Bishnu Deo Shaw @ Bishnu Dayal vs State Of West Bengal on 22 February, 1979

Equivalent citations: 1979 AIR 964, 1979 SCR (3) 355, AIR 1979 SUPREME COURT 964, (1979) 2 SCJ 216, 1979 CRILR(SC MAH GUJ) 402, (1979) 3 SCR 355 (SC), 1979 CRI APP R (SC) 385, 1979 ALLCRIC 175, 1979 SCC(CRI) 817, (1979) SC CR R 333, (1979) MAD LJ(CRI) 565, 1979 (3) SCC 714

Author: O. Chinnappa Reddy

Bench: O. Chinnappa Reddy, V.R. Krishnaiyer

PETITIONER:
BISHNU DEO SHAW @ BISHNU DAYAL

Vs.

RESPONDENT:
STATE OF WEST BENGAL

DATE OF JUDGMENT22/02/1979

BENCH:
REDDY, O. CHINNAPPA (J)
BENCH:
REDDY, O. CHINNAPPA (J)
KRISHNAIYER, V.R.

CITATION:
1979 AIR 964 1979 SCR (3) 355
1979 SCC (3) 714
CITATOR INFO :
R 1979 SC1384 (10)
O 1980 SC 898 (202)
MV 1982 SC1325 (61)

ACT:
Demand of death for murder, rationale of section 302 I.P.C. vis-a-vis-Section 354(3) of the Crl. P.C. 1973-"Special Reasons", meaning of-Section 354(3)360, 361 of Crl. P.C.-Scope of.

HEADNOTE:
The appellant was convicted by the Additional Session's Judge Alipore for the murder of his son and sentenced to death. The reason given by the Sessions Judge was that the

murder was "cruel and brutal" and that the facts showed the "grim determination" of the accused to kill the deceased. The Sessions Judge made no reference to the motive of the accused for the commission of the murder. The High Court while confirming the conviction and sentence observed that the accused had previously murdered his wife, suspecting her infidelity that the sentence of imprisonment imposed on him for the murder of his wife had no sobering effect, that he suspected that the deceased in the present case was not his own son and so he murdered him without any mercy or remorse, and that he, therefore deserved no mercy.

Allowing the appeal by special leave limited to the question of sentence, the Court

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HELD: 1. There were no "special reasons" justifying the imposition of the death penalty. [371 F]

(a) The Sessions Judge was wrong in imposing the sentence of death without even a reference to the reason why the appellant committed the murder. [371 C]

(b) The observation of the High Court that the appellant deserved no mercy because he showed no mercy smacks very much of punishment by way of retribution. [371 C]

(c) From the evidence, it is clear that the appellant was a moody person who had for years been brooding over the suspected infidelity of his wife and the injury of having a son foisted on him. The mere use of adjectives like "cruel and brutal" does not supply the special reasons contemplated by section 354(3) of the Criminal Procedure Code, 1973. [371D-E]

Rajendra Prasad v. State of Uttar Pradesh, [1979] 3 S.C.R. 78, applied.

2. "Special reasons" are reasons which are special with reference to the offender, with reference to constitutional and legislative directives and with reference to the times, that is, with reference to contemporary ideas in the fields of criminology and connected sciences. Special reasons are those which lead inevitably to the conclusion that the offender is beyond redemption, having due regard to his personality and proclivity, to the legislative

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policy of reformation of the offender and to the advances made in the methods of treatment etc. Section 354(3) of the 1973 Code has narrowed the discretion of sentence for murder. Death sentence is ordinarily ruled out and can only be imposed for "Special reasons". Judges are left with the task of discovering "special reasons". [368 D-E, 370E-F]

(a) Apart from Section 354(3), there is another provision in the Code which also uses the significant expression "Special reasons". It is Section 361, Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the 1898 Code and provides for the release on probation of good conduct or after admonition any person not under twenty-one

years of age who is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or any person under twenty-one years of age or any woman who is convicted of an offence not punishable with death or imprisonment for life, if no previous offence is proved against the offender, and if it appears to the Court having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct or after admonition. If the Court refrains from dealing with an offender under Section 360 or under the provisions of the Probation of Offenders Act, or any other law for the treatment, training, or rehabilitation of youthful offenders, where the Court could have done, so, Section 361, which is a new provision in the 1973 Code makes it mandatory for the Court to record in its judgment the "Special reasons" for not doing so. Section 361 thus casts a duty upon the Court to apply the provisions of Section wherever it is possible to do so and, to state "special reasons" if it does not do so. [368F-H, 369A-B]

