DALBIR SINGH & ORS. A

v.

STATE OF PUNJAB

May 4, 1979

[V. R. KRISHNA IYER, D. A. DESAI AND A. P. SEN, JJ.] B

Indian Penal Code (45 *of* 1860), *S.* 302 & *Criminal Procedure Code* 1973 (2 *of* 1974), *S.* 354(3)—*Imposition of death penalty—Court enjoined with duty to record 'special reasons' for awarding extreme penalty—Nature of the crime whether the sole determinant of the punishment.*

Constitution of India 1950, *Art.* 141—*Binding nature of Precedents—Ingredients of a decision—Explained—Ratio decidendi—Definition of.* C

There was a dispute between the appellants and the complainant's party over the 'turns of water' for irrigation of their agricultural lands. The dispute was settled by a patchwork mediation but it was of no avail. On the fateful day, the complainant's party were making merry with alcohol in the house of the prosecution witness when the 3rd appellant joined them. His unwelcome presence resulted in frayed tempers, and beatings of the 3rd appellant. The latter, bent on reprisal for the flagellation and humilation, waited till sundown and returned armed with friends and weapons. He ignited the attack by instigation and the 1st and 2nd appellants fired with their guns as a result of which 3 members of the complainants' party died on the spot. At this situation, PW 14 brought out his licensed gun from his house, and thereupon both sides started firing and a number of persons sustained gun shot injuries on their person. In the midst of this firing, the lambardar of the village appeared on the scene and made an attempt to pacify both the sides, but he also received gun shot injuries as a result of which he died two days later. A fourth person made a dying declaration that he had been shot by the appellants. D E

The Sessions Court held the appellants guilty under Section 302 I.P.C. and sentenced them to death, and the High Court on appeal confirmed the sentence. F

Allowing the appeal to this court,

HELD : [Per Krishna Iyer & Desai, JJ.]

1. Death sentence on death sentence is Parliament's function. Interpretative non-application of death sentence when legislative alternatives exist is within judicial discretion. [1065B] G

2. The dignity of man, a sublime value of the Constitution and the heart of penelogical humanisation, may find expression through culturisation of the judicial art of interpretation and choice from alternatives. If the Court reads the text of s. 302 Penal Code, enlightened by the fundamental right to life which the Founding Fathers of the Constitution made manifest, the judicial oath to uphold the Constitution will unfold profound implications H

beyond lip service to Form VIII of the Third Schedule and this lofty obligation and cultural Constitutional behest validates the exploration of the meaning of meanings wrapped in the uncharted either/or of the text of s. 302 IPC. [1065E-F]

3. Courts read the Code, not in judicial cloisters but in the light of societal ethos. Nor does the humanism of our Constitution holistically viewed, subscribe to the hysterical assumption or facile illusion that a crime free society will dawn if hangman and firing squads were kept feverishly busy. [1066A-B]

4. The myopic view that public executions backed by judicial sentences will perform the funeral of all criminals and scare away potential offenders is a die-hard superstition of sociologically and psychologically illiterate legalism which sacrifices cultural values, conveniently turns away from the history of the futility of capital penalty over the ages and unconsciously violates the global reality that half the world has given up death penalty, *de jure* or *de facto,* without added calamity. and the other half is being educated out of this State practised lethal violence by powerful human rights movements at once secular and spiritual. [1067B-C]

5. The jurisprudence of sentencing in Free India has been a Cinderella and the values of our Constitution have not adequately humanised the punitive diagnostics of criminal courts, which sometimes, though rarely, remind us of the torturesome and trigger-happy aberrations of the Middle Ages and some gory geographic segments, soaked in retributive blood and untouched by the correctional *karuna* of our Constitutional culture. [1068G]

6. After *Ediga Annamas's* case [1974] 4 SCC 443 the law of punishment under s. 302 IPC has been largely settled by this court and the High Courts are bound thereby. [1068H]

7. *Rajendra Prasad's* case [1979] 3 SCR 78 and *Bishnu Deo Shaw's* case [1979] 3 SCR p. 355 have indubitably laid down the normative cynosure and until over ruled by a larger bench of this court *that* is the law of the land under Art. 141. To discard it is to disobey the Constitution and such subversiveness of the rule of law, in a crucial area of life and death, will spell judicial disorder. Today, the law is what Rajendra Prasad, in its majority judgment, has laid down and that has been done at unmistakable length. Willy-nilly, that binds judges and parties alike. [1068H-1069A, 1069C]

