SUPREME COURT OF INDIA

OMA @ Omprakash & Anr.

Vs.

State of Tamil Nadu

C.A.No.143of2007

(K.S. Radhakrishnan and Dipak Misra,JJ.)

11.12.2012

JUDGMENT

K. S. Radhakrishnan, J.

1. Appellants, herein, were awarded death sentence by the trial court after having found them guilty under Sections 395, 396 and 397 of Indian Penal Code (for short 'IPC'). They were sentenced to death by hanging under subsection 5 of Section 354 of Criminal Procedure Code for offences committed under Section 396 IPC. The trial court after noticing that, the accused persons came from a State about 2000 k.m. away from Tamil Nadu, held as follows:

"In this case, the accused came from a state about 2000 k.m. from our state and they did not think that the victims were also human like them but they thought only about the well being of their family and their own life and committed the fear of death amongst the common public of our state by committing robbery and murder for about 11 years. Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is a rarest of rare case that calls for the imposition of death sentence."

2. We have noticed that the trial Court, among other grounds, was also influenced by a speech made by the then Chief Justice of Tamil Nadu as well as a judgment delivered by another learned Judge of Madras High Court on rowdy panchayat system. Following that judgment and the provision under Section 396 IPC, the trial court held that the accused deserves no sympathy and he be sent to the gallows.

3. The trial court then placed the matter before the Madras High Court for confirmation of the death sentence awarded to the accused persons. Meanwhile, the accused persons also

preferred criminal appeal No. 566 of 2006 against the award of death sentence. The appeal was partly allowed and conviction against Accused Nos. 1 and 2 under Sections 395, 396 and 397 IPC were confirmed but the sentence under Section 396 IPC was modified to that of life imprisonment instead of death sentence. Against which, accused Nos. 1 and 2 came up with this appeal. While this appeal was pending, the first appellant (A1) died and the second appellant (A2) has prosecuted this appeal.

4. The prosecution case is as follows:
The appellants and nine other absconding accused persons entered the house of one Lakshmi (PW 2) at 1 O' clock in the night of 07.06.1995 with the intention of committing burglary with iron rods in their hands and burgled 17 tolas of gold and Rs.5,000/- in cash. In that process, it was alleged that they had strangulated Doctor Mohan Kumar, husband of PW 2 with a rope and thereby killed him. It was alleged that the accused assaulted PW 2, her son Sudhakar (PW 5) and other son Sakthivel (PW 6). While escaping, they had also attacked Bormin Varghese (PW 1) with iron rod. FIR Cr. No. 403 of 1995 under Sections 396, 397 IPC was registered at 5.30 am on 07.06.1995 at Police Station Walajapet on the statement of one Patrick Varghese recorded by PW 7. Post Mortem of the deceased was conducted at 2.30 p.m. on 07.06.1995.

5. The prosecution could not nab the accused persons for over ten years. A2 was arrested on 26.02.2005 in connection with some other case in Cr. No. 59 of 1996. It is the prosecution case that his finger prints tallied with the ones lifted from the place of occurrence in that other case. Further, it was also stated, as per the investigation, A2 made a disclosure and pursuant to that the iron rod (M.O. 1) used 10 years back was recovered.

6. A1 was arrested on 21.09.2005 by the special team in connection with some other case in Cr. No. 352 of 2004 of Sri Perumbatoor Police Station. An identification parade was conducted so far as A1 is concerned on 20.10.2005 in which PW 10, Karthik an Auto Driver said to have identified A1. Later, the charge-sheet was filed by PW 15 on 23.12.2005 and charges under Sections 395, 396 and 397 IPC were framed against the accused persons on 24.03.2006.

7. The prosecution examined 15 witnesses to prove the case against the accused persons. Statements of the accused persons were recorded under Section 313 Cr.P.C. on 17.04.2006.

8. The trial court, as already indicated, convicted both the accused persons on 21.04.2006 for the offences under Sections 395, 396 and 397 IPC. The trial court granted life imprisonment under Section 395 and fine of Rs.1,000/- and they were sentenced to death for the offence under Section 396 IPC. They were also sentenced for RI for 7 years under Section 397 IPC.

9. The High Court, as already indicated, vide judgment dated 27.07.2006 converted the

sentence of death to life imprisonment under Section 396 IPC and rest of the sentence on other heads were confirmed.

