

(2009) 02 KAR CK 0011

In the Karnataka High Court

Case No : Criminal Reference Case No. 3 of 2006 and Criminal Appeal No. 2408 of 2006

Registrar General, High Court of Karnataka

APPELLANT

Vs

B.A. Umesh

RESPONDENT

Date of Decision : 18-02-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 376, 392

Citation : (2010) 1 ALT(Cri) 402 : (2009) CriLJ 3642 : (2011) 3 RCR(Criminal) 1908

Hon'ble Judges : S.R. Bannurmath, J

Bench : Single Bench

Advocate : C.H. Jadhav, S.P.P, for the Appellant; R.B. Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Bannurmath, J.

(On difference of opinion between V.G. Sabhahit and R.B. Naik, JJ.):

1. This reference and the criminal appeal are placed before me u/s 392 Cr.P.C. It is to be noted that both the learned Judges have found the accused guilty of the offence punishable under Sections 376, 392 and 302 IPC. Though both the Hon"ble Judges held that, the case falls clearly under the category of "Rarest of Rare Cases", there is a difference of opinion between the Hon"ble Mr. Justice V.G. Sabhahit and the Hon"ble Mr. Justice R.B. Naik as to whether the accused should be given capital punishment or not. As such, the present reference u/s 392 Cr.P.C. is before me.

2. In order to appreciate the evidence and the arguments on both the sides, it is necessary to look into the essential facts of the case as put forward by the prosecution.

3. According to the prosecution, the deceased Smt. Jayashri, mother of P.W.2 -

Suresh and sister of P.W.22 - Manjula, was the widow of late Dr. Maradi Subbaiah, who died in the year 1996 due to cancer. After his death, the deceased along with her son - Suresh was staying in a house belonging to one Smt. Lalitha at Dasarahalli, Bangalore as a tenant.

4. During the relevant period that is in the year 1998, Suresh was aged about seven years and was studying in a school. It was an usual practice that the mother would take the child to the school at about 8.30 a.m. and bring him back around 1.00 p.m. everyday. As such, on the fateful day i.e., on 28.2.1998 as usual Jayashri took P.W. 2 to the school and brought him back at about 1.00 p.m. According to the prosecution, after lunch, Jayashri was alone in the house as P.W. 2 went out of the house to play with his friends.

4A. It is alleged that at about 4.30 or so when he returned home, he saw the accused in the hall and who introduced himself as "Venkatesh Uncle" and informed P.W. 2 that his mother was possessed by ghost/devil and, therefore, he has tied her and he is going out to bring a doctor and so saying, the accused left the house with a bag full of articles. After sometime, when P.W. 2 went inside the house, he saw his mother with her hands tied together with one end of a sari and another end was tied to the window bar. It is stated that, P.W. 2 saw blood on the floor and the mother was not responding to his calls and as such, he went to the house of a neighbour - C.W. 7 and narrated what he saw. In turn, it is stated that, C.W. 7 called C.W. 6 - Geetha and P.W. 8 - Lalitha Jaya - the owner of the house. When all of them went to the house of the deceased, peeping, they saw Jayashri lying naked on the ground with hands tied with her saree and without any movement. Then P.W. 8 is stated to have called P.W. 7 - Bylappa, a police constable living in the same locality, who on coming to the spot, observed Jayashri dead and as such, he called over phone P.W. 29 - Nyama Gowda, Police Inspector of the jurisdictional police. On arrival of P.W. 29 along with P.W. 6 - a police constable, they also noted Jayashri dead with hands tied and there was blood on the floor. Suspecting foul play, he immediately took up the investigation and called the dog squad, fingerprint expert and photographer. After taking the photographs of the dead body, scene of offence and noting the almirahs in the house open and articles nearby lying scattered, fingerprint expert lifts all the chance prints, the Investigating Officer prepares the report as per Ex. P. 7 and sends the same to the police station. On receipt of this first information, a case in Crime No. 108/1998 is registered against an unknown person/s and the investigation is taken up.

5. During the investigation, the usual procedures like conducting inquest proceedings, spot mahazars, etc., are undertaken in the presence of independent mahazar witnesses. After taking the photographs of the scene of offence, the dead body is sent for autopsy. Statements of witnesses are recorded. Search for (unknown) accused is set up.

6. In the meanwhile, on 2.3.1998 at about 2.30 p.m., P.W. 18 - Siddagangaiah, A.S.I. of Peenya Police Station, on receipt of an information from the control

