Supreme Court of India
Shiv Mohan Singh vs State (Delhi Administration) on 10 March, 1977
Equivalent citations: 1977 AIR 949, 1977 SCR (3) 172
Author: V Krishnaiyer
Bench: Krishnaiyer, V.R.

PETITIONER:
SHIV MOHAN SINGH

Vs.

RESPONDENT:
STATE (DELHI ADMINISTRATION)

DATE OF JUDGMENT10/03/1977

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
CHANDRACHUD, Y.V.

CITATION:
1977 AIR 949 1977 SCR (3) 172
1977 SCC (2) 238
CITATOR INFO :
R 1980 SC 898 (82)

ACT:

Review--Exercise of the powers of Review must be justified by the compelling pressure of fresh circumstances within the limits of law--Supreme Court Rules, 1966 Order XI -Penal Code (1860) S. 302--Sentence--Validity of death sentence.

Criminal Procedure Code, 1973 (Act II of 1974)--Section 235(2) to be heard at the stage of passing sentence--Considerations in sentencing.

HEADNOTE:

The petitioner was convicted U/S.302 and sentenced to death by the. trial court which was confirmed by the High Court. The Special Leave application, to this Court was dismissed. A further petition for rehearing and a review petition thereafter having 'been dismissed, a petition for directions regarding demand of the case to the court of Sessions for reconsideration of the sentence in the light of s.235(2) Criminal Procedure Code 1973, was made, simultaneously with mercy petitions to the President. The mercy petitions to the President and the petition for direction to tiffs Court having been rejected the

petitioner's father moved the instant review petition. Dismissing the petition the Court.

HELD: (1) This court's review power has repeatedly been invoked ire vain and naturally a further exercise of the same power must be justified by the compelling pressure of fresh circumstances within the limits of law. Recognised grounds such as manifest injustice induced by obvious curial error or oversight or new and important matter not reasonably within the ken or reach of the party seeking review on the prior occasion, may warrant interference to further justice.

(2) Under the Indian Penal Code death penalty has been ruled to be constitutional. The law having sanctioned it and this Court having refused special leave against conviction and sentence in this very case, it is a vanquished cause to argue for a vague illegality vitiating capital sentence as such.

[179 D-E]

Gregg v. Georoia, U.S. Supreme Court decided on July 2, 1976 held not applicable.

(3) In India under present conditions deterrence through death penalty may not be a time-barred punishment in some frightful areas of barbarous murder. illustratively the court has mentioned that the brutal features of the crime and the hapless and helpless state of the victim steel the heart of the law to impose the sterner sentence. [180 A-B] Ediga Annamina v. State of A.P., [1974] 4 S.C.C. 443 explained.

(4) The law is thus harsh and humane and when faced with arguments about the social invalidity of the death penalty the personal predilections of the judge must bow to the law. The Bench with all its will to break through is bound by a jurisdictional servitude. This fetter is that if there is no legal ground for the alleged grievances the court cannot grant relief. The court enters a province of "powerless power" and finds itself in a quandary between codified law and progressive thought. The latter beckons, but the former binds [180 B, 177 F-G]

(5) Hearing is obligatory at the sentencing stage under the new Criminal Procedure Code. The humanist principle of individualising punishment to suit the person and his circumstances is best served by hearing the culprit even on the nature and quantum of the penalty to be imposed. [180 F]

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(6) The heinousness of the crime is a relevant factor in the choice of the sentence. The circumstances of the crime, especially social pressures which induce the crime which may be epitomised as "a just sentence in an unjust society" are another considerations. The criminal. not the crime. must figure prominently in shaping the sentence where a reform of the individual, rehabilitation into society and other measures to prevent recurrence, are weighty factors. Sombre sentencing is the Fifth Act in the tragedy of a murder

trial and for the judges of the Supreme Court, assumes a grim seriousness and poignant gravity.Pena The Code does not give the judge a free hand where murder has been made out. The choice is painfully--not quite scientifically though--limited to but two alternatives. [173 F, 180 A-C]

Observation: [Sentencing under the Indian scheme is not yet realistically forward looking nor correctionally flexible, but Parliament in its wisdom may examine this inadequacy].

