Shivu And Anr vs R.G. High Court Of Karnataka And Anr on 13 February, 2007

Equivalent citations: 2007 AIR SCW 1808, 2007 (4) SCC 713, 2007 (2) AIR JHAR R 787, AIR 2007 SC (SUPP) 556, (2007) 37 OCR 287, 2007 CRILR(SC MAH GUJ) 232, (2007) 2 CHANDCRIC 65, (2007) 1 CAL LJ 290, (2007) 2 SUPREME 118, (2007) 2 RECCRIR 53, 2007 (2) SCC (CRI) 686, 2007 (2) ALLCRILR 688, 2007 (59) ALLCRIC 387, 2007 (2) ALLCRIR 1387, 2007 (1) CURCRIR 458, 2007 (3) SCALE 157, 2007 ALL MR(CRI) 1386, 2007 (2) CRIMES 24, 2007 CRILR(SC&MP) 232

Author: Arijit Pasayat

Bench: Arijit Pasayat, Lokeshwar Singh Panta

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           CASE NO.:
Appeal (crl.)  202 of 2007

PETITIONER:
Shivu and Anr

RESPONDENT:
R.G. High Court of Karnataka and Anr.

DATE OF JUDGMENT: 13/02/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
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J U D G M E N T (Arising out of SLP (Crl.) No.1762 of 2006) Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Karnataka High Court accepting the reference made under Section 366 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.') and confirming death sentence awarded to the appellants in respect of offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC') and sentence of 10 years and fine of Rs.25,000/- with default stipulation for the offence punishable under Section 376 read with Section 34 IPC awarded by the learned District and Sessions Judge, Chamarajanagara.

Background facts which led to the trial of the accused persons are essentially as follows:

Jayamma, (PW.1) is the resident of Badrenahalli village in Kollegal Taluk. She resided with her husband, and children Raju (PW.2), Nagarajamma (PW.10) and Shivamma (hereinafter referred to as the 'deceased'). Both the accused are residents of the same village. The accused-aged about 20 and 22 years respectively were sexually obsessed youngsters. Few months prior to the incident, relating to the present appeal they attempted to commit rape on Lakkamma [daughter of Puttegowda (PW.7)], but were unsuccessful. For that act, they were admonished. Later, they attempted to commit rape on PW.10 (daughter of PW.1). PW.10 was also successful in escaping from their clutches. Though in both the incidents, the aggrieved persons wanted to lodge police complaints, against the accused, at the instance of village elders and family members of these accused, instead of lodging criminal cases, only Panchayath of village elders was called on each occasion and the accused were directed to mend their ways. But this warning had no effect on them. Emboldened by escape from punishment in those two incidents, they committed rape on the deceased a young girl of hardly 18 years and to avoid detection, committed heinous and brutal act of her murder. On the morning of 15.10.2001, deceased Shivamma went to the family land situated near her house to dump manure. As she did not return, PW.1 went in search of her after some time. When Shivamma was not seen in the land, PW.1 began to call her by name. Suspecting some untoward incident, when PW.1 went near the spot, she saw the body of the deceased lying on the ground with clothes disarrayed. Noticing that Shivamma was dead, PW.1 raised hue and cry and went towards the village calling people for help. Attracted by her cries, her son PW.2 and other villagers including Chikkiregowda (PW.3) came to the spot and on learning about the incident, especially the fact that the accused had been seen earlier at the spot where the dead body was found and had on detection run away, they went in search of the accused. In the meantime, Narayana Gowda (PW.5) the brother of PW.1 (maternal uncle of the deceased) who also resides in the same village came to the house of PW.1 and on suspecting the role of the accused in the rape and murder of Shivamma, wrote down the statement of PW.1 and after taking her L.T.I., took the same to the jurisdictional police at Rampur police station. M.K. AIi, the S.H.O. of Rampur police station (PW.20) on receipt of the information of the crime, after accepting the written complaint as per Ex.P.1, registered a case in Crime No.86/01 for the offences punishable u/s 376, 302 both read with Section 34 of the IPC against these two accused and took up investigation.

After registering the case, preparing the F.I.R., sending the same, the superior officers and the Court, the Investigating officer along with staff, went to the place of the incident and held the necessary mahazars like spot mahazar, seizure of certain articles found near the scene of offence. After inquest proceedings, the body of the deceased was taken for autopsy. In the meantime, on learning about the culpability of the accused in the crime, several villagers went in search of the accused. Accused No.1 was found at the bus stand while attempting to board a bus. He was brought and was interrogated. His disclosure confirmed the involvement of accused No.2 as the co-participant in the crime. People went in search of the second accused who was

found hiding in the house. Both of them were brought and kept in confinement in the house of one Shivamma near the spot. They admitted to their guilt. On arrival of the investigating officer, after the preliminary investigation as already noted, the accused were taken into custody and they were sent for medical examination. The post-mortem examination on the dead body of Shivamma was carried out by Dr. Pushpalatha, PW.11 along with Dr.Basavaraju PW.12. It confirmed rape on the deceased and that she had been killed by strangulation. The accused were examined by the doctor PW.12 who noted nail scratch marks on their bodies. Syed Ameer Pasha, (PW.13) a photographer was summoned and he took photographs of the scene of offence as well as the dead body. Similarly Siddappa (PW.15), Junior Engineer prepared the sketch of the scene of offence as per Ex.P.15. After recording the statements of material witnesses including the relatives and the other villagers who could throw light on the incident and after receipt of all material reports, charge sheet was filed against these two accused for offences punishable under Sections 376 read with 34 and 302 read with 34 of the IPC.

