ARE WE DOING ONLY LIP SERVICE TO BACHAN SINGH: RE-LOOKING INTO SENTENCING IN MURDER FROM 1990'S-2016?

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Abstract

The objective of this research article is to understand the general sentencing pattern of the Apex Court and test them on the principles of 'rarest of rare' outlined in the nearly four decade old, turning point landmark judgment of *Bachan Singh v. State of Punjab* and further impressed upon in the later *Machchi Singh v. State of Punjab*, in context of the aggravating and mitigating factors.

The lower courts, in trying murder trials, are often faced with the problem of taking almost every case to be a rarest of rare. This has become detrimental to the tenants of rarest of rare carved out in the two important judgments. Some blame lies on the procedural aspect too in this regard and the paper also tries to streamline the effectiveness of the procedural with the substantive law on sentencing in murder cases.

This study aims at unveiling the arbitrariness and disparity in the sentencing process in cases of the offence of murder.

To support the theory, relevant precedents of the Supreme Court particularly for the twin decades beginning 1996- to present, have been handpicked to demonstrate the discrepancies which lead to unpredictability, which is the ultimate death knell to an otherwise robust criminal justice system.

Introduction

Executing of murderers for their crime has been an ancient practice, in vogue since centuries. Many in India have been fighting for an end to the law of death row for the offence of murder. The Apex Court has laid down the rule for sentencing of murder cases that courts should award the death sentence only in the 'rarest of rare' cases. However, the application of this doctrine has not been uniform.

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The present research focuses on how the principles embodied in the case of *Bachan Singh v. State of Punjab*[1] and further developed in terms of mitigating and aggravating factors in the subsequent *Machhi Singh v. State of Punjab*[2] have come to be implemented in various Apex court judgments from 1990's to present times and how the sentencing pattern is not only arbitrary but also unequal.

Sentencing procedure for murder under the Code of Criminal Procedure, 1973

The modern trend in penology is to emphasize the humanist principle of individualizing punishment to suit the offender and his circumstances, to the extent that crime is said to be a result of pathological aberrations and other such factors of the offender.

The Code provides for wide discretionary power in the hands of Judges once conviction is determined. The Cr.P.C. contains the provisions on sentencing primarily in sections 235, 248, 325, 360 and 361.

Section 235 deals with the proceeding before a court of Sessions.[3] It directs the Sessions Judge to pass a judgment of acquittal or conviction and in case of conviction, follow clause 2 in order to sentence appropriately.

In order to facilitate information on these factors and probably as a reflection of the legislative response to modern notions of crime causation, section 235 (2) was incorporated into Cr.P.C. by an amendment in 1973, since the old code was found unsatisfactory.[4]

The new code required Judges to note 'special reasons' when imposing death sentence and required a mandatory[5] pre-sentencing hearing to be held in Trial Court. Such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any 'special reasons' to impose the sentence of death, and to ensure that the convict is given a chance to speak for himself on the sentence to be imposed upon him, also for the Judge to get an idea of the social and personal details of the convict and to see if any of them may affect the sentence.

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1. A.I.R. 1980 S.C. 898.
2. A.I.R. 1983 S.C. 957.
3. Code of Criminal Procedure, 1973, *see* Chapter 18, sec. 235.
4. *Infra, per* Bhagwati, J. at p. 2388.
5. Santa Singh v. State of Punjab, A.I.R. 1976 S.C. 2386; Dagdu v. State of Maharashtra, A.I.R. 1977 S.C. 1579; Shiv Mohan Singh v. State (Delhi Administration), A.I.R. 1977 S.C. 949; Shobhit Chamar v. State of Bihar, A.I.R. 1998 S.C. 1693.

In case of non-compliance with this provision, the case may be remanded to the Sessions Judge for retrial on the question of sentence only, although, it is not necessary for the Sessions Judge to hold a *de novo* trial, and it is restricted only to the question of sentence.[6]

As pointed out by Justice V.R. Krishna Iyer,

> "Criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty... It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the court to help it for a correct judgment in the proper personalized punitive treatment suited to the offender and the crime."[7]

Another major aspect of the procedural law is delay. Following a long period of legal uncertainty, during which a number of death sentences were commuted on grounds of delay, in 1988 a five judge constitutional bench of the Supreme Court ruled that an unduly long delay in execution of the sentence of death would entitle an approach to the Court, but that only delay after the conclusion of the judicial process would be relevant, and also that such period could not be fixed.[8]

This ruling effectively moved the focus of the question of delay away from the judicial process to that of the process of executive clemency.[9]

Rarest of rare guidelines

Regarding the offence of Murder, the sentence under section 302 is alternative punishments of death which is the maximum punishment or imprisonment for life, the minimum.

The death penalty under section 302, IPC and the sentencing procedure under section 354(3), Cr.PC, were held to be

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6 Narpal Singh v. State of Haryana, A.I.R. 1977 S.C. 1066.

7 V.R. Krishna Iyer, J. *in* Siva Prasad v. State of Kerala, 1969 KLT 862 at 871-872; *see also* Jumman Khan v. State of U.P., A.I.R. 1991 S.C. 345.