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Review Petition No. 2 of 1977.

(Petition for review of this Court's order dated 22-9- 1976 in Crl. M.P. Nos. 1567, 1600-1601/76).
Sital A.K. Dhar, for the petitioner.

R.N. Sachthey, for the respondent.

The Judgment of the Court was delivered by KRISHNA IYER, J.--If 'survival after death' may aptly describe any litigative phenomenon, the present review proceeding may well qualify for that quaint claim. The relief of review relates to the death penalty imposed upon the petitioner by the trial court, confirmed in appeal, and dismissed even at the stage of special leave by this Court. In the ordinary course, judicial finality, has thus been affixed on the capital sentence so awarded although Presidential clemency, which has been sought and negatived, may still be open under Article 72 of Constitution. Mercy, like divinity, is amenable to unending exercise but in this mundane matter it is for the Head of State to act and not for the apex Court.

Sombre sentencing is the Fifth Act in the tragedy of a murder trial and, for the Judges of the Supreme Court, assumes a grim seriousness and poignant gravity since the petitioner's final appeal for judicial commutation, if rejected, may perhaps prove imminently fatal to his life. Even so, vhen we chronicle the events connected with the judicial proceedings in this Court it will be realised that our review power has repeatedly been invoked in vain' and naturally a further exercise of the same power must be justified by the compelling pressure o[ fresh circumstances within the limits of the law. The nature of the judicial process, even at the tallest tower, is such that, to use Gardozo's elegant expressions, 'a judge even when he is free, is still not wholly free; he is not to innovate at pleasure; he is not a knight-errant, roaming at will in pursuit of his own ideal of beauty of of goodness; he is to draw inspiration from consecrated principles'. Where the Judge's values and those prevailing in society clash, the judge must, in theory give way to the 'objective right'.

The focus, therefore; must turn on the existence of grounds of manifest miscarriage of justice unavailable on the earlier occasions. Before that, a brief reference may be made to the 'criminal' facts.

A treacherous murder of a tender school-boy by the petitioner, the circumstances of which were so heartless and heinous, terminated condiguly at the trial court and the High Court, the extreme penalty having been visited on the offender for his horrendous killing. This Court refused special leave to appeal, drawing the dark curtain' on the criminal proceedings. The petitioner struggled to extricate himself from the executioner by a sequence of desperate steps. On his behalf, a motion for re-hearing the special leave petition was fruitlessly made to this Court. A review petition was made again to this Court in vain. Yet another, out of the same motive but with modified reliefs, was made and dismissed. Then followed an application for directions regarding remand of the case to the court of sessions for reconsideration of the sentence in the light of s. 235(3) of the Code of Criminal Procedure, 1973. Dismissal of this proceeding did not deter the petitioner from persisting in moving this Court. That is how the present review peti- tion has been put in on his behalf by his father. Mercy petitions to the President punctuated the court proceedings but they too were turned down. The convict, nevertheless, clung on and. as stated earlier, his pathetic persistence in the plea for commutation has been pressed before us by counsel on two scores. He has urged that a decision of this Court in Santa Singh v. State of Punjab(1) of which he was not aware at the earlier stages entitles. him to a remand to the Sessions Court for reconsideration of the sentence of death. Secondly, he has also pressed upon us personal and social circumstances which have re- ceived judicial approval as justifying the imposition of the lesser sentence of life imprisonment even where the offence of murder has been made out.

