(1995) 3 Supreme Court Cases 392

(BEFORE DR A.S. ANAND AND K.S. PARIPOORNAN, JJ.)

SHEIKH ISHAQUE AND OTHERS .. Appellants;

Versus

STATE OF BIHAR .. Respondent.

Criminal Appeals Nos. 600-601 of 1994†,
decided on March 10, 1995

A. **Criminal Procedure Code, 1973 — S. 354(3) — Choice of sentence, death or life imprisonment — Court can award sentence of death only in the rarest of the rare cases and must give special reasons for the same — Obligation of court to take into account aggravating and mitigating circumstances even if no argument addressed with regard to the sentence — Number of victims and motive of the crime are not the only considerations for imposing death penalty — An eye for an eye approach not proper — Penology**

B. **Penal Code, 1860 — Ss. 302/34 and Ss. 436/34 — Sentence — Death sentence — When not called for — Mitigating circumstances — Murder of three persons by burning them with the help of kerosene inside a shop — Absence of material on record showing which of the appellants actually sprinkled the kerosene and set the shop on fire or that they knew that there were three persons in the shop — Though appellants armed with bombs and firearms but they not using the same against the victims — Held, in the circumstances of the case, death sentence not justified**

Section 354(3) of Criminal Procedure Code, 1973 makes it *obligatory* in cases of conviction for offences punishable with death or with imprisonment for life *to assign* reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards the death penalty "*special reasons*" for such sentence shall be stated in the judgment. (Para 9)

In the present case both the courts were influenced only by the *number* of persons who had lost their lives at the hands of the assailants by burning and the motive for the commission of crime but those are *not* the only considerations which have to be kept in view for imposing death penalty. There is also no material on the record to show as to which of the appellants, along with "some others" actually set the shop on fire. After the High Court arrived at the conclusion that the appellants along with "some others" had set the shop on fire, it was not proper for it to have ignored that factor, which is a mitigating circumstance, while considering the question of sentence. Though the appellants, or at least some of them, were alleged to be armed with bombs and firearms, they had not used these weapons against their victims. This factor also deserved notice while considering whether the extreme penalty of death was called for in the case or not. That the appellants intended that the person inside the shop should be burnt alive is established beyond doubt but there is no material to show that the appellants knew or had reason to believe that there were three persons inside the shop at the relevant time. Therefore, the number of victims alone would not make the case "rarest of the rare". The imposition of proper sentence is an obligation on the court and even if no argument had been addressed on behalf of the appellants, the court was expected to take note of the legislative intendment relating to the award of capital

† From the Judgment and Order dated 18-8-1994 of the Patna High Court in Crl A. No. 215 of 1992 and Death Reference No. 5 of 1992

punishment as manifest from the provisions of Section 354(3) CrPC and award an appropriate sentence after taking into account the aggravating as well as the mitigating circumstances. The sentencing court has to make an endeavour to see that all relevant factors and circumstances bearing on the question of sentence are taken note of and only after giving due weight to the same it should proceed to impose the capital sentence. (Para 11)

The present case in spite of the fact that three persons lost their lives, is not one of the "rarest of the rare cases" in which the four appellants deserved to be sentenced to death. An eye for an eye approach is neither proper nor desirable. The mandate of Section 354(3) CrPC does not approve of it. The courts must be conscious of the change brought about in the matter of award of capital punishment by the legislature by enacting Section 354(3) CrPC limiting the award of the sentence of death only to the "rarest of the rare cases" and that too after recording "special reasons" for awarding the same, keeping in view the guidelines given by this Court in various judgments. (Para 12)

Jashubha Bharatsinh Gohil v. *State of Gujarat,* (1994) 4 SCC 353 : 1994 SCC (Cri) 1193: *Bachan Singh* v. *State of Punjab,* (1980) 2 SCC 684 : 1980 SCC (Cri) 580: *Anshad* v *State of Karnataka,* (1994) 4 SCC 381 · 1994 SCC (Cri) 1204, *followed*