8. Counting the casualties is not the main criterion for sentencing to death, nor recklessness in the act of murder. The sole focus on the crime and the total farewell to the criminal and his social-personal circumstances mutilate sentencing justice. [1069B]

9. The forensic exercise at the sentencing stage, despite the purposeful s. 235(2) Cr.P.C., has been a functional failure because of the casual way the punishment factors are dealt with, as if the nature of the crime was the sole determinant of the punishment. In *Rajendra Prasad's* case it has been explained how the prosecution must make out, by special factors, why the graver penalty should be inflicted. Evidence may be led and arguments addressed by both sides, but in practice s. 235(2) has been frustratingly ritualised. [1069D-E]

10. Section 302 of the Penal Code, read with s. 354(3) of the Criminal Procedure Code demands special reasons for awarding the graver sentence. [1070E] A

11. Taking the cue from the English legislation on abolition, the majority opinion suggested that life imprisonment which strictly means imprisonment for the whole of the man's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder. [1071F-G] B

12. The gallows swallow, in most cases, the social dissenter, the political dissenter, the poor and the under-privileged, the member of minority groups or one who has turned tough because of broken homes, parental neglect or other undeserved adversities of childhood or later. Judicial error leading to innocent men being executed is not too recondite a reality. Evidence in Court and assessments by judges have human limitation. [1071H-1072B] C

13. A Full Bench of the Madras High Court in *Athapa Goundan's* case (AIR 1937 Mad. 695) sentenced him to death. He was duly executed as also several others on the ratio of that ruling. This Full Bench decision was, however, over-ruled ten years later by the Privy Council in 1947 PC 67. Had it been done before Goundan was gallowed many judicial hangings could have been halted. [1072C] D

(A) In the instant case the earlier provocation came from the deceased's side by beating up Appellant No. 3. The parties, including the prosecution group were tipsy. There had been antecedent irrigation irritation between them. There was no pre-planned, well-laid attack, hell-bent on liquidating the enemy. [1069E] E

(B) The sentences of death in the present appeal are liable to be reduced to life imprisonment. [1071E]

F

(*Per Sen, J. dissenting*)

1. The question of abolition of capital punishment is a difficult and controversial subject, long and hotly debated and it has evoked during the past two centuries strong conflicting views. [1072H]

2. The question whether the scope of death sentence should be curtailed or not is for the Parliament to decide. The matter is essentially of political expediency and, as such, it is the concern of the statesmen, and, therefore, the domain of the Legislature and not the Judiciary. [1073A] G

3. It is not within the province of this Court while dealing with an appeal confined to sentence under Art. 136, to curtail the scope of death sentence under s. 302 I.P.C., 1860 nor is it constitutionally or legally permissible for this Court while hearing such an appeal to lay down that on grounds of compassion and humanism the sentence of death on a conviction for murder under s. 302, as a rule of universal application be substituted by a sentence H

A of imprisonment for life, irrespective of the gravity of the crime and the surrounding circumstances i.e., virtually abolish the extreme penalty. [1072G]

4. Section 302 I.P.C., 1860 confers upon the Court a discretion in the matter of the punishment to be imposed for an offence of murder and the Court has to choose between the sentence of death and a sentence of imprisonment for life while under s. 354(3) Cr. P.C., 1973 the Court is enjoined with
B a duty to record 'special reasons' in case the extreme penalty is awarded. But the question whether the death sentence should be awarded or not must, be left to the discretion of the Judge trying the accused and the question of sentence must depend upon the facts and circumstances obtaining in each case. A sentence of death when passed, is subject to confirmation by the High Court under s. 366(1) of the Code. The accused also has a right of appeal to the High Court under s. 374(2) against the sentence. Thereafter an
C appeal lies to this Court by special leave under Art. 136 on the question of sentence. It would, therefore, be manifest that it is neither feasible to define nor legally permissible for this Court to limit or circumscribe the connotation of the expression 'special reasons' occurring in s. 354(3) of the Code so as to bring about a virtual abolition of the death sentence. [1073B-E]

5. A decision on a question of sentence depending upon the facts and
D circumstances of a particular case, can never be regarded as a binding precedent, much less 'law declared' within the meaning of Art. 141 of the Constitution so as to bind all courts within the territory of India. [1073F]

6. According to the well settled, theory of precedents every decision contains three basic ingredients : (i) findings of material facts, direct and
E inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts, (ii) statements of the principles of law applicable to the legal problems disclosed by the facts, (iii) Judgment based on the combined effect of (i) and (ii). For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops
F the parties from reopening the dispute. However for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in the decision. This indeed is the *ratio decidendi*. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. [1073G-1074B]

G

7. The *ratio decidendi* may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other elements in the decision are not precedents. [1074C]

Qualcast (Wolverhampton) Ltd. v. *Haynes* L.R. 1959 A.C. 743 referred to.