room that, the public had apprehended a thief at S.M. Road near Officers' Model Colony, goes to the place along with the staff and on enquiry, learns that people have apprehended a person, who had attempted to commit robbery in the house of one Smt. Siba and in the process had also caused bleeding injuries to her and hearing cries, the people in neighbourhood have caught him. On enquiry with the said person, it is learnt that the name of the person is Umesh Reddy s/o Ajappa Reddy, resident of Chitradurga District. He is brought to the police station and produced before the Sub-Inspector of Police (S.H.O.). He is interrogated and during the interrogation, it is stated that, the accused reveals that, he is a habitual criminal who has committed many crimes at various places including the present case (rape, murder and robbery of Jayashri). He volunteers to show the articles robbed by him from various places including the house of the deceased Jayashri, kept in his house. He takes the police and the mahazar witnesses to a house in Janatha Colony at Madwar village, which he had taken on lease from P.W. 17 -Jayamma. Inside the house, he shows 191 different articles said to have been robbed by him from many places in Bangalore, Chitradurga, Belgaum and also while he was at Baroda in Gujarat State. These include 23 articles from the house of deceased-Jayashri. All these articles are seized under a mahazar Ex. P. 11. After returning back to the police station, P.W. 29 obtains finger prints of the accused under Ex. P. 15 and sends the same to the expert for comparison with the chance fingerprints obtained from the scene of offence. He also sends the clothes of the accused and the deceased to the FSL. After recording the statements of various witnesses, the accused is subjected to test identification parade (hereafter referred to as "the TIP"), which is conducted by the Taluka Executive Magistrate - P.W. 24. On receipt of all the necessary reports and on completion of the investigation, charge-sheet is filed against the accused for the offences punishable under Sections 376, 392 and 302, IPC.

7. After committal and on the basis of the charge-sheet material, the learned Sessions Judge frames charges against the accused for the offences punishable under Sections 376, 392 and 302, IPC. As the accused denied the charges and claims to be tried, he is tried in Session Case No. 725/1999.

8. In order to establish the guilt of the accused, the prosecution has relied upon the evidence of 29 witnesses and got marked Exs. P.I to. P.47 and Material Objects 1 to 32. Total denial appears to be the defence version to the incriminating circumstances and evidence adduced by the prosecution as is clear from the answers given by the accused when questioned u/s 313, Cr.P.C.

9. As already noted, on appreciation of the evidence and arguments addressed by both the sides, the trial Court by the judgment of conviction, dated 26th October 2006, found the accused guilty for all the offences charged and after hearing the accused regarding sentence, holding that this is one of the "Rarest of Rare Cases" awarded death punishment to the accused for the offence punishable u/s 302, IPC, rigorous imprisonment for 10 years and fine for the offence punishable u/s 392, IPC, and rigorous imprisonment for 7 years with fine

for the offence punishable u/s 376, IPC.

10. As against this judgment of conviction and sentence, the present appeal is filed. As noted earlier, the Division Bench which heard the matter at length, unanimously held the accused guilty on all counts and affirmed the judgment of conviction. However, there was a difference of opinion as to the confirmation of death sentence for the offence punishable u/s 302, IPC. The Hon''ble Mr. Justice V.G. Sabhahit was of the view that, the crime committed by the accused clearly falls under the category of "Rarest of Rare Cases" and hence, the death punishment is justified, the Hon''ble Mr. Justice R.B. Naik though agreed that, the case falls under the category of "Rarest of Rare Cases", felt that death punishment is not the only solution, as rigorous imprisonment for the full term of life of the criminal would meet the ends of justice.

11. Since there is a difference of opinion regarding sentence, the appeal has been referred to me, u/s 392, Cr.P.C.

12. At the outset it is to be noted that, even though both the learned Judges have considered in detail the evidence against the accused and have concurrently held against him, in the light of the decision of the Apex Court in the case of Sajjan Singh Vs. State of Madhya Pradesh, wherein it is laid down that "where the case is laid before the third Judge u/s 392, Criminal Procedure Code, it is the third Judge whose opinion matters and it is against that judgment that follows therefrom that an appeal lies to the Supreme Court. The third Judge is, therefore, required to examine the whole of the case independently and it cannot be said that he is bound by that part of the judgment of the two Judges comprising the Division Bench where there is no difference. As a matter of fact the third Judge is not bound by any such opinion of the division Bench. He is not hearing the matter as if he was sitting in a three-Judge Bench where the opinion of the majority would prevail. Hence, the third Judge may also be required to consider the matter afresh and come to independent conclusion."

13. As already noted even though both the Hon''ble Judges have concurrently held that the prosecution has proved the guilt of the accused beyond reasonable doubt, I have also looked into the entire evidence and also the arguments addressed by both the sides on merits.

14. From the evidence led by the prosecution, it is clear that there is no eye-witness account and as such, the entire case of the prosecution, revolves around the evidence of circumstantial nature.