(b) In the context of Section 360, the "Special reasons" contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offenders, 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. 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 Indian Parliament of the new trends in criminology. Therefore, 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. [369B-E]

3. Criminal justice is not a computer machine. It deals with complex human problems and diverse human beings. It deals with persons who are otherwise like the rest of us, who work and play, who laugh and mourn, who love and hate, who yearn for affection and approval, as all of us do, who think learn and forget. Like the rest of us they too are the creatures of circumstances. Heredity, environment, home neighbourhood, upbringing, school, friends, associates, even casual acquaintences, the books that one reads, newspapers, radio and TV, the economics of the household, the oppor-
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tunities provided by circumstances and the calamatics resulting therefrom the success and failure of one's

undertakings the affairs of the heart, ambitions and frustrations, the ideas and ideologies of the time, these and several other ordinary and extra-ordinary incidents of life contribute to a person's personality and influence his conduct. Differently shaped and differently circumstanced individuals react differently in given situations. A judge has to balance the personality of the offender with the circumstances the situations and the reactions and choose the appropriate sentence to be imposed. A judge must try to answer a myriad question such as was the offence committed without premeditation or was it after due deliberation ? What was the motive for the crime ? Was it for gain ? Was it the outcome of a village feud ? Was it the result of a petty drunken, street brawl, or a domestic bickering between a helpless husband and a helpless wife ? Was it due to sexual jealousy ? Was the murder committed under some, stress, emotional or otherwise ? What is the background of the offender ? What is his social and economic status ? What is the level of his education or intelligence ? Do his actions betray a particularly callous indifference towards the welfare of society, or on the other hand, do they show a great concern for humanity and are in fact inspired by such concern ? Is the offender so perpetually and constitutionally at war with society that there is no hope of ever reclaiming him from being a menace to society ? Or is he a person who is patently amenable to reform ? [369 E-H, 370 A-C]

(a) Judges in India have the discretion to impose or not to impose the death penalty. It is one of the great burdens which judges in this country have to carry. In the past, the reasons which weighed in the matter of awarding or not awarding the sentence of death varied widely and there was certainly room for complaint that there was unequal application of the law in the matter of imposition of the sentence of death. [367C-D]

(b) There cannot be any higher basic human right than the right to life and there can not be anything more offensive to human dignity than a violation of that right by the infliction of the death penalty. It is in the light of the right to life as a basic concept of human dignity, in the context of the unproven efficacy of the death penalty as a deterrent and in the background of modern theories of criminology based upon progress in the fields of science, medicine, psychiatry and sociology and in the setting of the march of the movement for abolition of Capital Punishment, that Judges in India are required to decide which sentence to impose in a case of murder, death or imprisonment for life? [366D, 367B-C]

Furman v. Georgia, 33 Lawyers Edn. 2nd Series 346 referred to.

(c) Realising that discretion, even judicial, must proceed along perceptive lines, but, conscious, all the same that such discretion cannot be reduced to formulate or put

into pigeon-holes, this Court has been at great pain ever since Ediga Annamma to point out the path along which to proceed. In the latest pronouncement of this Court in Rajendra Prasad v. State of Uttar Pradesh, several relevant principles have been enunciated to guide the exercise of discretion in making the choice between the penalties of death and life-imprisonment. [367F-G]

Ediga Annamma v. State of A.P. [1974] S.C.C. 443, Rajendra Prasad v. State of U.P. [1979] 3 SCR 78 referred to.

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4. Among the several theories of punishment the reformative theory is irrelevant where death is the punishment since life and not death can reform; the preventive theory is unimportant where the choice is between death and life imprisonment as in India; the retributive theory is incongruous in an era of enlightenment and inadequate as a theory since it does not attempt to justify punishment by any beneficial results either to the society or to the person punished. Equally, the denunciatory theory is as inadequate as the retributive theory since it does not justify punishment by its results. [359H, 360A-B, 361B]

5. (a) The very nature of the penalty of death makes it imperative that at every suitable opportunity life imprisonment should be preferred to the death penalty. [359E]

Furman v. Georgia, 33 L.ed. 2nd Edn. 346; relied on.

