REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 117 OF 2007

Bantu ...Appellant

Vs.

The State of U.P. ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Death sentence awarded by learned Special Judge EC Act/Additional Sessions Judge, Agra in Sessions Trial No. 83 of 2004 having been confirmed by the Allahabad High Court in appeal and in the reference made under Section 366 of the Code of Criminal Procedure, 1973 (in short the 'code') this appeal has been filed. The appellant was convicted for offences

punishable under Sections 364, 376 and 302 of the Indian Penal Code, 1860 (in short the 'IPC'). The girl who had not seen six summers in life was the victim of sexual assault and animal lust of the accused appellant. She was not only raped but was murdered by the accused appellant.

2. Prosecution version as unfolded during trial read as follows:

The genesis of the prosecution case was the written FIR lodged at Police Station Tajganj of Agra District on 4.10.2003 at 10.45 PM by Naresh Kumar (PW 2). The occurrence took place at about 9.30 O'clock the same night in village Basai Khurd within the said police station. The victim was an unfortunate teenaged girl Vaishali of about 5 years. She was the daughter of Vishal.

The broad features of the case as culled out from the FIR and evidence brought on record is as follows:

There was "Devi Jagran" at the house of Chandrasen

alias Taplu (PW 3) in village Basai Khurd in the eventful night. A number of persons of the locality had assembled there. The informant- Naresh Kumar (PW2) alongwith his brother Vishal and niece Vaishali (hereinafter referred to as the 'deceased') had also gone there. Around 9 P.M. the accused Bantu-a neighbour of the informant reached there. After exhibiting playful and friendly gestures with Vaishali with whom he was familiar before because of neighborhood, enticed her away on the pretext of giving her a balloon. Several persons including Naresh Kumar (PW 2) and Nand Kishore (PW 6) saw him going away with the girl from the place of "Devi Jagran". When Vaishali did not return for a long time, a frantic search was made to trace her out by the members of the family. Chandrasen alias Taplu (PW 3) and Sanjiv son of Daulat Ram informed them that they had seen the accused Bantu going with Vaishali hoisted on his waist towards the pond. Around 9.30 PM they reached near the field of one Dharma in which grown up Dhaincha plants were there. With the help of torches they saw that the accused Bantu was thrusting a

stem/stick of Dhaincha in the vagina of Vaishali having thrown her down. An alarm was raised, by them and Bantu was caught red handed in completely naked state. Vaishali was lying on the ground unconscious with a part of stem of Dhaincha inserted in her vagina. She was bleeding profusely. She had other injuries also on her person and was not responding at all. She was instantly rushed to S.N. Medical College, Agra where the doctors pronounced her to be dead. Upon interrogation, the accused Bantu allegedly admitted that after committing the rape he inserted stem/stick in her vagina to murder her.

On the case being registered, the investigation was taken up by SHO Dalip Kumar Mittal (PW 7). Major part of the investigation was conducted by him but the charge sheet came to be submitted by subsequent Investigating officer R.K. Dwivedi (PW 8).

A panel of two doctors headed by Dr. R.S. Chahar (PW 1) conducted post-mortem over the dead body of the deceased on 5.10.2003 at 3 P.M. The deceased was aged about five

years and about one day had passed since she died. The following ante mortem injuries were found on her person:

1. Multiple contusion over face and head, more on right side, ranging in size from .5 cm to .5cm x 3cm. Lips were contused with swelling multiple nail marks present over left side on her neck and behind the left ear.

2. Abrasion 2cm x 4cm present over posterior aspect of both elbows and right wrist.

3. Labia minora of both sides in posterior parts contused. Hymen ruptured free and clotted blood seen in vagina.

4. Green wooden stick found inserted in vagine. Length of external part of stick 24 cm. Incompletely broken in two parts. On internal examination, stick of 33 cm length found inside vagina, in continuation with external part of stick. Thus total length of the stick was 57 cm x .8cm in diameter at most of places.

Dried blood present on external part of stick.

