

NOTES AND COMMENTS

DEATH SENTENCING IN INDIA: NEED FOR A UNIFORM REGIME

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I. Introduction

“Hang the murderers and the rapists and we will deter all future crime”² seems to be the fundamental attitude that the country is inclined to. Nevertheless, as barbaric as death penalty may seem to be, it strikes to be a moral outcry to preserve social justice with the hope of condemning heinous crimes. Death Penalty has thus undoubtedly stood the test of time as a popular form of punishment since antiquity for it has fulfilled the multiple purposes of retribution, prevention and deterrence. Despite the attempt of the United Nations General Assembly through resolutions seeking for a moratorium on death penalty executions by the world nations,³ India has shown her indifference regarding the same. However, the abolitionists have always urged on the fact that death penalty as a capital punishment cannot be justified in modern civilized society as the notion of retribution should not be attached to any form of punishment. These ambivalent views continue to govern the field and there is an unending debate on the retention of death penalty as a form of punishment. Consequently, in India death penalty continues to be a recognized mode of punishment in the criminal justice system. In addition to some of the offences⁴ defined under the Indian Penal Code, currently there are other statutes also in India which prescribe death as a punishment, like the Piracy Bill, 2012, the Narcotic Drugs & Psychotropic Substances Act, 1985, the Commission of Sati (Prevention) Act, 1987, Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 etc.

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² Suhrith Parthasarathy, *India's muddled thinking on punishment*, THE HINDU, September 16, 2013 available at <http://www.thehindu.com/opinion/lead/indias-muddled-thinking-on-punishment/article5131843.ece> (last visited on 21st January 2014).

³ Available at: <http://www.un.org/apps/news/story.asp?NewsID=48192> (last visited on 18th February 2015)

⁴ S. 121, S. 132, S. 194, S. 302, S. 305, S. 307, S. 396 of the Indian Penal Code, 1860.

II. Historical Background on Death Penalty in India

The international developments centered around the discussion on abolition of capital punishment in grave offences, have had its impact in India too.⁵ Constitutionality of death penalty as a punishment in criminal offences and the sentencing procedure regarding the same, came up for consideration before the Supreme Court way back in *Jagmohan Singh v. State of UP*.⁶ Interpreting section 367(5) of the old Code of Criminal Procedure, 1898 it was declared that “if the accused is convicted of an offence deserving punishment with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed.” The Law Commission of India in its 35th Report on Capital Punishment affirmed the need to retain death penalty and recommended revision of the Criminal Procedure Code with the insertion of new sub-section s. 235 (2) and s. 354 (3) providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences.⁷ The suggested changes were subsequently incorporated through the new Code of Criminal Procedure, 1973 as an attempt to bring in coherence in the application of capital punishment.

III. Judicial Perspectives on Death Penalty in India

Consequently, the question of constitutionality of death penalty came up for consideration under the new Code of 1973. The sentencing guidelines under section 354 (3)⁸ was detailed by a constitutional bench of the apex court in *Bachan Singh v. State of Punjab*⁹, holding the view that ‘the courts shall impose the punishment of death sentence on a convict only in the ‘rarest of rare cases’ when the alternative option is ‘unquestionably foreclosed’ thereby balancing the aggravating and mitigating circumstances of the case. Thus while death was the rule under the old Code, it became the exception under the new Code.

Some of the aggravating circumstances that can be taken into account by the judges, as identified by the Court in *Bachan Singh* were that:

⁵ India has not supported the United Nations General Assembly Resolution calling for a Moratorium on Death Penalty See <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm> (last visited on 12th January 2014).

⁶ (1973) 1 SCC 20

⁷ 35th Report of the Law Commission of India, 1967 available at: <http://lawcommissionofindia.nic.in/1-50/Report35Volland3.pdf>

⁸ Section 354 (3) Cr. P. C.- “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence.”

⁹ AIR 1980 SC 898.

- **Manner of Commission of Murder-** 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 like when the house of the victim is set aflame with the end in view to roast him alive in the house, when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death, when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner etc.
- **Motive for Commission of Murder-** When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, (c) a murder is committed in the course for betrayal of the motherland.
- **Anti-social or Socially abhorrent nature of the Crime-** (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of 'bride burning' and what are known as '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.
- **Magnitude of the Crime-** 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.
- **Personality of the victim-** When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

Similarly, some of the mitigating circumstances which could be taken sight of by the judges were:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person.
- (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

Reiterating the principles in *Bachan Singh*, a ‘balance-sheet theory’ was subsequently formulated which held the view that a just balance has to be struck between the aggravating and the mitigating circumstances before the option of death penalty is exercised.¹⁰ Courts were also found to have followed the ‘Principle of Proportionality’ in awarding death sentence thereby evaluating the proportionality between the crime and punishment because of the reason that no punishment should be in excess of the degree of culpability of the crime being committed.¹¹

Despite having made several attempts to address the subjectivity in awarding death penalty, and the courts having adopted principles to guide the same, it is still being criticized of being judge-centric and not principle-centric.¹² This has in turn resulted in the loss of evenhandedness in justice delivery mechanism.

