

(1994) 04 SC CK 0045

In the Supreme Court Of India

Case No : Criminal Appeal No's. 47-50 of 1994 etc. etc.

Anshad and Others

APPELLANT

Vs

State of Karnataka
Shashi alias Shashidharan Vs State
of Karnataka

RESPONDENT

Date of Decision : 22-04-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 354(3)
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 34, 379, 394, 411

Citation : (1994) 3 JT 324 : (1994) 2 SCALE 653 : (1994) 4 SCC 381 : (1994) 3 SCR 642

Hon'ble Judges : Faizan Uddin, J;A. S. Anand, J

Bench : Division Bench

Advocate : Naresh Kaushik, Shankar Divate and Lalit Kaushik, for the Appellant;
P.S. Poti, Senior Advocate and Malini Poduval, for the Respondent

Final Decision : Partly Allowed

Judgement

A.S. Anand, J.—These are appeals by special leave and since they arise out of the common judgment of the High Court, they are being disposed of together.

2. Raj an (A1), Shashi (A2), Anshad (A3), Raju (A4) and Raghu (A5) were tried by the Second Additional Sessions Judge, Bangalore for offences under Sections 396, 449, 395 and 307 IPC and convicted. They were sentenced to suffer imprisonment for life and to pay a fine of Rs. 250/- each and in default to suffer rigorous imprisonment for three months under each of the charges under Sections 449 IPC, 396 IPC as well as u/s 307 IPC. Separate sentence for offence u/s 395 IPC was not passed by the learned trial court which rendered its judgment on 8th May 1992. The appellants challenged their conviction and sentence in the High Court and the State also filed an appeal seeking enhancement of the sentence of imprisonment. The High Court vide its judgment dated 16th November 1993, dismissed the appeal filed by the appellants but partly allowed the appeal filed by the State in respect of A1, A2 and A3. Their

sentence of life imprisonment was enhanced to that of death sentence. 3. The prosecution case is as follows: A1 who is a painter by profession developed acquaintanceship with the deceased Savitri Devi, a widow aged about sixty years, when he was engaged to paint a name board for a school which the deceased wanted to open. He had later on also painted a scenery in the portion of the house occupied by her son PW 36. Since, the school did not function properly it was closed about six months prior to the date of the occurrence which took place on 21st September 1988. The deceased Savitri Devi requested PW32 to find a tenant for the building in which the school was functioning and indicated the rent she expected as well as the amount of rent to be received in advance. The deceased was living in the second floor of a three storeyed building called 'Savitri Niwas' at Kumara Park, West of Bangalore. There were three tenants living in the basement while the ground floor was vacant and the first floor was occupied by PW36, Gopal son of the deceased. The ground floor which was lying vacant had in fact been allotted in a family arrangement by Savitri Devi to her second son PW 34.

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

5. A1 had been introduced to the deceased by PW32 while A2 and A3 were introduced to PW32 by A1 about one week prior to the occurrence. On coming to know that the school building was intended to be let out, A1 met PW32 in the house of the deceased and introduced A2 and A3 to the deceased as Cardamom Estate owners of Keraia and told her that they were interested in striking a deal regarding renting of the school building.

6. In the locality where deceased Savitri Devi was living, there is a Sindhi Hall in which the deceased had some interest. There is a Shiva Temple in that Hall. PW32 had been employed to carry out some repair work in the Temple. On 20th September 1988, PW 32 approached A1 and asked him whether he would decorate the dome of the Temple with a flower painting. A sketch of the flower to be so painted was prepared by A1, who took the same to the deceased for approval. A1 left the sketch with the deceased who asked him to come the following morning to receive advance money for executing the painting work. It was on the next day i.e. 21.9.1988 that the occurrence took place in which Savitri Devi and Sunil were murdered and injuries were caused to PW2 and PW3 also.