10. Shri Sanjay Jain, learned counsel appearing for the appellant (A2) submitted that the trial court and the High Court had committed a grave error in convicting the accused persons. Learned counsel challenged his conviction mainly on two grounds: one on the ground of non-conducting the identification parade so far as accused No.2 is concerned and other on the ground of recovery of alleged iron rod. Learned counsel submitted that A2 was arrested after ten years of incident and was not properly identified by any of the witnesses. Learned counsel also highlighted the contradictions in the evidence of PW1, PW2 and PW15 and brought out the lacuna in the evidence of those witnesses. It was pointed out that the identification parade was conducted only in respect of A1 who is no more and so far as A2 is concerned, no identification parade was conducted. Further, it was pointed out that the photograph of the appellant was shown to PW 1 which was marked with the objection of the accused. Further, learned counsel pointed out that none of the witnesses in their deposition had stated that they could identify A2. Learned counsel pointed out that it was the prosecution case that a rod was used for committing the crime but was not recovered and the one alleged to have recovered had nothing to do with the crime. Learned counsel submitted that the prosecution miserably failed to prove the case against the appellant beyond reasonable doubt and that this is a fit case where this Court should have given the benefit of doubt and the accused be acquitted.

11. Shri C. Paramasivam, learned counsel appearing for the State submitted that the High Court has rightly confirmed the conviction of the appellant and reduced the sentence to life imprisonment. Learned counsel submitted that there is no fixed rule with regard to the period within which test identification parade be held. Further, it was pointed out that no motive was alleged against the prosecution for the delay in conducting test identification parade. Learned counsel also submitted that even in the absence of test identification parade, the identification of accused persons by the witnesses in court is a substantive piece of evidence. Further, it was also pointed out that the gang of dacoits from Haryana and Rajasthan States used to come down to state of Tamil Nadu and commits heinous crimes like dacoity and murder and after arrest of those accused persons, several undetected cases could be detected and few of the accused persons have been convicted. Learned counsel submitted that the trial court and the High Court have rightly convicted the accused persons relying on the evidence of PW 1, PW 2, PW 5 and PW 10.

12. We are unhappy in the manner in which Sessions Court has awarded death sentence in the instant case. The tests laid down by this Court for determining the rarest of rare cases in ***Bachan Singh v. State of Punjab*** (1980) 2 SCC 684 and ***Machhi Singh & Ors. v. State of Punjab*** (1983) 3 SCC 470 and other related decisions like ***Jagmohan Singh v. State of U.P.*** (1973) 1 SCC 20, were completely overlooked by the Sessions Court. The Sessions Court h a d gone astray inreferring to theviews expressed by the then Chief Justice of Madras in a lecture delivered at Madurai, which advice according to the Sessions Judge was taken note of by another learned Judge in delivering a judgment in rowdy panchayat system. Sessions Judge has

stated that he took into consideration that judgment and the provision in Section 396 of the Indian Penal Code to hold that the accused had committed the murder and deserved death sentence. Further, the trial court had also opined that the imposition of death sentence under Section 396 IPC is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime and the judgment of the trial court should be on that ground.

12. It is apposite to refer to the special reasons which weighed with the Sessions Judge to award the death sentence which reads as follows:

> "36. In this case, it has been decided by this court to impose the maximum sentence of death to be imposed on the accused No. 1 and 2, under Section 396 of the Indian Penal Code, under Section 354(3) of the Criminal Procedure Code, the special reasons for awarding such sentence to be given show that the case is a case of rarest of rare cases. Therefore, this court gives the following reasons:

(a) Before the enactment of Criminal Procedure Code, many years ago, civilization has come into existence. From the rule of Kingdom to the rule of people and the democracy and constitution came into existence in many countries. In these circumstances, the death sentence is prevailing in all the countries in different from and that sentence is imposed on such criminal who deserves for the same. We all know that more particularly in the court in like America, the sentence like 'lynching' has attained the legal form and given to the deserving criminals and in Arab countries the law provide for imposing sentence like 'slashing', 'beheading' taking the organ for organ like 'eye for eye', 'tooth for tooth'. The above mentioned facts are the development of criminal jurisprudence. Therefore, this court is of the opinion that it is proper to impose death sentence to the accused in this case.

