the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which was not formulated earlier can be taken up by the High Court for reasons to be recorded, if it is of the view that the case involves such question.

7. Under the circumstances, the impugned judgment is set aside, and the matter is remitted to the High Court for disposal in accordance with law.

8. The appeal is disposed of in the aforesaid terms with no order as to costs.

(2006) 13 Supreme Court Cases 116

(BEFORE DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.)

BABLU ALIAS MUBARIK HUSSAIN .. Appellant;

Versus

STATE OF RAJASTHAN .. Respondent.

Criminal Appeal No. 1302 of 2006†, decided on December 12, 2006

A. **Penal Code, 1860 — Ss. 302 and 85 — Death sentence — Sustainability — Accused-appellant alleged to have killed his wife, three daughters aged 9 years, 6 years and 4 years respectively, and son aged 2½ years — Death sentence imposed by trial court on conviction, confirmed by High Court on reference — Acts not only brutal but also inhuman with no remorse for the same — Plea of drunkenness no excuse for such brutal and diabolic act — Five lives were taken and that too of four young children — Held, the case squarely falls under the rarest of rare category to warrant death sentence — Criminal Trial — Sentence — Death sentence**

(Paras 34, 35 and 4)

B. **Criminal Procedure Code, 1973 — Ss. 354(3), 360 and 361 — Sentence — Imposition of — Considerations — Regard to other provisions of the Code providing for reform and rehabilitation — Court to choose the appropriate punishment keeping in view personality of offender and circumstances, situations and reactions — Death sentence to be imposed only for special reasons — Penal Code, 1860 — S. 302 — Sentence — Death sentence**

C. **Penology — Sentence — Proportionality of — Principle of just deserts — Caution to trial Judges against departure from this principle when determining sentence based on other considerations — Criminal Procedure Code, 1973, S. 354(3)**

Section 302 IPC prescribes death or life imprisonment as the penalty for murder. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. There is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special

† Arising out of SLP (Crl.) No. 4765 of 2006. From the Final Judgment and Order dated 27-7-2006 of the High Court of Judicature for Rajasthan at Jodhpur in DB Crl. Murder Reference No. 2 of 2006 and DB Crl. Jail Appeal No. 447 of 2006 : **(2006) 4 RLW 2686**

reasons", as provided in Section 354(3) CrPC. Further, Section 361 CrPC which is a new provision in the Code makes it mandatory for the court to record "special reasons" for not applying the provisions of Section 360. In the context of Section 360 CrPC, the "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed. (Para 19)

Before the amendment of Section 367(5) of the old Code by the Criminal Procedure (Amendment) Act, 1955 the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment relates to procedure and now courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment. (Para 20)

Section 354(3) of the Code marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1-4-1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the reasons for the sentence awarded and in the case of death sentence "special reasons" are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. (Para 21)

Machhi Singh v. *State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681; *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580; *Ediga Anamma* v. *State of A.P.*, (1974) 4 SCC 443 : 1974 SCC (Cri) 479, *relied on*

State of Rajasthan v. *Kheraj Ram*, (2003) 8 SCC 224 : 2003 SCC (Cri) 1979, *referred to*

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 civilised 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 courtroom 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. (Para 28)

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. (Para 29)

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 terrific 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. (Para 30)

D. **Penal Code, 1860 — S. 85 — Scope and ambit of**

Three propositions as regards scope and ambit of Section 85 are:

(*i*) the insanity whether produced by drunkenness or otherwise is a defence to the crime charged;

(*ii*) evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and

(*iii*) the evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily gave to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. (Para 33)

E. **Penal Code, 1860 — S. 85 — Availability of defence under — Nature of intoxication necessary — Held, intoxication must have been against his will and/or the thing with which he was intoxicated was administered to him without his knowledge — Expression "without his knowledge" simply means an ignorance of the fact that what is being administered to him is or contains or is mixed with an intoxicant — Further held, defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence — Onus of proof in such cases lies on the accused (Paras 32 and 33)**

F. **Criminal Trial — Circumstantial evidence — Guilt established — Principle reiterated — Held, 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 — Such circumstances need 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 (Paras 10 to 17)

Hukam Singh v. *State of Rajasthan*, (1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063; *Eradu* v. *State of Hyderabad*, AIR 1956 SC 316 : 1956 Cri LJ 559; *Earabhadrappa* v. *State of Karnataka*, (1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446; *State of U.P.* v. *Sukhbasi*, 1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224; *Balwinder Singh* v. *State of Punjab*, (1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350; *Ashok Kumar Chatterjee* v. *State of M.P.*, 1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890; *Bhagat Ram* v. *State of Punjab*, AIR 1954 SC 621 : 1954 Cri LJ 1645; *C. Chenga Reddy* v. *State of A.P.*, (1996) 10 SCC 193 : 1996 SCC (Cri) 1205; *Padala Veera Reddy* v. *State of A.P.*, 1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407 : AIR 1990 SC 79; *State of U.P.* v. *Ashok Kumar Srivastava*, (1992) 2 SCC 86 : 1992 SCC (Cri) 241 : AIR 1992 SC 840; *Hanumant Govind Nargundkar* v. *State of M.P.*, AIR 1952 SC 343 : 1953 Cri LJ 129; *Sharad Birdhichand Sarda* v. *State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622, *relied on*