Twenty witnesses were examined to further the prosecution version. In their examination under Section 313 Cr.P.C. the accused persons except denying their involvement did not offer explanation of particular defence. The trial Court after considering the evidence on record recorded conviction and awarded sentence as aforenoted. Since the death sentence had been awarded by the trial Court reference was made to the High Court in terms of Section 366 Cr.P.C. for confirmation of the death sentence. The accused-appellants also preferred appeal in terms of section 374 (2) Cr.P.C. The circumstances on which the trial Court placed reliance for recording conviction are as follows:

a. Accused and deceased were last seen together near scene of offence.

b. The movements of the accused.

c. The rape and murder of the victim.

d. The immediate apprehension of the accused by the villagers and their extra judicial confession. e. Medical evidence in respect of accused indicating resistance put forth by the victim and lastly; f. The conduct of the accused prior to and after the crime.

Considering the heinous nature of the crime, the trial court held it to be falling in the rarest of the rare category and awarded death sentence.

The High Court as noted above confirmed the conviction and the sentence imposed.

In support of the appeal learned counsel for the appellants submitted that the case is based on circumstantial evidence and the circumstances highlighted do not present a complete chain to warrant any inference about the guilt of the accused. Alternatively,

it is submitted that the death sentence is not warranted.

Learned counsel for the appellant-State on the other hand submitted that the circumstances highlighted clearly establish the guilt of the accused and no exceptions can be taken to the reasons indicated by the Trial Court in the well- reasoned judgment. The evidence has also been analysed in great detail by the High Court and, therefore, no question of any interference is called for with the conviction recorded. So far as the sentence is concerned it is pointed out that the accused persons are hardened criminals. They had made earlier attempts of rape of two different girls i.e. daughter of PW.7 and PW.1.

PWs. 11 and 12 are the doctors who conducted the autopsy and it is PW.12 who has also medically examined the accused and given the wound certificates. PW.13 is the photographer who took the photograph of scene of offence and the dead body. PW.15 is the Junior Engineer who has prepared the sketch of the scene of offence as per Ex.P.15 and PW.14 is the Village Accountant who has furnished the R.T.C. of the lands in question. PWs. 18 and 19 have been examined by the prosecution to show the earlier attempts of the accused to molest other girls (Lakkamma and Nagarajamma) and their participation in the panchayath held by the village elders in that regard. However, it is to be noted that as they did not support the prosecution, they have been treated as hostile witnesses and in spite of searching cross-examination by the prosecution they have stuck to their contrary version. The remaining witnesses are mahazar witnesses and the members of the investigation team.

To show the presence of the accused at the time and place almost near the victim, the prosecution has relied upon the evidence of Puttegowda, PW.6, Jayamma (PW.1) and two independent witnesses, Kalamma (PW8) and Rudramma (PW.9). Puttegowda (PW.6) states that on the date of the incident while he was taking tea in the morning, he saw the deceased going towards her family land carrying basket of manure. He also saw that these two accused were following her from a little distance. He states that after some time he also saw Jayamma (PW.1) the mother of the deceased going towards the land and coming back raising hue and cry over the murder of her daughter Shivamma by the accused and her seeing them running away from the spot. The evidence of this witness, so far as this aspect is concerned, except the futile suggestion that this witness is speaking falsehood as he belongs to the group of Narayana Gowda and opposed to the accused has remained unshaken.

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan (AIR 1977 SC 1063), Eradu v. State of Hyderabad (AIR 1956 SC 316), Earabhadrappa v. State of Karnataka (AIR 1983 SC

> 446), State of U.P. v. Sukhbasi (AIR 1985 SC 1224), Balwinder Singh v. State of Punjab (AIR 1987 SC 350) and Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

In Bhagat Ram v. State of Punjab (AIR 1954 SC 621) it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. (1996 (10) SCC 193), wherein it has been observed thus:

> "21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

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

> 1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
>
> In State of U.P. v. Ashok Kumar Srivastava (1992 Crl. LJ 1104) it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

Sir Alfred Wills in his admirable book `Wills' Circumstantial Evidence' (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

In Hanumant Govind Nargundkar v. State of M.P. (AIR 1952 SC 343) it was observed thus:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

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

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must

show that in all human probability the act must have been done by the accused.

When the evidence on record is analysed in the background of principles highlighted above, the inevitable conclusion is that the prosecution has established its accusations.

The residual question relates to sentence. In Bachan Singh v. State of Punjab (1980 (2) SCC 684) and Machhi Singh and Ors. v. State of Punjab (1983 (3) SCC 470) the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category for awarding death sentence were indicated.

In Machhi Singh's case (supra) it was observed:

> "The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted:-
>
> (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

The following guidelines which emerge from Bachan Singh case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38):-

> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the `offender' also require to be taken into consideration along with the circumstances of the `crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

> (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
>
> (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-`-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.
>
> (3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or `dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
>
> (5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-`-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

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

A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

Considering the view expressed by this Court in Bachan Singh's case (supra) and Machhi Singh's case (supra) we have no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial Court and confirmed by the High Court was appropriate.

The appeal is dismissed.