Machhi Singh v. *State of Punjab,* (1983) 3 SCC 470 · 1983 SCC (Cri) 681 · AIR 1983 SC 957: *Kailash Kaur* v. *State of Punjab,* (1987) 2 SCC 631 : 1987 SCC (Cri) 431 : AIR 1987 SC 1368, *cited*

C. **Penal Code, 1860 — Ss. 302/34 and Ss. 436/34 — Appreciation of evidence — Murder of three persons by burning them with the help of kerosene inside a shop — Evidence of first informant, a close relative of the victims, found consistent and corroborated in all material and broader aspects from the FIR and other materials on record — His evidence cannot be discredited merely because some of the accused nominated by him were given benefit of doubt and no appeal against their acquittal filed by the State — Evidence of other co-villagers also found reliable — On facts, identity and complicity of the appellants fully established — Conviction upheld (Para 6)**

D. **Criminal Procedure Code, 1973 — S. 154 — FIR — Information by the village chowkidar that there was commotion in the village as firing and brickbatting was going on recorded in police diary — Names of assailants or victims not given — Held, such a cryptic statement cannot be treated to be an FIR — Fard bayan which formed the basis of the formal FIR rightly relied upon by the courts below as an FIR and a piece of corroborative evidence (Para 7)**

S-M/14245/CR

Advocates who appeared in this case :
Shakil Ahmed Syed, M. Taiyab Khan and Shad Anwar, Advocates, for the Appellants;
H.L. Agrawal, Senior Advocate (B.B. Singh, Advocate, with him) for the Respondent.

The Judgment of the Court was delivered by

DR A.S. ANAND, J.— On the night intervening 14-7-1990 and 15-7-1990, the complainant was sleeping on the roof of his house and his two sons Ram Sunder Bhagat and Pankaj @ Kapil Dev Bhagat were sleeping in the shop-house along with Durga Bhagat, the elder brother of the complainant. On hearing the noise of a bomb explosion, the complainant woke up and went towards his shop-house. Chowkidar Gulabi Paswan who was present there was raising alarm. Some members of the complainant's

family also came out and rushed towards the scene of occurrence and when they reached near the house of Banarsi Shah, they heard the exhortation of the accused party that the family members of Ram Sunder Bhagat would be finished on that day. The complainant could identify Sheikh Ilyas Ansari and Sheikh Ishaque Ansari by their voice. On reaching near the shop, the complainant saw four-five persons standing in the lane and shouting that nobody should be left alive and that all of them should be burnt to death. In the meanwhile, the complainant saw smoke coming out of the shop-house. Instantly, two bombs were exploded and some gunshots were also fired. The villagers rushed to the place of occurrence and indulged in brickbatting to scare away the assailants, who then fled away. The assailants, included the four appellants herein. After the assailants ran away, the complainant entered his house which had by then got engulfed in smoke. His son Jitender Kumar Bhagat PW 3 after breaking a window, entered the shop-house and found Durga Bhagat, Ram Sunder Bhagat and Pankaj Bhagat having been burnt to death. Gulabi Paswan was sent to inform the police at the police station. On learning about the occurrence, the police arrived at the scene of occurrence. On the statement of the complainant Baldev Bhagat PW 10, Ex. 2 First Information Report was recorded and further investigation was taken in hand.

2. Eleven accused were sent to face their trial for various offences including the offence of murders of Durga Bhagat, Ram Sunder Bhagat and Pankaj Bhagat.

3. The motive for the commission of the crime according to the prosecution is that the appellants had earlier committed dacoity and the son of the complainant had identified them at the trial in that case and on that account they bore a grudge against the complainant party. After being released from jail they (appellants herein) had threatened that the entire family of the complainant would be done to death for implicating them in the earlier dacoity case.

