A SUSHIL MURMU

v.

STATE OF JHARKHAND

DECEMBER 12, 2003

B [DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Penal Code, 1860/Criminal Procedure Code, 1973—Sections 201, 302/354(3)—Sacrifice of a young child—Severing and throwing the head of the child in a pond—Death sentence awarded by trial court—High Court C *confirming the death sentence—Correctness of—Held, on facts, this is a fit case to be treated as 'rarest of rarest cases'—Hence conviction and death sentence upheld.*

A 9-year old child was sacrificed before Goddess Kali by the D **appellant. The appellant severed the head of the child and threw it in a pond. The trial court found the appellant guilty under sections 302 and 201 IPC and awarded death sentence and 7 years imprisonment respectively. The High Court confirmed the death sentence.**

In appeal, the appellant contended that the death sentence awarded E **to the appellant be altered to life sentence on the ground that the killing of the child was not done with any motive; that the appellant was an illiterate and a tribal and brought up in an atmosphere surcharged with superstition; and that the appellant could be reformed.**

F **The State contended that the appellant was rightly awarded death sentence as this is a case which clearly falls within the "rarest of rare" category; that the appellant was also charged for commission of a similar offence which is pending.**

Dismissing the appeal, the Court

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HELD : 1.1. 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 H **only the guilty ought to be punished. Indeed the requirement that**

punishment not be disproportionately great, which is a coroloary 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. [712-F-H] A

1.2. 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. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes, it is the correctional need of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread. [713-A-C] B C D

Ediga Anamma v. *State of A.P.*, [1974] 4 SCC 443; *Bachan Singh* v. *State of Punjab,* [1980] 2 SCC 684 and *Machhi Singh* v. *State of Punjab,* [1983] 3 SCC 470, referred to.

1.3. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime uniformly disproportionate punishment has some very undesirable practical consequences. [713-C-D] E F

1.4. The appellant was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation. He had at the time of occurrence a child of same as the victim and yet he diabolically designed in a most dastardly and revolting manner to sacrifice a very hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity. The brutality of the act is amplified by the grotesque and revolting G H

A **manner in which the helpless child's head was severed. Even if the helpless and imploring face and voice of the innocent child did not arouse any trace of kindness in the heart of the accused, the non-challant way in which he carried the severed head in a gunny bag and threw it in a pond unerringly shows that the act was diabolic of most superlative**
B **degree in conception and cruel in execution. The tendency in the accused and for the matter in any one who entertains such revolting ideas cannot be placed on par with even an intention to kill someone but really borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts**
C **of law, as well. The socially abhorrent nature of the crime committed also ought not to be ignored in this case. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so described is the question. Superstition is a belief or notion, not based on reason or knowledge in or the ominous significance of a particular thing or circumstances, occurrence or the like but mainly triggered by thoughts**
D **of self aggrandizement and barbaric at times as in the present case. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child.**

E **[713-E-H; 714-A-E]**

1.5. Criminal propensities of the accused are clearly spelt out from the fact that similar accusations involving human sacrifice existed at the time of trial. Though the result could not be brought on record,
F **yet the fact that similar accusation was made against the accused-appellant for which he was facing trial court also be lost sight of. Hence this is not a fit case where any interference is called for, looking to the background facts. This is an illustrative and most exemplary case to be treated as the 'rarest of rare cases' in which death sentence is and**
G **should be the rule with no exception whatsoever. [714-D-E]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 947 of 2003.

From the Judgment and Order dated 29.4.2003 of the Jharkhand High
H Court in D.R. No. 3/2002 with Crl. A. No. 874 of 2002.

Anil Kumar Mittal (A.C.) for the Appellant. A

A.T.M. Rangaramanujam, Mrs. Alka Rani Jha and Anil Kumar Jha for the Respondent.

The Judgment of the Court was delivered by B

ARIJIT PASAYAT, J. The little drops of humanness which conjointly make humanity a cherished desire of mankind had seemingly dried up, when a young child of 9 years was sacrificed before Goddess Kali by the appellant for his own prosperity is what the prosecution alleges. C

"Little drops of
Water, little grains of sand,'
Make the mighty ocean
And the pleasant land,
Little deeds of kindness, little
Words of love, D
Help to make earth happy
Like the heaven above."

Said Julia A.f. Cabney in "Little Things". E

The still, sad music of humanity had become silent when it was forsaken oy the accused-appellant is what has been found by the Courts below.

11th December, 1996 turned out to be a heart-breaking day for Somlal Besra (PW-2). In the evening of that day he found his son Chirku Besra F (hereinafter referred to as 'the deceased') missing from house. He searched for him making inquiries from various persons. Information surfaced that he was sacrificed before Goddess Kali by the appellant. Two other persons, his wife and mother were also said to be parties to the gruesome killing. The prosecution case centered round extra judicial confession made by G accused before large number of persons, recovery of dead body at the behest of the accused-appellant and evidence of a witness who saw the accused carrying a bag on a bicycle which was thrown to a pond and after throwing the bag to the pond the accused returning by bicycle. The severed head was recovered from the bag thrown to the pond. Information was H

A given to police, investigation was undertaken. All the three accused persons were tried for offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (for short 'the IPC'). The appellant was found guilty for both the accusations and was sentenced to death for the former and 7 years rigorous imprisonment for the latter. Benefit of doubt was, B however, given to the co-accused and they were acquitted. Reference was made by the trial Judge i.e. the First Additional Sessions Judge, Jamtara for confirmation of death sentence under Section 366 of the Code of Criminal Procedure, 1973 (in short 'the Code') by the Jharkhand High Court which by the impugned judgment upheld both the convictions and C sentence. It was held that the murder was gruesome and death sentence was most appropriate sentence. Against the said judgment the present appeal has been filed. While granting leave, by order dated 4.8.2003 scope of appeal was limited to the question of sentence.

