

Changing attitude of the Supreme Court in imposing death penalty

Keywords- Rarest of rare case, death sentence, crime test

After a new provision under section 354 (3) of the Criminal Procedure Code, 1973 was inserted the conviction for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reason for the sentence awarded and in the case of sentence of death, the special reasons for such sentence, which means that the normal sentence for murder under section 367 (5) of the old Code of Criminal Procedure 1898 is no longer a sentence of death but imprisonment for life under new provision.

Constitutionality of capital punishment was first challenged in *Jagmohan Singh v. The State of U.P.*¹ where the constitutional Bench while upholding the constitutionality of death penalty whether total discretion can be conferred on the judges in awarding the death sentence, when the statute does not provide any guidelines on how to exercise the same. The decision in *Jagmohan Singh* (case) was rendered when the present Code of Criminal Procedure, 1973 was not in existence. However, the aforesaid position substantially changed with the introduction of a changed sentencing structure under the present Code of Criminal Procedure Code, 1973.

In *Rajendra Prasad v. State of U.P.*² it was held that the special reasons necessary for imposing a death penalty must relate not to the crime but to the criminal. It could be awarded only if the security of the state and society, public order in the interest of the general public compelled that course.

Evolution of sentencing policy

Capital punishment has been a subject matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputable statement of law follows and it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of the given case.

¹ (1973) 1 SCC 20

² (1979) 3 SCC 646

Doctrine of “rarest of rare” case (shifting focus from crime to criminal)

In *Bachan Singh v. State of Punjab*³ another constitutional Bench, while upholding the constitutionality of death sentence observed that for a persons convicted of murder, life imprisonment is the rule and death sentence an exception. The principal question that fall to be considered in this case are;

I whether death penalty provided for the offence of murder in section 302 IPC is unconstitutional.

II if the answer to the foregoing question be in the negative, whether the sentencing procedure provided in section 354 (3) of the CrPC 1979 is unconstitutional on the ground that it invest the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment of life.

The conclusion of the constitutional bench was that the sentence of death ought to be given only in the rarest of the rare case and it should be given only when the option of awarding the sentence of life imprisonment is “unquestionably foreclosed”. It laid down the framework law on this point. Bachan Singh effectively opened up Phase II of a sentencing policy by shifting the focus from the crime to the criminal, the Constitutional Bench in Bachan Singh looked at the suggestion given by learned counsel appearing in the case. These suggestion, if examined, indicate that insofar as aggravating circumstances are connected, they refer to the crime.

Bachan Singh severed as a watershed moment in the history of death penalty jurisprudence in India as it severed Indian Judiciary’s normative ambivalence on the subject. In Bachan Singh, court noted that death penalty is acknowledged in the constitution. Also the new sentencing procedures were held to be in the nature of safeguard as a guidance sentencing. The sentencing procedure was taken to be orienting the death punishment towards application in very selective situations. The another landmark judgment in *Machhi Singh*⁴ which did not only state the guidelines of Bachan Singh but also specified the mitigating circumstances

³ (1980) 2 SCC 684

⁴ *Machhi Singh v. State of rajasthan*, (1983) 3 SCC 470

which could be considered by the court while elaborating but also specified the mitigating circumstances which could be considered by the court while determining such serious issues.

Another great turn in criminal jurisprudence in imposing death penalty took in *Ravji alias Ram Chandra v. State of Rajasthan*⁵ where the Supreme Court observed that it is only characteristics relating to the crime, to the exclusion of the ones relating to the criminal, which are relevant for sentencing in the criminal trial. However, in *Santosh Kumar Satishbhashan Bariyar v. State of Maharashtra*⁶ the court pointed out that Ravji's case and the six subsequent cases in which Ravji Case was followed were decided *per incuriam* as the law laid down therein is contrary to the law laid by the Constitutional Bench of the Supreme Court in *Bachan Singh*. In *Bachan Singh*, Court held that before giving death sentence, Court should not confine its consideration principally or merely to the circumstances connected with the particular crime but must also give due consideration to the circumstances of the criminal.

In *B.A. Umesh v. Registrar General. High Court of Karnataka*,⁷ was a case where the convict was found guilty of rape, murder and robbery. The crime was carried out in a depraved and merciless manner. On these facts, despite the guilt of the criminal not having been established in any other case, the convict was found incapable of rehabilitation and the death sentence awarded to him was confirmed.

In *Sangeet Singh v. State of Haryana*,⁸ in an unprecedented Judgment, a two judge Bench of the Supreme Court held that the Court has not endorsed the approach of aggravating and mitigating circumstances in the sentencing policy in Phase II as introduced by the constitutional Bench in *Bachan Singh* seems to have been lost in transition.

In *Mohinder Singh v. State of Punjab*,⁹ another two Judge Bench, analysed the various principles laid down in decision reported in *Swamy Shraddananda @ Murli Mannohar Mishra v. State of Karnataka*, *Santosh Kumar Bariyar v. State of Maharashtra*,¹⁰ *Mohd. Farooq Abdul Gafir v. State of Maharashtra*,¹¹ *Haresh Mohandas Rajput v. State of Maharashtra*,¹² *State*

⁵ (1996) 2 SCC 175

⁶ (2009) 6 SCC 498

⁷ (2011) 3 SCC 85

⁸ (2013) 2 SCC 452

⁹ (2013) 3 SCC 294

¹⁰ (2009) 2 SCC 498

¹¹ (2010) 14 SCC 641

¹² (2011) 122 SCC 56

of *Maharashtra v. Goraksha Ambaji Adsul*,¹³ and the Supreme Court decision reported in *Mohammed Ajmal Kasab @ Abu Mujahid v. State of Maharashtra*,¹⁴ and held that a conclusion as to the “rarest of the rare” aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating to both to the crime and the criminal and the expression ‘special reason’ obviously means (exceptional reason) founded on the exceptionally grave circumstances of the particular case relating to the crime as well as criminal. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. 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 for the reason that life imprisonment is the rule and death sentence is exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised.

Crime Test, Criminal Test, and RR Test

This theory of imposing death penalty is a recent development in criminal jurisprudence emerged from the case *Anil @ Anthony Akriswamy Joseph v. State of Maharashtra*,¹⁵ where while awarding the death sentence all the three test shall be applied, i.e, crime test, criminal test and RR Test. To award death sentence, the “crime test” has to be fully satisfied, that is 100% and “criminal test” 0%, that is no mitigating circumstances favouring that accused. If there is any circumstances favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the “criminal test” may favour the accused to avoid the capital punishment. Even, iff both the test are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare Case Test (R-R Test). RR Test depends upon the perception of the society, that is, the society centric and not the judge centric, that is, whether the society will approve the awarding of death sentence to certain types of crime or not. While applying the test, the

¹³ (2011) 7 SCC 437

¹⁴ AIR 2012 SC 3565

¹⁵ (2014) 4 SCC 69

court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. example are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges. RR Test as held in *Shankar Kisanrao Khade v. State of Maharashtra*,¹⁶ depends upon the perception of the society that is "society centric" and not the "judge centric". While approving the test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy of certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc.

¹⁶ (2013) 5 SCC 546