated to be a person who lifted the child from the cot and gave it to Tabiz ali so that totka could be performed. The act of killing is stated to be the result of conspiracy hatched by the aforesaid parties.

7. As afore noted, the case of prosecution rests upon circumstantial evidence. The pieces of evidence which have been linked together shall be dealt with infra. It is necessary to take note of legal principles governing the cases of circumstantial evidence.

A person has, no doubt, a profound right not to be convicted of an offence, which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to proof is an exercise particular to each case. Referring to probability which amounts to proof is an exercise relating to the interdependence of evidence, and the confirmation of one piece of evidence by another. In this regard, a learned author says: (See 'The Mathematics of Proof II' Glanville Williams ' Criminal Law Review, 1979, by Sweet and Maxwell, p.340 (342).

'The simple multiplication rule does not apply if the separate piece of evidence are dependent. Two events are dependant when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other.'

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute

reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not art imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

8. It is no doubt true that conviction can be based solely on circumstantial evidence, but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the Apex Court as far as back as in 1952 in Hanumant Govind Naragundkar and Anr. v. State of Madhya Pradesh, : 1953 CriLJ129 , wherein it was observed thus:

'It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

9. A reference may be made to a later decision of the Supreme Court in Sharad Sirdhichand Sarda v. State of Maharashtra, : 1984 CriLJ1738 . Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and that infirmity or lacuna in prosecution cannot be cured by false defense or plea. The conditions precedent in the words of the Apex Court, before conviction could be based on circumstantial evidence, must be fully established. They are-

i. the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

ii. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

iii. the circumstances should be of a conclusive nature and tendency,.

iv. they should exclude every possible hypothesis except the one to be proved, and

v. there must be a chain of evidence as complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

We may also make a reference to a recent decision of Supreme Court in C. Change Reddy and Ors. v. State of A.P., : 1996 CriLJ3461 . Wherein it has been observed thus:

'In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.....'.

10. The question whether chain of circumstances unerringly established the guilt of the accused needs careful consideration. The 'Panchsheel' of proof of a case based on circumstantial evidence which is usually called five golden principles have been stated by the Apex Court in *Shah v. State of Maharashtra*, : 1984 CriLJ1738 . They read as follows:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other

hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved;
and

(5) There must be a chain of evidence complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. It is the cardinal principle of criminal justice that fouler the crime, higher the proof required. A golden thread which runs through the web of administration of criminal justice is to the effect that if two views are possible on the evidence adduced, one pointing to the guilt of the accused and the other to his innocence, the latter is to be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence. Baron Alderson stated the following to the jury in *Reg. v. Hedge*, (1838) 2 Law 227:

'The mind was apt to take a pleasure in adapting circumstances to one another and even the straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.' These observations were referred to in *Shankarlal v. State of Maharashtra* AIR 1981 SC 785: and in *Jaharlal Das v. State of Orissa*, : 1991 CriLJ1809 . Unlike direct evidence, indirect circumstances which throw light may vary from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction.

12. It is settled principle of law that the circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by those circumstances should be fully complete so as not to leave any reasonable

ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such so as to rule out a reasonable likelihood of the innocence of the accused. Where the various links satisfactorily make out a case and the circumstances point to the accused as the probable assailant with reasonable definiteness and if proximity to the accused as regards time and situation is shown, and the accused offers no Explanationn, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence such absence of Explanationn or false Explanationn would itself be an additional link which completes the chain. But at the same time it has to be borne in mind that it does not mean by implication that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. In other words, when deciding the question of sufficiency, what the court has to consider is the cumulative effect of all proved facts, each one of which reinforces the conclusion of guilt, and if the combined effect of all those facts taken together is conclusive, and establish guilt of the accused, conviction would be justified even though it may be that any one or more of these facts by itself is not decisive. The decision of the Apex Court in *Ananta Bhularan Kulkarni v. State of Maharashtra*, : 1992 CriLJ3997 also throws considerable light on the aspect. The apex Court reversed judgment of the Karnataka High Court, where the accused involved in the case was acquitted on the ground that circumstances did not show complete chain of circumstances to warrant conclusion of guilt. The Apex Court observed that the very fact that the respondent left the house in a hurry was very relevant and by the chain of circumstances, it can be established that the accused was alone responsible for the murder of his wife.