Mr. Anil Kumar Mittal, learned *amicus curiae* submitted that even D according to prosecution killing was not done with any motive. Though superstition is not expected and encouraged in modern society, yet an illiterate and tribal born and brought up in an atmosphere surcharged with superstition should not be awarded death sentence. The modern trend, according to him, is reformation and when in the case at hand balance sheet E of aggravating and mitigating circumstances is drawn up, the mitigating circumstances far outweigh the aggravating situation and, therefore, the death sentence should be altered to life sentence.

In response, learned counsel for the respondent-State submitted that a 9 years old child was sacrificed in the most brutal and diabolic manner. F This is a case which falls within the "rarest of rare" category and, therefore, death sentence has been rightly awarded. It was pointed out that it is not the first instance when the accused is charged with commission of such offences. In fact, as records reveal, the appellant along with two of his relatives was facing trial at the relevant time for committing murder by G sacrificing of his own brother before Goddess Kali.

Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary H

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

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It should be borne in mind that before the amendment of Section 367(5) of the old Code, by the Criminal Procedure Code (Amendment) Act, 1955 (26 of 1955) which came into force on 1.1.1956, on a conviction for an offence punishable with death, if the court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. After the amendment of Section 367(5) of the old Code by Act 26 of 1955, position is clear that the normal

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A penalty is imprisonment for life. It can be awarded in the presence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the court. The court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it imposes in its discretion. Therefore, B the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment C relates to procedure and now courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment.

Section 354(3) of the Code marks a significant shift in the legislative D policy underlying the old Code as in force immediately before 1.4.1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the E reasons for the sentence awarded and in the case of death sentence "special reasons" are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of these successive legislative changes in the Code that the judicial decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood.

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This Court in *Ediga Anamma* v. *State of A.P.*, [1974] 4 SCC 443 has observed : (SCC pp. 453-54, para 26)

> "26. Let us crystallize the positive indicators against death G sentence under Indian law currently. Where the murderer is too young or too old, the clemency or penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to down-grade the crime into a lesser one, judicial commutation is permis-sible. Other general social pressures, warranting judicial notice,

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

In *Bachan Singh* v. *State of Punjab,* [1980] 2 SCC 684 it has been observed that: (SCC p. 751, para 209)

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

A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, *inter alia*, the following questions may be asked and answered, (a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls

A for a death sentence?; and (b) are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

B Another decision which illuminatingly deals with the question of death sentence is *Machhi Singh* v. *State of Punjab*, [1983] 3 SCC 470.

In *Machhi Singh* (supra) and *Bachan Singh* (supra) cases the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated.

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In *Machhi Singh* case (supra) it was observed: (SCC p. 489, para 39)

The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted:-

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(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

E (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

F The following guidelines which emerge from *Bachan Singh* case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38):-

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

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(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an

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exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person *vis-à-vis* whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

A (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

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

If upon taking an overall global view of all the circumstances in the C light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

D 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 civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in E a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man F i.e. the Judge that leads to determination of the lis.

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 G 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 H 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. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

A bare look at the fact situation of this case shows that the appellant was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation. He had at the time of occurrence a child of same age as the victim and yet he diabolically designed in a most dastardly and revolting manner to sacrifice a very hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless child's head was severed. Even if the helpless and imploring face and voice of the innocent child did not arouse any trace of kindness in the heart of the accused, the non-challant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of most superlative degree in conception and cruel in execution. The tendency in the accused and for that matter in any one who entertains such revolting ideas cannot be placed on par with even an

A intention to kill someone but really borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts of law, as well. The socially abhorrent nature of the crime committed also ought not to be ignored in this case. If this act is not revolting or dastardly, it is beyond comprehen-
B sion as to what other act can be so described is the question. Superstition is a belief or notion, not based on reason or knowledge, in or of the ominous significance of a particular thing or circumstance, occurrence or the like but mainly triggered by thoughts of self aggrandizement and barbaric at times as in the present case. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No
C amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child.

Criminal propensities of the accused are clearly spelt out from the fact
D that similar accusations involving human sacrifice existed at the time of trial. Though the result could not be brought on record, yet the fact that similar accusation was made against the accused-appellant for which he was facing trial cannot also be lost sight of. In view of the above position, we do not think this to be a fit case where any interference is called for,
E looking to the background facts highlighted above. This in our view is an illustrative and most exemplary case to be treated as the 'rarest of rare cases' in which death sentence is and should be the rule, with no exception whatsoever. Appeal fails and is dismissed.

We record our appreciation for the fair presentation and assistance
F rendered by Mr. Anil Kumar Mittal, learned amicus curiae and Mr. A.T.M. Rangaramanujam, learned Senior Counsel for the respondent-State who very ably highlighted the legal principles revolving round the question of death sentence.

B.S. Appeal dismissed.