

State of Kerala Vs. Navas

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Court : Kerala

Decided On : Feb-09-2010

Reported in : 2010(2)KLT542

Judge : R. Basant and; M.C. Hari Rani, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 309 and 449; ;Code of Criminal Procedure (CrPC) - Sections 428, 432 and 433

Appeal No. : D.S.R. No. 4 of 2007 and Crl. A. No. 1620 of 2007

Appellant : State of Kerala

Respondent : Navas

Advocate for Def. : P. Vijaya Bhanu,; P.P. Harris and; P.M. Rafiq, Advs.

Advocate for Pet/Ap. : Grashious Kuriakose, Spl. Public Prosecutor and; K.J. Mohammed Anzar, Public Prosecutor

Disposition : Appeal allowed

Judgement :

R. Basant, J.

(i) Has the guilt of the accused been established beyond doubt by the circumstances proved by the prosecution ?

(ii) Is the instant case one that belongs to the category of rarest of rare cases, where the alternative options of punishment are unquestionably foreclosed and a sentence of death has to be imposed as laid down in *Bachan Singh v. State of Punjab* : (1980) 2 SCC 684?

(iii) Does the decision in *Swamy Shraddhananda (2) v. State of Karnataka* : 2008 (3) KLT SN 62 (C. No. 77) SC : (2008) 13 SCC 767 raise the bar further in the attempt to identify the rarest of rare cases where a sentence of death can be imposed and is liable to be confirmed?

1. These questions arise for consideration in this Death Sentence Reference and the Criminal Appeal, which we dispose of by this common judgment.

2. Navas @ Mulanavas, a person aged about 28 years has been found guilty, convicted and sentenced in a prosecution for the offences punishable under Sections 449, 302 and 309 I.P.C.. He faces a sentence of death for the offence under Section 302 I.P.C., sentence of rigorous imprisonment for a period of five years and fine of Rs. 1,000/- under Section 449 I.P.C. and simple imprisonment for a period of two months and a fine of Rs. 500/- for the offence under Section 309 I.P.C. Default sentences have also been imposed.

3. The prosecution alleged that the appellant had gained access into the house of the deceased persons - four in number, by making a hole on the eastern wall of the house on the night of 3/4.11.2005. He allegedly caused the death of Latha, a woman aged about 39 years, her husband Ramachandran aged about 45 years, their daughter Chithra aged about 11 years and her mother- in-law, Karthiayani Amma aged about 80 years. The accused thereafter allegedly attempted to commit suicide by cutting the vein of his left wrist. Investigation commenced with suo motu F.I.R., Ext.P23 registered by PW30, the local A.S.I. and culminated with the final report submitted by PW32, who completed the investigation.

4. The accused denied the offences alleged against him and thereupon the prosecution examined PWs 1 to 32 and proved Exts.P1 to P45 series. M.Os.1 to 122 were also marked by the prosecution. The accused did not examine any defence witnesses; but proved Exts. D1 to D5.

5. An appellate judgment must be read in continuation of the judgment of the Trial Court. We have been taken through the evidence of PWs 1 to 32, Exts.P1 to P45 series and Exts.D1 to D5. The relevant material objects have also been perused by us. In these circumstances, we are of the opinion that it is unnecessary to attempt a re-narration of the evidence of the prosecution witnesses as well as the prosecution and the defence exhibits.

(Ed. Note : Paras. 6 to 34 Deleted being narration of facts)

35. In these circumstances, we uphold the finding that the accused is guilty of the offences punishable under Sections 449, 309 and 302 of the Indian Penal Code. The challenge against the verdict of guilt and conviction is, in these circumstances, rejected.

36. What is the sentence to be imposed? This is the next question to be considered. The court below has chosen to impose a sentence of death on the accused for the offence under Section 302 of the Indian Penal Code. We are satisfied that the sentences imposed for the offences under Sections 449 and 309 of the Indian Penal Code are absolutely justified and they do not warrant any interference. The question is only whether the sentence of death imposed on the accused under Section 302 I.P.C. deserves to be confirmed or not. We shall now specifically advert to this aspect.

