

Supreme Court of India

Sk. Ayyub vs State Of Maharashtra on 11 May, 1994

Equivalent citations: 1994 SCC, Supl. (2) 269 JT 1994 (4) 129

Author: K J Reddy

Bench: Reddy, K. Jayachandra (J)

PETITIONER:

SK. AYYUB

Vs.

RESPONDENT:

STATE OF MAHARASHTRA

DATE OF JUDGMENT 11/05/1994

BENCH:

REDDY, K. JAYACHANDRA (J)

BENCH:

REDDY, K. JAYACHANDRA (J)

YOGESHWAR DAYAL (J)

CITATION:

1994 SCC Supl. (2) 269 JT 1994 (4) 129

1994 SCALE (2) 859

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J.- Original accused 1 to 4, 6, 12 to 14 and 23 are the appellants. They along with 14 others were tried for offences punishable under Sections 147, 148, 342/149, 225/149, 224, 302 and 302 read with 34, 109 and 149 IPC. The trial court acquitted 14 others and convicted A-1, Sk. Ayyub under Section 302 IPC and sentenced him to death and convicted other appellants under Sections 302/149 IPC and sentenced them to imprisonment for life and to pay a fine of Rs 200 each in default of payment of which to undergo RI for three months. They were also convicted under Section 147 IPC and sentenced to undergo RI for two years and to pay a fine of Rs 200 each in default of payment of which to undergo RI for three months. The appeals preferred by them were dismissed by the High Court. Hence the present appeals.

2. The prosecution case is as under. Most of the accused are the residents of Village Naigaon, Taluka Babhulgaon, District Yavatmal and some of them are from the neighbouring villages. On 6-6-1990

Chandabai Kambale, PW 4, who is the resident of the same village was in her house which is near the house of A-1. A-1 came to her house fully drunk and tried to molest her. He started abusing her in filthy language. PW 4 rescued herself and came into the open courtyard of her house and A-1 went away abusing her loudly. Subhash Kambale, the husband of PW 4 came a little later and she narrated the incident to him and he asked her to go and give a report to the police. PW 4 accordingly went and narrated the incident to the police and gave a report Ex. P-148 recorded by PW 18, a Head Constable. Shri Deshmukh, Police Sub-Inspector, deceased 1 along with two Head Constables PWs 3 and 7 and one Police Constable Shri Ramchandra Ingole, deceased 2, left the police station and reached Village Naigaon in an auto-rickshaw driven by PW 5 and got down near the school. On seeing A-1, Shri Deshmukh, deceased 1 told him to accompany him as he was charged under Section 151 CrPC on the report of PW 4. A-1 was reluctant to accompany the policemen. However, they caught A-1 and made him sit on the passenger seat in the auto-rickshaw. At that time A-22, Afasanabi, the wife of A-1, came in front of him auto-rickshaw and asked Shri Deshmukh as to why her husband was being taken away. At that time there was a marriage in the house of A-17 and a number of persons had gathered in the marriage. A-22 told the persons gathered there that her husband was being taken away by police without any reason on the basis of a report given by a prostitute. A-2, A-17 and A-23 started running behind the auto-rickshaw pelting stones. A-11 was coming in the opposite direction and was driving his harrow. Seeing the mob behind the auto-rickshaw, he put the harrow on the road as an obstacle and the auto-rickshaw was stopped near the tamarind tree. Deceased 1 PSI, Shri Deshmukh and deceased 2, Police Constable Shri Ramchandra Ingole got down from the auto-rickshaw. A-1 was taken away from the auto-rickshaw by the accused persons. The two head constables were caught by four accused. A-2 went near deceased 1 and told him not to take his brother A-1 and the deceased 1 told that A-1 is arrested under Section 151 CrPC and that he would be released on bail from the Tehsil Office, Babhulgaon. All of a sudden, A-3 caught the waist of deceased 1 from backside and A-23 caught his right hand. A-1 who was taken away from the auto-rickshaw immediately rushed towards deceased 1 and asked him why he was being taken away on the report of a prostitute. A-1 snatched the revolver from the holster of deceased 1. At that time deceased 2 came near deceased 1 in order to rescue him. It is alleged that A-1 fired one shot which hit deceased 2 and he fell down and A-1 fired a second shot against deceased 1 and he missed and it hit A-23. A-1 fired a third shot which hit on the head of deceased 1. He also fell down. Thereafter releasing the two head constables, PWs 3 and 7 the accused ran away towards Village Naigaon. PW 7 asked PW 3 to go to the police station to lodge a report and accordingly a report was given. A-23 who was hurt along with his relatives also reached the police station. The doctor, who examined deceased 1, declared him to be dead. PW 21, the Circle Police Inspector received a wireless message at about 4 p.m., reached the village with a posse of constables at about 4.50 p.m. and took over the investigation. He held the inquest over the dead bodies and sent the same for postmortem. He examined PWs 3, 7 and other witnesses and arrested some of the accused. He also seized some empty cartridges and after completion of the investigation, the charge-sheet was laid.