8 Triveniben v. State of Gujarat, (1988) 4 S.C.C. 574.

9 Bibha Tripathi, *Analyzing Judicial Trend on Mitigating Circumstances of Commutal of Death Sentence into Life Imprisonment*, Vol. 42 No. 1 *Ban.L.J.* (2013).

constitutionally valid by the Supreme Court in *Bachan Singh,*[10] with the following guidelines:

i. The extreme penalty of death need not be inflicted except in the rarest of the rare cases. i.e., in the 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 penalty is an exception. i.e., 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 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 relevant circumstances; and,
iv. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating factors 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. These guidelines were laid down in *Machchi Singh*[11] for trial courts to follow, in trying cases punishable with death sentence.

In judging adequacy of sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, the injury caused to society and individual, whether it is the case of a habitual, casual or professional offender, effect of the punishment on the offender, delay in trial and the mental agony suffered by the offender during the long duration of the trial, the prospects of correction and reformation of the offender are some of the important factors which have to be taken into account by the courts.[12]

Apart from these, there are some other relevant factors as well, such as, the consequences of the crime on the victim's family should also be considered while fixing the quantum of punishment. This point is relevant because amongst the many aims of punishment, one is to render justice to the victim.

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10 *Supra* note 1.
11 *Supra* note 2.
12 *Id.*

In light of this, the true paradox is notable in criminal cases such as *Jessica Lal*[13] and *Priyadarshini Mattoo*[14] where the accused were well connected persons, the trial court had little option than to acquit them of all charges, and the matter reached up to the Apex Court.[15] Similarly, in the *Naina Sahani*[16] case, the Supreme Court commuted punishment of death sentence to one of life.

From the realist school thinker, Justice Holmes we appreciate that life of law is not only logic but also experience. Herein, we question the tenant of neutrality of law and the dispassionate role of the bench.

In all scientific and social formulations, the possibility of error leading to unavoidable injustice is always there. In fact, this is evident from the concept of justice followed in the adversarial system itself, where the accused person is innocent until proven guilty beyond all reasonable doubt, and the principle of criminal jurisprudence is to save an innocent person, even if a hundred guilty escape.

Analysing case laws for discrepancies in sentencing

Jurists of criminal law have argued that the *Bachan Singh* judgment was neither a small nor insignificant achievement for the abolitionists as the rate of imposition of the death penalty would otherwise have definitely been higher.[17]

In two important decisions of 1996, *Major R.S. Budhwar v. Union of India*[18] and in *Shankar v. State of Tamil Nadu*,[19] the SC has held differently. In the former case, two army personnel committed the offence of murder upon orders of their superior officers, and it was held to be a case not fit for the rarest of rare category on the ground that, the Appellant had acted under dictation, surrendered after two days of the crime and spoken the truth in the confessional statement which ultimately brought the superior officers to book. While in the latter, the confession of the Appellant was not found to be sufficient to mitigate the punishment from death to life imprisonment, despite the fact that

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13 *Siddharth Vashist @ Manu Sharma* v. *State (NCT of Delhi)*, (2010) 6 SCC 1.
14 *State (Through CBI)* v. *Santosh Kumar Singh*, (2010) 13 (ADDL.) S.C.R. 901.
15 *See* https://www.academia.edu/10546932/Lethal_Lottery_the_death_penalty_in_India as visited on April 10, 2016.
16 *Sushil Sharma* v. *State (NCT of Delhi)*, (2014) 4 S.C.C. 317.
17 S. Murlidhar, *Hang them now, hang them not: India's Travails with the death penalty*, Vol. 40, JILI, 1998.
18 (1996) 9 S.C.C. 502.
19 (1994) 4 S.C.C. 478.

confession led to solving the crime by giving details of the police officers who aided him in his illicit businesses.

Similarly, in the case of *Kishori v. State of Delhi,* where after communal riots broke out in the NCT of Delhi and thousands of Sikhs were put to untimely death, and where the Appellant was a member of the armed riotous mob, yet, the apex court commuted the sentence on the ground that initially the Appellant had been convicted for seven cases and was acquitted in four of those in appeal, therefore he could not have been said to be a hardened criminal warranting the rarest of rare death penalty.

On the other hand, in the case of *Kehar Singh & Ors. v. Delhi Administration,*[20] the SC awarded the death penalty citing the reason that the very people in whom she reposed faith have shot her and put her safety at stake, and this is sufficient to award the death penalty.

> "....were posted on the security duty of the Prime Minister to protect her from any intruder or from any attack from outside and, therefore, if they themselves resort to this kind of offence, there appears to be no reason or no mitigating circumstance for consideration on the question of sentence. Additionally, an unarmed lady was attacked by these two persons with a series of bullets and it has been found that a number of bullets entered her body. The manner in which mercilessly she was attacked by these two persons on whom confidence was reposed to give her protection repels any consideration of reduction of sentence."[21]

It is pertinent to note that in the political world, assassinations of leaders is not an uncommon occurrence; in light of this it is hardly comprehendible that the Hon'ble Court held it to be a case fit for the rarest of rare.

