F.R.

THE HIGH COURT OF SIKKIM : GANGTOK

Crl. A. No.3 of 2007

State of Sikkim ..... **Appellant**

versus

1. Raju Chettri,
S/o Late Dil Bahadur Chettri,
R/o Duli Kaman, Darjeeling,
West Bengal

2. Puran Rai,
S/o Narshing Rai,
R/o Bermiok Kaman,
Darjeeling,
West Bengal
(Both at present Rongyek Jail) ..... **Respondents**

For Appellant : Mr. J. B. Pradhan, Public Prosecutor, Mr. Karma Thinlay, Additional Public Prosecutor and Mr. Santosh Kumar Chettri, Assistant Public Prosecutor.

For Respondents : Mr. N. Rai, Legal Aid Counsel with Ms. Jyoti Kharka, Advocate.

PRESENT : HON'BLE MR. JUSTICE A. H. SAIKIA, CHIEF JUSTICE.
HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE.

Last date of hearing : 26-08-2009

DATE OF JUDGMENT : 16-09-2009

J U D G M E N T

Wangdi, J.

The State of Sikkim has preferred this appeal u/S 377 Cr.P.C. against the order of sentence passed in consequence of the judgment in Sessions Trial Case No.4 of 2004 dated 30-03-2006

and 31-03-2006 respectively by the learned Sessions Judge, Special Division – I (I/C) at Gangtok.

2. It is the case of the State that the sentence of rigorous imprisonment for life and a fine of Rs.2,000/- imposed against the respondents/convicts for offences u/S 302/34 of the Indian Penal Code is grossly inadequate considering the brutality and mercilessness with which the respondents/convicts had committed the murder of the victims in cold blood in the most inhuman manner. From the evidence on record, it has been established that the murder was committed for the greed of money and with the motive to commit theft and that it has been established that the victims were innocent and helpless women, one aged about 70 years and other unmarried daughter aged about 40 years. Whereas the respondents/convicts were aged about 32 years and 19 years respectively by which it stands established that the murderers were physically in a dominating position. That the deceased mother and daughter were the only members of the family living in the flat and that the respondents/convicts were also living with them in the same flat demonstrates the faith and confidence reposed by the deceased persons on them.

It is also the case of the State that considering the finding of the learned trial Court in the impugned order of sentence dated 31-03-2006 that the acts of the convicts could not be condoned since they were not only heinous but also inflicted on unsuspecting victims who were women and could not measure up to be combined physical strength of the convicts. That there were no extenuating

circumstances and that the murder was committed in cool blood with the convicts having made preparation for the same in furtherance of their common intention, the sentence of rigorous imprisonment for life and a fine of Rs.2,000/- was grossly inadequate and incongruous. It was submitted further that considering the manner in which the offence was committed, the case falls in the category of "rarest of rare cases" and, therefore, the sentence was liable to be enhanced to that of death.

3. In the show cause that was filed by the respondents/convicts, they have apart from raising the question of maintainability of the appeal for non-compliance of the provisions of Section 377 of the Code of Criminal Procedure (in short "Cr.P.C.) and the appeal being barred by the law of limitation, also stated that the present case does not fall in the category of "rarest of rare cases" and that subject to the outcome of the appeal filed by them against the conviction, the sentence passed by the learned trial Court in its discretion and wisdom is adequate.

4. We have heard Mr. J. B. Pradhan, learned Public Prosecutor with Mr. Karma Thinley, learned Additional Public Prosecutor on behalf of the State and Mr. N. Rai, learned Legal Aid counsel with Ms. Jyoti Kharka, learned counsel on behalf of the respondents-convicts.

5. The law of sentence has always been an enigma where enormous discretion is vested in the Courts under the statute in such matters. More often than not, the sentencing Courts are faced

with serious dilemma at the time of considering as to which of the sentence out of the two, imprisonment for life or death, should be imposed. Inconsistencies in passing sentence in cases where the facts are para-materia are well accepted and are matters of records having been appreciated and noted in numerous decisions of the Supreme Court. Be that as it may, the well-established principle in passing a sentence is the objective satisfaction of the Courts with regard to the criminal rather than the crime. In the recent past, it has been the trend of the Courts to consider reformation of the criminals rather than being retributive by passing sterner punishments prescribed in the statute.