(b) All studies made on the subject whether capital punishment is the most desirable and most effective instrument for protecting the community from violent crime than other penalties say, a sentence of imprisonment for long terms, have led to the conclusion that the death penalty is inconsequential as a deterrent. [361 F]

(c) There is no positive indication that the death penalty has been deterrent. In other words, the efficacy of the death penalty as a deterrent is unproven. [365A]

6. The death penalty, rather than deterring murder, actually deters the proper administration of criminal justice. [365 A-B]

(a) There is the absolute finality and irrevocability of the death penalty. Human justice can never be infallible. The most conscientious judge is no proof against any mistakes. Cases are unknown where innocent persons have been hanged in India and elsewhere. [365B-C]

(b) Some Judges and Jurists have an abhorrence of the death penalty that they would rather find a guilty person not guilty than send even a guilty person to the gallows. The refusal of juries to convict persons of murder because of the death penalty is a well known phenomenon throughout the world. A perusal of some of the judgments of the Superior Courts in India dealing with cases where Trial Courts have imposed sentence of death reveals the same reluctance to convict because the result would otherwise be

to confirm the sentence of death. Thus a guilty person is prevented from conviction by a possibility that a death penalty may otherwise be the result. [365C-D]

(c) Yet a more 'grievious injury' which the death penalty inflicts on the administration of Criminal Justice is that it rejects reformation and rehabilitation of offenders as among the most important objectives of Criminal Justice, though the conscience of the World Community speaking through the voices of the Legislature of several countries of the world has accepted reformation and rehabilitation as among the basic purposes of Criminal Justice. Death penalty is the brooding giant in the part of reform and treatment of Crime and Criminals, 'inequitably sabotaging any social or institutional programme to reformation'. It is the 'fifth column' in the administration of criminal justice. [365E-G]

(d) There is also the compelling class complexion of the death penalty. A tragic by-product of social and economic deprivation is that the 'have-nots'
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in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. So, the burden of capital punishment falls more frequently upon the ignorant, the improverished and the underprivilege. [365 G-H]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 70 of 1979.

Appeal by Special Leave from the Judgment and order dated 1-2-1978 of the Calcutta High Court in Criminal Appeal No. 273 of 1976 and death Reference No. 4/76.

H. C. Mittal (Amicus Curiae) for the Appellant. G. S. Chatterjee for the Respondent.

The following Judgments were delivered:

CHINNAPPA REDDY, J.-"The murderer has killed. It is wrong to kill. Let us kill the murderer". That was how a Mr. Bonsall of Manchester (quoted by Arthur Koestler in his 'Drinkers of Infinity'), in a letter to the Press, neatly summed up the paradox and the pathology of the Death Penalty. The unsoundness of the rationale of the demand of death for murder has been discussed and exposed by my brother Krishna Iyer, J., in a recent pronouncement in Rajendra Prasad v. State of Uttar Pradesh(1). I would like to add an appendix to what has been said there.

The dilemma of the Judge in every murder case, "Death or life imprisonment for the murderer ?" is the question with which we are faced in this appeal. The very nature of

the penalty of death appears to make it imperative that at every suitable opportunity life imprisonment should be preferred to the death penalty. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And, it is unique finally in its absolute renunciation of all that is embodied in our concept of humanity" (per Stewart J., in Furman v. Georgia) (2). "Death is irrevocable, life imprisonment is not. Death, of course, makes rehabilitation impossible, life imprisonment does not"

(per Marshall, J., in Furman v. Georgia).

Theories of punishment, there are many reformative, preventive, retributive, denunciatory and deterrent. Let us examine which cap fits capital punishment. The reformative theory is irrelevant where death is the punishment since life and not death can reform. The preventive theory is unimportant where the choice is between death and life imprisonment as in India.

