Gentela Vijayavardhan Rao And Anr vs State Of Andhra Pradesh on 28 August, 1996

Equivalent citations: AIR 1996 SUPREME COURT 2791, 1996 (6) SCC 241, 1996 AIR SCW 3555, 1996 SCC(CRI) 1290, 1997 CRILR(SC&MP) 134, 1997 CRILR(SC MAH GUJ) 134, (1996) 7 JT 491 (SC), (1997) MAD LJ(CRI) 199, (1996) 3 RECCRIR 548, (1996) 3 SCJ 247, (1997) 1 APLJ 22, (1996) 2 LS 477, (1996) 4 ANDHLD 1121, (1996) 4 ANDH LT 1038, (1997) 1 EASTCRIC 62, (1997) 12 OCR 235, (1997) 2 CURCRIR 119, (1997) 1 CRICJ 49, (1996) 33 ALLCRIC 802, (1997) 1 BLJ 740, (1996) 3 ALLCRILR 295, (1996) 3 CRIMES 197, (1997) SC CR R 57

Author: K.T. Thomas

Bench: K.T. Thomas

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           CASE NO.:
Appeal (crl.)  195 of 1996

PETITIONER:
GENTELA VIJAYAVARDHAN RAO AND ANR.

RESPONDENT:
STATE OF ANDHRA PRADESH

DATE OF JUDGMENT: 28/08/1996

BENCH:
DR. A.S. ANAND & K.T. THOMAS

JUDGMENT:
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JUDGMENT 1996 SCR (5) SUPP 273 The Judgment of the Court was delivered by THOMAS, J. This is-a case involving death of 23 passengers in a bus. When the Super Express Bus set out its journey from Hyderabad to the terminal Chilakaluripet, none of the passengers nor its driver nor the conductor had any foreboding that the vehicle was heading to a very horrenous tragedy en route. The vehicle was set on fire and 23 passengers were roasted to death, besides a number of other passengers sustained serious burns. The two appellants before us were arraigned for converting the stage carriage into a wheeled inferno motivated by lust for wealth by robbing (he passengers. Trial court convicted them and sentenced them to the extreme penalty under law. High Court confirmed the conviction and sentence. They have come up with this appeal by special leave.

More details of the case :

> On the fateful day (8.3.1993) the Super Express Bus was driven by PW- 6 Lakshminarayana for operating service of the route Hyderabad - Chilakaluripet. The bus reached near a railway level crossing at Narasaraopet around 4,30 A.M. where it stopped to let two more passengers to board the bus Which was already replete with passengers. Just after the bus was in motion again, PW-6 sensed smell of petrol and so he stopped the vehicle to verify the cause of it Second appellant (Challapathy Rao) was dousing petrol inside the bus. First appellant (Vijayavaradhan Rao) had by then moved oat of the bus and was ready with a match box. The fear-stricken passengers sprang on their feet and started making tantrums. Then second appellant exhorted the first appellant to get down after lighting the match stick which was implicitly carried out and the automobile was in flames in a trice, A handful of passengers could wiggle out of the blazing vehicle in their thirst to live by escaping from the talons of fire. One of them (Baburao - PW-5) was chased by the first appellant and was caught. His trousers (pants) containing some cash in the pocket were forcibly grabbed by the first appellant but in turn he supplied his half burnt pants to PW-5 obviously to cover up nudity. During the same time second appellant chased another passenger (PW-1) and succeeded in intercepting him after covering some distance, and he robbed the wrist watch and case for Rs. 700 from the victim. The culprits then escaped from the scene with the booty which apparently was a modicum for this dastardly exercise.

At the scene of occurrence, fescue operations were briskly picked up at the instance of PW-6 (driver of the bus). However, a large number of passengers succumbed to extensive burns sustained in the incendiarism, though a few could survive for some more days but only to narrate then-woeful tale to others. There were a few passengers and sustained less serious burns and some of them figured as witnesses in this case during trial.

Police registered the crime case on the strength of the information furnished by PW-1. Appellants were arrested on 183.1993 and some incriminating articles were recovered pursuant to the information elicited by the police during interrogation. A test identification parade was con- ducted by PW-49, a judicial magistrate, in which the appellants were identified by some of the witnesses.

After trial both appellants were found guilty under Section 302, 307, 392, 341, 440 and 120-B IPC. For the offence of murder and criminal conspiracy, learned Sessions Judge sentenced both appellants to death penalty. For the offence under Section 307 and Section 392, he sentenced them to imprisonment for life and R.I. for 10 years, respectively. Short term imprisonment was awarded to both the appellants for the remaining minor offences.

A Division Beach of the Andhra Pradesh High Court heard the reference made by the Sessions Judge for confirmation of the death sentence, along with the appeal filed by the appellants, in challenge of the conviction and sentence, High Court confirmed the conviction and sentence and dismissed the appeal. The reference was accordingly answered.