4. The prosecution examined 13 witnesses in support of its case to connect the appellants and seven others with the crime. The trial court after analysing the evidence came to the conclusion that the case against the appellants and seven others stood proved beyond a reasonable doubt and convicted all the eleven of them for offences under Sections 302/34 IPC and Sections 436/34 IPC. While the four appellants, namely, Sheikh Ishaque, Sheikh Ilyas, Sheikh Shamim and Sheikh Rustam were sentenced to death, the remaining seven accused were sentenced to undergo imprisonment for life. No separate sentence was passed against either of the accused for the offence under Sections 436/34 IPC. The convicts filed two appeals in the High Court. The learned trial court also made a reference to the High Court for confirmation of the sentence of death imposed upon the four appellants. Vide its judgment, dated 18-8-1984, the High Court acquitted the seven co-accused of the appellants by giving them the benefit of doubt but the appeal filed by the appellants was dismissed and their conviction under Sections 302/34 IPC and the sentence of death imposed upon each of them was

maintained. The reference made by the trial court was accepted. Through this appeal by special leave, the appellants have challenged their conviction and sentence.

5. With the assistance of learned counsel for the parties, we have gone through the relevant evidence and the judgments of the courts below.

6. Baldev Bhagat PW 10, the first informant, on whose statement the formal FIR was registered has given a cogent and consistent version of the occurrence, as has been noticed in the earlier part of this judgment. Though he was subjected to lengthy cross-examination but nothing has been elicited from his testimony which may in any way affect his credibility. Both the trial court and the High Court carefully appreciated his evidence and came to the conclusion that his testimony inspired confidence and had received corroboration in all material and broader aspects from his *fard bayan*, Ex. 2 and other materials on the record. We agree with the trial court and the High Court that though PW 10 is related to the three deceased persons rather closely and therefore can be said to have an interest in the prosecution but his evidence has stood close judicial scrutiny and his testimony inspires confidence. Of course, at the trial he had also named some of the acquitted co-accused as being present at the time of occurrence but since benefit of doubt has been given to them by the High Court and the State has not filed any appeal against their acquittal, we are of the opinion that on account of mere acquittal of some of the accused nominated by him as being present along with the appellants at the time of occurrence is not enough to discredit his evidence. That apart, the evidence of PW 10 has received ample corroboration from the evidence of PW 3 Jitender Bhagat, son of the first informant and his other co-villagers, PW 1, PW 2, PW 11 and PW 12. All these four co-villagers are not related in any way to PW 10 or the deceased and a critical analysis of their evidence shows that their evidence does not suffer from any taint. Even though, PW 1 did not claim to have identified any of the assailants but his evidence goes to show that there was an occurrence on the night intervening 14-7-1990 and 15-7-1990 and that some of the assailants had entered into the shop-house and had stayed there for some time before coming out and that the said shop-house had been set on fire. He also deposed that on bricks being thrown by the villagers, the assailants had taken to their heels. He also testified about the raising of an alarm by the chowkidar and the explosion of the bombs and about the firing from the side of the accused party. Likewise, PW 2 testified that there was an occurrence in which bombs and crackers were exploded by the assailants and three persons had been burnt to death in the shop which had been set on fire. PW 11 and PW 12 have generally supported the prosecution version. PWs 4 and 5 are the sons of Durga Bhagat-deceased and their version of the occurrence is similar to the one given by first informant PW 10 Baldev Bhagat and PW 3 Jitender Bhagat. Though, in an appeal by special leave under Article 136 of the Constitution, this Court does not normally reappraise the evidence, which has been appreciated by two courts below, but looking to the gravity of the offence we have made an independent appraisal