37. We shall now make a balance sheet of the extenuating and aggravating circumstances which have been pointed out to us in this case. Bachan Singh (supra) obliges the courts to make a balance sheet of the aggravating and mitigating circumstances before taking a decision on the crucial question.

38. The aggravating circumstances are that there obviously was prior planning. As many as four lives were snuffed out by the accused. An entire family has been wiped out. The deceased persons include a minor child aged 11 years, an old woman aged 80 years and a sick individual - Ramachandran, husband of Latha. All the deceased persons were unarmed and defence less. No provocation/resistance is seen offered by them. The offence has been committed after mischievously planning the operation and after gaining access to the closed

house in that night by making a hole on the wall. A dare devil attitude on the part of the miscreant is evidently indicated. The nature of the weapons used -M.Os.29, 30 and 33 can also be entered on the aggravating side of the balance sheet. The nature and number of the injuries inflicted on deceased Latha, (43 of which 38 are stab injuries) is again an entry on the debit side. Prior instance of involvement in crimes is also against the accused. The learned Public Prosecutors point out that in M.O.24/Ext.P3, there is a veiled threat to many others. The initial relationship itself was objectionable and contumacious - that is the relationship which the deceased struck with Latha, a married woman having husband and child. The accused has no passion for life as can be seen from his conduct of attempting to put an end to his own life. That makes him potentially dangerous. The learned Prosecutors contend that these circumstances would bring the case within the sweep of the precedents including Bachan Singh (supra) and Machhi Singh v. State of Punjab : (1983) 3 SCC 470 and this would be a fit case where imposition of death sentence would be justified.

39. The learned Counsel for the accused, on the other hand, has marshalled circumstances which fall under the category of mitigating circumstances. He points out first of all that there is no semblance of any element of gain, profit or advantage for the accused. Rightly or wrongly the accused was labouring under an impression of deprivation in love. He was in an extremely agitated and excited state of mind when he committed the capital offences. Counsel points out that M.O.24/Ext. P3 must suggest that at least at some earlier point of time, Latha herself had suggested commission of suicide together. The accused had no motive whatsoever against Ramachandran, Chithra and Karthiayani Amma. In fact, the materials suggest that he had great affection and love at least for Chithra. He refers to Ramachandran in Exhibit P3 in endearing terms. He had not used any weapon against Karthiayani Amma, the mother of Ramachandran. He did not make any attempt to flee from justice. He imposed on himself the capital punishment of death by attempting to commit suicide. He is a young man aged about 28 years only, going by the age shown in the passport, though the driving licence suggests that he is four years elder. He was dragged by circumstances into an improper relationship with a woman much elder to himself-elder at least by a decade. There was no element of pre-meditation to cause the death of the other

three. Pre-meditation even if any could only be to die along with the said Latha. There is no requirement of any deterrence in a rare incident like the instant one. He cannot be termed a menace to society. He is still young and is not lost to civilisation and humanity. His liquidation would be totally unnecessary and uncalled for. The learned Counsel for the accused, in these circumstances, contends that the court may be pleased not to confirm death sentence and may choose to impose the lesser punishment of imprisonment for life.

40. Under Section 302 I.P.C., two alternative sentences alone are possible. The graver sentence is the sentence of death whereas the lesser option is to impose a sentence of imprisonment for life. Constitutional validity of the sentence of death has been considered by the Supreme Court. The last decision on the point is the decision in *Bochan Singh* (supra). The constitutional validity of the sentence of death has been upheld by the Supreme Court. In para.209 of the said decision, the law on the point is stated succinctly as follows:

A real and abiding concern for the dignity of human life postulates resistance to taking a 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.