15. According to the prosecution, the following circumstances are material and important to reconstruct the crime scene step by step and also role of the accused with the crime in question:

a) the deceased Jayashri was living with her son - P.W. 2;

b) On 28.2.1998, after bringing back P.W.2 from the school at about 1.00 p.m., both had their lunch and P.W. 2 went out of the house to play with his friends

and at that time, deceased Jayashri was alone in the house and he returned back around 4.30 p.m.;

c) When P.W. 2 returned home, he saw the accused in the hall of the house, who introduced himself as "Venkatesh uncle" and also told him that, his mother (Jayashri) is possessed by ghost/devil and as such, he had tied her hands and is going to fetch a doctor and so saying, left the house with a bag filled with articles;

d) After the accused left the house, when P.W. 2 entered the bedroom, he saw hands of his mother tied with one end of a saree and the other tied to the window and she was lying on the ground without speaking movements with blood on the floor and articles in the house lying scattered;

e) On his call and arrival of neighbours, they find Jayashri is dead, they call the police and investigation is set in motion;

f) P.Ws. 10 and 11 - the neighbours of the deceased, saw the accused going out of house carrying a bag;

g) On 2.3.1998, the accused is apprehended by public at S.M. Road while he had attempted to commit robbery in the house of Smt. Siba in the vicinity and also assaulted her and he is handed over to the police;

h) On enquiry, the police learnt the name of the accused as Umesh Reddy;

i) On interrogation, the accused gave a voluntary statement leading to the discovery and seizure of articles including large number of robbed articles including costly silk sarees, ornaments, V.C.R., belonging to the deceased Jayashri from his house pointed out to the police and recovery of the articles and identified by son and sister of the deceased as belonging to her;

j) After the arrest, the fingerprints of the accused are taken and they match with the chance fingerprints lifted in the house of the deceased;

k) Extra-judicial confession before the doctor,

l) Medical evidence; and

m) Total denial/silence of the accused.

Keeping the entire evidence and these circumstances, I have considered the arguments also.

16. At the outset, it is to be noted that, so far as death of Jayashri being homicidal in nature, there is no much dispute even from the accused side. Even otherwise, the inquest proceedings, the independent mahazar witnesses, statements of the neighbours and more importantly the autopsy report of the doctor - P.W. 26 - Dr. M. Somashekhar and his autopsy report -Ex.P.31, all make it very clear that in the evening of 28.2.1998, Jayashri, who was seen alive by her son around 2.30 p.m., was found dead with her hands tied with a saree, she

was lying naked with some injuries on her person. According to the report and the evidence of the doctor, the death was due to asphyxia as a result of smothering and there was evidence of violent sexual intercourse and attempted strangulation. The doctor has also noticed abrasions over the lips, chest and especially on breasts, forearms and more importantly laceration of the vagina, presence of blood and semen like material in the vagina clearly indicating forcible sexual intercourse and murder., Except hypothetical questions as to the cause of death, rigor mortis, time of death, etc., nothing damaging has been elicited from the doctor to show that, Jayashri did not meet with homicidal death. As such, in my view the prosecution has established that in the evening of 28th February, 1998, Jayashri was sexually assaulted and met with homicidal death. There is also no much dispute that at the scene of offence, there are clear signs of ransacking the cupboards, almirah, etc., indicating somebody had searched them and from the presence of empty jewel boxes, there is a possibility of a robbery or theft also.

17. But the moot question before us is, whether the prosecution has proved beyond reasonable doubt that it is the accused and accused alone, who not only committed sexual assault on the deceased but also committed her murder and thereafter committed a robbery of valuables in the house.

18. The main witness for the prosecution is P.W. 2-Suresh-son of the deceased Jayashri, who is alleged to have seen the accused inside the house and who gave his name as Venkatesh uncle and went out of the house with a bag full of articles. It is to be noted that P.W. 2 is almost 14 years of age when he gave evidence in the Court and as such, must be around eight or nine years when the incident took place. No doubt he is a child witness. The learned defence Counsel pointing out certain discrepancies from his evidence as well as the evidence of the other witnesses and tried to contend that, he is a tutored child witness and hence, unreliable one. It is also contended that, the fact that the person present in the house gave his name as Venkatesh uncle is also an after-thought as the same is not found corroborated by the other witnesses.

19. On perusal of the entire evidence of this witness, keeping in mind the well settled principles regarding appreciation of evidence of child witnesses and reliability, I find that the evidence of this witness is natural and untainted" one. His presence at the spot cannot be said to be an unnatural by any stretch of imagination. The significance of the words "Venkatesh uncle" said to have been given by the person inside the house! and the said person is none else than the accused, has been clearly established by the prosecution. No doubt the partial hostile witnesses - P.Ws. 3 and 8 -- the neighbours, who arrive at the spot denied the same and as such, they have been treated as a hostile witnesses. But apart from them, there are other witnesses, who have corroborated this aspect. It is also to be noted that, this name "Venkatesh" given by the accused is not for the first time to this witness but also earlier on when he had taken a house of P.W. 17-Jayamma and her son - Ravi -P.W. 5 on rent. The accused has also given

this name as Venkatesh to P.W.4, who secured the house for him. Though the name of the accused is Umesh Reddy, it is clear that to hide his identity and name, he has been using the name "Venkatesh" often. On careful scrutiny of the entire evidence of P.W. 2 and corroboration received from the other witnesses in this regard, I find that his evidence is untutored and a reliable one. It is also to be noted incidentally that, he has also identified the accused in the TIP conducted after the arrest of the accused. The acceptance of evidence of this witness by the trial Court, in my view, is just and proper and cannot be found fault with.

