

## Anshad vs State Of Karnataka on 22 April, 1994

**Equivalent citations: 1994 SCC (4) 381, JT 1994 (3) 324, AIRONLINE 1994 SC 580, AIRONLINE 1994 SC 409**

PETITIONER:

ANSHAD

Vs.

RESPONDENT:

STATE OF KARNATAKA

DATE OF JUDGMENT 22/04/1994

BENCH:

ANAND, A.S. (J)

BENCH:

ANAND, A.S. (J)

FAIZAN UDDIN (J)

CITATION:

1994 SCC (4) 381                      JT 1994 (3)      324

1994 SCALE (2) 653

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by DR ANAND, J.- These are appeals by special leave and since they arise out of the common judgment of the High Court, they are being disposed of together.

2. Rajan (A-1), Shashi (A-2), Anshad (A-3), Raju (A-4) and Raghu (A-5) were tried by the Second Additional Sessions Judge, Bangalore for offences under Sections 396, 449, 395 and 307 IPC and convicted. They were sentenced to suffer imprisonment for life and to pay a fine of Rs 250 each and in default to suffer rigorous imprisonment for three months under each of the charges under Sections 449 IPC, 396 IPC as well as under Section 307 IPC. Separate sentence for offence under Section 395 IPC was not passed by the learned trial court which rendered its judgment on 8-5-1992. The appellants challenged their conviction and sentence in the High Court and the State also filed an appeal seeking enhancement of the sentence of imprisonment. The High Court vide its judgment dated 16-11- 1993, dismissed the appeal filed by the appellants but partly allowed the appeal filed by

the State in respect of A-1, A-2 and A-3. Their sentence of life imprisonment was enhanced to that of death sentence.

3. The prosecution case is as follows. A- 1 who is a painter by profession developed acquaintanceship with the deceased Savitri Devi, a widow aged about 60 years, when he was engaged to paint a name board for a school which the deceased wanted to open. He had later on also painted a scenery in the portion of the house occupied by her son PW

36. Since, the school did not function properly it was closed about six months prior to the date of the occurrence which took place on 21-9-1988. The deceased Savitri Devi requested PW 32 to find a tenant for the building in which the school was functioning and indicated the rent she expected as well as the amount of rent to be received in advance. The deceased was living on the second floor of a three-storeyed building called 'Savitri Niwas' at Kumara Park, west of Bangalore. There were three tenants living in the basement while the ground floor was vacant and the first floor was occupied by PW 36 Gopal son of the deceased. The ground floor which was lying vacant had in fact been allotted in a family arrangement by Savitri Devi to her second son PW 34.

4. Savitri Devi deceased was living on the second floor of the house along with Yashoda and Bhagya two maidservants. Sunil, the second deceased in the case is the grandson of Savitri Devi, being the son of her daughter Vandana. He was aged about 15 years and had come to stay with her.

5. A- 1 had been introduced to the deceased by PW 32 while A-2 and A-3 were introduced to PW 32 by A-1 about one week prior to the occurrence. On coming to know that the school building was intended to be let out, A-1 met PW 32 in the house of the deceased and introduced A-2 and A-3 to the deceased as Cardamom Estate owners of Kerala and told her that they were interested in striking a deal regarding renting of the school building.

6. In the locality where deceased Savitri Devi was living, there is a Sindhi Hall in which the deceased had some interest. There is a Shiva Temple in that Hall. PW 32 had been employed to carry out some repair work in the Temple. On 20-9-1988, PW 32 approached A- 1 and asked him whether he would decorate the dome of the Temple with a flower painting. A sketch of the flower to be so painted was prepared by A-1, who took the same to the deceased for approval. A- 1 left the sketch with the deceased who asked him to come the following morning to receive advance money for executing the painting work. It was on the next day i.e. 21-9-1988 that the occurrence took place in which Savitri Devi and Sunil were murdered and injuries were caused to PW 2 and PW 3 also.