41. The Supreme Court had upheld the constitutional validity by insisting that a sentence of death can be imposed only in the rarest of rare cases. The true clue to find out the rarest of rare cases for imposition of the death sentence is also given in the said para.209. Litmus test is that the 'alternative option must be unquestionably foreclosed'. That is the test to find out the rarest of rare cases in which alone imposition of a sentence of death would be justified. Only two options were then available - a sentence of death or a sentence of imprisonment for life. That lesser alternative option must be unquestionably foreclosed, insisted *Bachan Singh* (supra).

42. How is the court to find out such a case. In *Machhi Singh* (supra) and in many other subsequent Supreme Court decisions, attempts were made to categorise the circumstances which can be pressed into service to identify the rarest of rare cases in which alone a sentence of death can be imposed. It is unnecessary for us to advert to all those precedents. Suffice it to say that in *Aloke Nath Dutta v. State*

of West Bengal (2007) 12 SCC 230, the Supreme Court after adverting to the course adopted by the Supreme Court itself in various cases lamented that different Benches had reacted differently in different decisions in their attempt to identify the rarest of rare cases. That was a decision by a two Judge Bench of the Supreme Court. Later, a three Judge Bench in Swamy Shraddananda (2) v. State of Karnataka (supra) stated thus about the attempts made by the Supreme Court.

49. In Alope Nath Ddutta v. State of W.B. (2007) 12 SCC 230, Sinha J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict (see SCC pp. 279-87, paras 151-78 : SCALE pp. 504-10, paras. 154-82). He finally observed (SCC para. 158) that 'courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar' and further 'it is evident that different Benches had taken different view in the matter' (SCC para. 168).

(emphasis supplied)

43. The three Judge Bench of the Supreme Court in Swamy Shraddananda (supra), proceeded to observe in para.51 as follows:

51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench.

(emphasis supplied)

44. That appears to us to be a fair assessment of the history of application of the Bachan Singh (supra) doctrine by courts subsequently, including the Apex Court.

45. We have no hesitation to agree that the personal element has to be eliminated totally and completely while considering the two alternative sentences permissible under Section 302 I.P.C. The law on the point is clear to us. In the rarest of rare cases alone, such a sentence can be imposed. In the attempt to identify such a rarest of rare case the true test is whether the lesser alternative is unquestionably foreclosed or not. Conscious of the alternatives available; considering the

extenuating and mitigating circumstances; having the objectives which the sentence has to serve in the particular case in mind and liberating oneself from personal prejudices and predilections a decision has to be taken on the crucial question.

46. We would repeat that courts must be satisfied that the lesser options available (to the graver option of imposing a death sentence) must be unquestionably foreclosed before they choose to impose a death sentence. We will remind ourselves that Judges dealing with this sublime area of criminal adjudication can neither be retentionists nor abolitionists. Subject to the law as declared in *Bachan Singh* (supra) and subsequent decisions, the court will have to consider all available circumstances without importing individual and personal concepts of the need to retain death sentence or abolish the same. It is true that the constitutional validity of the death sentence has been upheld but before imposing/confirming such sentence the court has to alertly consider the very purpose of punishment and decide whether in the facts and circumstances of the case imposition of the graver alternative is necessary and unavoidable.

47. We have already extracted the relevant portion in *Bachan Singh* (supra) which gives the quintessence of the law in para. 209. The lesser option must be unquestionably foreclosed for the Court to identify the rarest of rare cases. In this context, we feel that the decision in *Swamy Shraddananda* (supra) is of vital relevance.