H

8. Even where the direct facts of an earlier case appear to be identical to those of the case before the Court, the Judge is not bound to draw the same inference as drawn in the earlier case. [1074D]

9. There are no *rationes decidendi* much less any *ratio decidendi* in *Rajendra Prasad's case.* [1074-E] A

(i) In the minority opinion the need for judicial restraint was emphasised and the duty to avoid encroachment on the powers conferred upon Parliament. The assessment of public opinion on this difficult and complex question was essentially a legislative, not a judicial, function. [1074E] B

(ii) Buttressed by the belief that Capital punishment served no useful purpose, the majority, asserted that it was morally unacceptable to the contemporary society and found it shocking to their conscience and sense of justice. The deliberate extinguishment of human life by the State for an offence of murder, was a denial of human dignity and the death penalty was usually inflicted only on a few, i.e. the poor and downtrodden who are outcasts of a society, which led to the irresistible inference that the punishment was not fairly applied. [1074F] C

(iii) This may be 'progressive' stance which is out of place in a judicial pronouncement, which ought to be based on the facts and circumstances of the case and the law applicable. But the professed view does not stem from a firm belief in dignity of human life for the death penalty is advocated for certain classes of offenders, namely (1) white collar offenders, (2) anti-social offenders and (3) hardened murderers. This shows that the majority was not against the capital punishment in principle. [1074G-1075A] D

(iv) On the facts, the majority commuted the sentence of death to a sentence of imprisonment for life, and the decision cannot, therefore, be construed as laying down a *ratio decidendi.* [1075B] E

10. The majority decision tested in the light of the theory of precedents clearly does not lay down any legal principle applied to any legal problem disclosed by the facts and, therefore, the majority decision cannot be, said to have 'declared any law' within the meaning of Art. 141 so as to bind all courts in the country. General observations made in the context of sentencing jurisprudence will have to be regarded as the view of the Judge/Judges concerned—and not 'law declared by this court' under Art. 141 of the Constitution. Any attempt to limit or circumscribe the connotation of 'special reasons' mentioned in s. 354(3) of the Code of Criminal Procedure by indulging in classification of murders such as white collar offences and non-white collar offences or laying down so-called guidelines for imposition of the extreme penalty, would amount to unwarranted abridgement of the discretion legally vested in the trial court and constitutionally upheld by this Court. [1075C-D] F G

11. If the general observations on sentencing jurisprudence made in *Rajendra Prasad's* case are to be regarded as 'law declared by this Court' within the meaning of Art. 141 so, as to bind all courts in the country, then the observation or the so-called guidelines to the effect "'special reasons' necessary for imposing death penalty must relate, *not* to the crime as such *but* to the criminal" occurring in the majority judgment, it must be stated, would be unwarranted and contrary to s. 302 of the Indian Penal Code read with s. 354(3) of the Code of Criminal Procedure. [1075E-F] H

A 12. S. 302 of the I.P.C. gives a choice while s. 354(3) of the Code merely requires 'special reasons' to be indicated for imposing the death penalty. Nothing is stated whether the 'special reasons' should relate to the criminal or the crime. In the absence of any specific indication in that behalf 'special reasons' would relate both to the *crime* and the *criminal*. Previously, perhaps, more attention was being paid to the nature, gravity and the manner of committing the crime, though extenuating factors concerning the criminal, his B age, criminal tendencies etc. were not ignored. [1075G]

13. In the majority judgment in *Rajendra Prasad's* case nothing new has been said except that more emphasis on factors concerning the criminal is indicated. But in the great enthusiasm for doing so, the pendulum has swung to the other extreme and the guideline given is that the 'special reasons' must relate "*not* to the Crime as such *but* to the criminal," for which there is no C warrant in s. 354(3) of the Code of Criminal Procedure. [1075H-1076A]

14. The obsession to get the death penalty abolished from the Statute Book i.e. Indian Penal Code 1860 is so great that an interdict against it is surprisingly spelt out from the Constitution itself because right to life has been regarded as 'very valuable, sacrosanct and fundamental' therein, though in *Jagmohan Singh's* case [(1973) 1 S.C.C. 20] a constitution bench of this D Court unanimously held that the death penalty and the judicial discretion vested in the Court regarding its imposition on an accused are constitutionally valid. [1076B-C]