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) In this case, the accused came from a State about 2000 k.m. from our State and they did not think that the victims were also human like them but they thought only about the wellbeing of their family and their own life and committed the fear of death amongst the common public of our State by committing robbery and murder for about 11 years. Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is a rarest of rare cases that call for the imposition of death sentence.

The honorable Chief Justice of High Court of Madras, Justice A. P. Shah while delivering a lecture at Madurai said strict laws should be enacted as regard to Child abuse and the persons committing the crime should be punished accordingly. This advise was taken note of the honorable Justice Karpagavinayagm while delivering a judgment on rowdy panchayat system.

He ordered that the government should enact suitable law to eliminate this menace. Taking this judgment into consideration and that there is a provision in Section 396 of the Indian Penal Code that the people involved in dacoity can be imposed with death sentence, the accused who have committed the murder without any pity deserve to be imposed with the death sentence. This court is also of the opinion that the imposition of death sentence under Section 396 of the Indian Penal Code is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime. Accordingly this judgment should be. Therefore, this court is of the view that the death sentence should be imposed on the accused."
(emphasis added)

13. We cannot countenance any of the reasons which weighed with the Sessions Judge in awarding the death sentence. Reasons stated in para 36(b) and (e) in awarding death sentence in this case exposes the ignorance of the learned judge of the criminal jurisprudence of this country.

Section 354(3) of the Code states whenever a Court awards death sentence, it shall record special reasons. Going by the current penological thought, imprisonment of life is the rule and death sentence is an exception. The legislator's intent behind enacting Section 354(3) clearly demonstrates the concern of the legislature. This principle has been highlighted in several judgments of this Court apart from the judgments already referred to. Reference may also be made to few of the judgments of this Court, such as ***Ronal James v. State of Maharashtra,*** (1998) 3 SCC 625; ***Allauddin Mian v. State of Bihar,*** (1989) 3 SCC 5; ***Naresh Giri v. State of M.P.,*** (2001) 9 SCC 615 etc. We are disturbed by the casual approach made by the Sessions Court in awarding the death sentence. The 'special reasons' weighed with the trial judge to say the least, was only one's predilection or inclination to award death sentence, purely judge-centric. Learned judge has not discussed the aggravating or mitigating circumstances of this case, the approach was purely 'crime- centric'.

14. We are really surprised to note the "special reasons" stated by the trial judge in para 36(b) of the judgment. We fail to see why we import the criminal jurisprudence of America or the Arab countries to our system. Learned trial judge speaks of sentence like "lynching" and described that it has attained legal form in America. Lynching means kill someone for an alleged offence without a legal trial, especially by hanging. Learned judge failed to note that the constitutionality of death sentence came up for consideration before the U.S. Supreme Court in ***William Henry Furman v. State of Georgia*** 408 U.S. 238 (1972), which involved three persons under death sentence, more than 600 prisoners on death row. Five Judges invalidated the death penalty, four dissented and the Court held that death penalty to be cruel and unusual punishment in violation of the 8th and 14th amendments. Later in ***Gregg v. Georgia /*** **428 U.S. 153 (1976)]**, the court laid down the concern expressed in Furman. In the United States, some States have done away with death sentence as well. The judges' inclination to bring in alleged system of lynching to India and to show it as special reason is unfortunate and shows lack of exposure to criminal laws of this country. Learned trial judge while showing special reasons

referred to law prevailing in Arab countries, like imposing sentence o 'slashning' beheading, taking organ for organ like "eye for eye", "tooth for tooth" and says those are the developments of criminal jurisprudence. Learned judge then says that the accused persons in the present case also deserve death sentence. Learned judge lost sight of the fact that the Criminal Jurisprudence of this country or our society does not recognize those types of barbaric sentences. We are surprised to see how those factors have gone into one's mind in awarding death sentence.

15. We are also not concerned with the question whether the criminals have come from 20 km away or 2000 km away. Learned judge says that they have come to "our state", forgetting the fact that there is nothing like 'our state' or 'your state'. Such parochial attitude shall not influence or sway a judicial mind. Learned judge has further stated, since the accused persons had come from a far away state, about 2000 km to "our state" for committing robbery and murder, death sentence would be imposed on them. Learned judge has adopted a very strange reasoning, needs fine tuning and proper training.