The retributive theory is incongruous in an era of enlightenment. It is inadequate as a theory since it does not attempt to justify punishment by any beneficial results either to the society or to the persons punished. It is, however, necessary to clear a common misunderstanding that the retributive theory justifies the death penalty. According to the retributivist society has the right and the duty to vindicate the wrong done to it and it must impose a punishment which fits the crime. It does not mean returning of evil for evil but the righting of a wrong. It implies the imposition of a just but no more than a just penalty and automatically rules out excessive punishment and, therefore, capital punishment. According to a modern exponent of the retributive theory of justice "capital punishment... .. is with out foundation in a theory of just punishment. Indeed one could go further and assert that capital punishment is antithetical to the purposes and principles of punitive sanctions in the law. Requital, when properly understood in terms of a concept of just law, undoubtedly does have a legitimate role in punishment. However, neither requital nor punishment in general is a returning of evil for evil, and, therefore, I see no support for the demand that a murder (or an act of treason, or some other serious offence) be paid for with a life". The Biblical injunction 'an eye for an eye and a tooth for a tooth' is often quoted as if it was a command to do retributive justice. It was not. Jewish history shows that it was meant to be merciful and set limits to harsh punishments which were imposed earlier including the death penalty for blasphamy, Sabbath breaking, adultery, false prophecy, cursing, striking a parent etc. And, as one abolitionist reminds us, who, one may ask, remembers the voice of the other Jew: "Whoever shall smite on thy right cheek, turn to him the other also ?".

The denunciatory theory of punishment is only a different shade of the retributive theory but from a sternly moral plain. Lord Denning advanced the view before the Royal Commission on Capital Punishment: "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 punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely the death penalty" .. "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". The implication of this statement is that the death penalty is necessary not because the preservation of society requires it but because society demands it. Despite the high moral tone and phrase, the denunciatory theory, as propounded, is nothing but an echo of the retributive theory as explained by Stephen who had said earlier: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite". The denunciatory theory is as inadequate as the retributive theory since it does not justify punishment by its results. As Prof. Hart points out the idea that we may punish offenders not to prevent harm or suffering or even the reptition of the offence but simply as a means of emphatically expressing our condemnation, is uncomfortably close to human sacrifice as an expression of righteousness. And, the question remains: "Why should denunciation take the form of punishment".

The deterrent theory may now be considered. It is important to notice here that the question is not whether the penalty of death has deterrent effect on potential murderers but whether it deters more effectively than other penalties say, a sentence of imprisonment for a long term ? Is Capital Punishment the most desirable and the most effective instrument for protecting the community from violent crime ? What is the evidence that it has a uniquely deterrent force compared with the alternative of protracted imprisonment ? If the death penalty really and appreciably decreases murder, if there is equally no effective substitute and if its incidents are not injurious to society, we may well support the death penalty. But all studies made on the subject, as I will presently point out, appear to have led to the conclusion that the death penalty is inconsequential as a deterrent.

Sir James Fitz James Stephen, a great Victorian Judge and a vigorous exponent of the deterrent theory said in his Essay on Capital Punishment: "No other punishment of death. This is one of those committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results.. No one goes to certain inevitable death except by compulsion. Put the matter the other way, was there ever yet a criminal who when sentenced to death and brought out to die would refuse the offer of a commutation of a sentence for a severest secondary punishment? Surely not. Why is this? It can only be because 'all that a man has will be given for his life". In any secondary punishment however terrible, there is hope; but death is death; its terrors cannot be described more forcibly".

Stephen's statement was admittedly a dogmatic assertion since he himself stated that it was a proposition difficult to prove though according to him, self evident. The great fallacy in the argument of Stephen has been pointed out by several criminologists. Stephen makes no distinction between a threat of certain and imminent punishment which faces the convicted murderer and the

threat of a different problamatic punishment which may or may not influence a potential murderer. Murder may be unpremeditated, under the stress of some disturbing emotion or it may be premeditated after planning and deliberation. Where the murder is premeditated any thought of possibility of punishment is blurred by emotion and the penalty of death can no more deter than any other penalty. Where murder is premeditated the offender disregards the risk of punishment because he thinks there is no chance of detection. What weighs with him is the uncertainty of detection and consequent punishment rather than the nature of the punishment. The Advisory Council on the Treatment of Offenders appointed by the Government of Great Britain stated in their report in 1960 "We were impressed by the argument that the greatest deterrent to crime is not the fear of punishment, but the certainty of detection".