Wills' Circumstantial Evidence (Chapter VI), *relied on*

P-M/A/35479/SR

Advocates who appeared in this case :

V. Ramasubramanian, Advocate, for the Appellant;

Aruneshwar Gupta, Naveen Kr. Singh, Mukul Sood, Shashwat Gupta and Ms Shikha Tandon, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

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9. (1983) 3 SCC 470 : 1983 SCC (Cri) 681, *Machhi Singh* v. *State of Punjab* 121*c-d*, 126*f*, 126*f-g*, 126*g*
10. (1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446, *Earabhadrappa* v. *State of Karnataka* 121*g*
11. (1980) 2 SCC 684 : 1980 SCC (Cri) 580, *Bachan Singh* v. *State of Punjab* 121*c-d*, 126*c*, 126*f-g*, 127*a*
12. (1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063, *Hukam Singh* v. *State of Rajasthan* 121*g*
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14. AIR 1956 SC 316 : 1956 Cri LJ 559, *Eradu* v. *State of Hyderabad* 121*g*
15. AIR 1954 SC 621 : 1954 Cri LJ 1645, *Bhagat Ram* v. *State of Punjab* 122*a-b*
16. AIR 1952 SC 343 : 1953 Cri LJ 129, *Hanumant Govind Nargundkar* v. *State of M.P.* 123*d*

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J.— Leave granted.

2. Challenge in this appeal is to the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur confirming the death sentence awarded to the appellant for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short "IPC"). The trial court had imposed a death sentence and, therefore, made a reference for confirmation of death sentence by the High Court in terms of Section 366 of the Code of Criminal Procedure, 1973 (in short "the Code").

3. The appellant also filed an appeal and both the cases under reference and the appeal were taken up together and disposed of by a common judgment.

4. According to the prosecution the accused killed his wife Anisha, three daughters, namely, Gulfsha, Nisha and Anta @ Munni aged 9 years, 6 years and 4 years respectively and son Babu aged 2½ years. The Additional Sessions Judge (Fast Track), Nagaur had found the charge for commission of offence under Section 302 IPC to have been proved and imposed the death sentence.

5. Prosecution version in a nutshell is as follows:

On 10-12-2005 at about 6 a.m. Alladeen (PW 4) submitted a written report at Police Station Nagaur stating inter alia that in the evening of 9-12-2005 the appellant Bablu gave beating to his wife and children. But they were rescued on his intervention. He described Bablu as a person of notorious character. It was further averred that in the morning at about 5 a.m. his brother, appellant Bablu came out of the house shouting and making declaration that he has killed all the five bastards by strangulation one by one. He killed his wife Anisha, daughters Gulfsha, Nisha, Anta @ Munni and son Babu. The dead bodies were found placed on the mattresses tying the thumbs of each leg of the dead bodies by thread. On this information police registered a case for offence punishable under Section 302 IPC and proceeded with investigation. All the dead bodies were sent for post-mortem. A Medical Board consisting of three doctors conducted the post-mortem of all the five dead bodies. The appellant was arrested. After usual investigation police laid charge-sheet against the appellant for offence punishable under Section 302 IPC. On being committed the appellant was tried of the charge of offence punishable under Section 302 IPC by the Court of Additional Sessions Judge (Fast Track), Nagaur. The trial court on consideration of the evidence led by the prosecution found the appellant guilty of offence under Section 302 IPC.

6. The trial court relied upon the following circumstances to find the accused guilty:

(*1*) Extra-judicial confession made by the appellant before Murad Khan (PW 1), Bablu Kalva (PW 2), Mohd. Sharif (PW 3) and Alladeen (PW 4).

(2) The presence of the appellant in the house wherein the alleged incident took place.

(*3*) Recovery of earring of the wife from the possession of the appellant.