13. In *C.K. Raveendran v. State of Kerala*, : 2000 CriLJ497 , it was observed that law relating to circumstantial evidence requires that the prosecution must prove each of the circumstances, having a definite tendency pointing out toward the accused and though each of the circumstance by itself may not be conclusive, but the cumulative effective of number of circumstances must be so complete that it must exclude every other hypothesis and unequivocally point to the act of the

accused.

14. At this juncture it is necessary to take note of ingredients necessary to constitute offences punishable under Sections 120B, 201 and 364 IPC.

15. Section 120-B, IPC is the provision which provides for punishment for criminal conspiracy. Definition of criminal conspiracy given in Section 120-A reads as follows:

'120-A. When two or more persons agree to do, or cause to be done-

(1). An illegal act, or

(2). An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.'

The elements of a criminal conspiracy have been stated to be:

(a) an object to be accomplished,

(b) a plan or scheme embodying means to accomplish that object,

(c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means,

(d) in the jurisdiction where the statute so required, an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators

give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence Vol. II, Section 32, P. 559). For an offence punishable under Section 120-B prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable, when two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or use of criminal means.

No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that the direct evidence to prove conspiracy is rarely available. therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. But if these circumstances are compatible also with the innocence of the accused persons then it cannot be held that the prosecution has successfully established its case. Even if some acts are proved to have been committed it must be clear that they were so committed, in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. Inference from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable Explanation. (See *P.K. Narayan v. State of Kerala* : 1994 (3) SCJ 596.

16. Section 201 IPC presents a case of accession after the fact. 'An accessory after the fact' said Lord Hale, 'may be, where person knowing a felony to have been committed, receives, comforts, or assists the felon. (See Hale 618). therefore, to make an accessory ex post facto it is in the first place requisite that he should know of the felony committed. It is in the first place he must receive, relieve, comfort, or assist him. And, generally any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment, makes the assister an accessory. The ingredients of an offence under Section 201 IPC are (1) that an offence was committed, (2) that the accused knew or had reason to believe that such an offence has been committed, (3) that the accused caused evidence thereof to disappear, and (4) that the accused caused disappearance of evidence with the intention of screening the offender from legal punishment. What Section 202 requires is that the accused must have had the intention of screening the offender. To put it differently, the intention to screen the offender must be the primary and sole object of the accused. The fact that the concealment was likely to have that effect is not sufficient, for Section 201 speaks of intention as distinct from a mere likelihood.

17. Section 364 provides for the case of kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. Kidnapping is of two kinds as indicated in Section 359 i.e. (a) kidnapping from India and (b) kidnapping from lawful guardianship. Section 361 deals with the second category. The Section has four essentials namely, (a) taking or enticing away a minor or a person of unsound mind, (b) such minor must be under sixteen years of age, if a male; or under eighteen years of age, if a female, (c) the taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind and (d) such taking or enticing must be without the consent of such guardian.

18. In the aforesaid legal background, the guilt pointing out the circumstances against each of the accused persons need to be noted. Accused Shaqila as pointed out above is stated to be the mastermind in the conspiracy which had the idea of sacrificing a child so that her daughter can be blessed with a child. Evidence against her revolves around recovery of 'chadhi' of the deceased girl.