Internal examination revealed that small and large intestine were perforated at places due to insertion of the stick. The stomach contained semi digested food of about 200ml. Free and clotted blood was present in the cavity. The mesenteric vessels in the abdomen were torn due to insertion of wooden stick. Uterus was small in size and was ruptured due to insertion of wooden stick into the vagina. The walls of cervix were lacerated. Slides of vaginal swab were prepared for examination. The wooden stick inserted inside vagina was sealed. No spot of semen was found on the part of the body. Due to precarious condition of vagina, it was not possible to say whether rape was committed or not.

In the opinion of the doctor, the death was caused due to shock and haemorrhage as a result of ante mortem injuries due to insertion of the wooden stick into the vagina of the deceased.

The jeans pant of the accused was sent for chemical analysis to ascertain marks of blood and semen. As per the Doctor examining the accused, injuries could be caused by blunt object and were fresh in nature. The accused was fully capable of performing the act of rape. The injury report Ex. Ka-5 was prepared. According to the Doctor since no smegma was found present on the glans penis of the accused and it was clean, it was inferred that he had committed sexual intercourse. Smegma gets removed from the glans penis during sexual intercourse. The abrasions on the genitals of the accused supported his view. The Doctor denied the suggestion that the injuries could be sustained at 7-8 P.M. that night. Rather, he testified that the injuries could be sustained between 10-11 P.M. that night.

The defence was of denial and false implication due to enmity of witnesses arising out of land dispute. The accused, however, admitted that he was the neighbour of the informant and that there was a Devi Jagran at the house of Chandrasen alias Taplu (PW 3) in the eventful night. Other facts were denied by him in his statement under Section 313 Cr.P.C.

3. In order to establish the guilt of the accused appellant the prosecution in all examined 8 witnesses. Out of them, Naresh Kumar (PW 2) (informant and uncle of the deceased), Chandrasen alias Taplu (PW 3) and Nand Kishore (PW 6) were material witnesses of fact who supported the prosecution case in its entirety.

4. The trial court observed that the witnesses of fact were not supposed to manufacture false evidence play on the imagination. They truthfully narrated what they saw with their own eyes and their testimonial assertions went a long way to prove the factum of rape having been committed by the accused on the unfortunate child. The trial court found the accused guilty and sentenced him as under:

S.No.	Section under which Punishment awarded	Quantum of punishment
1.	364 IPC	10 Years' rigorous imprisonment with a fine of Rs.10,000/- with stipulation of two years' further simple imprisonment in default of payment

		of fine.
2.	376 IPC	Life Imprisonment with a fine of Rs.15,000/- with stipulation of three years' simple imprisonment in default of payment of fine.
3.	302 IPC	Death sentence

5. Since confirmation of death sentence needed approval of the High Court, reference was made to the High Court.

6. In support of the appeal before the High Court it was submitted that the circumstances do not make out the alleged offence. The High Court did not accept it. Placing reliance on the evidence on Naresh Kumar (PW2), Chandrasen (PW3) and three others who had taken the accused to the police station the conviction was accorded. It was noted that the accused was found in a naked condition at the spot and was caught by PW 2,3 and others. He was not wearing any underwear. The pant which he was made to wear before he was taken to the police station was seized by the police and was sent for

chemical examination to ascertain marks of blood, semen etc. The chemical examiner in its report found blood stains, sperms and semen on the pant of the deceased.

7. The High Court also noticed that in order to camouflage the serious kind of rape in a planned manner and after committing rape he mercilessly inserted wooden stick deep inside the fragile vagina of the girl to the extent of 33cms to cause her death, with a view to masquerade the crime as an accident. The High Court did not find any merit in the appeal and it was with a view that the death sentence was the appropriate sentence.

8. The stand taken before the High Court was reiterated. Additionally it was submitted that the case was one where even if prosecution version is accepted in toto death sentence was not the appropriate sentence.

9. Learned counsel for the respondent on the other hand supported the judgments of the trial court and the High Court and submitted that this was a case belonging to the

rarest of rare category. Death sentence was the appropriate sentence.

10. Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

11. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the

inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

12. We may also make a reference to a decision of this

Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, 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....".

13. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken

> cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

14. In State of U.P. v. Ashok Kumar Srivastava, (1992 Crl.LJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

15. Sir Alfred Wills in his admirable book "Wills'

Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

16. There is no doubt 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 this Court as far back as in 1952.

17. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), 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 be 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."

18. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before

conviction could be based on circumstantial evidence, must be fully established. They are:

> (1) 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;
>
> (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;
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> (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
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> (5) there must be a chain of evidence so compete 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.

19. It is obvious that he wanted to camouflage the serious crime of rape committed by him over the 5 years old

girl. So in a planned manner, after committing rape, he mercilessly inserted stem/stick deep inside the fragile vagina of the girl to the extent of 33 cms. to cause her death, with a view to masquerade the crime as an accident. It was his cruel innovation that he inserted a stick deep into her vagina causing death of the victim. It was just by providence that due to timely reach of the witnesses (PWs 2, 3 & others) (who were frantically searching the girl) he could be caught in naked condition while inserting stick into the vagina of the victim. He was near the lifeless body of the victim.

20. The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative

intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p.262). In 'Encyclopoedia of Crime and Justice' (Volume 4, page 1356) it is stated "……even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it

is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

21. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. In the instant case, the victim aged about five years was not only raped, but was murdered in a diabolic manner.

22. The law regulates a social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine

social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as

deterrence. In Mahesh v. State of M.P. (1987) 2 SCR 710), this Court while refusing to reduce the death sentence observed thus:

> "It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

23. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal etc. v. State of Tamil Naidu (AIR 1991 SC 1463).

24. 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 in essence 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 tragic 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.

25. 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 for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought 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.

26. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle MCG Dautha v. State of Callifornia: 402 US 183: 28 L.D. 2d 711 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate pun-

ishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

27. In Jashubha Bharatsinh Gohil v. State of Gujarat (1994 (4) SCC 353), it has been held by this Court that in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

28. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

29. In Dhananjoy Chatterjee v. State of W.B. (1994 (2) SCC 220), this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition

of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

30. Similar view has also been expressed in Ravji v. State of Rajasthan, (1996 (2) SCC 175). It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting

public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

31. These aspects have been elaborated in State of M.P. v. Munna Choubey [2005 (2) SCC 712].

32. In Bachan Singh v. State of Punjab [1980 (2) SCC 684] a Constitution Bench of this Court at para 132 summed up the position as follows: (SCC p.729)

> "132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the

petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware — as we shall presently show they were — of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before Parliament and presumably considered by it when in 1972-73 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in

Section 302, violates neither the letter nor the ethos of Article 19."

33. Similarly in Machhi Singh v. State of Punjab [1983 (3) SCC 470] in para 38 the position was summed up as follows: (SCC p. 489)

> "*38*. In this background the guidelines indicated in *Bachan Singh's case (supra)* will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh's case (supra)*:
>
> (*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant

circumstances.

(*iv*) 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."

34. The position was again reiterated in Devender Pal Singh v. State of NCT of Delhi [2002 (5)SCC 234] : (SCC p. 271, para 58)

"*58*. From *Bachan Singh*'s case (supra) and *Machhi Singh's case (supra)* the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:

The community may entertain such sentiment in the following circumstances:

(*1*) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(*2*) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin

> for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
>
> (*3*) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> (*4*) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
>
> (*5*) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

35. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the

court would proceed to do so.

36. What is culled out from the decisions noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up.

37. Lord Justice Denning, Master of the Rolls of the Court of Appeals in England said to the Royal Commission on Capital Punishment in 1950:

> "Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformative or preventive and nothing else... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not."
>
> In J.J. Rousseau's The Social Contract written in 1762, he says the following:

> Again, every rogue who criminously attacks social rights becomes, by his wrong, a rebel and a traitor to his fatherland. By contravening its laws, he ceases to be one of its citizens: he even wages war against it. In such circumstances, the State and he cannot both be saved: one or the other must perish. In killing the criminal, we destroy not so much a citizen as an enemy. The trial and judgments are proofs that he broken the Social Contract, and so is no longer a member of the State.

38. The case at hand falls in the rarest of rare category. The depraved acts of the accused call for only one sentence that is death sentence.

39. Looked at from any angle the judgment of the High Court, confirming the conviction and sentence imposed by the trial court, do not warrant any interference.

40. We record our appreciation for the able assistance rendered by Mr. Shankar Divate, learned amicus curiae in the true spirit of friend and officer of the Court.

41. The appeal fails and is dismissed.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
July 23, 2008