of the evidence on the record in the light of the submissions made at the bar. We find that the appreciation of evidence by the trial court and High Court is sound and proper. The evidence of PW 3 Jitender Bhagat which has fully corroborated the evidence of PW 10 was rightly relied upon by both the courts below and nothing has been pointed out before us from which any doubt may be cast on the reliability of the testimony of either of these two witnesses. From a close scrutiny of the evidence we find that whereas the identity and complicity of the appellants in the crime stands fully established by the prosecution witnesses, the same cannot be said with certainty about the acquitted co-accused. Besides, all the four appellants were named in the FIR. The prosecution witnesses have testified to the identification of Sheikh Ilyas and Sheikh Shamim by voice also. The High Court, therefore, rightly erred on the safer side to acquit the seven co-accused of the appellants while upholding the conviction of the appellants for committing three murders on the fateful night of 14-7-1990/15-7-1990. We are also not impressed by the argument of the learned counsel that on account of the acquittal of seven co-accused by the High Court, the case against the four appellants has also been rendered doubtful. There is no basis for such an argument. In recording the order of acquittal of the co-accused, it appears that the High Court was mainly influenced by the fact that in the earliest statement of the first informant, Ex. 2, the names of the seven co-accused had not been mentioned. No role had been ascribed to any one of them while the appellants had been named and specific roles assigned to them. The High Court, therefore, as a matter of abundant caution gave the benefit of doubt to the seven co-accused. Their acquittal does not in any way militate against the conviction of the four appellants whose complicity in the crime has been amply established by the prosecution evidence.

7. Learned counsel for the appellants then urged that the omission of the prosecution to examine Chowkidar Gulabi Paswan, who had been sent to the police station at the request of the first informant, first in point of time discredits the prosecution case. It is submitted that the statement given by Gulabi Paswan at the police station would be the FIR and the *fard bayan* of PW 10, Ex. 2, on which reliance has been placed would be inadmissible in evidence, being a statement recorded during the course of investigation. Learned counsel argued that since the prosecution had withheld the statement of the chowkidar, the prosecution case was materially detracted. We cannot agree. A similar argument was raised before the High Court and it was rightly found that the non-examination of Gulabi Paswan was of no consequence. According to the statement of the Investigating Officer, Gulabi Paswan had given some cryptic information at the police station to the effect that there was commotion in the village as firing and brickbatting was going on. This information was recorded in the police diary. It did not strictly speaking even disclose the commission of a cognizable offence, let alone disclosing as to who were the assailants or the victims. The cryptic statement of Gulabi Paswan therefore cannot be treated to be an FIR within the meaning of Section 154 CrPC. Under these circumstances, the *fard bayan* of

PW 10, Ex. 2 which forms the basis of the formal FIR cannot be said to be a statement recorded *during* the investigation. It is not hit by Section 162 CrPC. Both the courts below have rightly relied upon the said *fard bayan* as FIR and a piece of corroborative evidence.

8. Faced with this overwhelming and unimpeachable prosecution evidence connecting all the four appellants with the crime, learned counsel for the appellant submitted that the courts below had erred in awarding the sentence of death to them ignoring the cautions administered by this Court repeatedly regarding the imposition of the sentence of death only in the "rarest of the rare cases". We find force in this submission.

9. The High Court in para 40 of the judgment observed:

> "Applying the principle laid down therein, I am of the definite opinion that this case in the facts and circumstances which have been established by the evidence lead to only one conclusion that the four appellants, namely, Sheikh Ishaque, Sheikh Ilyas, Sheikh Shamim and Sheikh Rustom of Criminal Appeal No. 215 of 1992 along with some others had caused the death of the three victims by burning them with the help of kerosene and setting fire inside the room through its southern window."

