ILR 2011 KAR 516

K. SREEDHAR RAO AND B.V. PINTO, JJ

High Court of Karnataka, Rep. by Registrar General vs. Madhu @ Madhuranatha and Others*

A) CRIMINAL PROCEDURE CODE, 1973 – SECTION 374(2) – Appeal against a Judgment of Conviction – Penalty of Death Sentence imposed by the Trial Court – Pleaded there against – Discrimination in the sentencing policy under the Indian Penal Code – Murders for trivial reasons and murders for gainful motives – HELD, It would be unjust to weigh both of them in the same scale – In the majority of the cases that are come for trial before the Sessions Court are offence punishable under Section 302 IPC. Normally, the murder is committed by the accused for the reason of infidelity of the wife, domestic quarrels, land dispute, property disputes etc. The majority of the convictions recorded pertain to the offence of murder committed for the above reasons. In view of Section 354(3), the accused in such cases is sentenced to imprisonment for life. The accused in the said type of cases are all well behaved social beings to the entire society at large, except to the victim of crime. The motive for

*Crl.RC. No. 2 of 2008 C/w, etc., Dated: 8th day of September, 2010

such murders is not diabolical to the society at large, whereas, when a crime committed for gainful motive, anybody in the society could be indiscriminate target of crime. The offenders who commit murder for trivial reasons cannot be equated with the offenders who commit murders for gainful motives indiscriminately targeting the society at large and it would be unjust to weigh both of them in the same scale. In other words, if both the categories of offenders are punished with imprisonment of life, there would be no rational discrimination in the sentencing policy. – FURTHER HELD, Gone are the days to blindly believe the adage "crime never pays". The society is terribly criminalized. It is the utmost duty of the law enforcing authorities to endeavor that the youth of the country should not be attracted to criminal methods for their survival. The accused persons who commit macabre murders for gain should be sternly dealt with. Otherwise the youth of the country would be lured to take the path of crime for easy life and livelihood. Therefore, in the later category of cases depending upon the manner and magnitude of the acts of accused. The death sentence should be imposed considering it as a rarest of rare cases. - ON FACTS, HELD, The facts and evidence in the case disclose the accused are almost middle aged, there are no extenuating circumstances of unemployment and extreme poverty. The manner in which the gruesome murder is committed and the attempts made by them by

suppressing the evidence to screen them from punishment would show their pre-mediated and horrendous intentions and does not permit any leniency in the matter of sentence. Therefore, the death sentence imposed by the Trial Court deserved to be upheld. – INDIAN PENAL CODE, 1860 – SECTIONS 120-B, 364-A, 302, 201 READ WITH SECTION 34 – Offence under – Discussed.

(Paras 64, 65)

B) CRIMINAL PROCEDURE CODE, 1973 – SECTION 354(3) – Irrational and inequitable sentencing policy – Imposing death sentence in different category of cases – Scheme of Indian Penal Code – HELD, The sentencing policy under the Indian Penal Code and Section 354(3) of Cr.P.C. is highly irrational and inequitable. In the scheme of IPC, Section 302 IPC is not the only offence punishable with death sentence. The offence of waging war against the Government of India under Section 121, giving or fabricating false evidence with an intent to indict innocent person convicted for a capital offence under Section 194, kidnap for ransom under Section 364-A and dacoity with murder under Section 396 are all punishable with death penalty or imprisonment for life. – FURTHER HELD, The accused whose criminal propensity is limited only to individual or individuals and the accused whose criminal propensity is harmful to the society at large should not be treated alike in the matter of sentence. In a case of robbery

with murder, dacoity with murder, waging war against the Government of India punishable under Section 121, giving or fabricating false evidence with an intention to indict innocent persons convicted for a capital offence which is punishable under Section 194, kidnap for ransom under Section 364(A) have to be dealt sternly and ruthlessly. – INDIAN PENAL CODE, 1860 – SECTIONS 302, 121, 194, 364-A, 396 – Death penalty in different cases – Discussed. (Paras 63, 65)

Appeals are Dismissed/Death Sentence imposed is confirmed.