7. To appreciate the prosecution case, it would be useful to extract the relevant portion of the evidence of PW2 Sanjay. He deposed at the trial that he was studying in the IXth standard while his brother PW33 was studying in Vth standard. On the fateful day, he returned from school at about 4 p.m. when his father left for the shop. Sunil deceased, who was his cousin was seen by him around 7.30 p.m. along with A1 coming down from the second floor. On inquiry,

Sunil disclosed that he was going to drop his friend, namely, A1. After a little while A1 alone was seen going up to the second floor. Sanjay went to his room and started studying. Around 7.30 p.m., he received a call from his uncle Gopal Dass asking him to find out whether Sunil had reached the house. He told his father that he had seen Sunil going out to drop a friend and was told to inquire from the grand-mother as to at what time he would return. Sanjay therefore went to the main hall and opening the door called out to his grand-mother but there was no response. He then walked up to the second floor and found the doors open, the lights were on and the T.V. was on with the volume at a high pitch. He called out for his grand-mother but again there was no response. From the front room he entered the passage when all of a sudden A1 pushed him back with his shoulders and when he tried to enter again, A1 gagged his mouth with one hand and caught hold of his neck with the other and dragged him towards the passage. He noticed his grand-mother lying flat on the floor, at the entrance of the bed room and a person standing next to her having a cloth bundle in his hand. He was removing jewellery from the person of his grand-mother and putting it in the bundle. The said person was later on identified as A3. Sanjay PW2 also noticed that A2 was also standing next to his grand-mother near A3. He tried to extricate himself from the clutches of A1 but could not succeed and was dragged by A1 towards the dining hall and his head was banged on the show case. A1 then pushed PW2 into the puja room where he found two more persons standing near the almirah. His effort to escape from the clutches of A1 was futile. A1 pushed him on to a cot and squeezed his neck. He became unconscious. When he regained consciousness he found A1 and the other two persons, later on identified as A4 and A5, were not in the puja room. He came out of the puja room and went to the dining hall, where he found Sunil deceased lying on the ground. He turned him around and discovered that Sunil was not breathing but there was bleeding from his nose. He also noticed some injuries on his neck and that the wrist watch, a gold chain and the platinum ring were missing from the person of Sunil. At the same time, he saw his grand-mother's maid servant Yashoda untying the hands of the other maid servant PW3. He then walked upto his grand mother who also had a bleeding injury and found that she was also not breathing. A2 and A3, whom he had earlier seen standing near his grand-mother, were also not in the room. He noticed the golden neck chain, a diamond ring and golden bangles apart from a gold ring missing from the person of his grand-mother. On entering his grand-mother's room, he found all the cup boards opened and things lying scattered. Nobody was present there. He was shocked and went to the room to make a telephone call to the police but found that the telephone wire had been cut. Leaving Yashoda and the maid PW3, on the second floor, he went down to the first floor to telephone the police from there. He dialed the police control room at telephone No. 100 at about 8.30 p.m. and gave the information that his grand-mother and his cousin had been killed and that their house had been robbed. He then made an attempt to speak to his parents on the telephone but was not successful. Dr. Baliga PW4, the family doctor was called to the house and after examining his grandmother and Sunil, he declared them

both dead.

8. On receipt of the information from the police control room, sub-inspector Lav Kumar PW41 reached the spot. He recorded the statement of Sunil PW2 which formed basis of the FIR Ex.P5 at about 9.45 p.m. PW2 told PW41 that after examining the articles in the house, he would be able to give a list of the missing articles which the assailants may have removed from the house during the robbery. PW41 commenced the investigation and prepared inquest report of the dead bodies beside preparing the site plan etc. During the inquest proceedings PW41 also recorded the statements of PW2 and PW3 among others. PW2 further deposed at the trial that he furnished the list of missing articles Ex.P7 to the Investigating Officer. About two days prior to 21st October 1988, the police had asked PW2 to attend the jail premises with a view to identify the culprits. He went to the jail where about 35 persons of almost the same age, height and built were made to stand. A tehsildar conducted the identification parade. He correctly identified A2 to A5 as the assailants who had been seen by him in the house on the fateful day. A1 was not there. The witness (PW2) was then sent out and the participants in the identification parade were made to change their clothes and stand at different places. PW2 was once again called in and this time again he correctly identified A2 to A5 as the assailants. He also identified the missing articles after the same had been recovered by the police from A1 to A5 during the investigation.