After recording the above finding, the High Court addressed itself to the question of sentence and opined:

> "Learned Addl. P.P. has contended that the facts and circumstances definitely and clearly show that the three persons had been killed by burning in a very cold-blooded manner and the three members of a family were killed only because they had instituted a case of dacoity against the appellants in the preceding year. According to him, the sentence of death awarded by the trial court in the facts and circumstances of the case is proper and justified. He has cited two decisions of the Supreme Court reported in (*Machhi Singh* v. *State of Punjab*[1]) and (*Kailash Kaur* v. *State of Punjab*[2]) and has urged that even the Supreme Court has felt that in case of cruel method of killing by burning with the help of kerosene or when several persons were killed in preplanned manner, death sentence should be awarded. No argument was made by the learned counsel for the appellants with regard to the sentence. I am inclined to agree with the contention of the learned Addl. P.P. that only death sentence can meet the ends of justice in the facts and circumstances of the case which discloses diabolical manner in which the death had been caused to three persons in cold blood and the motive behind killing being institution of case of dacoity. It appears to be a case of such extreme culpability and cruelty as only death sentence can meet the ends of justice. I, accordingly, confirm the death sentence passed against the four appellants, namely, Sheikh Ishaque, Sheikh Ilyas,

1 (1983) 3 SCC 470 : 1983 SCC (Cri) 681 : AIR 1983 SC 957
2 (1987) 2 SCC 631 . 1987 SCC (Cri) 431 : AIR 1987 SC 1368

Sheikh Rustom and Sheikh Shamim (of Criminal Appeal No. 215 of 1992)."

While dealing with the question of sentence, the trial court has observed:

"In this way, it is clear that accused persons Sheikh Ishaque, Sheikh Shamim and Sheikh Rustam have not only ruthlessly committed brutal murder of the three deceased persons Ram Sunder Bhagat, Pankaj Bhagat and Durga Bhagat but also injured the existence and propriety of the whole law and order, in which every person has got right to get the persons committing offence with his/her body and property punished and to give evidence against them, therefore, in my opinion, the reasons, and the manner in which these four accused persons have committed murder of three persons possessing right for taking help and protection of the law and order of the country comes in the grade of exceptional case, and these four accused persons are liable to get maximum punishment prescribed for committing the offence of murder. Death sentence."

After giving our thoughtful consideration to the reasons given by both the trial court and the High Court, we find that both the courts below have failed to assign proper reasons which may bear judicial scrutiny in support of the sentence of death awarded to the appellants. Both the courts below appear to have overlooked the provisions of Section 354(3) of CrPC, 1973, as amended, which makes it *obligatory* in cases of conviction for offences punishable with death or with imprisonment for life *to assign* reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards the death penalty "*special reasons*" for such sentence shall be stated in the judgment. In *Jashubha Bharatsinh Gohil* v. *State of Gujarat*[3] this Court after taking note of the law laid down in *Bachan Singh* v. *State of Punjab*[4] and noticing the change of the legislative intent observed: (SCC pp. 360-61, para 14)

"Section 354(3) of the Code of Criminal Procedure, 1973, as amended, makes it obligatory in cases of conviction for offences punishable with death or with imprisonment for life to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards death penalty, 'special reasons' for such sentence shall be stated in the judgment. Thus, the Judge *is under a legal obligation to explain his choice of the sentence. The legislature in its supreme wisdom thought that in some 'rare cases' for 'special reasons' to be recorded it will be necessary to impose the extreme penalty of death* to deter others and to protect the society and in a given case even the sovereignty and security of the State or country. It, however, left the choice of sentence to the judiciary with the rider that the court may impose the extreme punishment of death for 'special reasons'. *The sentencing court has, therefore, to approach the question seriously and make an endeavour to see that all the relevant facts and circumstances*

3 (1994) 4 SCC 353 : 1994 SCC (Cri) 1193
4 (1980) 2 SCC 684 1980 SCC (Cri) 580

bearing on the question of sentence are brought on record. It is only after giving due weight to the mitigating as well as the aggravating circumstances, that it must proceed to impose the appropriate sentence." (emphasis ours)