CASES REFERRED	*AT PARAS*
1. *2009(2) SCC (Cri) 1150 Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra*	*(Ref) 57*
2. *2004 Crl.L.J. 2876 Sahdeo vs. State of U.P.*	*(Ref) 57*
3. *AIR 1989 Supreme Court 898 Bachan Singh vs. State of Punjab*	*(Ref) 57*
4. *AIR SCW 2010 1194 Mulla and Another vs. State of U.P.*	*(Ref) 58*
5. *1994 SCC (CRI) 527 Brij Mohan and Others vs. State of Rajasthan*	*(Ref) 58*

6. *AIR 2004 SC 394*
Sushil Murmu vs. State of Jharkhand *(Ref) 60*

7. *Ashafilal and Others vs. State of UP* *(Ref) 60*

Sri. H.S. Chandramouli, SPP for Petitioner in CRL. RC No. 2 of 2008
Sri. A.H. Bhagavan, Senior Counsel & Sri A.N. Radhakrishna, Advocate for R1, Sri Y.S. Shivaprasad, Advocate for R2, Sri R.B. Deshpande, Advocate for R3 in CRL RC No. 2 of 2008
Sri A.H. Bhagavan, Senior Counsel & Sri A.N. Radhakrishna, Advocate for Appellant. In CRL A No. 833 of 2008
Sri H.S. Chandramouli, SPP for Respondent, in CRL A No. 833 of 2008
Sri R.B. Deshpande, Advocate for Appellant, in CRL A No. 855 of 2008
Sri H.S. Chandramouli, SPP for Respondent, in CRL A No. 855 of 2008
Sri Y.S. Shivaprasad, Advocate for Appellant, in CRL A No. 864 of 2008
Sri H.S. Chandramouli, SPP for Respondent, in CRL A No. 864 of 2008

JUDGMENT

Sreedhar Rao, J

The appellants in the three appeals are Accused Nos.1 to 3 respectively before the Trial Court (for short A1 to A3). The material facts of the prosecution case disclose that one Prahallad–PW1 is a commission agent purchasing agricultural produce like ginger and other food grains from the cultivators and sell them to wholesale dealers

i.e., PW2 and PW12 at Sagar. PW2 and PW12 were due to pay Rs.2,50,000/- and Rs.1,50,000/- respectively towards carting ginger to PW1.

2. On 08.08.2005, PW.1 deputed his nephew Madhusudhan (deceased), to collect cash from PW.2 and PW12. The deceased accordingly went and collected Rs.2,50,000/- from PW.2 and Rs.1,50,000/- from PW.12 around 12.30 P.M. at Sagar and he did not return to Anandpur. PW.1 had gone out station on business and returned to Anandpur at 3.30 P.M. He found that the deceased had not returned from Sagar. He contacted PW.2 and PW.12. They informed that the deceased had collected cash and gone away. The whereabouts of the deceased was not known. PW.2 and PW.12 gave a missing complaint around 9.30 P.M. to the police narrating the above facts. The PW.1 made extensive search to trace the whereabouts of the deceased. He heard rumours from the people that A.1 to A.3 have kidnapped the deceased in the Maruti van belonging to A.1, robbed cash and kept the deceased in confinement. PW.1 on 11.08.2005 around 3.00 P.M. lodged a written complaint to the police narrating the above facts as per Ex.P1, wherein he makes a specific mention suspecting that the accused persons have kidnapped and robbed the cash and kept the deceased Madhusudan in confinement and request for action.

3. On 12.08.2005, A3 was arrested in the morning at Anandpur, later on after some time, A2 was arrested by a separate

team of police officers at Bangalore in the house of PW.10. A1 makes extra-judicial confession before PW.13 and requests to save him from prosecution. At the advise of PW.13, A1 surrendered at the police station on the same day. The voluntary statements of A1 to A3 are recorded at Exs.P82, P81 and P80 respectively.

4. After the arrest of A3 volunteered and showed the place where the dead body was buried in the forest. On exhumation only, the trunk of the body was found. The head was cut off and said to have been thrown in the near by Nandi river. The mahazar of the exhumation proceedings is at Ex.P.39. PW.15 to PW.17 and CW.22 are the mahazar witnesses. Further from the possession of A3, a cash of Rs.1,01,000/- kept it in his house and a mobile – M.O.11 is recovered under Mahazar – Ex.P.46. PW.17 and CW.22 are the mahazar witnesses.

5. A2 was arrested at Bangalore and was brought to Sagar by about 3.00 P.M. At his voluntary instance, the clothing of the deceased and wire used for strangulation, which was buried near the place where the dead body was buried is recovered vide mahazar Ex.P.43. PW.17 and CW.22 are the panch witness for the recovery. Further a cash of Rs.2,02,700/- is recovered which he had concealed in the cattle shed of his house vide mahazar -Ex.P.44. PW.17 and CW.22 are the panch witnesses.