20. The next circumstance to connect the crime with the accused is finding the accused near the house of deceased Jayashri around 4.30 p.m. Apart from the evidence of P.W. 2 -the son of the deceased, we have also the evidence of two independent witnesses in the form of P.Ws. 10 and 11.

21. P.W. 10 has his house opposite to the house of the deceased hardly 30 feet away. According to him, when he was standing outside his house at about 4.30 p.m. or so, he saw one person coming out of the house of the deceased Jayashri with a bag in his hand and proceeded towards pipeline road. Later he has identified the accused as the very person in the TIP held by the investigating agency as well as before the Court. Similar is the evidence of the other neighbour - P.W. 11. In spite of searching but futile lengthy cross-examination by way of negative suggestions, nothing fruitful or helpful to the accused has been brought out in their cross-examination to either discredit them or to hold that they are false or created witnesses. In my view, they are totally independent and natural witnesses, whose presence in front of their respective houses which are near the house of the deceased in the evening hours, cannot be unnatural and in fact has not been demolished by the defence. In addition, further corroborative material though not substantial is the indication of the police dog and evidence of its handler regarding the dog indicating that the culprit went towards pipeline road, which is the same direction which P.Ws. 10 and 11 have seen him going.

22. P.W. 24 is the Taluka Executive Magistrate, who has conducted the TIP on 30.3.1998. In this parade, P.Ws. 2, 10 and 11 have clearly identified the accused as the person seen in the house and going out of the house with a bag. The TIP reports are at Exs.P.29 and 30. Again there is no much effective damaging answers elicited from this witness in the cross-examination as to the correctness or otherwise of the TIP. the procedure followed, etc. The only material suggestion pointed out by the learned Counsel is regarding the delay in holding the TIP and wider coverage given to the case by the television and newspapers especially by publishing the photograph of the accused thereby affecting the credibility of the TIP.

23. On detailed consideration of the evidence of this witness especially cross-examination, I am satisfied, that there is no substantive material to discredit the evidence of this witness. Even otherwise, as now laid down by the Apex Court, TIP by itself is not a substantive evidence and it is only an aid to see for the

police as to whether the investigation is proceeding in the right direction or not. Hence, basically I find the evidence of this witness as to the witnesses - P.Ws. 2, 10 and 11 identifying the accused is acceptable and even otherwise its absence will not damage the credibility of evidence of these witnesses. Even otherwise these witnesses have positively identified the accused during the trial, when they were in the witness box in the Court. As held by the Hon'ble Supreme Court in the case of Daya Singh Vs. State of Haryana, it is not the identification in the TIP but the identification in the Court is substantive evidence. As such, looking at the evidence from any angle, I agree with the trial Court finding as to the establishing identity of the accused at the scene of offence and just prior to the detection of the crime.

24. The next connecting link of the accused with the crime in question is the recovery and seizure of valuable articles belonging to the deceased Jayashri, found in the house of the accused.

25. In this regard, it is to be noted that the accused was not directly apprehended by the Investigating Officer in the present case. At the initial stage, the Investigating Officer was not aware of the involvement of the present accused in the crime in question. However, on 2.8.1998 this accused was apprehended by public at another place while he had attempted to commit robbery and had also injured one person and the alert member of the public had apprehended him and handed over him to the police. P.W. 18 - Siddagangaiah and P.W. 20 Laxminarasappa speak about this aspect.

26. During the relevant time, P.W. 20 was working as the police constable on bandobast (maintaining law and order) duty and was in the Hoysala police-patrol jeep at about 2.20 p.m. According to him, he received a call from the police control room that, the public have detained one thief at Officers' Model Colony and the jeep should proceed to the place. As such, he goes to the place in the jeep and finds that, on the road near bus stop, public had gathered and he saw a person was sitting with his hands tied by the public. On enquiry, he learns that, the said person had not only attempted to rob one Smt. Siba but also injured her and he disclosed his name as Umesh, son of Ajjappa Reddy, resident of Madakari Nayakana Kote in Hiriyur Taluk, Chitradurga District. He further states that by then, P.W. 18 the A.S.I. of jurisdictional Peenya Police Station also arrived and all of them, bring the said person-accused to the police station and produced him before P.W. 29 - the P.S.I., and S.H.O., of the police station. On enquiry by the said officer, the accused not only revealed his identify as Umesh Reddy once again but also admitted his role in other crimes including the open now in question. It is to be noted that, no doubt this admission by itself cannot be considered as material evidence against the accused, however, the voluntary statement made by the accused as per Ex,P.41 and the admissible portion thereof has led the Investigating Officer to recover as many as 191 articles from the house of the accused, which he himself has pointed out to the police and the mahazar witnesses. The Investigating Officer - P.W. 29 and the unimpeached