9. The statement of PW2 has been corroborated in all material particulars by Bhagya PW3, the maid servant. She deposed that for a period of about three years she had been working with the deceased Savitri Devi. She knew A1 who used to visit the house of the deceased often and that A2 and A3 had also visited the house of the deceased about 15 days prior to the incident apart from their visit on the date of the occurrence itself. Describing the incident she stated that at about 7 p.m. Sunil had returned home and she alongwith the deceased witnessed the 'chitrahar' on the Television. After the 'chitrahar' was over. A1 along with A2 and A3 came to the house. A1 the three of them sat there talking to deceased Savitri Devi and later on she saw A1 and Sunil going out while A2 and A3 has remained in the house. She served water to A2 and A3 and on her asking Savitri Devi as to what should be cooked for the dinner, Savitri Devi came to the kitchen to give her provisions for cooking the dinner. After giving her the provisions she returned to where A2 and A3 were sitting. While she was mixing wheat flour to prepare chapatis, A3 came to the kitchen and immediately tied her with a cloth and holding her neck by one hand dragged her behind the dining hall. At that time she saw that two other persons enter the puja room, out of whom one had a flat nose and fat lips. Her hands were tied at the back by A3 and she was pushed near the bath room where she fell down. A towel was tied around her neck and pulled as a result of which she became unconscious. That after some time when she regained her consciousness somewhat and came towards the dining hall, she saw Savitri Devi deceased lying on the floor near the door of the room while A3 was removing the jewellery of Savitri Devi from her

person and A2 was standing near him. A1 was standing at the passage near the door of the verandah. Just then PW2 came calling out for his grandmother. A1 immediately held PW2 by his neck and dragged him to the dining hall and then pushed him into the puja room. That after she had regained consciousness, Yashoda PW12, another maid in the house, untied her hands. She also noticed Sunil deceased lying on the floor with bleeding from the nose. At that time none of the accused person was in the house. She went on to add that as she had seen all the accused persons she could identify them. She deposed about the missing articles of Sunil as well as of Savitri Devi deceased from their persons. She also deposed about the arrival of the police and recording of her statement during the investigation of the case. She then deposed about her participation in the identification parade held in the jail where she had, however, identified A2, A3 and A5 only.

10. The prosecution, at the trial examined 42 witnesses. The material witnesses who spoke about the occurrence are PW2 and PW3. Beside the testimony of PW2 and PW3, the prosecution relied upon various other circumstances, namely, medical evidence, recovery of articles belonging to deceased Savitri Devi and deceased Sunil; the identification of the accused persons A2 to A5; the expert evidence of the finger print expert; the testimony of PW25 and PW27 with a view to establish that A4 and A5 had hired a room in a hotel called Kailash Bhavan about the same time as the occurrence; the manner in which A1 came into contact with the deceased Savitri Devi and how PW32 introduced A2 and A3 to him and he introduced them to the deceased by giving a false status of both of them. Evidence of the son of the deceased PW36 was led to support the deposition of PW2. All the stages of investigation were supported by production of panch witnesses etc. Both the courts below have carefully analysed the evidence and extracted it in their judgments and we need not, therefore, reproduce the same. again.

11. Learned counsel for the appellants divided the case into two groups. The first group consists of A1, A2 and A3 while the second group consists of A4 and A5. A1 was arrested on 28th November 1988 while A2 was arrested on 6.10.88 and A3 to A5 on 7.10.88.

12. Mr. Naresh Kaushik, learned counsel arguing for A1, A3, A4 and A5 submitted that the prosecution had failed to establish the case against A4 and A5 beyond any reasonable doubt. He took us through the relevant parts of the evidence and we find some of force in his submissions. It is seen from the evidence that the names of A4 and A5 do not find any mention in the FIR and it was not even mentioned in it that besides A1 to A3 any other person was also the associate of A1 to A3. As a matter of fact in the FIR Ex.P.5 at more than one places, only three persons are alleged to be the assailants in the case. In the inquest report also we find that the statements of PW2 and PW3 were recorded during the inquest proceedings. There again only three persons were mentioned as assailants by both PW2 and PW3. Again, at the identification parades, though