15. So long as the extreme penalty is retained on the Statute Book, it would be impermissible for any Judge to advocate its abolition in judicial pronouncements. The forum for that is elsewhere. [1076D]

E (a) In the instant case it cannot be said that the award of death sentence to any of the two appellants, was not proper or uncalled for. Though the dispute was over the 'turns of water,' that would hardly furnish any justification for the commission of the pre-planned triple murder. The dastardly act of the appellants resulted in the loss of three precious lives. These were nothing but intentional, cold-blooded and brutal murders. [1077A, E]

F (b) The High Court was justified in confirming the death sentence passed under s. 368(a) of the Code, being satisfied that there were "special reasons" within the meaning of s. 354, sub-s. (3) of the Code of Criminal Procedure 1973. [1077A]

(c) On the facts and circumstances of the case, the award of death sentence to the two appellants who were trigger happy gentlemen was neither G 'erroneous in principle' nor was 'arbitrary or excessive', or 'indicative of an improper exercise of discretion', and is well merited. [1077G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 12 of 1979.

H Appeal by Special Leave from the Judgment and Order dated the 6th October, 1978 of the Punjab and Haryana High Court in Criminal Appeal No. 735 of 1978 and Murder Reference No. 6/78.

Frank Anthony and *Sushil Kumar* for the Appellants. A

R. S. Sondhi and *Hardev Singh* for the Respondent.

The Judgment of V. R. Krishna Iyer and D. A. Desai, JJ. was delivered by Krishna Iyer, J. A. P. Sen, J. gave a dissenting Opinion.

KRISHNA IYER, J.—Death sentence on death sentence is Parliament's B function. Interpretative non-application of death sentence when legislative alternatives exist is within judicial jurisdiction. The onerous option to spare the lives of the appellants to be spent in prison or to hand them over to the hangman to be jettisoned out of terrestrial life into "the undiscovered country from whose bourn no traveller returns" is the crucial function this Court has to exercise in the present appeal. C

Sir Winston Churchill, in his oft-quoted observation, said :

> "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."(1)

D

Without academic aura and maukish sentimentalism the court has to rise to principled pragmatism in the choice of the penal strategy provided by the Penal Code. The level of culture is *not* an irrelevant factor in the punitive exercise. So we must be forwarned against deeply embedded sadism in some sectors of the community, demanding retributive death penalty disguised as criminal justice—a trigger-happy pathology curable only by human rights literacy. But the dignity of man, E a sublime value of our Constitution and the heart of penological humanisation, may find expression through culturisation of the judicial art of interpretation and choice from alternatives. If the court reads the text of s. 302 Penal Code, enlightened by the fundamental right to life which the Father of Nation and the(2) founding fathers of the Constitution made manifest, the judicial oath to uphold the Constitution will F unfold profound implications beyond lip service to Form VIII of the Third Schedule and this lofty obligation and cultural-constitutional behest validates our exploration of the meaning of meanings wrapped in the uncharted either/or of the text of s. 302 I.P.C. It is right to state, to set the record straight, that this Court has in *Rajendra Prasad's* G case(3)., exposed the disutility and counter-culture of an obsolescent obsession with crime as distinguished from crime-doer and the sentencing distortion that develops almost into a paranoid preoccupation with death dealing severity as the saviour of society in the land of the

(1) Sentencing and Probation, National College of the State Judiciary, Reno, Neveda p.68. H

(2) Acharya Kripalani and the Lok Nayak have condemned death penalty publicly

(3) [1979] 3 S. C. R. 78.

A Buddha and the Mahatma and in a world where humanity has protested against barbaric executions by State agencies even with forensic 'rites' Courts read the Code, not in judicial cloisters but in the light of societal ethos. Nor does the humanism of our Constitution holistically viewed subscribe to the hysterical assumption or facile illusion that a crime—free society will dawn if hangman and firing squads were kept feversishly busy.

We may remind the intractable retentionists that the British Royal Commission, after studying statistics from six abolitionist countries, namely, Switzerland, Belgium, The Netherlands, Norway, Sweden and Denmark, observed : "The evidence that we ourselves received in these countries was to the effect that released murderers who commit further crimes of violence are rare, and those who become useful citizens are common."