evidence of mahazar witness - P.W. 12 corroborate the same. Further P.W. 5 the owner of the house leased to the accused and P.W.4, who had negotiated, corroborate this aspect. It is to be noted that, 191 items recovered as seen from the mahazar Ex. P. 11 all are valuable articles like large number of gold ladies ornaments, dozens of costly silk sarees, three or four imported cameras, V.C.Rs., silver plates, few ladies watches, currency notes worth nearly more than Rs. 1 lakh etc. Out of these articles, the articles of daily use like V.C.R., table clock, camera, ladies watch and some of the ornaments like gold ring and gold bangles have been identified by P.W. 2 - Suresh - son of the deceased as belonging to his mother deceased-Jayashri. It is worthwhile to note here itself that the accused has not claimed ownership of these valuable articles including large number of cash or explained the presence in his house and taking into consideration the undisputed fact that, the accused is habitual offender against whom as many as 21 criminal cases for various offences including theft, dacoity, rape have been registered during the year 1996 to 2002 not only in various police stations at Bangalore but also at Bellary, Chitradurga, Belgaum and three cases of dacoity at Baroda in Gujarat State. Out of these, admittedly some cases are pending trial and in 10 cases, he has been convicted for various sentences. As such, in my view, by considering the entire material evidence, the prosecution has successfully proved that the accused had committed a robbery/theft of the valuable articles recovered from his house and some of them are belonging to the deceased-Jayashri.

27. The next circumstance against the accused put forward by the prosecution is the admitted fingerprints of the accused matching with the chance prints lifted from the scene of offence. In this regard, the evidence of fingerprint expert P.W. 13 and P.W. 25 clearly proves that, the chance prints taken from the handle of the almirah and . wall clock from the house of the deceased Jayashri match with the admitted fingerprints of the accused taken after his arrest. Nothing worthwhile has been elicited from the cross-examination by the defence to doubt the scientific evaluation of the procedure followed. As such, this evidence clearly puts last nail in the coffin of the guilt of the accused.

28. Apart from these major circumstances, the material like nail scratch marks on the person of the accused as noted by the doctor during his examination and the medical examination of the dead body of Jayashri indicate possibility of the deceased causing them while defending herself, the nail clippings of the accused containing blood particles also support and establish the prosecution case against the accused. For such voluminous and glaring positive material, the accused's explanation is only a denial. Even he has not explained when questioned u/s 313, Cr.P.C. the circumstances like presence of injuries on his person, recovery of unusually large number of costly items like sarees, imported cameras, ladies wrist watches, ladies gold ornaments and huge sum of money. Neither he has explained about presence of these articles nor claimed them as belonging to him. This total denial on the face of positive, though circumstantial evidence entitles this Court to draw adverse inference against him. Moreover, this being the case

of robbery, rape and murder, the presumption available u/s 114 of the Indian Evidence Act can be safely drawn against the accused.

29. On re-assessment and the appreciation of the material on record, even by the Division Bench which has upheld the guilt of the accused beyond reasonable doubt and even on my independent re-assessment, it can be safely held that the prosecution has proved all the circumstances against the accused conclusively and the said circumstances are consistent only with the hypothesis of the guilt of the accused. The circumstances exclude every possible hypothesis except the one to be proved and unerringly point out the guilt of the accused that, it was the guilt of the accused, who subjected Jayashri to violent sexual intercourse, despite her resistance killed and thereafter committed a robbery of articles M.Os. 1 to 22 from the house. As such, I have no hesitation to hold that, the appreciation of evidence by the trial Court and the conclusion of guilt of the accused for the offences punishable under Sections 376, 392 and 302, IPC, is just and proper and needs no interference.

30. In the result, Criminal Appeal No. 2408/2006 deserves to be rejected. The same is dismissed as devoid of merit. The judgment of conviction dated 26.10.2006 in S.C. No. 725/1999 passed by the learned Sessions Judge, Bangalore stands confirmed.

31. This takes me to the main and important question as to the sentence awarded by the trial Court. In my view, so far as the sentences for the offences punishable under Sections 376 and 392, IPC, are concerned, they deserve to be sustained.

32. So far as the death punishment for the offence punishable u/s 302, IPC is concerned, as already noted there being a difference of opinion between the two members of the Division Bench as to whether the accused deserves to be sentenced to death punishment or life imprisonment and in view of the reference, I have considered the same in detail separately.

33. Relying upon the number of pronouncements of the Hon^{ble} Supreme Court in number of cases including the latest in the case of Swami Shradhananda, it is contended by the defence that, though the murder is most foul, still it does not fall within the category of "Rarest of Rare Cases" and even otherwise as the guidelines laid down by the Apex Court in various pronouncements, life imprisonment is the rule and capital punishment is the exception and as such, it is submitted that the accused be sentenced to imprisonment for life. Whereas, on behalf of the State, it is vehemently contended that, as the accused is habitual offender and in spite of sentences imposed against him in various cases earlier, it has no deterrent effect on him and as such, he is liable to be awarded with death punishment.

34. In order to appreciate the contentions of both sides, it is necessary for this Court to once again consider the philosophy behind the principles of awarding capital punishment and the well settled principles by the Apex Court in this

regard.

35. It may be pertinent to mention here that, Indian Criminal Jurisprudence is based on a combination of deterrent and reformatory theories of punishment.