48. The three Judge Bench in *Swamy Shraddananda* (supra) took the view that a sentence of imprisonment for life simpliciter is not adequate in that case. The three Judge Bench realistically took note of the prevalent situation where the sentence of imprisonment for life gets boiled down virtually to a sentence of imprisonment for 14 years, subject to remission, commutation, etc. The learned Judges of the three Judge Bench felt that to avoid a sentence of death, it is possible for the courts to devise a graver form of sentence of imprisonment for life which will virtually ensure that the society is insulated from the criminal for such period as the court may specify including the entire rest of his life. The court in its ingenuity has now raised the bar to make sure that even in a case where the lesser alternative of

an ordinary sentence of life is found to be grossly inadequate, the court has the option to impose a graver sentence of life with appropriate stipulations to be specified by the court. The following passages appearing in paras.92 to 94 according to us is of very great significance in this ultimate and sublime exercise of discretion between life and death by the courts. In para.92, the court after observing the inadequacy of a sentence of life limited to imprisonment for 14 years, proceeded to observe that: a far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death.

The court proceeded in para.94 to lay down the dictum that such a graver sentence of imprisonment for life with appropriate directions can be imposed. Para. 94 reads as follows:

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

49. In devising or inventing such a mode of graver sentence above the ordinary term of imprisonment for life but below the sentence of death, the Court has realistically found that insistence on imposition of death penalty can be further reduced. The alternative option must be foreclosed. The court has in fact increased the alternative options available. The only alternative option prior to *Swamy Shraddananda* (supra) was a sentence of life without any rider. The courts are now given the option to suitably modulate and prescribe the manner in which a life sentence can and ought to be executed. In *Swamy Shraddananda* (supra), the court proceeded to direct that the accused in that case who was guilty of a very heinous and horrendous crime can be saved from the sentence of death by imposing this modified version of a life sentence-with a rider/direction that the accused shall not be released from prison for the rest of his life.

50. To avoid the possibility of any confusion for the subordinate courts, we would like to clarify that under Section 302 I.P.C., there are only two sentences permissible. They are a sentence of death and a sentence of imprisonment for life. Courts do not have the option to impose any other sentence. *Swamy Shraddananda (supra)* only permits the imposition of a sentence of imprisonment for life with the rider that the accused shall not be released from prison invoking the jurisdiction for commutation/reduction of sentence for a specified number of years or for the rest of his life. *Swamy Shraddananda (supra)*, we may clarify, does not permit courts to impose a sentence of imprisonment for any specified number of years above 14 years. A sentence of death or imprisonment for life has to be imposed under Section 302 I.P.C. in every case invariably.

51. Abolitionists, according to us, have won a major battle in the war against death sentence by the dictum of the three Judge Bench in *Swamy Shraddananda (supra)*. This has been achieved by increasing the options that are available to the court. It is the bounden duty of the court now to consider whether the worst form of a sentence of imprisonment for life is also unquestionably foreclosed. Only when such a definite conclusion is reached, can the court choose to impose the death sentence now. We reckon this as a definite instance of raising the bar much higher than it was available prior to *Swamy Shraddananda (supra)*. The court has to consider not only the ordinary sentence of life as the lesser option. It has to consider the graver sentence of life permitted under *Swamy Shraddananda (supra)* and a conclusion must be reached that even the gravest permissible alternative is unquestionably foreclosed in the facts and circumstances of the given case. So reckoned, the burden on the Court now becomes heavier. Before imposing the death sentence, it has to be considered whether the option of a life sentence with the gravest rider is also unquestionably foreclosed.

52. It is perhaps of great relevance to note that in para. 93 of *Swamy Shraddananda (supra)* the three Judge Bench specifically observes that such an approach will have the great advantage of having the death penalty on the statute book but to actually use it as little as possible - really in the rarest of rare cases only. We extract para.93 below to ensure that we are properly guided on this aspect.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology.