6. At the voluntary instance of A1, Maruti van used for the commission of offence is seized vide mahazar- Ex.P.47. PW.17 and CW.22 are the panch witnesses. Further a cash of Rs.30,000/- is recovered along with a packet containing chilli powder packet vide mahazar – Ex.P.48. PW.17 and CW.22 are the mahazar witnesses. A1 also led the police to the place where he had thrown the chappals of the deceased. PW.25 had collected those chappals. The chappals are seized under mahazar-Ex.P50. PW.19 and CW.30 are the panch witnesses to the mahazar.

7. The prosecution case further discloses that the accused knew that the deceased was in the possession of huge cash. Therefore, took him in their Maruti van. While on the way, deceased was strangulated with a nylon rope and killed. The vehicle was stopped. The dead body was taken into the forest. A2 beheaded the neck, threw the head and spade near the Nandi river. The clothing was taken out and trunk of the body was buried. The clothing-M.Os.1 and 2 and nylon wire-M.O.19 used for strangulation is separately buried.

8. The prosecution case further discloses that PW.11 is the resident of Malandur village and he is acquainted with A1 and the deceased. A1 a day before the incident solicited PW11 to join him for committing the crime. PW.11 refused the offer. However, A1 after committing the crime deposited Rs.50,000/- with PW11 and made extra-judicial confession of causing murder of deceased. PW.11, out of the said amount had spent Rs.11,000/- for purchase of

mobile–M.O.14 and BSNL SIM-M.O.15. The balance of Rs.39,000/- along with the M.O.14 and M.O.15 was produced before the police by PW.11 and he also informed the fact of extra-judicial confession.

9. A2 was arrested from the house of PW10 at Bangalore. A2 had left ganja packet-M.O.13, SIM card–M.O.12, and gold chain–M.O.5 in the house of PW.10. The said articles were produced by PW.10 before the police. PW.1 has identified M.O.5-gold chain as belonging to the deceased.

10. The prosecution case further discloses that One Nagendra-PW.3 is the owner of the hotel at J.C.Road, Sagar is a witness to the circumstance that on 08.08.2005 around 12 noon, accused persons came in a Maruti van to his hotel, took tea and later on went away in the van along with one more person who is not known to him.

11. One Nagesh-PW.4 owns a mechanic shop at Sagar. He is a witness to the circumstance that on 08.08.2005 around 12 Noon, he came to tempo stand at Sagar and saw in the Maruti van the accused persons and the deceased. The deceased had a formal talk with him and thereafter A3 drove the Maruti Van towards Anandpur.

12. One Sirajuddin-PW.5 was managing the hotel of his brother at Sagar on Shimoga road, he is a witness to the circumstance that on 08.08.2005, A1 to A3 along with one person around 12.45 P.M. came in the van, stopped the van, took tea and went away.

13. The dead body was subjected to Post Mortem. The Autopsy report discloses that the cause of death cannot be determined. The PM report also discloses that there were multiple chopped wounds around neck. PW.1 identified the trunk of the dead body as that of the deceased on the basis of the tattoo marks found on the hand. The condition of the dead body, absence of the head would categorically suggest that it is a homicidal death.

14. The blood samples of the parents of the deceased viz., PW.22–father and his mother is taken and sent to DNA and fingerprinting test along with the femur bone of the dead body. DNA report–Ex.P.74 discloses that the dead body is that of the son of PW.22.

15. PW.41 and PW.46 are the Police Inspectors who conducted part of the investigation. PW.47 is the Police Inspector who conducted and concluded the investigation and filed charge sheet. The accused persons are charged for committing offences U/Ss.120-B, 364-A 302, 201 R/w. Sec.34 of IPC.

16. With a sense of displeasure, we notice that the trial Judge who framed the charge has not properly appreciated the material facts while framing charge. The facts do not suggest that there was any kind of coercion or force used by A1 to A3 to compel the deceased to accompany in their Maruti Van. The facts also do not suggest that the deceased is kidnapped for ransom, therefore, charge

under Sections 364 and 364-A of IPC is unfounded. The proper charge should be under Section 120-B, 302 and 394 of IPC.