36. The provision of death sentence for convicts of murder and similar heinous crimes is on the statute book, since the enactment of the Indian Penal Code in 1860. But the circumstances and considerations for awarding it, have changed by the amendments of procedural law. Initially, death punishment was the rule and life imprisonment was an exception, but the position has reversed now.

37. The constitutional validity of the death punishment was considered by the Hon'ble Supreme Court in the case of *Jagmohan Singh Vs. The State of U.P.*, . Apart from the constitutional validity, the Apex Court also considered and discussed position in other countries, the structure of Indian Criminal Law, various policies and bills proposed in the Parliament, the extent of judicial discretion, etc. In this regard, the main issues discussed were:

- a) Whether death sentence serves any penological purpose?
- b) Views of famous jurists and sociologists from all over the world, various foreign cases and position in other countries;
- c) Circumstances which can aggravate or mitigate death punishment;
- d) Cases in which the death sentence should be inflicted; and
- e) The extent of judicial discretion and need of guidelines.

38. On the question of constitutional validity, the Apex Court observed thus:

The Constitution-makers had recognised the death sentence as the permissible punishment and had made constitutional provisions for an appeal, reprieve and the like. But more important than these provisions in the Constitution is Article 21 which provides that no person shall be deprived of his life except according to the procedure established by law. The implication is very clear. Deprivation of life is constitutionally permissible if that is then according to the procedure established by law. In the face of these indications of constitutional postulates, it will be very difficult to hold that capital sentence was regarded per se unreasonable or not in the public interest. The subject of capital punishment is a difficult and controversial subject, long and hotly debated. It has evoked strong views. In that state of affairs, if the Legislature decides to retain capital punishment for murder, it will be difficult for the Supreme Court in the absence of material regarding its unreasonableness to question the wisdom and propriety of the legislature in retaining it.

39. Thus, though the Apex Court settled this controversy long back in 1973, even thereafter this question came up again and again before the Apex Court

40. After the amendment of Criminal Procedure Code in 1973 u/s 354(3) it was specifically mandated that special reasons are to be recorded by the Court for

imposing death punishment in capital offences.

41. The next important case and which can be termed as a milestone in the Indian Criminal Jurisprudence is the case of Bachan Singh Vs. State of Punjab, . So strong were the principle laid down by the Apex Court in that case, the principles are being followed even now.

42. On the question of reasonableness of death punishment, the Apex Court observed "If notwithstanding the view of the abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislature, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of the society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973, it took up revision of the Code of 1898 and replaced by it by the Code of Criminal Procedure, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. Therefore, it could be concluded that the impugned provision in Section 302, violates neither the letter or the ethos of Articles 19 and 21." "

43. At this stage, it is also relevant to note the observations of the Law Commission in its 35th report "Experience of other countries could not be conclusive for India. Need for a deterrent control provided by capital punishment is greater in various classes of society. There is a greater danger in India of increase in violent crimes if capital punishment is abandoned, particularly in respect of professional criminals."

44. While considering as to laying down standards or norms restricting the area of imposition of death penalty to a narrow category of murders, the Apex Court in the Bachan Singh's case, following the observations from a American decision in the case of Mc Gautha v. California (1971) 402 US 183, "the infinite variety of cases and facets to each case would make general standards either meaningless "boiler plate" or a statement of the obvious that no jury/judge would need." The Apex Court observed that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the

anticipatory capacity of the human calculus. Standardisation of the sentence process tends to sacrifice justice at the altar of blind uniformity.

45. In the end, the court following the decision in Jagmohan's case held that the sentencing process exactly as it came from the legislative, flexible and responsive to its case on its merits, subject to the discretion of the court and in case of any error in exercise of discretion subject further to correction by the Superior Court. The Apex Court observed that "In Jagmohan's case, this Court had held that the sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all aggravating and mitigating circumstances of the crime."

46. In conclusion, the Constitution Bench in Bachan Singh's case observed that "It is therefore imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with ever more scrupulous care and humane concern, directed along the high road of legislative policy outlined in Section 354(3) viz., that for persons convicted of murder, life imprisonment is the rule and the death, sentence is an exception. 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."

47. The principle "Rarest of rare case" came up for consideration in the case of Machhi Singh and Others Vs. State of Punjab, the Hon'ble Supreme Court observed that "The reasons why the Community as a whole does not endorse the humanistic approach reflected in "death sentence-in-rare-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience 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. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the antisocial or

abhorrent nature of the crime, such as for instance.

1. Manner of commission of murder.

48. 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. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house, (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death, (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

2. Motive for commission for murder

49. When the murder is committed for a motive which evinces total depravity and meanness? For instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold-blooded murder is committed with deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

3. Antisocial or socially abhorrent nature of the crime.

a) When murder of a member of Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance, when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands are benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

4. Magnitude of the crime

50. 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 larger number of persons of a particular caste, community or locality are committed.