No Indian is innocent of the insightful observations of the Father of the Nation over 40 years ago in the Harijan :

> "I do regard death sentence as contrary to *ahimsa*. Only he takes life who gives it. All punishment is repugnant to *ahimsa*. Under a state governed according to the principles of *ahimsa*, therefore, a murderer would be sent to a penitentiary and there given every chance of reforming himself. All crime is a kind of disease and should be treated as such."(1)

With this exordial exercise we may get back to the macabre episode in this appeal which has blown up into four murders, typical of the syndrome of village violence triggered off by tremendous trifles when viewed in retrospect. When a psychic stress, left to smoulder and flame up, is fuelled by factions and firearms, social irritants and economic discontents, ubiquitous in rural India, it suddenly flares as showdowns and shootings, taking many precious lives in haywire fury. The solution for explosive tensions and return to tranquility is curing the inner man through proven meditational, mental-moral neural technology, elimination of social provocation and economic injustice and of addiction to inebriants which dement the consumer. Timely vigilance of policing agencies to nip in the bud burgeoning confrontations and prompt and potent enforcement of the Arms Act the failure to do which makes weapons freely available also account for escalating violence. The social autospsy of murders is more significant than the medical post-mortem of cadavers or the forensic close-up of crime after it has occurred. The escapation of violence cannot be arrested

(1) Harijan, March 19, 1937

by inert police presence going into action after tragic clashes, but only by a holistic ministering to the inner man as well as collective consciousness. It is obvious, yet obscure, that a crime-firee society is beyond the gift of severe judges or heavy-handed policemen. And the myopic view that public executions backed by judicial sentences will perform the funeral of all criminals and scare away potential offenders is a die-hard superstition of sociologically and psychologically illiterate legalism which sacrifices cultural values, conveniently turns away from the history of the futility of capital penalty over the ages and unconsciously violates the blobal reality that half the world has given up death penalty *de jure* or *de facto,* without added calamity, and the other half is being educated out of this State-practised lethal violence by powerful human rights movements at once secular and spiritual.

These observations, not meant to be polemical or pontifical, gain functional relevance as we proceed to narrate the minimal facts, as found by the High Court, since we have set our face against reopening evidentiary re-appreciation after concurrent findings have already been rendered by the courts below.

Punjab villagers are good agriculturists and know the value of water for golden harvests. The scene of the four murders, the victims and the villians, the main witnesses to the case and the prosecution scenario take us to the village Sarhali Mandan in Amritsar District which has irrigation facilities and consequent irritation potential. A new scheme, regulating the turns for taking irrigation water, was introduced, about the time of occurrence which affected the accused and benefitted Kapur Singh, a leading prosecution witness. This switch in irrigationed turns sparked off friction. Had it been wholesomely resolved by imaginative official handling this murder, perhaps, could have been obviated. Many murders in the Punjab have been caused by social bungling regarding turns of water which tragically convert the passion for production of the farmer into passion for removal of the obstructor by murder. Governments have some times been deaf and dumb about this etiology. A stitch in time saves nine, is good criminology.

Away, the dispute on the turn of water between the two was settled by a patchwork mediation which did not finally extinguish the fires of fury earlier ignited. For a group, mainly of prosecution witnesses, was making merry with alcohol in the afternoon of October 13, 1977 at the house of Karaj Singh, a prosecution witness, when one of the appellants, Jarnail Singh went in. His unwelcome presence resulted in frayed tempers, heated tantrums and beating of the 3rd appellant. The latter, bent on reprisal for the flagellation and humiliation, waited till sundown

A and returned armed with friends and weapons from outside. Abuses were the provocative invitation for the fracas. The tipsy response brought the opposite party out. Jarnail Singh, the 3rd appellant, who was the victim of the earlier beating, ignited the attack by instigation and his party went into violent action. Guns boomed, *dangs,* dived, three B men and later a fourth, fell dead and the curtain was drawn after the catastrophe was complete.

Probably, the accused party was also drunk. And alcohol makes men beside themselves and buries sanity. The role of intoxicating drinks and drugs in aggressive behaviour and explosive crime has not been the C subject of sufficient criminological research in the country. Impressionistically speaking, half of violent crime, explosive sex and reckless driving, has its 'kick' in alcohol and the gains of 'prohibition' have new dimensions. That apart, in the case on hand, the High Court analysed the evidence, liberally applied the rule of benefit of doubt and climaxed its judgments with sentences of death and imprisonment for life on the D various accused who were eventually held guilty. We are concerned only with those who received capital penalty, and the court expressed itself thus on this momentous issue of death sentence :

> As both Dalbir Singh and Kulwant Singh, accused, fired at Jagir Singh, Sardul Singh and Piara Singh who were absolutely unarmed recklessly and without provocation of E any kind, the sentence of death awarded to each of them by the learned Additional Sessions Judge is also hereby affirmed."