Prof. Hart countered Stephen's argument with these observations: 'This (Stephen's) estimate of the paramount place in human motivation of the fear of death reads impressively but surely contains a suggestio falsi and once this is detected its congency as an argument in favour of the death penalty for murder vanishes for there is really no parallel between the situation of a convicted murderer over the alternative of life imprisonment in the shadow of the gallows and the situation of the murderer contemplating his crime. The certainty of death is one thing, perhaps for normal people nothing can be compared with it. But the existence of the death penalty does not mean for the murderer certainty of death now. It means not very high probability of death in the future. And, futurity and uncertainty, the hope of an escape, rational or irrational fastly diminishes the difference between death and imprisonment as deterrent, and may diminish to vanishing point.. The way in which the convicted murderer may view the immediate prospect of the gallows after he has been caught must be a poor guide to the effect of this prospect upon him when he is contemplating committing his crime".

A hundred and fifty years ago a study was made by the Joint Select Committee appointed by the General Assembly of Connecticut and they reported "Your Committee do not hesitate to express their firm belief that a well devised system of imprisonment, one which should render the punishment certain and perpetual would be far more effectual to restrain from crime than punishment of death".

One of the most comprehensive enquiries ever undertaken on the subject was that made by the Royal Commission on Capital Punishment. The Commission visited several countries of Europe and the United States, addressed questionnaires to many other countries in search of information and examined celebrated experts and jurists. The Commission's conclusions are of significance. They said: "There is no clear evidence in any of the figures we have examined that the abolition of Capital Punishment has led to an increase in the homicide rate, or that its reintroduction to a fall.. prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment and there is some evidence (though no convincing statistical evidence) that this is in fact so. But its effect does not operate universally or uniformly and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in just perspective and not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty".

Prof. Thorsten Sellin who made a serious and through study of the entire subject in the United States on behalf of the American Law Institute stated his conclusion: "Any one who carefully examines the above data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rate of capital crime. It has failed as a deterrent".

In 1962 statistics were compiled and a report was prepared at the instance of the United Nations Economic and Social Council on the question of Capital Punishment, the laws and practices relating thereto and the effects of capital punishment and the abolition thereof on the rate of criminality. According to the report all the information available appeared to confirm that neither total abolition of the death penalty nor its partial abolition in regard to certain crimes only had been followed by any notable rise in the incidence of crime which was previously punishable with death.

Late Prime Minister Bhandarnaike of Sri Lanka suspended the death penalty in 1956. A Commission of Inquiry on Capital Punishment was appointed and it reported "If the experience of the many countries which have suspended or abolished capital punishment is taken into account there is in our view, cogent evidence of the unlikelihood of this 'hidden protection'.. It is, therefore, our view that the statistics of homicide in Ceylon when related to the social changes since the suspension of the death penalty in Ceylon and when related to the experience of other countries tend to disprove the assumption of the uniquely deterrent effect of the death penalty, and that in deciding on the question of reintroduction or abolition of the capital punishment reintroduction cannot be justified on the argument that it is a more effective deterrent to potential killers than the alternative of protracted imprisonment". It is a tragic irony that Prime Minister Bhandarnaike who suspended the Capital Punishment in Ceylon was murdered by a fanatic and in the panic that ensued death penalty was reintroduced in Ceylon.

In the United States of America several studies have been made but 'the results simply have been inconclusive'. The majority Judges of the United States Supreme Court who upheld the constitutionality of the death penalty in the State of Georgia in Gregg v. Georgia(1) were compelled to observe "Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence supporting or refuting this view". In the same case the minority Judges Brennan, J., and Marshall, J., were convinced that 'capital punishment was not necessary as a deterrent to crime in our society'.

In India no systematic study of the problem whether the death penalty is a greater deterrent to murder than the penalty of life imprisonment has yet been undertaken. A few years ago I made a little research into the matter and studied the statistics relating to capital crime in several districts of Andhra Pradesh from 1935 to 1970.(2) The pattern was most eratic but it can be boldly asserted that the figures do not justify a conclusion that the death penalty has been a deterrent, but, then, the figures do not also lead inevitably to the conclusion that the death penalty has not been deterrent. One of the complicating factors is the discretion given to Judges to inflict death penalty or imprisonment for life (about which more later) which destroys the utility of any study based on statistics. The most reasonable conclusion is that there is no positive indication that the death penalty has been deterrent. In other words, the efficacy of the death penalty as a deterrent is unproven.