3. The prosecution examined PWs 3, 5, 6 and 7 as eyewitnesses. The accused denied the offence and pleaded that in order to control the unruly mob, deceased 1 fired bullets and one of them hit A-23 and another hit deceased 2, the police constable and being afraid deceased 1 committed suicide by shooting himself in the head. The trial court convicted A-1 under Section 302 IPC holding that he

caused the death of the two deceased persons and convicted the remaining appellants on the ground that they held the deceased and facilitated the commission of the offence by A- 1 and thus they were liable under Sections 302/149 IPC. On the question of sentence, the trial court held that the case of A-1 comes under the category of rarest of rare cases and accordingly sentenced him to death and sentenced other accused to imprisonment for life as already mentioned. The sentence of death awarded against A-1 was referred for confirmation by the High Court and the State also filed an appeal for enhancement of sentence of accused 2, 3, 14 and 23 and the convicted accused preferred separate appeal. The High Court confirmed the death sentence and dismissed other appeals by a common judgment.

4. Learned counsel for the appellants submitted that the two deceased persons and other members of the police party behaved in a high-handed manner and took A-1 in custody and wanted to take him away when he and several others had gathered in the house of A- 1 7 to attend the marriage and that A-22 pleaded that her husband is being arrested and taken away for no fault of his and even assuming that the evidence of the eyewitnesses is to be accepted, the accused cannot be held liable for the offence of murder. He also submitted that in the circumstances of the case, the death sentence imposed against A-1 is not warranted and that remaining accused cannot be convicted under Sections 302/149 IPC inasmuch as they have not caused hurt to anybody and that shooting by A-1 was his individual act which was sudden and therefore there is no question of the remaining accused sharing the common object to commit the murders of deceased 1 and 2.

5. There cannot be any doubt about the report Ex. P- 148 given by PW 4 against A-1 alleging that he tried to molest her. It was only because of the said report that deceased 1 and 2 along with PWs 3 and 7 came to Village Naigaon where this unfortunate incident happened. The plea of the accused that deceased 1 fired at the mob and in that process A-23 and deceased 2 received injuries and that A-1 committed suicide is highly artificial and has been rightly rejected. Learned counsel for the appellants also could not seriously assail the evidence of the eyewitnesses. We have gone through the evidence of these witnesses and they are not shaken in any way in the cross-examination and their evidence has rightly been accepted by both the courts below.

6. First we will consider whether the conviction of accused 2 to 4, 6, 12 to 14 and 23 under Sections 302/149 IPC can be sustained? PW 3 gave the earliest report about the occurrence. In that he stated that he himself, PW 7 and deceased 1 and 2 went to the village in an auto-rickshaw and that they wanted to arrest Ayyub, A-1. He avoided the arrest and committed an attack on them accompanied by 10 to 12 persons and that A-1 snatched away the loaded revolver from deceased 1 and opened fire as a result of which deceased 1 and 2 received bullet injuries. He has not stated that anyone of the other accused caught hold of deceased 1. Now coming to his present deposition he has given a number of details. He deposed that when they were taking Ayyub, A-1 in an auto-rickshaw after arrest, a number of people ran behind the auto-rickshaw and ultimately they succeeded in stopping the auto-rickshaw and that A-3 all of a Sudden caught hold of waist of the deceased from the backside and A-23 caught the right hand of deceased 1 and that A- 1 2 and A- 1 3 pulled deceased 1 from the auto- rickshaw and two other persons caught hold of PW 7 and that A-12 and A-13 dragged PW 3 near the tamarind tree. He further deposed that A-1 became angry and rushed towards deceased 1 and asked him as to why he was taking him on the report of a prostitute and he snatched

the revolver from the holster of deceased 1 and fired and caused injuries to deceased 1 and 2 and also to A-23, as already mentioned.