17. We also notice that there is no specific offence of robbery with murder defined in IPC, like dacoity with murder defined under Section 396 IPC. Section 394 IPC refers to robbery. Section 397 refers to robbery or dacoity with an attempt to cause death or grievous hurt. In the course of robbery if death takes place that cannot precisely fit into the definition under Section 397 IPC. That apart, the sentence prescribed under Section 397 IPC is also irrational, because in a case of grievous hurt under Section 326 IPC, the offence is punishable with imprisonment for life, whereas under Section 397 IPC minimum sentence of 7 years is prescribed without prescribing the maximum sentence. This would invariably confuse the Judge while convicting the accused under Section 397 IPC. It is therefore necessary that an offence of robbery with murder should be defined like the offence of dacoity with murder under Section 396 IPC prescribing similar sentence. This anomaly requires to be corrected by necessary amendment to IPC.

18. The prosecution has relied upon the following circumstance to prove the guilt of the accused:

1. Motive for the commission of offence is to the effect that A1 to A3 caused murder of the deceased, robbed the cash and cut off the head,

buried trunk of the dead body. The head and the weapon used were thrown at the Nandi river.

2. PW.11 is a witness to the motive and also to the extra judicial confession made by A1 about causing the death for gain. PW.11 also produces cash of Rs.39,000/- with mobile phone and SIM card, which he had purchased from out of Rs.50,000/- deposited with him by A1.

3. A1 makes extra-judicial confession before PW.13 and requests him to save him from the prosecution. At the advice of PW.13, A1 surrendered before the police.

4. At the voluntary instance of A3 the place where the dead body is buried in the forest is located and on exhumation the trunk of the dead body is discovered.

5. PW.1 identifies the trunk of the dead body with the help of the tattoo mark as that of the deceased. The DNA report shows that the deceased is the son of PW.22.

6. The PM report and the circumstances in which the body is found shows that the death is homicidal.

7. The A2 was staying in the house of PW.10 at the time of his arrest at Bangalore. A.2 had left two unimportant articles and gold chain-MO.5. PW.10 produced the same before the police. PW.1 has identified MO.5 as belonging to the deceased.

8. The recovery of cash of Rs.1,01,000/- from A3 from his house. Recovery of Rs.2,02,700/- from A2 which he had concealed in the cattle shed of his house coupled with absence of explanation by A2 and A3 as to the lawful source to account the possession of huge money.

9. The recovery of mobile set M.O.14 from A.3. PW1 identifies MO.14 as belonging to the deceased.

10. The last seen circumstance of the deceased in the company of A1 to A3 around 12.30 P.M. on 08.08.2005 witnessed by PW.4 who is acquainted with the accused and the deceased.

19. PW.1 has given evidence in support of the prosecution case. He testifies to the fact that he had deputed the deceased to collect money from PW.2 and PW.12 and that the deceased did collect Rs.4 lakhs from them but did not return home. PW.2 and PW.12 give missing to Sagar Police on the same day i.e., 08.08.2005. PW.1 also gives complaint on the basis of rumours that A1 to A3 have abducted the deceased, robbed the cash and kept him in confinement. The evidence of PW.1 also discloses that at the voluntary instance of A3 the dead body was discovered. He identified the trunk of the dead body on the basis of tattoo marks. He also identifies the gold chain – M.O.5 produced by PW.10 under mahazar as belonging to the deceased. The evidence further discloses that the A2 was staying in the house of PW.10 at the time of his arrest and he had left the gold chain in the house of PW.10, which came to be produced by PW.10 before the police. The discovery of the dead body at the instance of A3 and recovery of gold chain, which was in possession of A2 produced by PW.10, would heavily incriminate A3 and A2.

20. The evidence of PW.11 and PW.13 would disclose the extra judicial confession made by A1 before them. Indeed A1 solicited PW.11 to be his companion to commit the offence. He refuses the request. A1 after committing murder deposited Rs.50,000/- and confesses committing murder of deceased. PW11 had spent Rs.11,000/- for purchasing mobile set and a SIM. The balance of Rs.39,000/- was produced. The evidence of PW13 discloses

that A1 fell to his feet, confessed the guilt of causing murder of the deceased for gain, asking his pardon and to save him from the prosecution. The evidence of extra judicial confession given by PWs.11 and 13 would clinchingly establish the guilt of A.1.

21. The discovery mahazar of the dead body at the voluntary instance of A3 is at Ex.P.39. On exhumation the trunk was found. The corpus deliti is identified by PW.1. The DNA report also discloses that the dead body belongs to son of PW.1. Thus the corpus deliti is proved to be of the deceased. PW.16 to PW18, PW.20 and PW.21 are the seizure mahazar witness of the dead body, clothing of the deceased and cash from A2 and A3 support the case of the prosecution that at the voluntary instance of the accused the dead body was discovered. One Dr. Manjula PW.38 has conducted the PM. Her evidence disclose that the chop wound found on the neck are ante mortem. The circumstances in which the dead body was found would suggest that the death is homicidal. PW.4 testify to the last seen circumstance of deceased in the company of accused. PW.18 is a witness to recovery of cash of Rs.39,000/- mobile set and BSNL card - M.Os.14 and 15 from PW.11 under mahazar Ex.P.34. The said witness has supported the mahazar proceedings.