Shortly, in the case of *State of Tamil Nadu v. Nalini & Ors.*,[22] each of the twenty-six accused were sentenced to death by the High Court, which gave seven special reasons for all of the accused persons and no mention of the mitigating and/or aggravating circumstances was made.

Later, in the Supreme Court, nineteen of the twenty-six were found innocent of the offence of murder and offences under TADA. Of the remaining seven found guilty for the charge of murder four

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20 A.I.R. 1988 S.C. 1883.
21 *Per* Oza, G.L., J.
22 (1995) 5 S.C.C. 253.

were sentenced to death, including Nalini. The Supreme Court was once again divided on the issue of sentence, as two[23] of the three Judges,[24] did not view the circumstances of *Nalini* as those warranting the lesser punishment sufficient to deserve any leniency. Although, *Thomas, J.* felt that she did not deserve the maximum penalty.

The upshot of the decision on the application of the rarest of rare test is that there is no consistent or reliable pattern under which judges exercise their discretion.[25]

Again in the case of *Dhananjoy Chatterjee @ Dhana v. State of West Bengal,*[26] a security guard was held guilty for the rape and murder of a 14 year old girl living in the Apartment where he was appointed as a guard. The Supreme Court held that sentencing should be determined by the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. Further, the court held that the very fact that he committed a crime on the residents, whose protection it was his job, made it extremely heinous, and shook society's faith and hence their cry for justice was justified.

Dhananjoy was executed in 2004, the first for India since 1995.

It is interesting to compare another case with similar and far more glaring circumstances. The case of *Priyadarshini Mattoo*,[27]where, a young law student is harassed and stalked by a former senior collegiate from the prestigious Faculty of Law, DU. Here, although the victim had lodged repeated complaints with her department as also the police, and had also been provided a personnel security guard by the Commissioner of Police, yet, the offender raped and caused her death in the most gruesome manner, at a time when she was all alone in her own home, unprotected and defenceless.

It is astonishing to observe the statement of Additional Sessions Judge, G.P. Thareja in the instant case, while acquitting the accused which reflects the deplorable state of our criminal justice system.

> "Though I know he is the man who committed the crime, I acquit him, giving him the benefit of doubt."

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23 *Quadri*, S.S.M., J. and *Wadhwa*, D.P., J.
24 *Thomas*, K.T., J.; *Quadri*, S.S.M., J. and *Wadhwa*, D.P., J.
25 *Supra* note 21.
26 (1994) 2 S.C.C. 220.
27 *Supra* note 19.

This is one of the cases to have triggered public indignation over the miscarriage of justice at the instance of high profile and influential accused and son of Former Senior IPS Officer.

Quite surprisingly, the Supreme Court commuted the death penalty awarded by the High Court to life imprisonment, holding that,

> "Undoubtedly, the appellant would have had time for reflection over the events of the last fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family, on the contrary there is nothing to suggest that he would not be capable of reform." In the light of the above observation and in the absence of any overt action on the part of the accused relatable to such brooding, the only reasonable presumption that follows is that of course a period of fifteen years is a long time to reflect upon one's wrong doings."

Once again rarest of rare guideline is seen shunted and the scales of justice disturbed.

A comparison may again be drawn on the grounds for awarding the rarest of rare in terms of two cases involving rape and murder. *Amrit Singh v. State of Punjab*[28] and *State (through Reference) v. Ram Singh & Ors.,*[29] known as the *16 December* case. In the former, the division bench of the Supreme Court noted, that although the case before them is one of rape and murder, the death of the victim occurred as a consequence of the bleeding from internal injuries suffered during the rape and not from strangulation. For this reason, the court commuted the death sentence to life. Whereas, in the latter, media and public fury were such strong factors that it changed the entire face of the criminal justice system with new laws being laid down to include non-penile penetration as rape and also the amendment of section 376A of IPC, *inter alia.*

In another case *Bachhitar Singh & Anr. v. State of Punjab,*[30] the Supreme Court commuted death sentence of Appellants who abetted and conspired in cold blood, to eliminate their brothers and their entire families, for property. The Court noted lack of

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[28] A.I.R. 2007 S.C. 132.
[29] Crl. App. No.1398/2013.
[30] A.I.R. 2002 S.C. 3473.

evidence to show that accused were a menace to the society or could not be reformed and rehabilitated.

Conclusion and suggestions

It has been seen above that in many cases although the relevant facts are similar, the sentencing is different. Many cases are silent with nothing mentioned in regard to the balance sheet of mitigating or aggravating factors as stipulated for in *Machchi Singh* to have a comparison. In some instances, the decision of death sentence is absent due to political or other factors, while in some political and social pressure become responsible for inviting the death penalty.

The distressing uneasiness that the fate of life or death penalty is invariably dependent on the Coram of the bench, and a different set of judges may have ended in a different punishment is one which cannot be shaken off the conscience of the criminal justice system.

This said, the only protection lies in the procedural law and adherence to the pre-sentence hearing is possibly the only safeguard. This needs further strengthening, as recommended by the Law Commission,[31] by providing a mandatory appeal to the Apex Court. Also, unanimous decisions of the judges would prove to be another procedural safeguard in homogenizing the sentencing pattern.

[31] 187th Report, 2003.