7. It can thus be seen that part attributed to accused 2 to 4, 6, 12 to 14 and 23 that some of them caught hold of the deceased, is a development which is not mentioned in the earliest report. The evidence of other witnesses also is to the same effect. Even taking this evidence to be true, it is difficult to hold that the common object of the unlawful assembly was to commit the murders and that the other appellants shared the same along with A-1. The facts mentioned above are clearly to the effect that it was a sudden act on the part of A-1 who snatched the revolver and shot at the police party. No other accused participated in any manner in the attack on deceased 1 and 2 nor they have caused any injury to PW 7 and other constables. It is therefore clear that the object of the unlawful assembly was to deter the police from discharging their duties namely to arrest A-1. The High Court, as a matter of fact, observed that the behaviour of the mob shows that they wanted to anyhow release A-1 from the custody of the police and that initially the common object of the unlawful assembly was to get him released and to that extent it was unlawful. While considering whether the common object of the unlawful assembly was to commit murders also, the High Court observed that though the accused were knowing that A-1 had fired the first bullet, yet they did not set free deceased 1 and the two head constables and thereby they helped A-1 to achieve his target and consequently they must be held to have shared the common object along with A-1 to kill the deceased persons. We think that this reasoning is not correct. As mentioned above, A-1 suddenly snatched the revolver and started firing at deceased 1 and 2 and in that split second the other accused could not have developed an object which is common to that of A-1 namely to kill the two deceased persons. As a matter of fact in the FIR it is not stated that they caught hold of deceased 1. Under these circumstances they cannot be held guilty under Sections 302/149 IPC. The common object was only to get A-1 released from the police custody and thereby they committed an offence punishable under Sections 353/149 IPC.

8. Next coming to the case of A-1, the prosecution has established beyond all reasonable doubt that he fired at deceased 1 and 2 as a result of which they unfortunately died. The question is whether his case comes under the category of rarest of rare cases for awarding death sentence. This Court in *Bachan Singh v. State of Punjab* has considered this aspect and has given certain guidelines for awarding death sentence and has also indicated certain mitigating circumstances which are to be taken into account. Some of them read as under: (SCC p. 750, para 206) "Mitigating circumstances.- In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society. (4) The probability that the accused can be reformed and rehabilitated.

The Constitution Bench in the above case further stated thus:

"In order to apply these guidelines inter alia the following questions may be asked and answered:

(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?

1 (1980) 2 SCC 684: 1980 SCC (Cri) 580 If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that, death sentence is warranted, the court would proceed to do so."

The Constitution Bench also indicated certain aggravating circumstances which are to be taken into account and the same reads as under: (SC.C p. 749, para 202) "Aggravating circumstances.- A court may, however, in the following cases impose the penalty of death in its discretion-

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or (d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who has rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

However, it is cautioned that: (SCC p. 749, para 203) "Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other."

The trial court has referred to some of these aggravating circumstances which can be taken into account in awarding death sentence. No doubt, deceased 1 was discharging his official duty but there are mitigating circumstances which strongly indicate that this is not one of the rarest of rare cases.