16. Learned trial judge in para 36(f) has also referred to a judgment of the High Court rendered by a learned Judge of the High Court on "rowdy panchayat system". Learned trial judge has stated that he has taken into consideration that judgment also in reaching the conclusion that death sentence be awarded. We are not in a position to know how that judgment is relevant or applicable in awarding death sentence. Learned trial judge has also not given the citation of that judgment or has given any explanation, as to how that judgment is applicable to the case on hand.

17. Learned trial judge has also opined that the imposition of death sentence under Section 396 of the IPC is the only weapon in the hands of judiciary under the prevailing law to help to eliminate the crime. Judiciary has neither any weapon in its hands nor uses it to eliminate crimes. Duty of the judge is to decide cases which come before him in accordance with the constitution and laws, following the settled judicial precedents. A Judge is also part of the society where he lives and also conscious of what is going on in the society. Judge has no weapon or sword. Judge's greatest strength is the trust and confidence of the people, whom he serves. We may point out that clear reasoning and analysis are the basic requirements in a judicial decision. Judicial decision is being perceived by the parties and by the society in general as being the result of a correct application of the legal rules, proper evaluation of facts based on settled judicial precedents and judge shall not do anything which will undermine the faith of the people.

18. We also fail to see how the reasons stated in para 36(f) be a guiding factor to award death sentence. One of the Code of bConduct recognized at the Bangalore Conference of the year 2001 reads as follows:

"A judge shall exercise the judicial function independently on the basis of the judge's

assessment of the facts and in accordance with a conscientious understanding ofthe law, free of any extraneous influences, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason."

19. Criminal Court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by Judges on a private platform. The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made on the State Judicial Academies or National Judicial Academy at Bhopal, only update or open new vistas of knowledge of judicial officers. Criminal Courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents. Judges or academicians opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision making process, especially when judges are called upon to decide a criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. National Judicial Academy and State Judicial Academies should educate our judicial officers in this regard so that they will not commit such serious errors in future.

20. The High Court of Madras heard the Criminal Appeal No. 566/2006 filed by the accused Nos. 1 and 2, along with Referred Trial 1 of 2006. The High Court, however, did not confirm the death sentence awarded by the trial Court, but awarded life sentence to both the accused persons. As already indicated, we are, in this case, concerned only with the conviction and sentence awarded on the 2nd accused, since 1st accused is no more.

21. We may indicate at the outset that the accused persons were apprehended after a period of ten years from the date of the incident and nine other accused persons are still absconding. The incident had taken place on 07.06.1995 and the accused persons were arrested on 26.02.2005 from Rajasthan in connection with some other case ie. Cr. No. 59 of 1996. The prosecution version that A-2 finger prints tallied with ones lifted from the place of occurrence in Cr. No. 59 of 1996. Further, it is also the prosecution case that A2 made a disclosure and pursuant to that iron rod (M.O. No.1) used 10 years back was recovered. An identification parade was conducted so far as A1 is concerned on 20.10.2005, who is now no more. However, no identification parade was conducted so far as A-2 is concerned. It has come out in evidence that the photographs of A-2 was shown to PW 1 by the police on 30.10.2005 and asked him to identify the accused and on identification by PW 1, the accused was interrogated by the police. In cross-examination, PW1 has stated as follows:

"Accused No.2 attacked me before I could see him and make any enquiry. He assaulted me with a rod. I could not see with which hand he assaulted me. It is incorrect to suggest that the accused did not assault me as stated by me."

22. PW 1 also further stated in cross-examination as follows:

"There was light only after the neighbors switched on the light. It was dark earlier. It is incorrect to suggest that it is not possible to see the accused in the darkness."

23. PW 2 - Lakshmi, wife of the deceased in her examination-in-chief stated as follows:

"I opened my eyes and saw. When I saw, accused Nos. 1 and 2 were present amongst the persons. I fainted immediately. There was commotion in my house."

24. In cross-examination, she has stated as follows:

"In the police interrogation, I did not tell that the accused Nos. 1 and 2 were present in the incident that took place in my house."

25. PW 5, brother of PW 1, in his examination-in-chief has stated as follows:

"At that time accused Nos. 1 and 2 attacked me with the rod. I fell down and fainted. When I regained consciousness I was in the room of my father. My father, my mother and younger brother sustained injuries. I asked my mother to wake up my father. Myself and my mother tried to wake up my father. After that neighbors admitted us in the hospital. I remember it was in the C.M.C. hospital. The accused attacked me similar rod that is being showed to me by you. Material object No. 1 is the rod."