5. Personality of the victim of murder

51. When the victim of a murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless women or a person rendered helpless by old age or infirmity, (c) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

52. While referring to Bachan Singh's Case and the guidelines indicated in the said decision, in Machhi Singh's case, the Apex Court observed the guidelines:

(i) The extreme penalty of death need not be inflicted except in gravest case of extreme culpability;

(ii) Before opting for 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. In other words, 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 mitigating circumstances before the option is exercised.

(ii) The Hon"ble Supreme Court further observed that in order to apply these above guidelines, the Court may ask question as to whether there is something uncommon about the crime which renders the sentence of, (a) 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 the sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? It further observed that if overall view of all the circumstances in the light of aforesaid proposition and taking into account the answer to the questions proposed herein- above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

53. In the case of *Lenha v. State of Haryana* 2002 SCC (Criminal) 526, a Bench of three Hon"ble Judges again reiterated all these principles and held that "in rarest of rare cases when the 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, that 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-a-vis whom the murdered is in a dominating position or in a position of trust; or murder is committed in the course of 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 case 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 the family or a large number of persons of a particular caste, community or locality, are committed.

5) When the victim of a murder is an innocent child, or a helpless women or old or infirm person vis-a-vis whom the murderer is in a dominating position on a public figure generally loved and respected by the community.

54. The Apex Court in the said decision further observed as follows:

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 civil society and it is no longer the physical opinion of the majority that takes away the liberty of citizens by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at the 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, accusation are brought against the accused,, the prosecution is given an opportunity of meeting the accusation 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.

55. 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.

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. 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 result 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.

56. In the case of Dhananjay Chatterjee alias Dhana Vs. State of W.B., the Apex Court observed thus: "shockingly large number of criminals even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility.... The imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must act not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering the imposition of appropriate punishment."

57. In *Sevaka Perumal, etc. Vs. State of Tamil Nadu*, it is observed thus: "Law as a corner-stone of the edifice of order should meet the challenges confronting the society in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation of sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration."

58. The learned State Public Prosecutor has also taken us through the pronouncement of this Court in the case of *Registrar, High Court of Karnataka v. Shivu* reported in AIR (2006) Kant 368, affirming death sentence for the accused for the offences of rape and murder, which is confirmed by the Hon'ble Supreme Court in *Shivu and Anr. v. Registrar General, High Court of Karnataka and Anr.* reported in (2007) 2 SCC (Cri) 686 : 2007 AIR SCW 1808.

59. In all these decisions referred to above, the basic questions considered by the courts are:

a) Is there something uncommon about the time which render sentence of imprisonment for life in a play and calls for a death sentence?

b) Are the circumstances of the crime such that there is no alternative but to impose their punishment is even after recording maximum leverage to the mitigating circumstances which speak in favour of the offender?

60. As against these decisions of the Hon'ble Supreme Court, the learned Counsel for the defence placing reliance on the latest pronouncement of the Apex Court in the case of *Swami Shraddhananda alias Murali Manohar Mishra v. State of Karnataka* reported in 2008 (6) AIR Kar R 21, contended that all these decisions referred to above have been once again considered by the Apex Court and has for all practical purposes held that the basic decisions of the Apex Court in *Machhi Singh's* case which in turn is based on the decision in *Bachan Singh's* case is no more a good law. It is submitted that in view of this latest decision of the Apex Court only life imprisonment can be awarded and not death punishment.

61. I have gone through this decision at length and at the outset note that the contention of the defence is not correct. No doubt, it is true that the three-Judge Bench of the Apex Court in this case of Swami Shraddhananda was considering whether the death punishment imposed on the accused Swami Shraddhananda by the trial Court and the High Court is sustainable, in view of the difference of opinion between two Hon'ble members of the Bench. It is also true the Apex Court in this case has considered at length the earliest pronouncements including the pronouncement of the Constitution Bench in Jagmohan Singh's case followed by the other pronouncements i.e. Bachan Singh's case, Machhi Singh's case and affirmed the Constitutionality of death sentence but also observed that the guidelines issued in Bachan Singh's case and Machhi Singh's case though provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. The Apex Court expressing its anguish as to the present day deficiency in the Criminal Justice System, inability to definitely say as to what is or is not a rarest of rare case category, proceeded to consider the facts and circumstance in Swami Shradhananda's case and altered the death punishment to life imprisonment for the full life of the accused.

62. It is to be noted that the Hon'ble Supreme Court has though affirmed the Constitutional validity of imposing death sentence, and also the principles laid down in Bachan Singh's case and Machhi Singh's case in the facts and circumstances of the case of Swami Shraddhananda reduced the death punishment to imprisonment for life in letter and spirit.

63. As such, as observed by the Apex Court itself, facts and circumstances in each case are required to be considered on its own merit to hold whether the accused before the court deserves death punishment or not,

64. In this regard, though it is categorically held that the guidelines laid down in Bachan Singh's case and Machhi Singh's case provide very useful guidelines but they are not to be taken as inflexible, absolute or immutable.

65. Keeping in mind all these decisions and principles laid down by the Apex Court, I have considered the facts and circumstances of the present case.