53. This is not to say that the decision of the Constitution Bench in Bachan Singh (supra) is in any way obliterated. Death sentence remains on the statute book. It is for the Court, without importing personal norms in favour of retention or abolition to consider dispassionately whether the given case is one belonging to the rarest of rare cases where, even the graver options of life sentences with rider (ranging from an ordinary life sentence which for all intents and purposes boils down to a sentence of imprisonment for 14 years to any specified minimum number of years above 14 below the entire life and a sentence of imprisonment with no release for the rest of life of the accused as indicated in Swamy Shraddananda (supra)) is unquestionably foreclosed. We totally agree with the learned Prosecutors that in spite of Swamy Shraddananda (supra) there is space for a certain narrow category of cases which still belongs to the category of rarest of rare cases - call it the rarest of rarest of rare cases if necessary, wherein also a sentence of death permitted by Statute can be and will have to be imposed. But, in identifying that case, the 'lesser option' referred to in Bachan Singh (supra) must be understood realistically. Till Swamy Shraddananda (supra), there was only one alternative option of sentence of life without prescribing any further restrictions or guidelines. Now, we have not one alternative option; but various alternative options taking advantage of the 'vast hiatus between 14 years' imprisonment and imprisonment till death'. All Courts called upon to choose between the sentence of death and the alternative options now available can impose a death sentence only when the Court is convinced and satisfied that none of the other alternatives available in the wake of Swamy Shraddananda (supra) are sufficient and those options are unquestionably foreclosed. We have no hesitation to opine that the imposition of death sentence can now be made only in such graver cases, where all the other options are found to be insufficient. The bulk of such cases shall stand considerably and substantially reduced now - after Swamy Shraddananda (supra).

54. A question still remains whether the instant case is one in which the graver alternatives of a life sentence are also unquestionably foreclosed. We have rendered our anxious consideration to all the relevant inputs. We are unable to agree that all the options now available can be said to be unquestionably foreclosed in the given circumstances. In every case of death sentence, the court must consider the purpose of the sentence. The theory of reformation will have no place whatsoever in a case of imposition of death sentence. In a case like the instant one, the consideration of compensation/restoration cannot also have any place, as all the members of the family have been liquidated by the conduct of the accused. The purpose of a death sentence -of eliminating the menace to the society in the form of a hardened criminal and to save society from the activities of such criminal may not also have much role, given the alternative option of a life sentence which will ensure that the accused does not come into contact with the society thereafter. The learned Prosecutors point out that there may be jail breaking or natural calamities which may lead to escape of prisoners from the jail and such convicts may still come into contact with the members of the society. We do not think that, that contingency is one which can be taken into account by the court ordinarily while considering whether the possibility of the hardened criminal being exposed to society is eliminated by a graver sentence of life as permitted under *Swamy Shraddananda* (supra). The argument that tax payers' money will have to be spent unnecessarily for supporting a life in prison with no tangible relevance or purpose for the society does not impress us at all as that argument is virtually directed against the prescription of a sentence of imprisonment for life by the legislature. A refined civilization wedded to the ideal of respect to life and its dignity must be happy to spend money to avoid liquidation of life when there is an alternative available.

55. Deterrence is the other possible concern which has to be taken note of. As to how many criminals can be deterred from committing the crime because of the severity of the death sentence is itself a very uncertain area. Statistics, it appears to us, cannot be of any crucial assistance on this aspect. We have no hesitation to observe that more criminals can be deterred from crimes by the conviction that immediate and certain punishment shall follow rather than the impression that he may be visited with a graver capital punishment on some uncertain future date.

Immediateness and certainty of reasonable punishment and not the severity of the same serves the cause of deterrence best in our assessment. In a situation where the society comes across certain types of crimes frequently (like bride burning or terrorist machinations or crimes by personnel of the protection (armed) forces like body guards, etc.), deterrence may certainly have a place. But to deter persons from committing a crime like the instant one, we are of the firm opinion that imposition of death sentence on an offender like the accused herein may not have much significance.