Inspector Ashok Kumar, P.W. 20 has stated that on 7.10.1987 he arrested Shakila who was present with accused Babu Lal in the house. Disclosure statement of Shakila, (Ex. P.7/F) was recorded and on her pointing out the place towards inside her house, where she buried the clothes of deceased and other articles used at the Totka performance, several articles were recovered, i.e. Kachi Ext. P.1, Bottle Ex.P.2, Earthen Diya, Ext.P.3, Half burnt cotton butti, Ex. P.4. piece of newspaper Ex.P.5, Patashas, rice grain and laung Ext.P.5/1-3. The recoveries were witnessed by Bharpai, P.W.5, Tale Ram P.W.7, Head Constable Asha P.W.19. The Kachi (Chandi) Ext.P.1 was identified by Bharpai, P.W.5. Said witness claimed to have heard Shaqila saying to accused Muneer that for performing the 'Totka' prescribed by Tabeez Ali, right time has come. Surinder Singh, P.W.4 also stated that at 6.45 p.m. near the shop of Guptajee, he had seen Shakila and Tabiz Ali and to have heard Tabiz Ali saying to Shaqila that being Dussehra day as well as Friday, totka should be done as advised by him. Accused Babu Lal about whose role, we shall deal later was arrested from the house of Shaqila. According too Ram Phal, P.W.3, Babu Lal stays in her house. Accused Muneer and Iqbal were seen going out of her house and throwing something in the Houdi. So far as recoveries are concerned, even though a definite question was put to her in her examination under Section 313 of the Code, except a bald denial she did not say anything with regard to them. So far as accused Babu Lal is concerned, Ram Phal P.W.3 stated that on the fateful night he had seen accused Babu Lal picking up the child from the cot. His statement 'was to the effect that Babu Lal threatened him of dire consequences in case he told anybody of what he was doing. The recovery of the child from the Houdi was after a very short point of time. It is nobody's case that child had died earlier. On the contrary the medical evidence as tendered by P.W. 12 with reference to the postmortem report shows that death was due to drowning. Obviously death occurred because of drowning in the tank. That being the position, the circumstance that Babulal was seen picking the child from the cot a short time before the dead body was discovered in the tank is a guilt pointing one. At this juncture, it is necessary to take note of the submission of the learned counsel appearing for the appellants to effect that P.W.3 and P.W.4 cannot be believed because they had not disclosed as to what they allegedly saw for a long time. The plea is clearly untenable because Explanationns have in fact been given

by them as to why they remained silent for some time. It is to be noted that accused persons were arrested within a short time of the incident. Though it was urged by the learned counsel for the appellants that there was unusual delay in effecting arrest, we do not find any substance in such plea. Accused persons were arrested on 7.10.1987. Further no question was put to the investigating officer alleging that there was any inaction. Merely because, as alleged by the accused persons, there is some delay in effecting arrest that cannot be a circumstance to outweigh the evidentiary value of the circumstances adduced by the prosecution. Presence of P.W.3 at the place of occurrence is normal because he is a resident of the same locality. P.W.4 Surinder Singh spoke about the conversation between Shaqila and Tabiz Ali. He is a government servant. There is even no attempt to show as to why either Jai Kishan or Surinder Singh who are independent witnesses would speak a falsehood to falsely implicate the accused person. Their evidence is sufficient to establish the guilt of accused Shaqila and Babu Lal. So far as accused persons Tabiz Ali and Chaman are concerned, we find the evidence to be scanty. Nobody has spoken about their role in the gory episode. The only thing that prosecution has shown so far as Chaman's involvement is concerned is that Totka was performed so that she could bear a child. That itself is not sufficient for finding her guilty. So far as Tabiz Ali is concerned, it is stated that he is the person who usually performs totka. It is the version of P.W.4 that he had heard Shaqila and Tabiz Ali discussing about the auspicious day. Such evidence falls short of clinching nature which is required to fasten guilt on him. So far Muneer and Iqbal are concerned, P.W.1 Jai Kishan stated that he had seen them coming out of the house of Shaqila and throwing something in the pond. He stated that the object that was thrown could be a child. It is brought in evidence that after throwing the body, they went back to Shaqila's house. In the ultimate analysis, the prosecution has established its case against Shaqila and Babu Lal so far as the offences punishable under Section 302, Section 364, Section 201 and Section 120B IPC are concerned. Accusations for commission of offence punishable under Section 201 IPC have been established against accused Muneer and Iqbal. But the evidence is not sufficient for bringing home accusations relating to other offences. Though this is a fact that recording of statements under Section 313 of the Code has not been done in a happy manner and on the contrary has been done in a

casual and vague manner, yet guilt pointing circumstances, so far as the accused persons are concerned have been put in definite terms to them. We, therefore, find no substance in this plea that the accused were prejudiced by vague and indefinite manner in which the statements under Section 313 of the Code were recorded.