7. To appreciate the prosecution case, it would be useful to extract the relevant portion of the evidence of PW 2 Sanjay. He deposed at the trial that he was studying in the IXth standard while his brother PW 33 was studying in Vth standard. On the fateful day, he returned from school at about 4 p.m. when his father left for the shop. Sunil deceased, who was his cousin was seen by him around 7.30 p.m. along with A- 1 coming down from the second floor. On inquiry, Sunil disclosed that he was going to drop his friend, namely, A- 1. After a little while A- 1 alone was seen going up to the second floor. Sanjay went to his room and started studying. Around 7.30 p.m., he received a call from his uncle Gopal Dass asking him to find out whether Sunil had reached the house. He told his

father that he had seen Sunil going out to drop a friend and was told to inquire from the grandmother as to at what time he would return. Sanjay therefore went to the main hall and opening the door called out to his grandmother but there was no response. He then walked up to the second floor and found the doors open, the lights were on and the T.V. was on with the volume at a high pitch. He called out for his grandmother but again there was no response. From the front room he entered the passage when all of a sudden A- 1 pushed him back with his shoulders and when he tried to enter again, A-1 gagged his mouth with one hand and caught hold of his neck with the other and dragged him towards the passage. He noticed his grandmother lying flat on the floor, at the entrance of the bedroom and a person standing next to her having a cloth bundle in his hand. He was removing jewellery from the person of his grandmother and putting it in the bundle. The said person was later on identified as A-3. Sanjay PW 2 also noticed that A-2 was also standing next to his grandmother near A-3. He tried to extricate himself from the clutches of A.- 1 but could not succeed and was dragged by A-1 towards the dining hall and his head was banged against the showcase. A-1 then pushed PW 2 into the puja room where he found two more persons standing near the almirah. His effort to escape from the clutches of A- 1 was futile. A- 1 pushed him on to a cot and squeezed his neck. He became unconscious. When he regained consciousness he found that A-1 and the other two persons, later on identified as A-4 and A-5, were not in the puja room. He came out of the puja room and went into the dining hall, where he found Sunil deceased lying on the ground. He turned him around and discovered that Sunil was not breathing but there was bleeding from his nose. He also noticed some injuries on his neck and that the wrist-watch, a gold chain and the platinum ring were missing from the person of Sunil. At the same time, he saw his grandmother's maidservant Yashoda untying the hands of the other maidservant PW 3. He then walked up to his grandmother who also had a bleeding injury and found that she was also not breathing. A-2 and A-3, whom he had earlier seen standing near his grandmother, were also not in the room. He noticed the gold neck chain, a diamond ring and gold bangles apart from a gold ring missing from the person of his grandmother. On entering his grandmother's room, he found all the cupboards open and things lying scattered. Nobody was present there. He was shocked and went to the room to make a telephone call to the police but found that the telephone wire had been cut. Leaving Yashoda and the maid PW 3, on the second floor, he went down to the first floor to telephone the police from there. He dialed the police control room at telephone No. 100 at about 8.30 p.m. and gave the information that his grandmother and his cousin had been killed and that their house had been robbed. He then made an attempt to speak to his parents on the telephone but was not successful. Dr Baliga PW 4, the family doctor was called to the house and after examining his grandmother and Sunil, he declared them both dead.

8. On receipt of the information from the police control room, Sub-Inspector Lav Kumar PW 41 reached the spot. He recorded the statement of Sunil PW 2 which formed basis of the FIR Ex. P-5 at about 9.45 p.m. PW 2 told PW 41 that after examining the articles in the house, lie would be able to give a list of the missing articles which the assailants may have removed from the house during the robbery. PW 41 commenced the investigation and prepared inquest report of the dead bodies besides preparing the site plan etc. During the inquest proceedings PW 41 also recorded the statements of PW 2 and PW 3 among others. PW 2 further deposed at the trial that he furnished the list of missing articles Ex. P- 7 to the Investigating Officer. About two days prior to 21- 10-1988, the police had asked PW 2 to attend the jail premises with a view to identify the Culprits. He went to the