We propose to deal only with this punitive crisis limited to its lethal aspect.

F The judgment under appeal is a hint of the judicial confusion even in this grave area of death penalty. True, the jurisprudence of sentencing in Free India has been a Cinderella and the values of our Constitution have not adequately humanized the punitive diagnostics of criminal courts, which sometimes, though rarely, remined us G of the torturesome and trigger-happy aberrations of the Middle Ages and some gory geographic segments, soaked in retributive blood and untouched by the correctional *karuna* of our constitutional culture. But after *Ediga Annama's* case(1), the law of punishment under s. 302 I.P.C. has been largely settled by this Court and the High Courts are bound thereby. *Rajendra Prasad's* case (supra) and *Bishnu Deo* H *Shaw's*(2) case, have indubitably laid down the normative cynosure

(1) [1974] 4 S. C. C. 443
(2) [1979] 3 S.C. R. 355

and until over-ruled by a larger bench of this court *that* is the law of the land under Art. 141. To discard it is to disobey the Constitution and such subversiveness of the rule of law, in a crucial area of life and death, will spell judicial disorder. One thing is clear. Counting the casualties is not the main criterion for sentencing to death; nor recklessness in the act of murder. The sole focus on the crime and the total farewell to the criminal and his social-personal circumstances mutilate sentencing justice. We express ourselves in this explicit fashion since the deep-rooted *Raj* criminological prejudices still haunt Free India's courts and govern our mentations from the grave. To-day, the law is what *Rajendra Prasad* (supra), in its majority judgment, has laid down and that has been done at unmistakable length, Willy-nilly, that binds judges and parties alike.

The problem in the present case, going by those canons, is easy of resolution. Death sentence in this case is indefensible. We can surely understand how the courts below have fallen into this fatal error. The forensic exercise at the sentencing stage, despite the purposeful s. 235(2) Cr.P.C., has been a functional failure because of the casual way the punishment factors are dealt with, as if the nature of the crime was the sole determinant of the punishment. We have explained in *Rajendra Prasad's* case how the prosecution must make out, by special factors, why the graver penalty should be inflicted. Evidence may be led and arguments addressed by both sides, but in practice s. 235(2) has been frustratingly ritualised.

Nor do we think that the court's attention been drawn to *Ediga Annamma's* case. The two recent decisions of this Court could not have been within the ken of the Court because they were delivered later. Be that as it may, one has only to read the ratio in these three cases side by side with facts of the present case to hold that death penalty is unmerited. Here, the earlier provocation came from the deceased's side by beating up Appellant No. 3. The parties, including the prosecution group, were tipsy. There had been antecedent irrigation irritation between them. There was no preplanned, well-laid attack, hell-bent on liquidating the enemy. A quarrel over turn of water; a pacification *pro tempore;* an afternoon exuberance with jocose and bellicose potions, beating up one appellant leading to a reprisal *vi et armis.*

In *Rajendra Prasad's* case (supra) the court, in its majority judgement, observed :

> "It is not the number of deaths caused nor the situs of the stabs that is telling on that decision to validate the non-

A application of its ratio. It is a mechanistic art which courts the cadavers to sharpen the sentence oblivious of other crucial criteria shaping a dynamic, realistic policy of punishment.

B Three deaths are regrettable, indeed terrible. But it is no social solution to add one more life lost to the list. In this view, we are satisfied that the appellant has not received reasonable consideration on the question of the appropriate sentence. The criteria we have laid down are clear enough to point to the softening of the sentence to one of life imC prisonment. A family feud, an altercation, a sudden passion, although attended with extra-ordinary cruelty, young and malleable age, reasonable prospect of reformation and absence of any conclusive circumstances that the assailant is a habitual murderer or given to chronic violence—these catena of circumstances bearing on the offender call for the D lesser sentence."

The other criteria have been set out at some length in the same judgment and, going by them, there is hardly any warrant for judicial extinguishment of two precious Indian lives. Section 302 of the Penal Code, read with Section 354(3) of the Criminal Procedure E Code, demands special reasons for awarding the graver sentence, and to borrow the reasoning in *Rajendra Prasad's* case.