19. Section 302, IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the Court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. So the discretion to impose the sentence of death or life imprisonment may not be wide, after all. Section 354(3) has narrowed the discretion. Death sentence is ordinarily ruled out and can only be imposed for 'special reasons'. Apart from Section 354(3) there is another provision in the Code which also uses the significant expression 'Special reason'. It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562, of the Criminal Procedure Code 1896 (in short old Code) Section 361 which is a new provision in the Code makes it mandatory for the Court to record 'special reasons' for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section wherever, it is possible to do so and to state 'special reasons' if it does not do so. If the context of Section 360, the 'special reasons' contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This some indication by the Legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the Statute Book at the same time and they are part of the emerging picture of acceptance by the Indian Parliament of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining

the sentence to be awarded. Special reasons must have some relation to these factors. These aspects have been highlighted in the case of Bishnu Deo Shaw v. State of West Bengal : 1979 CriLJ841 . Criminal justice is not a computer machine. It deals with complex human problems and diverse human beings. A judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

20. It should be borne in mind that before the amendment of Section 367(5), Old Code, by the Criminal Procedure Code (Amendment) Act, 1955 (XXVI of 1955) which came into force on January 1, 1956, on a conviction for an offence punishable with death, if the Court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. It has been held by the Allahabad High Court that since the amendment of Section 367 (5), Old Code, the question of proper sentence when the accused is convicted of an offence punishable with death is to be decided like any other point for determination with the decision thereon and the reasons for the decision. See: cases of Majoiya Ratna v. State: : AIR 1961 MP10 : Satya Vir v. State: (1958) Cri LJ 1266. The High Court of Bombay in a Full Bench case has held that after the amendment of Section 367 (5) of Old Code by Act XXVI of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of Court. The Court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it imposes in its discretion. therefore, 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 this Section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence (See Vali Mohammad v. State: (1968) 71 Bom LR 1. The amendment of Section 367 (5), of the Old Code does not affect the law regulating punishment under the Penal Code. This amendment relates 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 preferring the lesser punishment (See: Ram Singh v. State : : AIR1960 All748 : Summer Singh v. State: (1962) Cri

LJ 672 : Arjoon v. State ; Jan Mohammed v. State: 1963) Cri Li 481. The correct approach to the question of sentence now is that upon a conviction for murder, the Judge should ask himself the question, 'Are there any aggravating circumstances in the case which imperatively call for the exaction of the extreme penalty?' (See Amalla Koteswara Rao v. State: : AIR 1963 AP249 .

21. See 354 (3) of the Code, marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1 April, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The Court is required to state the reasons for the sentence awarded in the case of death sentence 'special reasons' are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of these successive legislative changes in Code that the juridical decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood and some of the judgments under the old Code, after amendments have lost their significance.

22. The Supreme Court has observed : 'Let us crystallize the positive indicators against death under Indian Law currently, where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socioeconomic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302 read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the Court may humanly opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used

and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life.' (See *Ealada Anamma v. State* : 1974 CriLJ683 .

23. In *Bachan Singh v. State of Punjab*, : 1980 CriLJ636 , it has been observed that 'a real and abiding concern for the dignity of human life postulates resistance to taking life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.' A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, inter alia, the following questions may be asked and answered; (a) Is there something uncommon about the crime which renders sentence of imprisonment for the life inadequate and calls for a death sentence?; and (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offender

24. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court-room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his

innocence. It is the outcome of cool deliberations and the screening of the material by the informed man of the Judge that leads to determination of the lis. The Courts cannot allow emotional and sentimental feelings to come into the judicial pronouncements. Once sentimental and emotional feelings are allowed to enter the judicial mind, the Judge is bound to view the evidence with a bias and in that case the conclusion may also be biased resulting in some cases in great injustice. The cases are to be decided strictly on evidence, howsoever, cruel or horrifying the crime may be. All possible chances of innocent man being convicted have to be ruled out.