jail where about 35 persons of almost the same age, height and build were made to stand. A tehsildar conducted the identification parade. He correctly identified A-2 to A-5 as the assailants who had been seen by him in the house on the fateful day. A- 1 was not there. The witness (PW 2) was then sent out and the participants in the identification parade were made to change their clothes and stand at different places. PW 2 was once again called in and this time again he correctly identified A-2 to A-5 as the assailants. He also identified the missing articles after the same had been recovered by the police from A- 1 to A-5 during the investigation.

9. The statement of PW 2 has been corroborated in all material particulars by Bhagya PW 3, the maidservant. She deposed that for a period of about three years she had been working with the deceased Savitri Devi. She knew A- 1 who used to visit the house of the deceased often and that A-2 and A-3 had also visited the house of the deceased about 15 days prior to the incident apart from their visit on the date of the occurrence itself. Describing the incident she stated that at about 7 p.m. Sunil had returned home and she along with the deceased witnessed the 'chitrahar' on the television. After the 'chitrahar' was over, A- 1 along with A-2 and A-3 came to the house. All the three of them sat there talking to deceased Savitri Devi and later on she saw A- 1 and Sunil going out while A-2 and A-3 had remained in the house. She served water to A-2 and A-3 and on her asking Savitri Devi as to what should be cooked for the dinner, Savitri Devi came to the kitchen to give her provisions for cooking the dinner. After giving her the provisions she returned to where A-2 and A-3 were sitting. While she was mixing wheat flour to prepare chapatis, A-3 came to the kitchen and immediately tied her with a cloth and holding her neck by one hand dragged her behind the dining hall. At that time she saw two other persons enter the puja room, out of whom one had a flat nose and fat lips. Her hands were tied at the back by A-3 and she was pushed near the bathroom where she fell down. A towel was tied around her neck and pulled as a result of which she became unconscious. That after sometime when she regained her consciousness somewhat and came towards the dining hall, she saw Savitri Devi deceased lying on the floor near the door of the room while A-3 was removing the jewellery of Savitri Devi from her person and A-2 was standing near him. A-1 was standing in the passage near the door of the verandah. Just then PW 2 came calling out for his grandmother. A-1 immediately held PW 2 by his neck and dragged him to the dining hall and then pushed him into the puja room. Then after she had regained consciousness, Yashoda PW 12, another maid in the house, untied her hands. She also noticed Sunil deceased lying on the floor bleeding from the nose. At that time none of the accused persons was in the house. She went on to add that as she had seen all the accused persons she could identify them. She deposed about the missing articles of Sunil as well as of Savitri Devi deceased from their persons. She also deposed about the arrival of the police and recording of her statement during the investigation of the case. She then deposed about her participation in the identification parade held in the jail where she had, however, identified A-2, A-3 and A-5 only.

10. The prosecution, at the trial examined 42 witnesses. The material witnesses who spoke about the occurrence are PW 2 and PW 3. Besides the testimony of PW 2 and PW 3, the prosecution relied upon various other circumstances, namely, medical evidence, recovery of articles belonging to deceased Savitri Devi and deceased Sunil; the identification of the accused persons A-2 to A-5; the expert evidence of the fingerprint expert; the testimony of PW 25 and PW 27 with a view to establish that A-4 and A-5 had hired a room in a hotel called Kailash Bhavan about the same time as the

occurrence; the manner in which A-1 came into contact with the deceased Savitri Devi and how PW 32 introduced A-2 and A-3 to him and he introduced them to the deceased by giving a false status of both of them. Evidence of the son of the deceased PW 36 was led to support the deposition of PW 2. All the stages of investigation were supported by production of panch witnesses etc. Both the courts below have carefully analysed the evidence and extracted it in their judgments and we need not, therefore, reproduce the same again.