In the ordinary course, the supplicant's forensic battle for life must be repelled by us since this Court has refused leave, rejected review petitions and denied reconsideration. Even so, realising that by this prolonging proceeding he is longing for dear life and clutching at legal straws, we have desisted from a dramatic rejection of the petition outright, anxious to set if there be some tenable ground which reason- ably warrants judicial interdicts to halt the hangman's halter. We were willing to strain, within permissible limits, to blend leniency with legality. 'The last breath' is the last hold of the law on the living to do justice and at that point judges, while hating the crime, do not hate the man who committed it, such being the humanism of penal justice. Circuit Judge Christmas Humphreys told the B.B.C. Reporter recently that a judge looks "at the man in the dock in a different way, not just a criminal to be punished, but a fellow human being, another form of life who is also a form of the same one life as oneself". In the context of Karuna and punishment for Karma the same Judge said: (1) Criminal Appeal No. 230 of 1976 decided on 17-8-76.

> "The two things are not incompatible. You do punish him for what he did, but you bring in a quality of what is sometimes called mercy, rather than an emotional hate against the man for doing something harmful. You feel with him; that is what compassion means."

(The Listener, d/25.11.1976, P. 692) But if the harsh frontiers' of the criminal are clearly drawn, to travel beyond is out of bounds for the court. The focus of counsel's first submission was turned on the compassion of the Code of Criminal Procedure, 1972 which obligates the court, under section 235, to hear the convict on the question of sentence. The provision is salutary although its application to the present case is moot, in the light of. section 484 of the Code. Without pausing to decide whether the new Code applies, we have extended to the petitioners the benefit of the

benignant provision and allowed his counsel to present the circumstances he relies on to activate our commiserative jurisdiction. It is true that the New Code provides many additional facilities for persons accused of crime., the paramount idea being to avoid an innocent man being mistakenly found guilty or punished disproportionately. In the present case, the conviction has become conclusive and only the question of sentence is being argued for extenuating consideration. Even so, sometimes one is led to wonder whether the words of Learned Hand have some relevance to the Indian system. The learned Judge said of the American system:

> "Under our criminal Procedure, the accused has every advantage. While the prose-cution is held rigidly to the charge, the accused need not disclose the barest outline of his defence. He is immune from questioning or comment on his silence; he cannot be con- victed when there is the least fair doubt in the minds of anyone of the 12 Jurers. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prose- cution of crime".

We advert to this aspect only to emphasize a sense of perspective in the judiciary when applying the protective procedural provisions of the Code. Sentencing under the Indian scheme, is not yet realistically forward-looking nor correctionally flexible but Parliament in its wisdom, may examine this inadequacy.

The penalty of death is an irrevocable process and naturally our pensive thought was turned to the moral-jural aspects of the utility and futility of this deadly sanction of State against citizen of hanging a human being into a cold oadaver. The miscellany of ideological sociological- jural considerations, although not pertinent within the narrow horizon of a court of law, has a fascinating and portentous significance when we remind ourselves that the Supreme Court goes beyond chopping little law into spacious jurisprudence on great occasions and our Penal Code is itself under review before Parliament.

This prolegomenon to the principles of capital sentence is our alibi for a brief divagation into the basics of infliction of death as a weapon of extinction society uses against its terribly deviant members as beyond deterrence. Is the death penalty a purposeful punitive strategy or legitimate legal weapon, viewed against the advanced peno- logical goals of reformation, deterrence and social defence ? Why is death terrifying and what are the objects of punishment served by its infliction ?

The literature on doing justice at the sentencing stage is profound and proliferating and penological controversy on death penalty has led to a Great Divide among sociologists, jurists and spiritualists. To go eggregiously wrong on punishment is to commit the crime' of sentence and, natural- ly, since taking the life of the prisoner neither prevents him nor reforms him (for he is no more), theories supporting capital punishment prove self-defeating. Moreover, the irreversible step of extinguishing the offender's life leave society with no opportunity to retrieve him if 'the' convic- tion and punishment be found later to be rounded on flawsome evidence' or the sentence is discovered to be induced by some phoney aggravation, except the poor consolation of posthumous rehabilitation as has been done in a few other countries for which there is no procedure in our system. May be, these

are campaign points of abolitionists against capital sentence.