25. While considering the question of sentence, the inquiry is whether the factors which subjectively influenced the mind of the offender to commit the murder are extenuating or not; the manner in which he committed the murder is of less relevance. However, a note of warning to be given at this stage. The manner in which the murder is committed may be such that it throws doubt upon the facts alleged in support of the extenuating circumstances. To that extent it may be relevant. They assume relevance, when one considers the question of sentence. If the manner of killing was certainly callous, cold-blooded and deliberate, a great deal of moral blameworthiness for the murder can certainly be attached.

26. The question of sentence in a case of murder has almost always presented to Courts a certain amount of difficulty, particularly because life-imprisonment is a rule whereas death sentence is an exception. (See *Ambaram v. State of M.P.*: : 1976 CriLJ1716). Even before the coming into force of the Code, an accused held vicariously liable for a murder was awarded lesser punishment. Since the coming into force of the Code, life imprisonment for murder has been recognized as a rule and capital sentence is only an exception. 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 be justified in imposing the lesser of the two sentences provided by law. A murder on the spur of the moment and actuated by anger, jealousy, pride and sense of honour and the like may call for

the lesser penalty. On the contrary, any murder that has been planned beforehand and has been committed with cruelty or for a sordid purpose, and without the least trace of any spirit, fairplay or sportsmanship, without giving a chance to the victim, should necessarily be punished with death. The plurality of factors, bearing on the crime and the doer of the crime, must carefully enter the judicial verdict, regard being had to the circumstances of the particular case. thereforee, though both the sentences are legal, yet in deciding whether the case merits the less severe of the two penalties, a history of relations between the parties, concerned, the background, the context of the factual setting the crime, the strength and nature of the motive operating on the mind of the offender and the magnitude of the crime, the manner of the commission as also the character and antecedents of the accused are more important considerations. Both pre-time and post-time events should necessarily assume relevance enabling and guiding the judicial decision. Mere absence of extenuating circumstances in favor of the accused is not a sufficient ground imposing the extreme penalty of death.

27. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty out to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

28. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges and those from whom they take advice affirm that punishment ought always to fit the crime: yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of

circulation, and sometimes even the traffic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

29. But the passions of the Judges, of legislators, and of the public, together with the sophistications of penology, do not give full account of why we have punishment in excess of culpability. A thoughtful agreement may be made which in effect relies on the theory of justification that we find acceptable in the chapter 'Punishment, Desert and Rehabilitation' by Norval Morris. The gist of the argument is that the strength of the law is greater when punishment for breaking it is more severe. It is not a matter of greater intimidation produced by a greater threat, but of a mere solemn attitude of respect and obedience which in cases of extreme temptation or provocation will cause inhibition to prevail when otherwise it would not. The argument has a special appeal when used to justify capital punishment for murder. It is said that the extreme penalty makes the prohibited act seem a more awful one. This in essence was the view expressed by J.F. Stephen when he suggested that murder is regarded as it is because the law hangs a man for it. J.F. Stephen in his 'A History of the Criminal Law of England' : (1883) said : 'Some men, probably abstain from murder because they fear that if they committed murder they would be hanged. Hundred of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged. The argument, then, is one of social utility that bypasses the question of what punishment is deserved, and stresses instead on presumed enhancement of the law as an instrument of restraint. It is an argument that purports to meet the objection that disproportionately great punishment is needless and therefore, unjustifiable.

30. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction that is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is though

then to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

31. The principle of mitigation, like the principle of proportion, has both legislative and judicial applications. Discretionary dispensations can be granted by a Judge in order to make sentences right with regard to these other things after he has first arrived at a presumptive sentence based on desert according to culpability. Probation and low minimum sentence allow mitigation when circumstances that have no bearing on the crime provide a good reason for moderating a sentence.