11. Learned counsel for the appellants divided the case into two groups. The first group consists of A-1, A-2 and A-3 while the second group consists of A-4 and A-5. A-1 was arrested on 28-11-1988 while A-2 was arrested on 6-10-1988 and A-3 to A-5 on 7-10-1988.

12. Mr Naresh Kaushik, learned counsel arguing for A-1, A-3, A-4 and A-5 submitted that the prosecution had failed to establish the case against A-4 and A-5 beyond any reasonable doubt. He took us through the relevant parts of the evidence and we find some force in his submissions. It is seen from the evidence that the names of A-4 and A-5 do not find any mention in the FIR and it was not even mentioned in it that besides A-1 to A-3 any other person was also the associate of A-1 to A-3. As a matter of fact in the FIR Ex. P-5 at more than one places, only three persons are alleged to be the assailants in the case. In the inquest report also we find that the statements of PW 2 and PW 3 were recorded during the inquest proceedings. There again only three persons were mentioned as assailants by both PW 2 and PW 3. Again, at the identification parades, though PW 2 identified A-4 and A-5 also besides A-2 and A-3, PW 3 was only able to identify A-2, A-3 and A-5. Both the trial court and the High Court for good and sound reasons rejected the evidence of PW 25 and PW 27 and found that the prosecution story that A-4 and A-5 had hired a room in Kailash Bhavan Hotel about the same time when the occurrence took place was not correct. This circumstance was held not established in the case and we are in agreement with that finding. At the trial, however, we find that PW 2 as well as PW 3 attempted to make definite improvements over their earlier statements when they tried to implicate A-4 and A-5 also in the crime by putting up a new story that when PW 2 was pushed into the puja room he saw A-4 and A-5 standing near the almirah or that PW 3 had seen two persons enter the puja room when her mouth was being gagged and hands tied by A-3. As already noticed PW 2 had not mentioned it in the FIR Ex. P-5 or in his statement recorded during the inquest proceedings and PW 3 had not given this version either in her police statement or in her statement recorded during the inquest proceedings. It appears to us that PW 2 and PW 3 have made definite improvements in their testimony with a view to implicate A-4 and A-5 also for reasons best known to them. Moreover, the prosecution has not been able to show any connection whatsoever between A-4, A-5 with the other accused A-1 to A-3 by leading any evidence at all. It is also relevant to note here that so far as the fingerprint expert PW 20 is concerned, he did not lift any fingerprints of A-5 from the place of occurrence. The expert opinion regarding the alleged comparison of the fingerprints of A-4 allegedly lifted from the place of occurrence and the admitted fingerprints of A-4 has been successfully Challenged and shattered in the cross-examination of the expert and it would not be safe to place any reliance on the expert evidence to connect A-4 with the crime or even to hold that A-4 was present in the house of the deceased at the time of the occurrence. The only circumstance which the prosecution has been able to prove against A-4 and A-5 is the recovery of certain articles belonging to the deceased from their possession. Evidence has been led to how that the wrist-watch belonging to Sunil was recovered from A-4 on a disclosure statement made by him

under Section 27 of the Evidence Act while one gold ring belonging to Savitri Devi was recovered from A-5 on his disclosure statement recorded under Section 27 of the Evidence Act. The evidence of recoveries is reliable and trustworthy. Both the trial court and the High Court have rightly believed the recovery evidence. Nothing has been sought to our notice to throw any doubt on the same either. Neither the ownership of the articles nor the testimony of the panch witnesses has been doubted. We, consequently, accept that the two recoveries referred to above were made from A-4 and A-5 and that those articles belonged to the deceased. Thus, the only circumstance which can be said to have been established against A-4 and A-5 is that they were found in possession of a wrist-watch and a gold ring belonging to the deceased Sunil and Savitri Devi respectively. That in our opinion is not sufficient material to hold them, guilty of being participants in the crime of murder more particularly since the prosecution has led evidence to show that A-1 to A-3 had disposed of some of the articles removed from the house of the deceased and got converted some others into different ornaments from the two goldsmiths produced as witnesses in the case. A-4 and A-5 can only be held liable for being in possession of stolen property and, thus, guilty of an offence under Section 411 IPC. In our opinion, both the trial court and the High Court failed to properly appreciate the inherent infirmities in the prosecution evidence regarding the complicity of A-4 and A-5 and fell in error in convicting them also for the offence of murder. Considering the evidence on the record, we set aside their conviction and sentence as recorded by the trial court and the High Court and instead convict them for an offence under Section 411 IPC only. We shall refer to the question of sentences later.