6. Two passages from the judgment in the case of ***Rajendra Prasad*** vs. ***State of U.P.*** reported in ***AIR 1979 S.C. 916*** rendered by Krishna Iyer, J. in his inimitable manner sets out the changing perception of the Courts as under:-

> **"KRISHNA IYER, J. (for himself and on behalf of Desai J. – Majority view):-** THE DEADLY QUANDARY: To be or not to be: that is the question of lethal import and legal moment, in each of these three appeals where leave is confined to the issue of the propriety of the impost of capital penalty against which the brutal culprits desperately beseech that their dear life be spared by the Summit Court and the incarceratory alternative be awarded instead. There is, as here, a judicial dimension to the quasi-Hamletian dilemma when "a murder most foul" demands of sentencing justice punitive infliction of death or the lesser punishment of life imprisonment, since the Penal Code leaves the critical choice between physical liquidation and life-long incarceration to the enlightened conscience and sensitized judgment of the Court.
>
> **2.** A narration of facts is normally necessary at this early stage but we relegate it to

> a later part, assuming for the nonce the monstrosity of the murder in each case. Is mere shock at the horrendous killing sufficient alibi to extinguish one more life, de hors circumstances, individual and social, motivational and psychical? The crime and the criminal, contemporary societal crises, opinions of builders and moulders of the nation, cultural winds of world change and other profound factors, spiritual and secular, and above all, constitutional, inarticulately guide the Court's faculty in reading the meaning of meanings in preference to a mechanistic interpretation of Section 302, I.P.C., projected in petrified print from Macaulay's vintage mint."
>
> (Emphasis supplied)

In the very same judgment while prescribing a set of condensed guidelines some illuminating portions of the Constitution Bench decision in the case of ***Sunil Batra*** Vs. Delhi Administrative and Ors. reported in ***AIR 1978 S.C. 1675*** has been extracted of which the following is reproduced considering its relevance to the present case:-

> "Consciously and deliberately we must focus our attention, while examining the challenge, to one fundamental fact that we are required to examine the validity of a pre-constitution statute in the context of the modern reformist theory of punishment, jail being treated as a correctional institution."
>
> "Cases are not unknown where merely on account of a long lapse of time the Courts have commuted the sentence of death to one of life imprisonment on the sole ground that the prisoner was for a long time hovering under the tormenting effect of the shadow of death."
>
> "The scheme of the Code, read in the light of the Constitution, leaves no room for doubt that reformation, not retribution, is the sentencing lodestar." (emphasis added)
>
> 2. The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which

make deprivation of life and liberty reasonable as penal panacea.

3. The current ethos, with the strong emphasis on human rights and against death penalty, together with the ancient strains of culture spanning the period from Buddha to Gandhi must ethically inform the concept of social justice which is a paramount principle and cultural paradigm of our Constitution.

4. The personal and social, the motivational and physical circumstances, of the criminal are relevant factors in adjudging the penalty as clearly provided for under the new Code of 1973. So also the intense suffering already endured by prison torture or agonising death penalty hanging over head consequent on the legal process."

(Emphasis supplied).

7. In the case of ***Swamy Shraddananda (2)*** vs. ***State of Karnataka*** reported in ***(2008) 13 SCC 767*** the Supreme Court has noted the lack of consistency in the sentencing process even by the Supreme Court some of the portions of which we feel it appropriate to reproduce below:-

"**48.** That is not the end of the matter. Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* laid down the principle of the rarest of rare cases. *Machhi Singh*, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions nether the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently.