PW2 identified A4 and A5 also besides A2 and A3, PW3 was only able to identify A2, A3 and A5. Both the trial court and the High Court for good and sound reasons rejected the evidence of PW25 and PW27 and found that the prosecution story that A4 and A5 had hired a room in Kailash Bhavan Hotel about the same time when the occurrence took place was not correct. This circumstance was held not established in the case and we are in agreement with that finding. At the trial, however, we find that PW2 as well as PW3 attempted to make definite improvements over their earlier statements when they tried to implicate A4 and A5 also in the crime by putting up a new story that when PW2 was pushed into the puja room when he saw A4 and A5 standing near the almirah or that PW3 had seen two persons enter the puja room when her mouth was being gagged and hands tied by A3. As already noticed PW 2 had not mentioned it in the FIR Ex. P. 5 or in his statement recorded during the inquest proceedings and PW3 had not given this version either in her police statement or in her statement recorded during the inquest proceedings. It appears to us that PW2 and PW3 have made definite improvements in their testimony with a view to implicate A4 and A5 also for reasons best known to them. Moreover, the prosecution has not been able to show any connection whatsoever between A4, A5 with the other accused A1 to A3 by leading any evidence at all. It is also relevant to note here that so far as the finger print expert PW20 is concerned, he did not lift any finger prints of A5 from the place of occurrence. The expert opinion regarding the alleged comparison of the finger prints of A4 allegedly lifted from the place of occurrence and the admitted finger prints of A4 has been successfully challenged and shattered in the cross-examination of the expert and it would not be safe to place any reliance on the expert evidence to connect A4 with the crime or even to hold that A4 was present in the house of the deceased at the time of the occurrence. The only circumstance which the prosecution has been able to prove against A4 and A5 is the recovery of certain articles belonging to the deceased from their possession. Evidence has been led to show that the wrist watch belonging to Sunil was recovered from A4 on a disclosure statement made by him u/s 27 of the Evidence Act while one gold ring belonging to Savitri Devi was recovered from A5 on his disclosure statement recorded u/s 27 of the Evidence Act. The evidence of recoveries is reliable and trustworthy. Both the trial court and the High Court have rightly believed the recovery evidence. Nothing has been brought to our notice to throw any doubt on the same either. Neither the ownership of the articles nor the testimony of the panch witnesses has been doubted. We, consequently, accept that the two recoveries referred to above were made from A4 and A5 and that those articles belonged to the deceased. Thus, the only circumstance which can be said to have been established against A4 and A5 is that they were found in possession of a wrist watch and a gold ring belonging to the deceased Sunil and Savitri Devi respectively. That in our opinion is not sufficient material to hold them guilty of being participants in the crime of murder more particularly since the prosecution has led evidence to show that A1 to A3 had disposed of some of the articles removed from the house of the deceased and got converted some others into different ornaments from the two

goldsmiths produced as witnesses in the case. A4 and A5 can only be held liable for being in possession of stolen property and, thus, guilty of an offence u/s 411 IPC. In our opinion, both the trial court and the High Court failed to properly appreciate the inherent infirmities in the prosecution evidence regarding the complicity of A4 and A5 and fell in error in convicting them also for the offence of murder. Considering the evidence on the record, we set aside their conviction and sentence as recorded by the trial court and the High Court and instead convict them for an offence u/s 411 IPC only. We shall refer to the question of sentence later.

13. We shall now take up the case of A1 to A3. The prosecution case regarding their complicity in the crime has been brought out from the evidence of the prosecution witnesses including the injured witnesses PW2 and PW3. Their testimony with regard to the involvement of A1 to A3 in the crime has remained totally unshackled during the cross examination. The other evidence led by the prosecution including the manner in which A1 falsely introduced A2 and A3 to the deceased and how taking advantage of the confidence he had built up with her, he not only secured his entry "but also the entry of A2 and A3 into her house and gave their false introduction to her has been proved in the case beyond every reasonable doubt. The medical evidence, the evidence of the finger print expert and the evidence of recovery of the property belonging to the deceased directly and positively connects A1, A2 and A3 with the crime.

14. Faced with the over-whelming cogent and reliable prosecution evidence which has been rightly accepted both by the trial court and the High Court, learned counsel for the appellants M/s. P.S.Poti and Naresh Kaushik, submitted that it was not a fit case for the award of the sentence of death. Learned counsel argued that the High Court should not have in the circumstances of the case enhanced the sentence of A1 to A3 from that of life imprisonment as imposed by the trial court to that of death. Learned counsel argued that since the trial court had used its discretion to award the lesser sentence, the High Court without giving any strong "special reasons" could not have enhanced it.