13. We shall now take up the case of A-1 to A-3. The prosecution case regarding their complicity in the crime has been brought out from the evidence of the prosecution witnesses including the injured witnesses PW 2 and PW 3. Their testimony with regard to the involvement of A-1 to A-3 in the crime has remained totally unshaken during the cross-examination. The other evidence led by the prosecution including the manner in which A-1 falsely introduced A-2 and A-3 to the deceased and how taking advantage of the confidence he had built up with her, he not only secured his entry but also the entry of A-2 and A-3 into her house and gave their false introduction to her has been proved in the case beyond every reasonable doubt. The medical evidence, the evidence of the fingerprint expert and the evidence of recovery of the property belonging to the deceased directly and positively connects A-1, A-2 and A-3 with the crime.

14. Faced with the overwhelming, cogent and reliable prosecution evidence which has been rightly accepted both by the trial court and the High Court, learned counsel for the appellants M/s P.S. Poti and Naresh Kaushik submitted that it was not a fit case for the award of the sentence of death. Learned counsel argued that the High Court should not have in the circumstances of the case enhanced the sentence of A-1 to A-3 from that of life imprisonment as imposed by the trial court to that of death. Learned counsel argued that since the trial court had used its discretion to award the lesser sentence, the High Court without giving any strong "special reasons" could not have enhanced it.

15. We have given our serious considerations to the question of conviction and sentence of A-1 to A-3.

16. Indeed with the acquittal of A-4 and A-5, the conviction of A-1, A-2 and A-3 for an offence under Section 396 IPC cannot stand because the number of accused would in that case be less than five. However, the evidence on the record does show that all the three accused A-1, A-2 and A-3 are responsible for the murder of Savitri Devi and Sunil as also for committing robbery and theft of the articles belonging to the deceased in the manner suggested by the prosecution. No challenge to the recovery of the ornaments and other articles was made and rightly so, in the face of the cogent, reliable and positive evidence produced by the prosecution. The appellants A-1 to A-3 in our opinion can safely be convicted for an offence under Sections 302/34 IPC read with Sections 394/34 and 379/34 IPC. We accordingly modify their convictions in the manner noticed above.

17. Of course the learned Sessions Judge dealt with the question of sentence in a rather cryptic manner and after pronouncing the order of conviction on 8-5-1992 itself, on the same day by a one paragraph order dealt with the question of sentence. The manner in which the learned Sessions Judge dealt with the question of sentence under Section 235(2) CrPC leaves much to be desired. The object for which Section 235(2) CrPC was brought on the statute book appears to have been completely ignored by him. We disapprove the manner in which he decided the question of imposition of sentence in a rather cryptic manner. It exposes lack of sensitiveness on his part while dealing with the question of sentence. We need say no more on this topic so far as the learned Sessions Judge is concerned.