7. At the time of hearing the reference and the appeal the primary stand taken by the accused-appellant was that the extra-judicial confession relied upon by the prosecution is not correct. It was submitted that the alleged confession publicly standing on a platform is highly improbable. The High Court found that the evidence of Murad Khan (PW 1) and Bablu (PW 2) was cogent and credible. PW 1 was a neighbour and PW 2 is the brother of the accused-appellant. There is no reason as to why they would falsely implicate the accused-appellant by making an untruthful statement. Added to that, evidence of PW 1 about the behaviour of the appellant was relevant. The third circumstance was the recovery of ornament from the possession of the appellant. The circumstances highlighted by the prosecution according to the High Court presented a complete chain of circumstances. Though it was submitted by the accused-appellant that even if the prosecution case was accepted in its totality, there was no special reason to impose the death sentence. The High Court considered this plea in the background of what has been stated by this Court in *Machhi Singh* v. *State of Punjab*[1] and *Bachan Singh* v. *State of Punjab*[2]. Reference was also made to the decision in *State of Rajasthan* v. *Kheraj Ram*[3]. The High Court was of the view that the appellant had acted in a most cruel and diabolic manner. He deliberately planned and meticulously executed the same. There was not even any remorse for such gruesome acts. On the contrary, he was satisfied with what he had done. He made a declaration of his act of abusing his wife and children. Accordingly, the death sentence was confirmed.

8. The stand taken by the accused-appellant before the High Court was reiterated in this appeal. Additionally, it was stated that the accused was in a state of drunkenness and did not know the consequences of what he did and, therefore, death sentence should not have been awarded.

9. On the contrary, learned counsel for the State submitted that the cruel and diabolic acts of the accused show that he does not deserve any leniency so far as the sentence is concerned. Drunkenness cannot be an excuse for such cruel and inhuman acts.

10. "*9.* 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*[4], *Eradu* v. *State of Hyderabad*[5], *Earabhadrappa* v. *State of Karnataka*[6], *State of U.P.* v.

1 (1983) 3 SCC 470 : 1983 SCC (Cri) 681
2 (1980) 2 SCC 684 : 1980 SCC (Cri) 580
3 (2003) 8 SCC 224 : 2003 SCC (Cri) 1979
4 (1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063
5 AIR 1956 SC 316 : 1956 Cri LJ 559
6 (1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446

Sukhbasi[7], *Balwinder Singh* v. *State of Punjab*[8] and *Ashok Kumar Chatterjee* v. *State of M.P.*[9]) 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*[10] 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 the offences home beyond any reasonable doubt.

10. We may also make a reference to a decision of this Court in *C. Chenga Reddy* v. *State of A.P.*[11] wherein it has been observed thus: (SCC pp. 206-07, para 21)

'*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.'

11. In *Padala Veera Reddy* v. *State of A.P.*[12] it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

'*10.* (*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 the 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.'

12. In *State of U.P.* v. *Ashok Kumar Srivastava*[13] 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

7 1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224
8 (1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350
9 1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890
10 AIR 1954 SC 621 : 1954 Cri LJ 1645
11 (1996) 10 SCC 193 : 1996 SCC (Cri) 1205
12 1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407 : AIR 1990 SC 79
13 (1992) 2 SCC 86 : 1992 SCC (Cri) 241 : AIR 1992 SC 840

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.

13. 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; *(5)* if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.'

14. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested on 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.*[14] wherein it was observed thus: (AIR pp. 345-46, para 10)

> '*10.* ... 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 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.'

15. A reference may be made to a later decision in *Sharad Birdhichand Sarda* v. *State of Maharashtra*[15]. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by 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: (SCC p. 185, para 153)

> '*153.* (*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. ...

14 AIR 1952 SC 343 : 1953 Cri LJ 129

15 (1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622

(*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.'

* * *

25. The only other thing which needs consideration is whether death sentence as awarded by the trial court is proper.

26. Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for 'special reasons', as provided in Section 354(3). There is another provision in the Code which also uses the significant expression 'special reason'. It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short 'the old Code'). Section 361 which is a new provision in the Code makes it mandatory for the court to record 'special reasons' for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state 'special reasons' if it does not do so. In the context of Section 360, the 'special reasons' contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to

balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

a *27.* It should be borne in mind that before the amendment of Section 367(5) of the old Code by the Criminal Procedure Code (Amendment) Act, 1955 (26 of 1955) which came into force on 1-1-1956, on a conviction for an offence punishable with death, if the court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. After the *b* amendment of Section 367(5) of the old Code by Act 26 of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the court. The court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it *c* imposes in its discretion. Therefore, the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment relates to procedure *d* and now courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment.

28. Section 354(3) of the Code marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1-4-1974, according to which both the alternative sentences of death or *e* imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the reasons for the sentence awarded and in the case of death sentence 'special reasons' are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death *f* sentence. It is in the light of these successive legislative changes in the Code that the judicial decisions prior to the amendment made by Act 26 of 1955 and again by Act 2 of 1974 have to be understood.