15. We have given our serious considerations to the question of conviction and sentence of A1 to A3.

16. Indeed with the acquittal of A4 and A5, the conviction of A1, A2 and A3 for an offence u/s 396 IPC cannot stand because the number of accused would in that case be less than five. However, the evidence on the record does show that all the three accused A1, A2 and A3 are responsible for the murder of Savitri Devi and Sunil as also for committing robbery and theft of the articles belonging to the deceased in the manner suggested by the prosecution. No challenge to the recovery of the ornaments and other articles was made and rightly so, in the face of the cogent, reliable and positive evidence produced by the prosecution. The appellants A1 to A3 in our opinion can safely be convicted for an offence u/s 302/34 IPC read with Sections 394/34 and 379/34 IPC. We accordingly modify their convictions in the manner noticed above.

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

18. We have perused the reasons given by the High Court for awarding the sentence of death. Apart from referring to some of the "aggravating circumstances" like the betrayal of confidence of the deceased by A1 and murder for committing robbery on a helpless widow, the High Court only referred to some of the judgments of this court and then almost abruptly came to the conclusion that the sentence of death was called for in the instant case. We notice with regret that the High Court did not take into account any of the mitigating circumstances at all. Courts are expected to exhibit sensitiveness in the matter of award of sentence particularly, the sentence of death because life once lost cannot be brought back. This Court has in cases more than one emphasised that for determining the proper sentence in a case like this while the court should take into account the aggravating circumstances it should not overlook or ignore the mitigating circumstances. The manner in which the crime was committed, the weapons used and the brutality or the lack of it are some of the considerations which must be present to the mind of the court. Of course, the High Court has the power and jurisdiction to enhance the sentence of life imprisonment to death but that power has to be sparingly exercised, in "rarest of the rare cases" for 'special reasons' to be recorded. The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) Cr. P.C. Death sentence, being an exception to the general rule, should be awarded in the "rarest of the rare cases" for "special reasons" to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. The number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of "rarest of the rare cases". The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedents of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon case to case.

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

a) that A1 to A3 had gone to the house of the deceased empty handed and did

not even pick up any weapon like knife etc. from the house of the deceased nor used any such weapon while committing the murder of the two deceased;

b) that they did not do away with the lives of PW2 and PW3, the only two eye witnesses and thereby screen the offence completely;

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

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

e) the manner in which the crime was committed and the jewellery removed from the person of the deceased would also show that A1 to A3 took off the jewellery from the person of the deceased by removing the same rather than tore it off from their bodies causing any injuries to the deceased;

20. There are some other minor mitigating circumstances also which were pointed out from the evidence but we need not detain ourselves to refer to all of them. It appears to us that the object of the appellants A1 to A3 was to commit theft/ robbery in the house of the deceased but finding the deceased there and some resistance and being surprised by the entry of Sunil they tried to drag and gag her as well as her grand son, Sunil, when he appeared on the spot and strangled them by the use of towels, which unfortunately proved fatal. From the statement of PW2 it appears that deceased Savitri Devi died after the appellants had left and therefore it is possible to say that the appellants may have attempted only to render her unconscious for decamping with the jewellery and other articles. The reasons given by the High Court to enhance the sentence of life imprisonment to death, without taking into account all circumstances and balancing the aggravating and the mitigating circumstances, in our opinion, are neither 'special reasons' nor otherwise adequate and sufficient to impose the sentence of death on either of the three convicts A1 to A3. In taking this view we are also influenced by the view expressed by a three Judges' Bench of this Court in Dalip Singh and Others Vs. State of Punjab, . The circumstances noticed above, coupled with the fact that the offence u/s 396 IPC has not been made out, dictates that we adopt the safer course and impose the sentence of life imprisonment on A1, A2 and A3 for the offence u/s 302/34 IPC and set aside the sentence of death. We do so accordingly. We also sentence them each to suffer imprisonment for a period of five years for the offence u/s 394/34 IPC and while convicting them for the offence u/s 379/34 IPC, we do not consider it necessary to pass any separate sentence of imprisonment on them. The substantive sentences shall run concurrently.

21. As a result of the above discussion, the appeals of A4 and AS are partly allowed and they are acquitted of the offences charged but convicted for the offence u/s 411 IPC and sentenced to the term of imprisonment already

undergone by them. The conviction of A1, A2 and A3 is altered to the one under Sections 302/34 IPC. 394/34 IPC and 379/34 IPC and they are sentenced in the manner noticed above. To the extent indicated hereinabove their appeals are also partly allowed. A4 and A5 shall be set at liberty forthwith, if not required in any other case. The recovered property shall be handed over to the heirs of the deceased, if not already done.