22. One Manjappa – PW.19 is the panch witness for seizure of chappals of the deceased as per M.O.6 under mahazar - Ex.P-40 produced from the possession of one Huchappa – PW.25.

23. One Halesh - PW.20 is the panch witness for seizure of gold chain – M.O.-5, SIM card and Ganja seized vide mahazar Ex.P.-34 produced by Filix Decosta – PW.10.

24. One Veereshappa – PW.21 is the panch witness for seizure of clothes of the deceased, which was discovered at the voluntary instance of A.2

25. One Keshavamurthy – PW.22 is the father of the deceased and he has identified the dead body and clothes of the deceased and sent sample for DNA test.

26. One Shivappa - PW.23 is the panch witness for seizure of guddali who has brought the same from his relatives to dig the ground where the dead body was buried and shown by A.3.

27. One Dharmappa – PW.24 is the witness to the efforts made by the appellant to trace the head of the body where A.2 had thrown it in the river and the said incident was voluntarily shown by A.2.

28. One Huchappa – PW.25 is the person who was in possession of Chappals of the deceased marked at M.O-6 found in the land and he has produced the same before the police.

29. One K.Subramanya – PW.26 is the jeweller who testified to the fact that M.O.5 is made for the deceased and is a witness for recovery of gold chain – M.O.5.

30. One Jayaram – PW27 is the cousin brother of the deceased who has identified gold chain – M.O.5 which was possessed by the deceased at the time of the incident.

31. One B.Mukunda Chandra – PW.29 is the Range Forest Officer who has prepared the sketch of the place where the body was discovered.

32. One N.Yuvaraj Hegde – PW.30 is the Asst. General Manager – BSNL, Bangalore. His evidence discloses the fact that Mobile No.9448171001 stands in the name of Revanasiddaiah – PW.34 and mobile No.9448864373 stands in the name of Gayathriyamma.

33. One H.Bheemeshwarappa – PW31 is the Asst. Engineer, PWD, has prepared the sketch of scene of offence where the dead body was buried.

34. One Umesh M.S. – PW.32 is the Photographer who has taken photos of exhumation of dead body.

35. One Raju – PW.33 is the panch witness for spot mahazar for Ex.P2 done on the shop of PW.2 and PW.12 where the said witness had given cash of Rs.4,00,000/- to the deceased before the incident.

36. One Shivanand Narasimha Boomkar – PW.35 is the Asst. Regional Transport Officer (ARTO) who speak to the fact of Maruti Omni Van belonging to A3 – Jayanna.

37. One Gurumurthy Kulkarni – PW.36 is the Motor Vehicle Inspector – RTO speak to the fact that TVS moped bearing No.KA-15/311 stands in the name of Balachandra. It appears seizure of TVS moped is totally unnecessary and has no evidentiary value in this case.

38. One Ganesh – PW.37 is the panch witness for spot mahazar where mobile of A2 found laying on the road. This recovery of mobile is of no consequence and has no evidentiary value to prove the guilt of the accused in this case.

39. One Dr. A.R.Manjula – PW.38 is the doctor who conducted Post Mortem.

40. One M.H.Basavaraj – PW.39 is the PC who carried the articles to the FSL and mobiles to the Deputy General Manager - BSNL.

41. One Abbeer – PW.40 is the PC who carried the bones to DNA test to Hyderabad

42. One S.K.Prahlad – PW.41 is the CPI, Hosanagar Circle, who arrested A2 in the house of PW.10 on 12.08.2005.

43. One Shivanandappa – PW.42 is the PC who made unsuccessful search of the head of the deceased, which was thrown into the river. His evidence has not incriminating value.

44. One Kundan - PW.43 is the PC who has drafted mahazars in this case at the instructions of the I.O. as per Ex.P-39 and Ex.P-40.

45. One Sadashivappa – PW.44 is the PC who submitted FIR to JMFC.

46. One D.S.Negi – PW.45 is the Technical Examiner in Centre for DNA Fingerprints and Diagnostics, Hyderabad who conducted DNA test and identified forms as per Ex.P.75 and P.76.