66. In the present case, the accused has taken advantage of the helplessness of the deacease-Jayashri being alone in the house and in order to satisfy his lust, torn her clothes and indulged in violent sexual intercourse, as apparent from the medical evidence especially the injuries on the private parts after tying her hands with the sari she was wearing and other end to the window bar. In spite of her resistance, the accused has not stopped but has further brutally committed her murder. Thereafter, he has robbed her of her valuables including costly saris, ornaments, VCR etc.

67. It is also to be noted that this is not the first offence committed by the accused-Umesh Reddy. It is not in dispute that there are in all 21 cases registered against him for various heinous offences punishable under Sections 394, 392, 376, 379, IPC. Out of these, he has been though acquitted in 11 cases

for want of sufficient evidence, nevertheless stands convicted in nine cases. It is also to be noted that in some of the cases, he has escaped from lawful custody and as such, in five cases registered separately u/s 224, IPC, and in many, he has been found guilty and convicted. It is also to be noted that, he was apprehended by the public while he was committing robbery and had caused injuries to one Smt. Siba and during the interrogation his role in the present crime has come to light.

68. In my view, by looking at this balance sheet of the accused, there is hardly any scope for finding any mitigating circumstances in his favour. The antecedent of the accused and his conduct would clearly point out that, he is a habitual criminal and in spite of sentences of imprisonment imposed on him in several cases, the same have no deterrent effect on him.

69. In my view, as noted by the Apex Court itself in various pronouncements and the observations of various jurists including that of Sir James Fieziames Stephen, the great Jurist, who was concerned with drafting of IPC, "No other punishment that a man so effectually from committing crime as the punishment of death. This is one of those propositions which are difficult to grow simply because they are in themselves more obvious than any proof can make them."

70. In the words of another Jurist R. Venkatesan Iyengar "Death penalty is like a "just" war. For example, there is nothing wrong in finding a terrorist or a serial murderer to death. By putting an end to the life of a terrorist or a serial murderer you eliminate the threat to the lives of many people. Also there is nothing wrong in sentencing a murderer who has committed a barbaric and unspeakable crime. Death penalty to such criminal is not only just by it also serves to satisfy the collective conscience of the society that justice has seemingly been done not only to the victims but also to the entire society."

71. Lord Denning appearing before the Royal Commission on "capital punishment" expressed his following views:

Punishment is the way in which society expresses its denunciation of wrongdoing and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should reflect revulsion felt by the great majority of the citizens. For them it is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because the wrong-doer deserves it, irrespective of whether it is deterrent or not.

72. As noted by another Jurist and Chairman of the Committee on Reforms of Criminal Justice System, the Hon^{ble} Dr. Justice V.S. Malimath in his Report "In fixing a sentence many factors are relevant e.g., the nature of offence, the mode of commission of the offence, the utter brutality of the same, depravity of the mind of the accused."

73. After giving my anxious considerations keeping in mind the views of great

Jurists, the various pronouncements of the Constitutional Benches of the Hon'ble Supreme Court, I find that there are absolutely no mitigating circumstances in favour of the accused. No doubt it is pleaded on his behalf that, the life sentence for a full term of his life as done in the case of Swami Shradhananda to meet justice be awarded, but I am unable to accept this proposition. In Swamy Shradhananda's case, there were certain mitigating circumstances in favour of the accused like first time offender, accused being fairly aged person, etc. But as the facts disclose, in this case, here is a ex-policeman, who had become habitual pervert and violent offender, who not only commits robbery but also to satisfy his lust, attacks helpless women and commits a rape and in the present case, has also murdered Smt. Jayashri brutally after having violent sexual intercourse with her. Thereafter, he has committed robbery of valuable articles from her house. It is also in evidence that, after this murder, rape and robbery of Smt. Jayashri, he has again attempted to commit these offences so in the house of Smt. Siba, wherein unfortunately for him, he was caught by the public and thus, his role in the present crime also came to limelight. In my view, there cannot be any better example of the case of "Rarest of Rare Nature" than the present one. It is to be noted that even after punishments in earlier cases for robbery, dacoity and rape, he has not reformed and it is now high time to expect any reformation from such an habitual offender and pervert criminal. I also do not understand why such devil in the man's garb be looked after and maintained by the society by locking him up even for life in the jail, especially keeping in view, undisputed fact that whenever opportunity was available, he has also a tendency to run away from the custody and commit new heinous crimes. Hence, considering all these aspects, in my view, that as this is a case of "Rarest of Rare Category", the death punishment imposed by the trial Court has to be confirmed or else, the faith in Criminal Justice System imposed by the society would be shattered.

74. In the result and for the reasons stated above, Criminal Appeal No. 2408/2006 filed by the accused, in my opinion is devoid of merits and hence liable to be dismissed, confirming the judgment of conviction and sentence, dated 26/27-10-2006, passed by the learned Sessions Judge, Fast Track Court-VII, Bangalore, in S.C. No. 725/1999. Consequently, Criminal Reference Case No. 3/2006 made by the learned Sessions Judge, Fast Track Court-VII, Bangalore, is answered confirming the death punishment.