Envisioned from another fundamentally different angle, is the dread of death penalty a deterrant ? Socrates would not recant, Jesus would not plead, St. Joan would not deny--with the cup of poison, bleeding crucifixion and burning stakes starting them in the face as punishment. Why, Higher Truth, acting through its inspired agents, taunts human law; for, then the body'gives little purchase over the soul, as Gandhiji demonstrated by defiance of British-Indian 'justice'. And, more dramatically yet dimly, psychic, electronic and medical explorations, scientifically conducted, are reportedly revealing through fascinating flashes of research and recording and extraordinary but tested investigations into rebirth, that death is only discarnation, not utter dissolution, that after 'death' we survive and act in a demonstrable, subtle dimension of existence. No longer is this thesis projected as faith but sought to be proved as fact. If, in the not distant future, the greatest of all man's fears--fear of death--is dispelled by the finding of poetic science proving that you live after 'death' and can communicate with the 'living', that the confusion between discarnation and death can be scientifi- cally explored and cleared, a revolution in the penological programmes of society would have dawned. The trans-physi- cal human future, as sciences unravel, may make our current penal strategies obsolescent. At Court, current criminal law binds us willy-nilly and we have to abandon the subject suggestively.

The basic issue 'What is death ?', may engage us psycho-criminologically, although a wee-bit digressively for a moment, to assess the social impact of the death penalty. By and large, humankind holds fast to the belief that death is a total extinction of dear- life and views its arrival through the executioner's rope or electric chair or firing squad with awesome horror. With poetic pragmatism, Shakespeare expressed this common feeling when he referred, in the context of death, to 'that undiscovered country from whose journ no traveller returns'. There are others, however--and among them are ancient seers, modern divines and several psychic researchers in institutes who regard as super-senSory. Reality or scientific verity that there is life after life, that the phenonmenon of death may even have a liberating effect, that the grosset exist- ence is in corporeal life and the subtler in the incorporeal state and life-death life is a continuum. Our sages assert with vision that deathbound littleness iS not all we are and great death as integral to the life process. Many scien- tists are investigating what happens after death and lifting the dark veil with luminous evidence of ethenic survival. Even so, most men even pious ones--are earthy materialists, and, in our work-a-day world, take it an axiom that it is given to us to live but once. The law, a people's practical scheme, which operates on the behavioral patterns and psyche of the humdrum run of mortals, steers clear of super-scientific and mystic may be and grounds itself on the hard-headed realist's view that the sentence of death is the maximum punishment as it puts the criminal out of material existence. Indeed, it is a fiercely final step for mortals and, in a sense, abhorrent because survival after death, though slowly, murkily, falteringly, gaining scientific, ground, is still suspect and has not made headway into the thoughtways of jurisprudes and legislators, rationalists and practical people. If after-life and re-birth are verities, as many poetic scientists claim to prove beyond easy dis- missal both penology and criminology will undergo re-evalu- ation. For, as punishment 'death penalty' will cease to be terrible and criminologyically, crime will be inescapably punished'in this life or on re-birth, These futuristic projections are of no practical consequence now. Jurispru- dence has to react to and build upon established belief- systems, branches of human knowledge and behavioral

sciences.

But these problems are more Tomorrow's challenge to philosophers, spiritualists, social and mental scientists, fundamental thinkers, parliamentarians and penal reformers. The Bench, with all its will to break-through, is bound by a jurisdictional servitude. This fetter is, as stressed by Government counsel, that if there is no legal ground for the alleged grievance, the Court cannot grant relief. The Court enters a province of 'powerless power' and finds itself in a quandary between codified law and progressive thought. The latter beckons, but the former binds.