47. One M.A.Nataraj – PW.46 is the Police Inspector who conducted part of investigation.

48. One Bhaskar Rai – PW.47 is the Police Inspector (I.O.) who registered FIR lodged by PW.1 and registered the crime and conducted further investigation.

49. The Trial Court on the basis of the said evidence, convicted A1 to A3 for offence under Sections.364, 302 and 201 R/w. Sec.34 of IPC. The accused persons are sentenced to death for conviction under Section 302 IPC. For confirmation of death sentence a reference

is made. The each of the accused persons have filed appeals against the conviction.

50. Sri A.H.Bhaghavan, Learned Counsel for A1 strenuously contended the following discrepant circumstances to assail the order of conviction and alternatively opposed for imposition of death penalty:-

> (a) The evidence of PW.1 and PW.12 discloses that they paid cash of Rs.4,00,000/- to the deceased around 12.30 P.M. The evidence of PW6 discloses that he saw A1 and A3 in a Maruthi Van around 1.10 P.M. Rest of the evidence of PW.6 is inconsequential. But the prosecution has projected the said circumstance as the one after the event of murder within the shortest time gap. It is impossible to have committed the offence.
>
> (b) The theory of extra judicial confession to PW.11 and PW.13 is concocted.
>
> (c) The conviction of the accused persons U/s.364 of IPC in the absence of proof of material ingredients is bad in law.

51. Sri Shivaprasad, Learned Counsel for appellant adopted the arguments of Sri A.H. Bhaghvan and in addition to that he has submitted the following circumstances to assail the order of conviction:-

(1) Recovery of cash at the voluntary instance of A2 is artificial and it is in the evidence that at the time of recovery, there was no electricity, with the help of candle-light the recoveries are effected.

(2) The evidence regarding recovery proceedings is artificial and cannot be relied upon.

(3) There is no mention of missing of gold chain – M.O.5. Therefore, the evidence of recovery of gold chain alleged to be produced by A2 is concocted circumstance.

52. Sri R.B. Deshpande, Learned Counsel for A3 adopted the arguments submitted by counsel for A1 and A2 and strenuously submitted that the theory of recovery of dead body and money at the voluntary instance of A3 is concocted.

53. Sri Chandramouli, Learned SPP strenuously argued that whatever the discrepant circumstances pointed out by counsel for appellants/accused are trivial in nature and cannot dent the credibility of evidence of the independent witnesses examined by the prosecution to prove the guilt. The discrepancy with regard to the time of accused and deceased being together at Sagar as stated by PW.4 and the evidence of PW.6 regarding witnessing A1 at Hosagund Bus Stand at 1.00 P.M. cannot be viewed seriously. The time stated by the witnesses

cannot be considered as precisely correct because usually there would be variations of the time from watch to watch and also because of individual perceptions. The prosecution has successfully established the guilt of the A1 by adducing the evidence of extra judicial confessions made by him to PW.11 and PW.13. The recovery of the dead body at the voluntary instance of A3 and recovery of unexplained huge cash of Rs.1,01,000/- from A3. The recovery of gold chain-M.O.5 which was possessed by A2 at the time of his arrest as per the evidence of PW.10 would clinchingly establish the complicity of the guilt of A2 with the offence. The prosecution has successfully established that PW.1 has identified the dead body is that of the deceased by tattoo marks and also by DNA report. The fact that the exhumation proceedings are not conducted with the assistance of Executive Magistrate is a lapse on the part of the investigating agency. The said lapse cannot have the effect of denting the credibility of the material witnesses who have testified the fact of discovery of dead body at the voluntary instance of the A3.

54. In view of the said evidence it has strenuously argued that the prosecution has successfully proved the guilt and the order of conviction is sound and proper.

55. On thorough scrutiny of the evidence, we find that there is some discrepancy with regard to the evidence of PW.4 and PW.6 regarding the time at which PW.4 saw accused persons and the deceased at Sagar tempo stand and the time at which PW.6 saw A1

at Hosagunda Bus stand. Literally if the time stated by them is considered, it is a shortest gap of time. But however the said discrepancy cannot be given much importance because its quite natural that perception of time defers from person to person depending upon the variation of time between one wrist watch and the other. The lapse of the police in not conducting exhumation proceedings with the assistance of an Executive Magistrate cannot be viewed seriously to reject the credibility of the material witnesses who testify to the discovery of the dead body at the voluntary instance of A3. PW.16 is the president of Grama Panchayath and an independent witness. PW.17 another independent witness testify to the discovery of the dead body at the voluntary instance of A3. He also testify to the recovery of cash of Rs.1,01,000/- and the mobile of the deceased from his possession. The A3 has not given any explanation to the said recoveries.