"The death penalty, rather than deterring murder, actually deters the proper administration of criminal justice".(1) There is the absolute finality and irrevocability of the death penalty. Human justice can never be infallible. The most conscientious judge is no proof against sad mistakes. Every criminal lawyer of experience will admit that cases are not unknown where innocent persons have been hanged in India and elsewhere. And, it is not the only way the death penalty strikes at the administration of criminal justice. Some Judges and Juries have an abhorrence of the death penalty that they would rather find a guilty person not guilty than send even a guilty person to the gallows. The refusal of Juries to convict persons of murder because of the death penalty is a well known phenomenon throughout the world. A perusal of some of the judgments of the Superior Courts in India dealing with cases where Trial Courts have imposed sentences of death reveals the same reluctance to convict because the result would otherwise be to confirm the sentence of death. Thus a guilty person is prevented from conviction by a possibility that a death penalty may otherwise be the result.

That is not all. There is yet a more 'grievous injury' which the death penalty inflicts on the administration of Criminal Justice. It rejects reformation and rehabilitation of offenders as among the most important objectives of Criminal Justice, though the conscience of the World Community speaking through the voices of the Legislature of several countries of the world has accepted reformation and rehabilitation as among the basic purposes of Criminal Justice. Death penalty is the brooding giant in the path of reform and treatment of Crime and Criminals, "inevitably sabotaging any social or institutional programme to reformation'. It is the 'fifth column' in the administration of criminal justice.

There is also the compelling class complexion of the death penalty. A tragic by product of social and economic deprivation is that the "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. So, the burden of capital punishment falls more frequently upon the ignorant, the impoverished and the underpriviledged. In the words of Marshall, J., "Their impotence leaves them victims of a sanction that the welthier, better represented, just-as guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status-quo because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate and we have today's situation". As a matter of historical interest it may be mentioned here that when in 1956, in Great Britain, the House of Commons adopted a resolution "That this House believes that the death penalty for murder no longer accords with the needs or the true interests of a civilised society, and calls on Her Majesty's Government to introduce forthwith legislation for its abolition or for its suspension for an experimental period", and the death penalty Abolition Bill was introduced, 'from the hills and forests of darkest Britain they came: the halt, the lame, the deaf, the obscrue, the senile and the

forgotten-the hereditary peers of England, united in their determination to use their medieval powers to retain a medieval institution",(1) and the bill was torpedoed by the House of Lords. Capital Punishment was however abolished in Great Britain in 1966.

There is finally the question whether the death penalty conforms to the current standards of 'decency'. Can there be any higher basic human right than the right to life and can anything be more offensive to human dignity than a violation of that right by the infliction of the death penalty. Brennan, J., observed in Furman v. Georgia(2) "In comparison to all other punishments today.. the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.. death for whatever crime and under all circumstances is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.. as executed person has indeed lost the right to have rights". Senor Tejera of Uruguay in the debate in the United Nations said "A death penalty is an anachronism in the twentieth Century and it is significant that no one in the committee has defended it. It is the duty of the United Nations to promote progress and to protect man from the prejudices and barbarity surviving from the past".

In a large number of countries in the world where the murder rate is higher than in India, the death penalty has been abolished. In most Latin American countries, in Argentina, Brazil, Columbia, Costa Rica, Ecuador, Maxico, Panama, Peru and Uruguas, Venezuala, in European countries, in Austria, Belgium, Denmark, Germany, Italy, Netherlands, Norway, Sweden, and Switzerland, in Iceland, in Israel, in many Australian States and in many of the States in the United States of America, death sentence has been abolished.

It is in the light of the right to life as a basic concept of human dignity, in the context of the unproven efficacy of the death penalty as a deterrent and in the background of modern theories of criminology based upon progress in the fields of science, medicine, psychiatry and sociology and in the setting of the march of the movement for abolition of Capital Punishment, that Judges in India are required to decide which sentence to impose in a case of murder, death or imprisonment for life?