We divagated into the import and portent of life and after-life on capital sentence not because these distant, dubious searches have immediate legal standing but merely to show how we may be swept off our feet if we chase 'tomorrow' theories, especially since law in court is hard realism. To-day for the condemned prisoner, the day of execution is the dreadful last day of life. Even so, critics like Beccaria have said 'the death penalty cannot be useful, because of the example of barbarity it gives men .... It seems to me absurd that laws which are an expression of the public will, which detest and punish homicide, should themselves commit it'. On the other hand, the deterrent and retributive theorists prevail amongst penologists and lextalionis con- tinues in sublimated form Orthodox jurists have shared the view of Genesis 9:6: "Whosoever sheddeth a man's blood, so shall his blood be shed." To epitomize, in this blurred area of criminal jurisprudence we are lost in the conflict between ideals, theories and research findings and the subject remains so fluid that legislative decision-making and jurisprudential debate must crystallize into a Code before the Court can activise these norms or incorporate them as judge-made law.

The plea of counsel against death penalty has topical favour and echoes the recent American debate. To abbrevi- ate.the discussion, We content ourselves with adverting to the judicial division of opinion in the Supreme Court of U.S.A. in Gregg v. Georgia (decided on July2, 1976) wherein Mr. Justice Brennan, in his dissenting Judgment,drove home his point thus:

> "I emphasize only that foremost among the moral concepts' recognized in our cases and inherent in the clause is the primary moral principle that the state, even as it punish- es, must treat its citizens in a manner con- sistent with their intrinsic worth as human beings a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the clause.
>
> Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the clause that prohibits point- less infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment."

Mr. Justice Marshall added the weight of his opinion:

"The two purposes that sustain the death penalty as non-excessive in the court's view are general deterrence and retribution. The Enrlich study, in short, is of little, if any assistance in assessing the deterrent impact of the death penalty. The evidence I reviewed in Furman remains convincing in my view, that 'capital punishment is not neces- sary as a deterrent to crime in our society. The justification for the death penalty must be found elsewhere.

The other principal purpose said to be served by the death penalty is retribution. The notion that retribution can serve as a moral justification for the sanction of death finds credence in the opinion of my brothers Stewart, Powell, and Stevens, and that of my brother White in Roberts v. Louisians. It is thin notion that I find to be the most disturbing aspect of to- day's unfortunate decision.

The foregoing contentions--that socie- ty's expression of moral outrage through the imposition of the death penalty preempts the citizenry from taking the law into its own hands and reinforces moral values--are not retributive' in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think not neces- sary to the accomplishment of those results. There remains for consideration, howev- er, what might be termed the purely retribu-

tive justification for .the death penalty--that the death penalty is appropri- ate, not because of its beneficial effect on Society, but because the taking of the murder- er's life is itself morally good. Some of the language of the plurality's opinion appears positively to embrace this notion of retribu- tion for its own sake as a justification for capital punishment."

These American views of eminent judges deserve deferential notice but do not aid us in the decision of this Indian Appeal which relates to implementation of a valid sentence since, under the Indian Code, death penalty. has been ruled to be constitutional. The law having sanctioned it and this Court haying refused special leave against conviction and sentence. in this very case, it is a vanquished cause to argue for a vague illegality vitiating capital sentence as such. To that extent the pall must fall.

Counsel for the petitioner brought to our notice a number of recent decisions of this Court where judges have expressed themselves in favour of a sentencing policy of life term as against death penalty. In Ediga Annamma (1974 (4) SCC 443) the Court pointed to the retreat of death penalty as part of punitive strategy in many countries of the world. Counsel cited rulings of this Court to show that where the murderer too young or too old or the haunting horror of being hanged has been hovering over his head for a few years or the condemned prisoner is the sole bread- winner of the whole family, the lesser sen- tence of life imprisonment should be the judicial choice. He

> brought to our notice the social and personal circumstances in the present case relevant to the above approach. Undoubtedly, the prisoner was a young man around 21/22 years when he committ`d the crime. He claims that his young wife will be helpless, that upon him depends the family for livelihood, that his mother is blind, that all of them will have a miserable, indigent life If, the petitioner were to be extinguished from earthly existence. He also emphasised that since 1974 the sentence of death had been shattering his morale. It must, however, be pointed out that counsel for the State refuted some of the more important of these grounds and went to the extent of even stating that the petitioner's wife had remarried.