26. In cross-examination, PW 5 stated as follows:

"In the police enquiry I told that I did not know what happened as I was sleeping. I do not remember whether I told the doctor in the hospital at Valajah that I was assaulted by unknown persons In the police interrogation, I did not tell that I had seen the accused No. 1 and 2 "

27. The investigation officer stated that he did not receive any documents about the arrest of the appellant (A2) and he had not mentioned in the final report about the crimes that had taken place in other States.

28. We may indicate that in the instant case, FIR was registered against unknown persons. A2, as already stated, was arrested after ten years on 26.02.2005 in connection with some other crime. We fail to see how PW1 and PW2 could identify A2 in the court at this distance of time. They were guided by the photographs repeatedly shown by the police.

29. Evidently, the witnesses did not know the accused earlier, hence the accused could be identified only through a test identification parade which was not done in this case, so far as A-2 is concerned. In this connection, we may refer to the judgment of this court in Mohd. Iqbal

M. Shaikh v. State of ***Maharashtra*** (1998) 4 SCC 494 wherein this Court held that:

> "If the witness did not know the accused persons by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in court about the identification, which is held after fairly a long period could get corroboration from the identification parade. But unfortunately the prosecution did not take any steps in that regard and no test identification parade had been held."

30. This Court in Ravindra Alias Ravi Bansi Gohar v. State of Maharashtra and Others (1998) 6 SCC 609 deprecated the practice of showing the photographs for indentifying the culprits and held as follows:

> "The identification parade belongs to the investigation stage and they serve to provide the investigating authority with materials to assure themselves if the investigation is proceeding on the right lines. In other words, it is through these identification parades that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits - and not by showing the suspects or their photographs. Such being the purpose of identification parades, the investigating agency, by showing the photographs of the suspects whom they intended to place in the TI parade, made it farcical. If really the investigating agency was satisfied that PWs 2 and 12 did know the appellants from before and they were in fact amongst the miscreants, the question of holding the TI parade in respect of them for their identification could not have arisen."

31. In Ravi alias Ravichandran v. State represented by Inspector of Police (2007) 15 SCC 372, this Court held that:

> "A judgment of conviction can be arrived at even if no test identification parade has been held. But when a first information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him."

32. Further, it is also held that:

> "It was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

33. A-2, it may be noted, was not named in the FIR, nor any identification parade was conducted to identify him by the witnesses. It is rather impossible to identify the accused

person when he is produced for the first time in the court i.e. after ten years since he was unknown to the witnesses. We are of the view that it is a glaring defect which goes to the root of the case since none of the witnesses had properly identified the accused.

34. We may notice that it is the case of prosecution that one rod was also used for the murder of the deceased persons in this case, but that rod was not recovered. One rod stated to have been recovered at the instance of A2 could not be connected with the crime. PW 5 in his examination-in-chief had stated that the accused had attacked him with a similar rod that was being shown to him which would indicate that the witness could not conclusively connect the rod which was used for committing the crime. Further, the rod was recovered after a period of ten years of the incident and it is highly doubtful, whether it was used for the commission of the offence. Further, the prosecution case is that a rope was used for the strangulation causing death to Dr. Mohan Kumar, but the rope was not recovered.

35. In ***Dwarkadas Gehanmal v. State of Gujarat*** (1999) 1 SCC 57, this Court has held that it is for the prosecution to prove that the object recovered has nexus with the crime. This Court in ***Mustkeem alias Sirajudeen v. State of Rajasthan*** (2011) 11 SCC 724 held, "what is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution." This Court held as follows:

> "With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution."

36. In this case, the prosecution could not prove that the rod recovered has any nexus with the crime alleged to have been committed by A-2. We are of the view that the prosecution, therefore, could not establish the guilt of the second accused beyond reasonable doubt. The High Court, therefore, committed a gross error in awarding life sentence to A2.

37. This appeal is, therefore, allowed and the conviction and sentence awarded to A-2 is set aside. We are informed that the accused has already served the jail sentence for more than eight years now. A-2 is, therefore, set at liberty, unless he is wanted in any other case.