¹⁰ *Machhi Singh & Ors. v. State of Punjab*, (1983) 3 SCC 470

¹¹ *Sushil Murmu v. State of Jharkhand*, AIR 2004 SC394; *C. Muniappan & Otr. v. State of T.N.*, (2010) 9 SCC 567.

¹² V. Venkatesan, *For a Moratorium on Death Sentence*, THE HINDU, December 10, 2012 available at <http://www.thehindu.com/opinion/lead/for-a-moratorium-on-death-sentence/article4181705.ece> (last visited on January 15, 2014)

IV. Recent Developments in the Death Penalty Jurisprudence in India

An unusual appeal, lately, from 14 former judges of the Supreme Court to the President urging him to use the power of clemency to commute the capital punishment imposed on 13 convicts into life imprisonment set the debate further in motion.¹³ The Supreme Court in three different occasions¹⁴ also endorsed this view, when they pointed out the error having been committed in sentencing 13 convicts to death, in some of the hitherto cases¹⁵ (7 cases) relying on the judgment in *Ravji @ Ram Chandra v. State of Rajasthan*¹⁶ which in their opinion was decided *per incuriam*. Moreover, in *Sangeet & Anr. v. State of Haryana*¹⁷ the court has raised concerns on the need for a relook into the aggravating and mitigating circumstances approach, as it is impossible to draw a balance sheet between the aggravating circumstances of the crime and the mitigating circumstances of the criminal.

The Supreme Court verdict against Ajmal Kasab also seems to have followed the flawed application of balance sheet theory.¹⁸ The most recent verdict on death penalty, which dealt with the December 16th 2012- Delhi Gang Rape, the Sessions Court took note of the exceptional depravity and extreme brutality of the crime that aroused “intense and extreme indignation of society” along with the extreme misery suffered by the victim and the grave impact of the crime on the social order. This also suggests that there

¹³ V. Venkatesan, *A Case against Death Penalty*, THE HINDU, available at: <http://www.hindu.com/thehindu/thscrip/print.pl?file=20120907291700400.htm&date=f12917/&prd=fline&> (Visited on March 15, 2014).

¹⁴ *Santosh Kumar Bariyar v. State of Maharashtra* (2009) 6 SCC 498, *Dilip Tiwari v. State of Maharashtra* (2010) 1 SCC 775 and *Rajesh Kumar v. State* (2011) 13 SCC 706

¹⁵ *Dayanidhi Bisoi v. State of Orissa*, (2003) 9 SCC 310, *Mohan Anna Chavan v. State of Maharashtra*, (2008) 7 SCC 561, *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra*, (2008) 15 SCC 269, *Bantu v. State of U.P.*, (2008) 11 SCC 113, *State of U.P. v. Sattan @ Satyendra and Ors*, (2009) 4 SCC 736, *Ankush Maruti Shinde and Ors v. State of Maharashtra*, (2009) 6 SCC 667, *Saibanna v. State of Karnataka*, (2005) 4 SCC 165.

¹⁶ 1996- SC held that only characteristics relating to the crime to the exclusion of the ones relating to the criminal are relevant to sentencing in criminal trial.

¹⁷ (2013) 2 SCC452- Supreme Court held the view that a balance sheet cannot be drawn comparing the aggravating circumstances of the crime and the mitigating circumstances of the criminal, as they are distinct and unrelated.

¹⁸ *Ajmal Mohammad Amir Kasab v. State of Maharashtra*, available at: <http://www.nia.gov.in/acts/Ajmal%20Kasab%20-%20Supreme%20Court%20Judgment.pdf>

has been a shift in the judicial approach toward the crime as compared to the criminal.¹⁹

The potential dichotomy in the application of the *Bachan Singh* guidelines is evident from the conflicting view of the judges of a division bench of the Supreme Court in the infamous case of *Swamy Shraddananda v. State of Karnataka*.²⁰ It was a case where the accused gained confidence of the deceased as she was in possession of huge assets and later when they got married the deceased executed a will in favor of the accused and opened several bank accounts in joint names. The accused subsequently murdered her by administering drugs on her, put the body in a wooden box and buried it at the backyard of their house. On the question of the imposition of death sentence and the appreciation of the rarest of the rare doctrine both the judges gave two divergent opinions resulting in a total deadlock. According to Sinha, J where conviction is solely based on circumstantial evidence, it cannot be presumed to be foolproof of the incidences. The character of the criminal is immaterial at the sentencing stage and the fact that the accused made a confession on certain aspects of the incident and his long custody are factors going against his death sentence. Thus according to him the case would not seem to be an instance of what may be called as a diabolical murder there being a weak link in the hypothesis that the murder was meticulously planned. Accordingly it could not be conclusively said that the murder of wife for usurping property could be particularly a *rarest of rare* incident. However in the opinion of Katju, J there was no absolute rule that when the conviction is based on circumstantial evidence death sentence could not be awarded particularly when there are a chain of links which connects the accused with the crime. He did not concede to the argument that a time gap between the commission of the murder and the final conviction could be a mitigating factor. He believed that the case warranted awarding of death sentence as the accused being in the dominant position of trust had committed murder of his wife for gains in a cold-blooded, calculated and diabolical manner.