56. The evidence of PW10 would establish that the A2 was in possession of gold chain-M.O.5 belonging to the deceased. M.O.5 is identified by PW.1 and PW.27 as belonging to the deceased. PW.16 and PW17 are the mahazar witnesses testify to production of M.O.5 and seizure of the same under mahazar. PW.16 and 17 testify to recovery of huge cash of Rs.2,02,700./- at the voluntary instance of A2. A2 has not given any explanation to prove the bonafide possession. The evidence of PW.11 and PW.13 would prove that A1 had made extra judicial confession of committing murder and robbing money. It may be that PW.11 may appear as accomplice but nonetheless the evidence of PW.13 clinchingly establish the extra

judicial confession of A1. The analysis of the above evidence would clinchingly establish the guilt of A1 to A3. Therefore, the order of conviction is sound and proper.

57. Learned Counsel for the appellants submits the following are the extenuating circumstances to reduce the death penalty to an imprisonment for life:-

> (1) The prosecution has endeavored to establish the guilt by circumstantial evidence. Therefore, it is not safe under the circumstances to impose death penalty.
>
> (2) There is no evidence to show that the accused persons have criminal antecedents and there is no material to infer that they cannot be reformed as lawful citizens.
>
> (3) The accused persons are young in age. In view of the following decision, it is submitted that even in case of robbery and murder imposition of death sentence is not imperative.
>
> (a) ***SANTOSH KUMAR SATISHBHUSHAN vs. STATE OF MAHARASHTRA[1];***

1. 2009(2) SCC (Crl) 1150

(b) ***SAHDEO vs. STATE OF U.P.***[2]

(c) In ***BACHAN SINGH vs. STATE OF PUNJAB***[3], their lordships observed:

"206. According to some Indian decisions, the post-murder remorse, penitence or repentance by the murderer is not a factor which may induce the Court to pass the lesser penalty (e.g. Mominuddin Sardar), AIR 1935 Cal 591. But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235 (2) and 354 (3). We have already extracted the views of Messinger and Bittner (ibid). which are in point".

(4) The prosecution version discloses that the death was caused by strangulation. Cutting of the head after causing death and that too only for the purpose of destroying the evidence and to screen themselves from the prosecution. Therefore, their act of cutting of head cannot be considered as cruel and gruesome murder.

2. 2004 Crl.L.J. 2876 3. AIR 1989 Supreme Court 898

(5) The evidence of PW.13 discloses that A1 had become repentant. Therefore, makes an extra judicial confession to him and at his instance voluntarily surrendered before the Police.

58. Sri R.B.Deshpande, the counsel for A3 relied upon the decision of the Supreme Court in ***MULLA AND ANOTHER vs. STATE OF U.P.***[4], ***SANTOSH KUMAR SATISHBHUSHAN BARIYAR vs. STATE OF MAHARASHTRA (Supra)*** and ***BRIJ MOHAN AND OTHERS vs. STATE OF RAJASTHAN***[5].

59. It is argued that in ***MULLA AND ANOTHER vs. STATE OF U.P. (Supra)*** five murders and dacoity are committed. The Supreme Court has held that it is not a rarest of rare case to call for imposition of death penalty. The decision in ***BRIJ MOHAN AND OTHERS vs. STATE OF RAJASTHAN (Supra)*** is also a case of dacoity with murder. The Court held that it is not a rarest of rare case to impose death penalty. In the decision in ***SANTOSH KUMAR SATISHBHUSHAN BARIYAR vs. STATE OF MAHARASHTRA*** **(Supra),** it is a case of kidnap for ransom. The Court held that it is not a rarest of rare case to impose death penalty. With reference to facts and reasons given by the Supreme Court in the said case, it is strenuously argued that facts of the case stand far better than the nature and heinous propensity of crime committed by

4. AIR SCW 2010 1194

5. 1994 SCC (CRI) 527

the accused in the cited cases. Therefore, argued that imposition of death penalty is bad in law.