18. We have perused the reasons given by the High Court for awarding the sentence of death. Apart from referring to some of the "aggravating circumstances" like the betrayal of confidence of the deceased by A-1 and murder for committing robbery on a helpless widow, the High Court only referred to some of the judgments of this Court and then almost abruptly came to the conclusion that the sentence of death was called for in the instant case. We notice with regret that the High Court did not take into account any of the mitigating circumstances at all. Courts are expected to exhibit sensitiveness in the matter of award of sentence particularly, the sentence of death because life once lost cannot be brought back. This Court has in cases more than one emphasised that for determining the proper sentence in a case like this while the court should take into account the aggravating circumstances it should not overlook or ignore the mitigating circumstances. The manner in which the crime was committed, the weapons used and the brutality or the lack of it are some of the considerations which must be present to the mind of the court. Of course, the High Court has the power and jurisdiction to enhance the sentence of life imprisonment to death but that power has to be sparingly exercised, in "rarest of the rare cases" for 'special reasons' to be recorded. The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) CrPC. Death sentence, being an exception to the general rule, should be awarded in the "rarest of the rare cases" for 'special reasons' to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. The number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of "rarest of the rare cases". The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedent, of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon case to case.

19. Some of the mitigating circumstances which have been pointed out by learned counsel for the appellants and of which notice was not taken by the High Court are:

(a) that A-1 to A-3 had gone to the house of the deceased empty handed and did not even pick up any weapon like knife etc. from the house of the deceased nor used any such weapon while committing the murder of the two deceased;

(b) that they did not do away with the lives of PW 2 and PW 3, the only two eyewitnesses and thereby screen the offence completely;

(c) that there is nothing on the record to show that they acted in an exceptionally brutal or cruel manner while committing murder. The medical evidence shows only abrasions and scratches on the body of the deceased caused by nails frictions;

(d) there is nothing on the record to show as to which out of the three appellants strangled which of the two deceased;

(e) the manner in which the crime was committed and the jewellery removed from the person of the deceased would also show that A-1 to A-3 took off the jewellery from the person of the deceased by removing the same rather than tore it off from their bodies causing any injuries to the deceased.

20. There are some other minor mitigating circumstances also which were pointed out from the evidence but we need not detain ourselves to refer to all of them. It appears to us that the object of the appellants A- 1 to A-3 was to commit theft/robbery in the house of the deceased but finding the deceased there and some resistance and being surprised by the entry of Sunil they tried to drag and gag her as well as her grandson, Sunil, when he appeared on the spot and strangled them by the use of towels, which unfortunately proved fatal. From the statement of PW 2 it appears that deceased Savitri Devi died after the appellants had left and therefore it is possible to say that the appellants may have attempted only to render her unconscious for decamping with the jewellery and other articles. The reasons given by the High Court to enhance the sentence of life imprisonment to death, without taking into account all circumstances and balancing the aggravating and the mitigating circumstances, in our opinion, are neither 'special reasons' nor otherwise adequate and sufficient to impose the sentence of death on either of the three convicts A- 1 to A-3. In taking this view we are also influenced by the view expressed by a three-Judge Bench of this Court in *Dalip Singh v. State of Punjab*'. The circumstances noticed above, coupled with the fact that the offence under Section 396 IPC has not been made out, dictates that we adopt the safer course and impose the sentence of life imprisonment on A-1, A-2 and A-3 for the offence under Sections 302/34 IPC and set aside the sentence of death. We do so accordingly. We also sentence them each to suffer imprisonment for a period of five years for the offence under Sections 394/34 IPC and while convicting them for the offence under Sections 379/34 IPC, we do not consider it necessary to pass any separate sentence of imprisonment on them. The substantive sentences shall run concurrently.



21.As a result of the above discussion, the appeals of A-4 and A-5 are partly allowed and they are acquitted of the offences charged but convicted for the offence under Section 411 IPC and sentenced to the term of imprisonment already undergone by them. The conviction of A-1, A-2 and A-3 is altered to the one under Sections 302/34 IPC, 394/34 IPC and 379/34 IPC and they are sentenced in the manner noticed above. To the extent indicated hereinabove their appeals are also partly allowed. A-4 and A-5 shall be set at liberty forthwith, if not required in any other case. The recovered property shall be handed over to the heirs of the deceased, if not already done.