Judges in India have the discretion to impose or not to impose the death penalty. It is one of the great burdens which Judges in this country have to carry. In the past, the reasons which weighed in the matter of awarding or not awarding the sentence of death varied widely and there was certainly room for complaint that there was an unequal application of the law in the matter of imposition of the sentence of death. The varying outlook on the part of Judges was well brought out a few years ago by two decisions of the Andhra Pradesh High Court. In the first case, while confirming the conviction of certain "Naxalites" for murder, the judges set aside the sentence of death and awarded life imprisonment instead. That the murder was not for any personal motive but was in pursuit of some mistaken ideology was the reason which weighed with the judges for substituting the sentence of life imprisonment for the sentence of death. Within a few months this view was subjected to severe criticism by two other Judges, who, in the second case confirmed the sentence of death.

Realising that discretion, even judicial, must proceed along perceptive lines, but, conscious, all the same, that such discretion cannot be reduced to formulae or put into pigeon- holes, this Court has been at great pains eversince Ediga Annamma to point the path along which to proceed. In the latest pronouncement of this Court in Rajendra Prasad v. State of Uttar Pradesh (supra) several relevant principles have been enunciated to guide the exercise of discretion in making the choice between the penalties of death and life- imprisonment. I express my agreement with the elucidation of the principles in Rajendra Prasad v. State of Uttar Pradesh. (supra).

Section 302 Indian Penal Code prescribes death or life- imprisonment as the penalty for murder. While so, the Code of Criminal Procedure instructs the Court as to its application. The changes which the Code has undergone in the last 25 years clearly indicate that Parliament is taking note of contemporary criminological thought and movement. Prior to 1955, Section 367(5) of the Code of Criminal Procedure 1898 insisted upon the Court stating its reasons if the sentence of death was not imposed in a case of murder. The result was that it was thought that in the absence of extenuating circumstances, which were to be stated by the Court, the ordinary penalty for murder was death. In 1955, sub-section (5) of Section 367 was deleted and the deletion was interpreted, at any rate by some Courts, to mean that the sentence of life imprisonment was the normal sentence for murder and the sentence of death could be imposed only if there were aggravating circumstances. In the Code of Criminal Procedure of 1973, there is a further swing towards life imprisonment. Section 354(3) of the new Code now provides:

> "When the conviction is for an offence punishable with death or, in the alternative 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."

So, the discretion to impose the sentence of death or life- imprisonment is not so wide, after all. Section 354(3) has narrowed the discretion Death Sentence is ordinarily ruled out and can only be imposed for 'Special reasons', Judges are left with the task of discovering 'Special reasons'.

Let us first examine if the Code of Criminal Procedure gives any clue leading to the discovery of 'Special reasons'.

Apart from Section 354(3) there is another provision in the Code which also uses the significant expression 'special reasons'. It is Section 361. Section 360 of the 1973 code re-enacts, in substance, Section 562 of the 1898 Code and provides for the release on probation of good conduct or after admonition any person not under twenty one years of age who is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or any person under twenty one years of age or any women who is convicted of an offence not punishable with death or imprisonment of life, if no previous offence is proved against the offender, and if it appears to the Court, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct or after admonition. If the Court refrains from dealing with an offender under Section 360 or under the provisions of the Probation of Offenders Act, or any other law for

the treatment, training, or rehabilitation of youthful offenders, where the Court could have done so, Section 361, which is a new provision in the 1973 Code makes it mandatory for the Court to record in its judgment the 'special reasons' for not doing so. Section 361 thus casts a duty upon the Court to apply the provisions of Section 360 wherever it is possible to do so and, to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 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. 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 Indian Parliament of the new trends in criminilogy. We will not, therefore, be wrong in assuming 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 is not a computer machine. It deals with complex human problems and diverse human beings. It deals with persons who are otherwise like the rest of us, who work and play, who laugh and mourn, who love and hate, who yearn for affection and approval, as all of us do, who think, learn and forget. Like the rest of us they too are the creatures of circumstance. Heredity, environment, home neighborhood, upbringing, school, friends, associates, even casual acquaintenances, the books that one reads, newspapers, radio and TV, the economics of the household, the opportunities provided by circumstances and the calamities resulting thereform, the success and failure of one's undertakings, the affairs of the heart, ambitions and frustrations, the ideas and ideologies of the time, these and several other ordinary and extra-ordinary incidents of life contribute to a person's personality and influence his conduct. Differently shaped and differently circumstanced individuals react differently in given situations. A Judge has to balance the personality of the offender with the circumstance the situations and the reactions and choose the appropriate sentence to be imposed. A judge must try to answer a myried questions such as was the offence committed without premeditation or was it after due deliberation ? What was the motive for the crime ? Was it for gain ? Was it the outcome of a village feud ? Was it the result of a petty, drunken, street brawl, or a domestic bickering between a hapless husband and a helpless wife ? Was it due to sexual jealousy ? Was the murder committed under some stress, emotional or otherwise ? What is the background of the offender ? What is his social and economic status? What is the level of his education or intelligence? Do his actions betray a particularly callous indifference towards the welfare of society or, on the other hand, do they show a great concern for humanity and are in fact inspired by such concern ? Is the offender so perpetually and constitutionally at war with society that there is no hope of ever reclaiming him from being a menace to society ? Or is he a person who is patently amenable to reform ? Well, may one exclaim with Prof. Vrij "What audacity is involved in these three tasks: to interpret life, explain an act, predict the latest inclination of a human mind."