Shri S. Ravindra Bhat, learned counsel who argued for the appellants, quite at length, mainly contended that the Sessions Court and the High Court have erroneously concluded that identity of

appellants as the culprits has been established and alternatively pleaded for reducing death penalty to the lesser sentence of imprisonment for life. It must be said in fairness to the learned counsel that he did not dispute the prosecution case that the bus with the passengers Was put to flames at the time and place suggested by the prosecution.

We have been taken through the material evidence in this case. Regarding identity of the culprits the evidence seems to the overwhelming to support the conclusion concurrently reached by the two courts that appellants were the persons who set the bus ablaze. Inspite of concurrent finding arrived at by the two courts we felt it necessary to scrutinise the evidence. We may make a brief reference to the material evidence in this appeal, particularly when the High Court has chosen to confirm the death sentence passed on two persons.

PW-6- Lakshminarayana (driver of the bus) and PW-7 Jangu Kalisia Wali (conductor to the bus) have identified both appellants in the trial court as the persons who committed this crime. We further note that PW-6 had correctly pointed out these appellants during test identification parade conducted by the judicial magistrate. PW-1 Narayana Swamy and PW-5 (Baburao) have testified to the respective roles played by each appellant in the incident with clarity. PW-1 has a further case that while he was fleeing from the flames he was chased by the second appellant and after covering some distance he was caught and then PW-1 had to surrender his cash and wrist Watch (MOI) to the robber. PW-5 also has a similar story that when he ran to escape he was chased and intercepted by the first appellant who demanded his pants to be surrendered. PW-5 succumbed to the demand, but in return he got a partially burnt pants worn by first appellant. PW-9 Venkata Rao, another passenger who identified both the persons as the culprits further added that a little girl by name Vasavi, who too was in the bus, made a bid to avert further precipitation of the criminal acts at the first stage of perpetration of the crime by offering her gold necklace, put in the din and bustle he feeble voice would not have reached the ears of the marauders. In this context we refer to Ext. P-72 which is the dying declaration recorded by the judicial magistrate from a six year bid girl called Vasavi who later succumbed to the burn injuries. We have no doubt that Vasavi, the declarant, was he same girl as referred to by PW-9 in his evidence.

In addition to the above evidence, PW-63 (DSF - CID, Circar Zone) who conducted investigation in the case, has deposed that on the information supplied by the second appellant he recovered MO-1 wrist watch from a pawn broker. PW-12j a clerk attached to "Siva Pawn Brokers" at Guntur has given evidence that on 10.3.1993 second appellant had pledged an HMT wrist watch with him. For further support, PW-12 produced Ext. P-3 which is the counterfoil of the pledge receipt. This is a clinching circumstances which ensures confidence in the judicial mind that PW-1 was absolutely correct when he said that he was robbed of "his wrist watch by the second appellant. Equally effective is the evidence of PW-63 DSP, that first appellant produced MO-II pants after arrest. The same was identified in court by PW-5 as his pants which first appellant had grabbed from him on the date of occurrence.

Learned counsel for the appellants had invited our attention to the dying declarations made by some of the victims in which those declarants have stated that four persons had boarded die bus at the railway level cross and those four persons had participated in the crimes But the Sessions Court and

the High Court did not consider that aspect as exculpative of the acts attributed to these appellants. Perhaps those victims would have though that in addition to the appellants there were two more persons to help them. That initial impression of two or three victims formed in the twilight is not enough to create any dent on the sturdy prosecution case which has been unfurled in the trial court by the witnesses.

The judicial magistrate who recorded the dying declaration took down the statements of PW-5 and PW-7 also as dying declarations thinking that they too might succumb to the burns. There is no doubt that when they survived, their statement cannot be used as evidence under Section 32 of the Evidence Act. The High Court has rightly observed so. But those two statements (Ext. P-71 and Ext. P-75, respectively) were relied on by the High Court on the premise that "it is relevant and admissible as res gestae under Section 6 of the Evidence Act."

If those statements (Ext. P-71 and Ext. P-75) are admissible as relevant under Section 6 of the Evidence Act they become substantive evidence. So we have to consider whether Ext. P-71 and Ext. P-75 could be treated as res gestae.

The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as lo form part of the same transaction-becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In R. v. Lillyman, (1896) 2 O.B. 167 a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against nearsay evidence, has observed in Teper v. Reginam, (1952) 2 All E.R. 447, thus :

> 'The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."
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> The correct legal position stated above needs no further elucidation.

Here, there was some appreciable interval between the acts of inccnciarism indulged in by the miscreants and the judicial magistrate recording statements of the victims- That interval, therefore, blocks the statement from acquiring legitimacy under Section 6 of the Evidence Act. High Court was, therefore- in error in treating Exts. P-71 and P-75 as forming part of res gestae evidence.