9. In the instant case, a marriage was taking place in the village where A-1 and several other accused gathered to attend the same. This unfortunate incident took place because of a trivial but unpleasant incident. A-1 is neighbour of PW 4 whose husband Subhash Kambale was distilling illicit liquor and on that day A-1 in somewhat drunken condition went to the house of PW 4 and asked her to serve some more liquor. PW 4 stated that she does not know where her husband has gone and that there was no liquor in the house. A quarrel ensued and A-1 is alleged to have abused PW 4 and then caught hold of her right hand in that drunken condition. PW 4 jerked off her hand and came out. In the meanwhile, her husband came and she narrated the incident to him and both of them went to the police station and the police came to arrest A-1 and tried to take him to the police station in the manner, as mentioned above. In the cross-examination, PW 4 admitted that she was not married to Subhash Kambale but she was living with him as his wife. A-22, the wife of A-1, as a matter of fact protested that her husband was being arrested and taken away in a high-handed manner on a report given by a prostitute. Then, as mentioned above, the whole thing happened in a sudden manner. In such a situation, the state of mind of the assailant has also to be taken into account. As a matter of fact, before the courts below, the learned counsel for the defence has referred to certain aspects in the evidence of the eyewitnesses namely that A-1 was subjected to humiliation. The evidence of PW 5, the auto- rickshaw driver, shows that A-1 was made to sit or rather dumped in the narrow gap between passenger seat and driver seat. Apart from that A-1 sincerely felt that he was being illegally arrested. Even, according to the prosecution case, the police came to arrest the accused only under Section 151 CrPC. No doubt the police have ample power under Section 151 CrPC to arrest and there is nothing illegal about it. But we are only referring to this aspect to assess the state of mind of A-1 at the time of occurrence coupled with the surrounding circumstances. Further it is rather important to note that it was a sudden affair and not a result of premeditation. As a matter of fact, even the trial court held thus:

"There is no evidence on record to show that the accused persons had premeditated plan to commit the murder of Shri Deshmukh and Ingole nor there was a meeting of mind. On the contrary, it has come on record that the common object of unlawful assembly formed at the spur of moment and thereby the accused Ayyub (A-1) succeeded in killing Shri Deshmukh and Ingole by revolver firing. Under such circumstances, it could not be said that the accused persons had common intention."

It must also be noted that A-1 appears to have used the weapon in a confused manner after snatching the same from deceased 1. The fact that one of the shots hit A-23 itself shows the unsteady way in which A-1 must have acted. They were not premeditated or cold-blooded murders and it is clear that A-1 has acted in a high-handed manner but that was only on a sudden impulse in the circumstances mentioned above. In *Anguswamy v. State of TN.*², a police constable was murdered but according to the facts of the case, the deceased acted overzealously in chasing and attempting to apprehend the appellants who inflicted fatal injuries on the deceased police constable in a sudden desire to release themselves from the grip and not in a pre-planned manner. Considering whether the death sentence was warranted in the circumstances, this Court observed as under: (SCC p. 37, para 4) "No report was made against the appellants for their provocative behaviour and no case was registered against them for the commission of any cognizable offence. The deceased acted overzealously and attempted to apprehend the appellants. As the earlier incident had passed off, the

appellants were perhaps unable to fathom the reason for their attempted arrest and therefore tried to wriggle out from the clutches of the deceased by the use of force. Since the appellants felt that they were being unjustly treated by the deceased, they in order to free themselves attacked the deceased and caused the injuries. It cannot be said that the attack was a preplanned one. It was rather sudden and actuated by a desire to free themselves. It, therefore, follows that the murder cannot be said to belong to the rarest of rare category warranting the sentence of death."

2 (1989) 3 SCC 33: 1989 SCC (Cri) 481 We do agree with the learned counsel for the State that such offences committed against the public servants while discharging their duties should be seriously viewed. We are very much conscious that the public servants should not be deterred or obstructed in an unlawful manner in discharging their official duties and anybody who commits an offence while causing such obstruction should, no doubt, be punished severely. But when it comes to the question of awarding sentence, there are many other circumstances which have to be taken into consideration before awarding death sentence.

10. Having given our earnest consideration, we think that the ends of justice will be met if the death sentence imposed against A-1 is reduced to sentence of imprisonment for life. In the result the conviction of A-1, Ayyub under Section 302 IPC is confirmed but sentence of death is reduced to one of imprisonment for life. In addition he shall pay a fine of Rs 20,000. The conviction of the remaining accused 2 to 4, 6, 12 to 14 and 23 under Sections 302/149 IPC and sentence of imprisonment for life awarded thereunder are set aside. Instead each of them is convicted under Sections 353/149 IPC and sentenced to undergo RI for two years and each of them is further sentenced to pay a fine of Rs 10,000 each. However, their conviction under Section 147 IPC and sentence of two years' RI and the fine along with default clause are confirmed. Thus the total fine comes to Rs 1,01,600. The same shall be paid equally to the legal heirs of deceased 1 and 2 and if the appellants fail to pay the amount of fine within three months from today, the same shall be recovered as provided under Section 357 read with Section 431 CrPC. In the result the appeals are partly allowed.