'Special reasons', we may, therefore say, are reasons which are special with reference to the offender, with reference to constitutional and legislative directives and with reference to the times, that is,

with reference to contemporary ideas in the fields of Criminology and connected sciences. Special reasons are those which lead inevitably to the conclusion that the offender is beyond redemption, having due regard to his personality and proclivity, to the legislative policy of reformation of the offender and to the advances made in the methods of treatment etc. I will not attempt to catalogue and 'Special reasons'. I have said enough and perhaps more than what I intended, to indicate what according to me should be the approach to the question. Whatever I have said is but to supplement what my brother Krishna Iyer has already said in Rajendra Prasad v. State of U.P.(1) Coming to the case before us, our brothers Jaswant Singh and Kailasam, JJ., ordered 'notice confined to the question of sentence only.' At the last hearing we granted special leave to appeal on the question of sentence. The appellant was convicted by the learned Additional Sessions Judge, Alipore, for the murder of his son and sentenced to death. The High Court of Calcutta confirmed the conviction and sentence. The reason given by the learned Sessions Judge for giving the sentence of death was that the murder was 'cruel and brutal' and that the facts show the 'grim determination' of the accused to kill the deceased. The Sessions Judge made no reference to the motive of the accused for the commission of the murder. The High Court while confirming the sentence observed that the accused had previously murdered his wife, suspecting her infidelity and suspecting that the deceased in the present case was not his own son, that the sentence of imrisonment imposed on him for the murder of his wife had no sobering affect and that he had murdered his own son without any mercy or remorse and that he, therefore, deserved no mercy. We do not think that either the Sessions Judge or the High Court made the right approach to the question. The Sessions Judge was wrong in imposing the sentence of death without even a reference to the reason why the appellant committed the murder. The observation of the High Court that the appellant deserved no mercy because he showed no mercy smacks very much of punishment by way of retribution. We have examined the facts of the case. We find some vague evidence to the effect that the appellant suspected that the deceased was not his own son and that he used to get angry with the deceased for not obeying him. There is also vague evidence that he had killed the mother of the deceased and had suffered sentence of imprisonment for that offence. From the vague evidence that is available we gather that the appellant was a moody person who had for years been brooding over the suspected infidelity of his wife and the injustice of having a son foisted on him. We do not think that the mere use of adjectives like 'cruel and brutal' supplies the special reasons contemplated by Section 354(3) Criminal Procedure Code. In the light of the principles enunciated in Rajendra Prasad v. State of U.P.,(1) and in the light of what we have said earlier, we do not think that there are any 'special reasons' justifying the imposition of the death penalty. We accordingly allow the appeal as regards sentence, set aside the sentence of death and impose in its place the sentence of life imprisonment.

KRISHNA IYER, J.-I have had the advantage of reading the Judgment of my learned brother, Shri Justice Chinnappa Reddy. I wholly agree with his reasoning and conclusion. Indeed, the ratio of Rajendra Prasad etc. v. State of Uttar Pradesh etc.(1), if applied to the present case, as it must be, leads to the conclusion that death sentence cannot be awarded in the circumstances of the present case. Counsel for the State, if I recollect aright, did state that in view of the criteria laid down in Rajendra Prasad's case the State did not propose to file any written submissions against commutation to life imprisonment. I concur with my learned brother and direct that the appeal, confined to sentence, be allowed and the alternative of life imprisonment imposed.

V.D.K. Appeal allowed