" 'Special reasons' necessary for imposing death penalty must relate, *not* to the crime as such *but* to the criminal. The crime may be shocking and yet the criminal may not F deserve death penalty. The crime may be less shocking than other murders and yet the callous criminal, e.g. a lethal economic offender, may be jeopardizing societal existence by his act of murder. Likewise, a hardened murderer or dacoit or armed robber who kills and relishes killing and G raping and murdering to such an extent that he is beyond rehabilitation within a reasonable period according to current psycho-therapy or curative techniques may deserve the terminal sentence. Society survives by security for ordinary life. If officers enjoined to defend the peace are treacherously killed to facilitate perpetuation of murderous H and often plunderous crimes social justice steps in to demand penalty dependent on the totality of circumstances."

We see no need to expand on the narrow survival of death sentence in our Code confined to those exceptional situations explained in *Rajendra Prasad's* case. It is heartening, though unheeded that the framers of the Code themselves stated :

> "We are convinced that the Death penalty should be *very sparingly inflicted*. To a great majority of mankind nothing is so dear as life."(1)

Death sentence on death sentence is the upsurge of world opinion and Indian cultural expression. In *Shanti Parva* of the *Mahabharata*, Prince Satyavana in the discussion on the capital penalty says :

> "Destruction of the individual by the king can never be a virtuous act. By killing the wrong-doer the king kills a large number of innocent persons, wife, father, mother and children are killed. A wicked person is seen to imbibe good conduct from a pious person. Good children spring from wicked persons. The extermination of the wicked is not in consonance with eternal law."(2)

while such unanimity in sublimity may not, by itself, repeal the legislated text, judicial dispensers do not behave like cavemen but breathe the fresh air of finer culture.

The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad's* case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

Another sombre fact of history, not often stressed in court sentences save by judges like Douglas and Thurgod Marshall, is that the gallows swallow, in most cases, the social dissenter, the political

(1) Indian Penal Code—Objects and reasons.

(2) Chapter 13, Shanti Parva, Mahabharata, translated by Shri K. G. Subrahmanyam, Advocate in "Can The State kill its Citizens" Pub. by M L. J. Office, Madras.

protester, the poor and the under-privileged, the member of minority groups or one who has turned tough because of broken homes, parental neglect or other undeserved adversities of childhood or later. And a sobering thought which eminent judge and jurist M. C. Chagla told the country over the national T.V. the other day judicial error leading to innocent men being executed in not too recondite a reality. Evidence in court and assessments by judges have human limitations.

It is worth recalling that a Full Bench of the Madras High Court in *Athapa Goundan's* case (AIR 1937 Mad. 695) sentenced him to death. He was duly executed as also several others on the ratio of that ruling. This Full Bench decision was, however, over-ruled 10 years later by the Privy Council in 1947 P.C. 67. Had it been done before Goundan was gallowed many judicial hangings could have been halted. But dead men tell no tales and judicial 'guilt' has no temporal punishment.

Parenthetically, it may be right to observe, before we conclude, that modern neurology has unrevelled through research the traumatic truth that agressive behaviour, even brutal murder, may in all but not negligible cases be traced to brain tumour. In such cases cerebral surgery, not hanging until he is dead, is the rational recipe. This factor is relevant to conviction for crime, but more relevant to the irrevocable sentence of death.

We allow the appeal in regard to appellants Nos. One and Two and reduce their death sentence to one of life imprisonment.

SEN, J.—I do not see any reason to differ from the view expressed by me in my dissenting opinion in *Rajendra Prasad's case*(1). I still adhere to the view that it is not within the province of this Court while dealing with an appeal confined to sentence under Art. 136, to curtail the scope of death sentence under s. 302 I.P.C., 1860, nor is it constitutionally or legally permissible for this Court while hearing such an appeal to lay down that on grounds of compassion and humanism the sentence of death on a conviction for murder under s. 302, as a rule of universal application, be substituted by a sentence of imprisonment for life, irrespective of the gravity of the crime and the surrounding circumstances i.e., virtually abolish the extreme penalty. The question of abolition of capital punishment is a difficult and controversial subject, long and hotly debated and it has evoked during the past two centuries strong conflicting views, as was pointed out by me in *Rajendra Prasad's* case (supra). The question whether

(1) [1979] 3 S.C.R. 78.

the scope of death sentence should be curtailed or not is for the Parliament to decide. The matter is essentially of political expediency and, as such, it is the concern of the statesman and, therefore, the domain of the Legislature, and not the Judiciary.