Though the statement given to a magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless, some utility in trials. It can be used to corroborate this testimony in court under Section 157 of the Evidence Act which permits such use, being a statement made by the witness "before any authority legally competent to investigate" . The word "investigate" has been used in the section in a broader sense. Similarly the words "legally competent" denote a person vested with the authority by law to collect facts. A magistrate is legally competent to record dying declaration "in the course of an investigation"

as provided in Chapter XII of the Code of Criminal Procedure, 1973. The contours provided in Section 164(1) would cover such a statement also. Vide Magaeodan and Others v. State of UP., AIR (1983) SC 126, However, such a statement, so long as its maker-remains alive, cannot be used as substantive evidence. Its user is limited to cor-roboration or contradiction of tie testimony of its maker.

The result of the above discussion is, these is no reason to disturb the conviction of the appellants under different offences passed by the trial court and confirmed by the High Court.

Now we have to deal with the plea for reducing death penalty to the lesser alternative sentence of imprisonment for life, learned counsel high-lighted three circumstances, as mitigating features, for persuading us to scale down the death sentence. First is, appellants were of young age (one of them must be 26 years now and that other man is around 23). Second is, the prime motive of the appellants was not murder but only robbery and the act of incendiarism might have been committed in a weak moment. Third is, appellant did not prevent at least some of the passengers, who tried to get out of the bus, from escaping out of the scene.

Death sentence remains in the statute book and its constitutional validity stands approved by the Constitution Bench in the celebrated decision of Bachan Singh v. State of Punjab, [1980] 2 SCC 684 : AIR (1980) SO 898. The Constitution Bench while upholding the validity of death sentences, has laid down, as a legal principle, that such sentence can be awarded only in "rarest of rare cases when the alternative option is unquestionably foreclosed". No litmus is provided nor any test formulated to discern precisely what is the rarest of the rare cases in which the alternative option is thus foreclosed. However, a Three Judge Bench of this Court in Machhi Singh and Others v. State of Punjab, AIR 1983 SC 957 has elaborated the ratio in Bachan Singh

(supra). The Bench laid stress on the reaction of the community at large in cases "when its collective conscience is shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards distrability or otherwise of retaining death penalty". Rarest of rare cases would be discerned when the crime is viewed "from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime". The Bench has suggested a few instances thereof as guidelines and has observed that in order to apply those guidelines the following questions may be asked and answered : (1) was there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence: (2) Were the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weight age to the mitigating circumstances which speak in favour of the offender?

In Dhananjoy Chatterjee v. State of West Bengal, (1994] 2 SCC 220 in which one of us (Dr. Anand, J,), speaking for the bench has reaffirmed the said principle in the following terms;

"Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime,"

This was reiterated in Bheru Singh V. State of Rajasthan, [1994] 2 SCC 467. In the above cases as well as in certain other cases this Court confirmed the death sentence awarded as cases belonging to the category of "rarest of the fare cases" in consideration of the overall view adopted in each of such cases.

Trial judge, after narrating the reasons to award death sentence to the appellants, has observed that "if this type of persons are allowed to escape death penalty it would result in miscarriage of justice and common man would loss faith in justice system", High Court also dealt with the sentence aspect in detail, giving "the most anxious consideration keeping in mind that the life once taken under the order of the court cannot be restored by the order of the court and that mercy seasons justice, but at the same time guards against misplaced sympathy for that would shake the confidence of the citizens in the administration of Justice and would have the tendency to tempt them to resort to private vengeance which would be destructive of the administration of justice."

The three circumstances advanced by the learned counsel are too Slender for treating them as mitigating circumstances. Even if we assume that such circumstances have any mitigative overtone they have been totally eclipsed by the other pillowing aggravative features looming large in the pizarre scenario of the crime unfurled in the evidence. Learned counsel tried repeatedly to strike a note of caution to us that the number of victims may not prejudicially influence our judicial perspective in awarding sentence of death. True, number of victims by itself is not a yardstick to discern a ease of the category described by the Constitution Bench in Bachan Singh's case (supra).

Nonetheless number of victims is not altogether outside the scope of consideration and should not be marginalised in appropriate cases, (vide Sheikh Ishaque & Ors. v. State of Bihar, {1995] 3 SCC 392.) Bearing in mind the principles governing the sentencing policy, particularly the death sentence, we have considered the overall picture in this case. We have no doubt that this is one of the rarest of the rare cases not merely because of the record number of innocent human beings roasted alive by the appellants but by the inhuman manner in which they have plotted the scheme and executed it. What they needed, perhaps, was only wealth by plundering others. For that motive they designed a scheme with the highest proportion of viciousness. Carrying most inflammable liquid in a cane together with a match box they checked into a passenger bus during the dawn of the ill-dated day. None of the harmless faces of the unfortunate passengers not even those of some cute children in the bus, had deterred these appellants from incendiaring them into charred corpses in a split second. When human mind was allowed to be transformed itself into such demonic form and the planned pogrom was executed with extreme pedravity, we have no hesitation to agree with the courts below that this is one of the rarest of the rare cases in which alternative option is unquestionably foreclosed.

We, therefore- confirm the sentence also. The appeal is accordingly dismissed.