In Ediga Annamma this Court, while noticing the social and personal circumstances possessing an extenuating impact, has equally clearly highlighted that in India under present conditions deterrence through death penalty may not be a time-barred punishment in some frightful areas of barbarous murder. Illustratively, the Court has mentioned that the brutal features of the crime and the hapless and helpless state of the victim steel the heart of the law to impose the sterner sentence.

The law is thus harsh and humane and when faced with arguments about the social invalidity of the death penalty the personal predilections of the Judge must bow to the law as by this Court declared, adopting the noble words of Justice Stenley Mosk of California uttered in a death sen- tence case: "As Judge, I am bound to the law as I find it to be and not as fervently wish it to be".

(The Yale Law Journal No. 6, p. 1138).

A learned writer on the Indian Constitution has observed :-

> " .... judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws are not always just, and the lights are not always luminous. Nor, again are judicial methods always adequate to secure justice."

We have given deep consideration to the many circumstances pressed by the petitioner's counsel to review our earlier orders dismissing review and refusing special leave to appeal. While we agree that Judges, like others are falli- ble and their findings are not 'untouchably' sacrosanct, we disagree that on an overall view of the many circumstances of the crime and the criminal in the present case, the sentence of death should be departed from.

Recognized grounds such as manifest injustice induced by obvious curial error or oversight, or new and important matter .not reasonably within the ken or reach of the party seeking review on the prior occasion, may warrant interfer- ence, to further justice. The scenario of events in this case rules out the arguments urged by counsel. Hearing is obligatory at the sentencing stage under the New Criminal Procedure Code. The humanist principle of individualising punishment to suit the person and his circumstances is best served by hearing is obligatory at the sentencing stage under the New Criminal imposed. In the present case, the date of commencement of the trial ,might rule out the applicability of the new Code. Moreover, he had already come to this Court seeking special leave to appeal at a time when the new Code was in force. He did not urge the ground of denial of

opportunity to be heard at the sentencing stage. Assuming indulgently in his favour that he came to know the correct law on this branch only after the decision of this Court in Shant Singh (Supra), his earlier application for review was disposed of after that ruling was rendered by this Court. Even then the present grievance of non-hearing was not pressed. He has missed the bus and his contention based on the new Code is of doubtful substance. Even so, having regard to the compassion that must temper the rigour of rigid rules we have allowed counsel a fresh opportunity to put forward before us, after taking instructions from his cli- ent, all the circumstances the Court should consider by way of ameliorative gesture and reduction of the death penalty to a life term incaraceration. The heinousness of the crime is a relevant factor in the choice of the sentence. The circumstances of the crime, especially social pressures which induce the crime which we may epitomise as a just sentence in an unjust society' are another consideration. The criminal, not the crime, must figure prominently in shaping the sentence where a reform of the individual, rehabilitation into society and other measures to prevent recurrence, are weighty factors. The Penal Code does not give the Judge a free hand where murder has been made out. The choice is painfully--not quite scientifically though--limited to but two alternatives. We have given reasons why, as the law now stands, we decline to demolish the death sentence. We therefore, dismiss the review peti- tion.

The judicial fate notwithstanding, there are some cir- cumstances suggestive of a claim to Presidential clemency. The two jurisdictions are different, although some consider- ations may overlap. We particularly mention this because it may still be open to the petitioner to invoke the mercy power of the President and his success or failure in that endeavour may decide the arrival or otherwise of his dooms- day. With these observations we leave the 'death penalty' Judicially 'untouched'.

S.R. Review petition dismissed.