Arguendo, the judiciary has awarded death penalty in appropriate cases applying the rarest of rare principle; the execution of the same has always remained in a state of flux. The death sentence has been commuted in many of them by the executive and it is not possible to know what weighed with the executive in commuting the death sentence of each convict.²¹ Once the sentence is decided and confirmed by the judiciary, the decision on commutation or remission of the sentence is completely within the hands of

¹⁹ Abhishek Tripathy, *The Danger in Precedents*, THE HINDU, February 26, 2014 available at: <http://www.thehindu.com/opinion/op-ed/the-danger-in-precedents/article5726541.ece> (Visited on February 26, 2014).

²⁰ (2007) 12 SCC 288

²¹ *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5SCC546.

the executive power. The constitutionally guaranteed clemency power²² of the executive head is not contrary to the appropriate government's power to commute sentence under the Code of Criminal Procedure.²³ The exercise of sole discretion by the President or the Governor (under the aid and advice of the council of ministers) in commutation of death sentences is also subject only to a limited judicial review²⁴ and the executive rationale behind the decision is not made available in the public domain for any kind of scrutiny.

However the executive's laxity by showing inordinate delay in ruling on mercy petitions has compelled the Supreme Court to intervene and declare that such long delays could be a ground to commute death sentence.²⁵ The Apex Court in the case of *Shatrughan Chauhan v. Union of India*,²⁶ commuted the death sentences of 15 death convicts (who had approached as a final resort to the Court after their mercy petitions were dismissed by the President) to life sentence, by viewing that various supervening circumstances which had arisen in those cases had violated the fundamental rights of the convicts making the execution of their sentences unfair and excessive. Similarly, in *Devender Pal Singh Bhullar's case*,²⁷ the Court commuted the death sentence of the convict on the ground of inordinate delay in the execution of sentence and mental health problems faced by the petitioner.

The consultation paper²⁸ initiated lately by the Law Commission of India on capital punishment has also reflected on the ambiguity on the existing regulatory regime in India. It is a need of the hour to address these existing lacunae in the law governing on death penalty in India.

²² Articles 72 and 161 of the Constitution.

²³ S. 432 to 435 of the Code of Criminal Procedure, 1973

²⁴ The power thus exercised can be subjected to judicial review on the limited grounds that the order has been passed without application of mind; that it is mala fide; that it has been passed on extraneous or wholly irrelevant considerations; that relevant materials have been kept out of consideration; and that it suffers from arbitrariness- *Epuru Sudhakar and Anr. v. Government of A.P. and Ors*, (2006) 8 SCC 161

²⁵ *Shatrughan Chauhan & Anr. v. Union of India*, WP. (Cri.) No. 55 of 2013, decided on January 21, 2014.

²⁶ *Ibid.*

²⁷ *Navneet Kaur v. State of NCT of Delhi & Anr*, Decided on March 13, 2014 available at: <http://supremecourtfindia.nic.in/outtoday/cur8822013.pdf>

²⁸ Consultation Paper on Capital Punishment, Law Commission of India, May 2014.

V. Conclusion

The Indian Judiciary has been guided by the principles of *Bachan Singh* for over three decades now. But evidently there has been inconsistency in the application of the said principles by the courts, resulting in disparity in judicial decision. In order to restore the faith in the judiciary, the Supreme Court of India which is well known for its activism, needs to take up initiative to have a re-look into the existing regime on death sentencing.

Bhagawati, J's view in the minority judgment in *Bachan Singh* had enumerated that 'the lack of legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence would result in violation of Article 14 and 21 of the Constitution.' The research intends to reiterate the same view with the assertion that there is need for a uniform regime governing death sentencing in India, on the dearth of which death sentencing in India may go against the Constitution of India. It is time for the Indian legislature to step in and take pro-active measures to lay down a uniform legislative framework or to empower an independent body to perform the same, to ensure evenhandedness in criminal justice delivery in India.

In England, the concept of 'guidelines judgments' are in place which is considered as a judge managed sentencing model rather than a statute induced one. Unlike this, in the United States of America, though death penalty continues to be in practice, there is a Sentencing Commission in place, established under the Sentencing Reforms Act 1984 along with the Federal Sentencing Guidelines, to provide for uniformity in sentencing. The guidelines take into account both the seriousness of the criminal conduct and the defendant's criminal record in awarding sentences in federal offences.²⁹ A similar approach could also be adopted in India wherein the task of framing guidelines on sentencing policy regulating death penalty could be entrusted on an independent body rather than leaving it to the whims and fancies of individual judges. At this juncture, we need to deliberate on whether *Bachan Singh* should remain as the panacea on death penalty jurisprudence in India.

²⁹ Available at : http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited on March 12, 2014)