60. Therefore, Sri.H.S.Chandramouli Learned State Public Prosecutor relied upon the decision reported in the case of ***SUSHIL MURMU vs. STATE OF JHARKHAND***[6], wherein it is held that 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 and also when the murder is committed for a motive which evinces total depravity and meanness; e.g., 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 and some of the instances laid down in the decision to impose death penalty. In the case of ***ASHAFILAL AND OTHERS vs. STATE OF U.P.***[7] the accused committed gruesome murder out of vengeance with regard to property with the mother of the victim. In the said case, death penalty is imposed. The decision in ***SANTOSH KUMAR SATISHBHUSHAN BARIYAR vs. STATE OF MAHARASHTRA (Supra)*** wherein the murder of three persons of a family by causing multiple stab injuries with a knife. The motive of crime being robbery and it is between master and servant. The injuries on the deceased discloses that assailants have practically butchered them and death sentence was imposed.

6. AIR 2004 SC 394

61. With reference to the facts of the case Sri H.S. Chandramouli argued that robbery and murder is committed with pre-meditation. The evidence of PW.11 would disclose that the commission of offence was well-planned conspiracy. A1 in fact invited PW.11 to take part in committing the offence. The gruesome acts of the accused of committing murder beheading and deliberately burying the trunk, throwing the head in the river would disclose barbaric and macabre intentions. The accused are around 30 years of age, therefore they cannot be called as young. If any lenience is shown it would give wrong signals to the society and the impact of deterrence of law on the society would get melted. It is necessary that a stern message should be sent to the society and in particular to the youth that no body can adopt crime for livelihood.

62. The facts in ***MULLA vs. STATE OF U.P. (Supra)*** disclose that the accused was aged about 65 years suffering extreme poverty and had already undergone sentence of 10 years when death sentence was reduced to imprisonment of life.. In Santosh Kumar's case, the accused persons were young in age and unemployed. In Brijmohan's case it was a dacoity, but the accused were armed and were outside the house giving moral support to the others who committed acts of dacoity.

63. The sentencing policy under the Indian Penal Code and Section 354(3) of Cr.P.C. is highly irrational and inequitable. In the scheme of IPC, Sec. 302 IPC is not the only offence punishable with death sentence. The offence of waging war against the Government of

India U/S.121, giving or fabricating false evidence with an intent to indict innocent person convicted for a capital offence U/S.194, kidnap for ransom U/S.364-A and dacoity with murder U/S.396 are all punishable with death penalty or imprisonment for life.

64. In the majority of the cases that are come for trial before the Sessions Court are offence punishable U/s.302 IPC. Normally, the murder is committed by the accused for the reason of infidelity of the wife, domestic quarrels, land dispute, property disputes etc. The majority of the convictions recorded pertain to the offence of murder committed for the above reasons. In view of Sec. 354(3), the accused in such cases is sentenced to imprisonment for life. The accused in the said type of cases are all well behaved social beings to the entire society at large, except to the victim of crime. The motive for such murders is not diabolical to the society at large, whereas, when a crime committed for gainful motive, anybody in the society could be indiscriminate target of crime. The offenders who commit murder for trivial reasons cannot be equated with the offenders who commit murders for gainful motives indiscriminately targeting the society at large and it would be unjust to weigh both of them in the same scale. In other words, if both the categories of offenders are punished with imprisonment of life, there would be no rational discrimination in the sentencing policy.

65. The accused whose criminal propensity is limited only to individual or individuals and the accused whose criminal propensity is harmful to the society at large should not be treated alike in the matter

of sentence. In a case of robbery with murder, dacoity with murder, waging war against the Government of India punishable under Section121, giving or fabricating false evidence with an intention to indict innocent persons convicted for a capital offence which is punishable under Section194, kidnap for ransom Under Section 364(A) have to be dealt sternly and ruthlessly. Gone are the days to blindly believe the adage "crime never pays". The society is terribly criminalised. It is the utmost duty of the law enforcing authorities to endeavor that the youth of the country should not be attracted to criminal methods for their survival. The accused persons who commit macabre murders for gain should be sternly dealt with. Otherwise the youth of the country would be lured to take the path of crime for easy life and livelihood. Therefore, in the later category of cases depending upon the manner and magnitude of the acts of accused. The death sentence should be imposed considering it as a rarest of rare case.

The facts and evidence in the present case disclose the accused are almost middle aged, there are no extenuating circumstances of unemployment and extreme poverty. The manner in which the gruesome murder is committed and the attempts made by them by suppressing the evidence to screen them from punishment would show their pre-meditated and horrendous intentions and does not permit any leniency in the matter of sentence. Therefore, the death sentence imposed by the Trial Court deserves to be upheld. The appeals of the accused are dismissed.