56. The theory of retribution is the other concern. Refined and civilised states have altogether given up the theory of retribution as a theory in itself justifying imposition of a sentence. But the theory of retribution has indirect influence on the doctrine of proportionality. 'To each what he deserves' according to us is the most acceptable definition of justice. In that view of the matter, a person who has deprived another of his right to live may, under the doctrine of proportionality or on the doctrine of moral entitlement, have to face a sentence of death. Cry for justice from society is also relevant. The court must translate into its decision the abhorrence with which the enlightened society views a crime. No Judge can afford to be more liberal, more refined, more tolerant or more civilised than what the society, from which he hails can afford and accept. If there is unbridgable gap between the norms prevalent in the society and the liberal attitude of the Judges, the system would run the risk of the ugly head of private vengeance being raised. But, this is not to say that the Judges must ride the crest of populist sentiments and attitudes. The Judge also has a duty to refine society. He can lead the society in civilisation and refinement. The Judge need not wait to be the last die hard to convert, transform, assimilate and imbibe liberal ideals. But it will have to be ensured that he is only ahead of them and not far removed from them in attitudes and norms. In this view of the matter, in appropriate cases death sentence will certainly have to be imposed.

57. Courts at all levels will have to ensure that subjectivity is eliminated altogether while choosing to impose or not choosing to impose the death sentence. Life is such a precious commodity and the Constitution cherishes the human right of right to life so much that personal prejudices and predilections of the individual Judge

have to be eliminated completely in the decision to judicially terminate and liquidate life. There cannot be Benches that are pro death sentences and anti death sentences. Of all the arguments against the retention of the death sentence, none is more effective and disturbing than the thought that the choice between life and death may depend on the personal attitude and vagaries of the Judge before whom the case may come up. The observation in Alok Nath and Swamy Shraddhananda (supra) to which we have already adverted to suggest that the Indian legal system has not yet been able to acquit itself creditably on this aspect even during the post Bachan Singh period. This imposes a great amount of responsibility on the Judges called upon to perform that sublime responsibility of choosing between the graver and the lesser options. One of the surest ways to correctly identify the fit case to impose the death sentence or to put it better to identify that case where all the alternative options are unquestionably foreclosed, is to ascertain whether all unbiased trained judicial minds without doctrinaire prejudices and predilections are likely to unanimously endorse and answer the question in favour of death sentence. Then and then alone can the graver option of death sentence be preferred by a court.

58. Having considered all circumstances, we are of the definite opinion that in the facts and circumstances of this case, the sentence of death is not warranted. A sentence of imprisonment for life, subject to the safeguards/directions as permitted by Swamy Shraddhananda (supra) shall serve the ends of justice, we are of the very definite opinion.

59. Let it not be assumed that this Court does not perceive the instant one to be a serious and dastardly crime. We, to say the least, are convinced that the offence committed calls for societal abhorrence and disapproval. But, the totality of circumstances instill in us the satisfaction that this is not a case where the range of further options available to the court after Swamy Shraddhananda (supra) are unquestionably foreclosed. Placing fetter on the powers of the Executive under Sections 432 and 433 Cr.P.C. for a prescribed period (and with due caution administered that the powers under Article 72 and Article 161 should not be lightly invoked to get over the prescription of such period fixed by this Court) a sentence of imprisonment for life which shall ensure that the offender does not get exposed

to society for a period of 30 years can be imposed. We are not prescribing the 'entire rest of the life' as the period, as fixed by their Lordships in *Swamy Shraddananda* (supra), considering the totality of circumstances and because of the optimistic faith in the infinite capacity of the human soul to repent and reform.

60. In the result:

(a) this appeal is allowed in part.

(b) the verdict of guilty and conviction of the appellant under Sections 449, 309 and 302 I.P.C. are upheld.

(c) The sentence imposed on the appellant/accused for the offences punishable under Sections 309 and 449 I.P.C. are upheld.

(d) The death sentence reference is answered against the prosecution. The sentence imposed for the offence punishable under Section 302 I.P.C. is modified and reduced to imprisonment for life. It is further directed, as permitted by the decision in *Swamy Shraddananda* (supra) that the accused shall not be released from prison for a period of 30 (thirty) years including the period already undergone with set off under Section 428 Cr.P.C. alone.

(e) Needless to say, even thereafter, if the question of release is being considered, the same must be done only after careful consideration and evaluation of all circumstances.

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