49. In *Aloke Nath Dutta* v. *State of W.B.* 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). Katju, J. in his order passed in this appeal said that he did not agree with the decision in *Aloke Nath Dutta* in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju, J. may be right that there cannot be an absolute rule excluding death sentence in all cases of circumstantial evidence (though in *Aloke Nath Dutta* it is said "normally" and not as an absolute rule). But there is no denying the illustrations cited by Sinha, J. which are a matter of fact.

50. The same point is made in far greater detail in a report called "*Lethal Lottery, The Death Penalty in India*" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of the Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see Chapters 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

.....

52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

(Emphasis supplied).

The Supreme Court in the above judgment has accepted the fact that the question of death penalty is not free from the subjective element and it depends a great deal on the personal predilection of the Judges constituting the Bench.

We are mindful of the position that a convict of murder may be punished with imprisonment for as long as we please. But death penalty is something entirely different. No one can undo an executed death sentence. ***(para 47 of Swamy Shraddananda case – supra)***

8. Coming to the facts of the present case, it cannot be denied that the offence was a heinous one perpetrated against unsuspecting persons who were physically iniquitously placed and that the gruesome offence was committed with the object of satisfying the avarice of the convicts. However, we are faced with the question as to whether the offence, notwithstanding its gravity, fall within the meaning of "rarest of rare cases" that call for sterner punishment, against the respondents/convicts.

9. The Supreme Court while considering the parametors of the powers of sentencing and its complexities, has held in the case of ***Sushil Murmu*** vs. ***State of Jharkhand*** reported in ***AIR 2004 S.C. 394*** that there is a definite swing in the trend of the legislature thereby the Courts, towards life imprisonment and that death sentence is ordinarily ruled out making it possible to be imposed for "special reasons" as provided u/S 354(3) Cr.P.C. It

has been further held that the "special reasons" contemplated by Section 361 Cr.P.C. 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. The following extract of paragraph 6 from the said judgment reflects the trend in the sentencing process as indicated by the legislature:-

> **"6.** ..... This is 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 legislature 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. Criminal justice 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."

(Emphasis supplied).

There are a large number of other cases on the question on which we need not dwell upon as there is consistency in the above proposition in all of them.

10. When we consider the facts of this case, it is in evidence that primary offence initially planned by the respondent/convicts was to commit the theft of cash and valuables of the deceased persons. In the ordinary course of human conduct, thefts are generally committed by persons who are either deprived or needy and that appears to be the case here, a fact which is quite evident from the fact that the convicts were working as servants under the deceased persons. When we consider the sequence of events culminating in the convicts committing the offence of murder, it will appear that it had occurred as a panic reaction when the convicts heard the cries of the ladies. Otherwise, nothing could have come in the way of them committing the offence at the very beginning. The manner in which the convicts were making their get away before they were apprehended also reflect their inexperience as criminals. The convicts do not appear to have any criminal record as their antecedents were not stated by the prosecution to be questionable. These apart, the fact that they disclosed the fact about the commission of the offence at the very first instance reflect that they do not suffer from the depravity of hardened criminals deserving to be extinguished from the society. The first convict is aged about 32 years and second 19 years only. These factors are necessary and essential considerations when the Court is faced with the option to impose the sentence of either imprisonment for life or that of death. While deliberating on all these aspects, we are mindful of the fact that the lives of two persons had been most brutally taken by the respondents/convicts

and a feeling of disgust and anger do arise in us. But there is no place for emotion in the justice delivery system where law occupies the highest pedestal before which everything is subservient.

11. Considering the guidelines laid down by the Hon'ble Supreme Court, we are of the view that the convicts are not beyond redemption and with the kind of reformative policy that have been adopted by the Governments towards the serving convicts in jail, we do see some hope in the respondent/convicts redeeming themselves from the dredges of the past and transform themselves into good human beings. This would not be possible if they are sentenced to death because death is irreversible. For the reasons aforesaid, we do not see any reason to interfere with the impugned orders.

12. In the result, the appeal is dismissed.

(Justice S. P. Wangdi)
Judge
16-09-2009

(Justice A. H. Saikia)
Chief Justice
16-09-2009