10. Again, in *Anshad* v. *State of Karnataka*[5], it was observed: (SCC pp. 389-90, para 18)

"*Courts are expected to exhibit sensitiveness in the matter of award of sentence particularly, the sentence of death because life once lost cannot be brought back. This Court has in cases more than one emphasised that for determining the proper sentence in a case like this while the court should take into account the aggravating circumstances it should not overlook or ignore the mitigating circumstances.* The manner in which the crime was committed, the weapons used and the brutality or the lack of it are some of the considerations which must be present to the mind of the court.... The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) CrPC. Death sentence, being an exception to the general rule, should be awarded in the 'rarest of the rare cases' for 'special reasons' to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. *The number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of 'rarest of the rare cases'.* The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedents of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon case to case." (emphasis supplied)

11. Both the trial court and the High Court have not bestowed proper consideration, as was expected of them, while awarding and confirming the death sentence insofar as the appellants are concerned. It appears to us, from the observations of the two courts below, that both the courts were influenced only by the *number* of persons who had lost their lives at the hands of the assailants by burning and the motive for the commission of crime but then those are *not* the only considerations which have to be kept in view for imposing death penalty. On the prosecution's own showing it is not known as to which of the appellant had actually sprinkled the kerosene inside the shop. There is also no material on the record to show as to which of the appellant, along with "some others" actually set the shop on fire. After the High Court arrived at the conclusion that the appellants along with "some others" had set the shop on fire, it was not proper for it to have ignored that factor, which is a mitigating circumstance, while considering the question of sentence. Though the appellants, or at least some of them, were alleged to be armed with bombs and firearms, they had not used these weapons against their victims. This factor also deserved notice while considering whether the extreme penalty of death was called for in the case

5 (1994) 4 SCC 381 · 1994 SCC (Cri) 1204

or not. That the appellants intended that the person inside the shop should be burnt alive is established beyond doubt but there is no material to show that the appellants knew or had reason to believe that there were three persons inside the shop at the relevant time. Therefore, the number of victims alone would not make the case "rarest of the rare". We notice with regret that the High Court below did not take into account any of the mitigating circumstances, may be because, as observed by the High Court "*no argument was made by the learned counsel for the appellants with regard to the sentence*", but then the High Court overlooked that the imposition of proper sentence is an obligation on the court and even if no argument had been addressed on behalf of the appellants, the court was expected to take note of the legislative intendment relating to the award of capital punishment as manifest from the provisions of Section 354(3) CrPC and award an appropriate sentence, after taking into account the aggravating as well as the mitigating circumstances. The sentencing court has to make an endeavour to see that all relevant factors and circumstances bearing on the question of sentence, are taken note of and only after giving due weight to the same, it should proceed to impose the capital sentence. That apparently has not been done in the instant case.

12. In our opinion, some of the mitigating circumstances which we have noticed above make it imperative to say that the present case in spite of the fact that three persons lost their lives, is not one of the "rarest of the rare cases" in which four appellants deserved to be sentenced to death. An eye for an eye approach is neither proper nor desirable. The mandate of Section 354(3) CrPC does not approve of it. The courts must be conscious of the change brought about in the matter of award of capital punishment by the legislature by enacting Section 354(3) CrPC limiting the award the sentence of death only in the "rarest of the rare cases" and that too after recording "special reasons" for awarding the same, keeping in view the guidelines given by this Court in various judgments. Neither of the two courts below have given any *special reasons* for awarding the sentence of death. While, the prosecution has established the case against the appellants beyond a reasonable doubt and agreeing with the trial court and the High Court, we uphold their conviction for the offence under Sections 302/34 IPC and Sections 436/34 IPC but we are of the opinion that the sentence of death imposed upon the four appellants is not warranted. The appropriate sentence, in the facts and circumstances of the case would be imprisonment for life. We, accordingly, set aside the sentence of death imposed upon the appellants and instead sentence each one of them to suffer life imprisonment for the offence under Sections 302/34 IPC. No separate sentence was passed by the High Court for the offence under Sections 436/34 IPC and we also do not propose to pass any separate sentence for the said offence.

13. As a result, except for the commutation of the sentence, the appeal fails and is dismissed.