29. This Court in *Ediga Anamma* v. *State of A.P.*[16] has observed: (SCC pp. 453-54, para 26)

> '*26.* Let us crystallise the positive indicators against death *g* sentence under Indian law currently. Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary *h*

16 (1974) 4 SCC 443 : 1974 SCC (Cri) 479

features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302, read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanly opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.'

30. In *Bachan Singh case*[2] it has been observed that: (SCC p. 751, para 209)

'*209.* A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.'

31. 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 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 imprisonment for life inadequate and calls for a death sentence? and (*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?

32. Another decision which illuminatingly deals with the question of death sentence is *Machhi Singh case*[1].

33. In *Machhi Singh*[1] and *Bachan Singh*[2] cases the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated.

34. In *Machhi Singh case*[1] it was observed: (SCC pp. 471-72)

'The following questions may be asked and answered as a test to determine the "arest of 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*[2] will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

(*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 the 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 cold-blooded murder for gains of a person vis-à-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-à-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.'

35. 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 civilised 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 courtroom 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.

36. The principle of proportion between crime and punishment is a principle of just deserts 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 deserts, 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.

37. 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 terrific results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

38. 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. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction that is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought then 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."*

11. Section 85 IPC deals with act of a person incapable of judgment by reason of intoxication caused against his will. As the heading of the provision itself shows, intoxication must have been against his will and/or the thing with which he was intoxicated was administered to him without his knowledge. There is no specific plea taken in the present case about intoxicant having administered without the appellant's knowledge. The expression "without his knowledge" simply means an ignorance of the fact that what is being administered to him is or contains or is mixed with an intoxicant.

12. The defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. Basically, three propositions as regards the scope and ambit of Section 85 IPC are as follows:

(*i*) the insanity whether produced by drunkenness or otherwise is a defence to the crime charged;

(*ii*) evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and

(*iii*) the evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily gave to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

13. In the instant case, the plea of drunkenness can never be an excuse for the brutal, diabolic acts of the accused. The trial court and the High Court have rightly treated the case to be one falling in rarest of rare category thereby attracting the death sentence.

14. The brutal acts done by the accused-appellant are diabolic in conception and cruel in execution. The acts were not only brutal but also

* **Ed.**: *State of Rajasthan* v. *Kheraj Ram*, (2003) 8 SCC 224, pp. 233-35 & 239-44, paras 9-15 & 25-38

inhuman with no remorse for the same. Merely because he claims to be drunk at the relevant point of time, that does not in any way get diluted not because of what is provided in Section 85 IPC but because one after another five lives were taken and that too of four young children. This case squarely falls under the rarest of rare category to warrant death sentence.

15. The appeal deserves dismissal which we direct.

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(BEFORE S.B. SINHA AND MARKANDEY KATJU, JJ.)

RANJIT SINGH AND OTHERS .. Appellants;

Versus

STATE OF PUNJAB .. Respondent.

Criminal Appeal No. 142 of 2005†, decided on November 9, 2006

A. **Evidence Act, 1872 — S. 32(1) — Dying declaration — As sole basis of conviction — Permissibility — Held, conviction can be recorded on the basis of dying declaration alone, if the same is wholly reliable (Para 13)**

B. **Evidence Act, 1872 — S. 32(1) — Dying declaration — Basis of conviction — Suspicion regarding correctness — Corroboration — Requirement of — Held, in the event of suspicion as regards correctness or otherwise of the dying declaration, the courts in arriving at the judgment of conviction shall look for some corroborating evidence (Para 13)**

C. **Evidence Act, 1872 — S. 32(1) — Dying declaration — Two dying declarations — Inconsistency between — Effect — Application of caution — In the instant case there was inconsistency in the roles ascribed by the deceased to her brothers-in-law and sisters-in-law in her two dying declarations — However, role ascribed to mother-in-law in lighting the matchstick to set the deceased ablaze was consistent — Held, in such case, rule of caution is to be applied and therefore benefit of doubt should be given to the brother-in-law and sisters-in-law — However, mother-in-law directed to surrender and be taken into custody immediately (Paras 18 to 22)**

D. **Criminal Trial — Search and seizure — When permissible — Necessity of articles sought to be seized be related to matter in issue — Death by burning — Taking of photographs or seizure of alleged pieces of burnt clothes — Necessity of — Evidence of accused that deceased caught fire accidentally — Held, whether the deceased received burn injuries accidentally or otherwise may be a matter in issue but that she received burn injuries was not an issue — Hence, it was not necessary to take photographs or seize the alleged pieces of burnt clothes — Penal Code, 1860 — Ss. 302, 498-A and 304-B — Death by burning — Search and seizure — Evidence Act, 1872 — Ss. 5 and 27 — Search and seizure — When permissible (Para 24)**

Y-M/35336/SR

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† From the Final Judgment and Order dated 2-3-2004 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 282-DB of 2000