32. The principle of mitigation has what is probably its most important legislative application when abolition of capital punishment is debated. It is said by defenders of the death penalty that the most serious crimes that involve taking a life deserve punishment in kind, for anything else will leave the perpetrator a person who in some measure has got away with his crime. Appeals to intuitions produce support for this. Unless to lifelong torment of prison is assured as a substitute for execution, it seems even to those who take a dispassionate view of the matter that the most serious crimes of all have not been visited with adequate punishment. But even if the principle of proportion calls for capital punishment or hopeless incarceration for life, the principle of mitigation of sentence requires as to give head to, those humans and other moral considerations that apply in every case and that militate strongly against such punishment. When those reasons are made clear and their force is generally appreciated, there can be no claim that those who are not made to pay with their lives-whether by the death penalty or through a living death-have got away with their crime. Under such circumstances we condemn the crime adequately by punishment that is something less than deserved. These aspects were highlighted in the chapter. 'Proportional Punishment and Justifiable Sentences' by Hyman Gross in the book 'Sentencing', edited by Hyman Gross and Andrew Von Harisch.

33. We may take notice of few cases which involved innocent children, such as Al-lauddin v. State of Bihar AIR 1988 SC 456 and Sidagaida v. State of Karnataka

AIR 1981 SC 784 wherein infants were involved. The mitigating circumstances were held to be that the crime was not committed for personal gain. On a close reading of the factual position in those cases the scenario appears to be contextually different. In *Sevaka Perumal v. State of Tamil Nadu*, : 1991 CriLJ1845 , as observed by the Apex Court, these compassionate grounds can always be pressed and are not relevant. In *Henry Westmuller Roberts v. State of Assam*, 1985 (1) Crimes 877, Apex Court upheld the death sentence as the accused in the were accused of kidnapping children by threatening ransom. In a very recent case (*Ram Deo Chauhan v. State of Assam*: AIR 2000 SCW 2784 Apex Court observed that though it is time that in a civilized society a tooth for tooth, and a nail for nail or death for death is not the rule, but it is equally true that when a man becomes beast and menace to the society, he can be deprived of his life according to procedure established by law, as Constitution itself has recognized the death sentence as a permissible punishment for which sufficient constitutional provisions for an appeal, reprieve and the like have been provided under the law. The reason for taking life of innocent and helpless child and that too with the primitive idea that it would make a barren woman fertile, in the twentieth century to say the least is very cruel and cold blooded act. It is almost like a situation that a child is sacrificed so that parents of that child become childless and another couple is blessed with a child. We do not find any mitigating circumstance. As observed in *Ram Das Chauhan's* case (supra) fact that accused was young person at time of occurrence cannot be considered as mitigating circumstance. The inevitable conclusion is that it is a case belonging to rarest of rare category. Accordingly the death sentences awarded to Shaqila and Babu Lal for commission of offence punishable under Section 302 IPC are confirmed.

34. Shelley in *Death* (1820) wrote as follows:

'Death is here and death is there. Death is busy everywhere, all around, within, beneath, above is death and we are death.'

One who is born has to die sometime. 'If life worth living? That depends on the liver.' - Anon, (c.1855). 'Life is made up of sobs, sniffles, and smiles, with sniffles predominating' - said O. Henry in 'Gift of the Magi.' But man always lives with a

hope, a hope for a better future.

35. Ultimately the appeals filed by Chaman, Tabiz Ali, are allowed and convictions and sentence imposed upon them are set aside and they are acquitted of the charges. The reference of death sentence made by the District Judge is confirmed along with the confirmation of conviction and corresponding sentences so far as offences punishable under Section 302, 364, 201 and 120B are concerned for Shaqila and Babulal; and their appeals are dismissed. The conviction and consequential sentence for offence punishable under Section 201 in respect of Muneer and Iqbal are maintained, while they are acquitted of other charges. Their appeals are allowed to the extent indicated. Appeals and reference are accordingly disposed of.

36. We record our appreciation for Mr. Sanjeev Khanna, who appeared amicus curiae for some of the accused-appellants and assisted the Court in a dexterous manner.

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