Section 302 I.P.C., 1860, confers upon the Court a discretion in the matter of the punishment to be imposed for an offence of murder and the Court has to choose between a sentence of death and a sentence of imprisonment for life; while under s. 354(3) Cr.P.C., 1973, the Court is enjoined with a duty to record 'special reasons' in case the extreme penalty is awarded. But the question whether the death sentence should be awarded or not must, in my view, be left to the discretion of the Judge trying the accused and the question of sentence must depend upon the facts and circumstances obtaining in such case. When a sentence of death is passed it is subject to confirmation by the High Court under s. 366(1) of the Code and the accused also has a right of appeal to the High Court under s. 374(2) against the sentence. Thereafter an appeal lies to this Court by special leave under Art. 136 on the question of sentence. It would, therefore, be manifest that it is neither feasible to define nor legally permissible for this Court to limit or circumscribe the connotation of the expression 'special reasons' occurring in s. 354(3) of the Code so as to bring about a virtual abolition of the death sentence.

With greatest respect, the majority decision in *Rajendra Prasad's case* (supra) does not lay down any legal principle of general applicability. A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less 'law declared' within the meaning of Art. 141 of the Constitution so as to bind all Courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients :

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element in the decision for it determines

finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in the decision. This indeed is the *ratio decidendi*(1). It is not every thing said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. In the leading case of *Qualcast (Wolverhampton) Ltd.* v. *Haynes*(2) it was laid down that the *ratio decidendi* may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the Court, the Judge is not bound to draw the same inference as drawn in the earlier case.

One would find that in the decision in *Rajendra Prasad's* case, there are no *rationes decidendi*, much less any *ratio decidendi*. In a minority opinion, I emphasised the need for judicial restraint and the duty to avoid encroachment on the powers conferred upon Parliament. In my view, the assessment of public opinion on this difficult and complex question was essentially a legislative, not a judicial, function. The majority expressed their personal distaste for the capital punishment,butteressed by the belief that it served no useful purpose. They asserted that the capital punishment was morally unacceptable to the contemporary society and found it shocking to their conscience and sense of justice. The deliberate extinguishment of human life by the State for an offence of murder, they reasoned on metaphysical theories of punishment, was a denial of human dignity. They concluded by stating that the death penalty was usually inflicted only on a few, i.e., the poor and down-trodden who are outcastes of a society, which led to the irresistible inference that the punishment was not fairly applied. This may be a 'progressive' stance, which is out of place in a judicial pronouncement, which ought to be based on the facts and circumstances of the case and the law applicable. But the professed view does not stem from a firm belief in dignity of human life for they themselves advocate the death penalty for certain classes of offenders,

(1) R. J. Walker & M. G. Walker, The English Legal System, Butterworths 1972 3rd Edn., pp. 123-124.

(2) L. R. [1959] A.C. 743.

namely (1) white-collar offenders, (2) anti-social offenders, and (3) hardened murderers. This show that the majority was not against the capital punishment in principle. On the facts before them they commuted the sentence of death to a sentence of imprisonment for life, and the decision cannot, therefore, be construed as laying down a *ratio decidendi.*

Testing the majority decision in *Rajendra Prasad's* case (supra) in light of theory of precedents as expounded above it seems to me clear that it does not lay down any legal principle applied to any legal problem disclosed by the facts and, therefore the majority decision cannot be said to have 'declared any law' within the meaning of Art. 141 so as to bind all Courts in the country. General observations made in the context of sentencing jurisprudence will have to be regarded as the view of the Judge/Judges concerned—and not 'law declared by this Court' under Art. 141 of the Constitution. Any attempt to limit or circumscribe the connotation of 'special reasons' mentioned in s. 354(3) of the Code of Criminal Procedure by indulging in classification of murders such as white collar offences and non-white collar offences or laying down so-called guidelines for imposition of the extreme penalty, would amount to unwarranted abridgement of the discretion legally vested in the trial court and constitutionally upheld by this Court.

If the general observations on sentencing jurisprudence made in *Rajendra Prasad's case* (supra) are to be regarded as 'law declared by this Court' within the meaning of Art. 141 so as to bind all Court's in the country, then the observation or the so-called guideline as to the effect " 'special reasons' necessary for imposing death penalty must relate, *not* to the crime as such *but* to the criminal" occurring in the majority judgment, it must be pointed out, if I may say so, with respect, would be unwarranted and contrary to s. 302 of the Indian Penal Code read with s. 354(3) of the Code of Criminal Procedure. Section 302 of the Indian Penal Code gives a choice while s. 354(3) of the Code merely requires 'special reasons' to be indicated for imposing the death penalty. Nothing is stated whether the 'special reasons' should relate to the criminal or the crime. In the absence of any specific indication in that behalf 'special reasons' would relate both to the *crime* and the *criminal.* Previously, perhaps more attention was being paid to the nature, gravity and the manner of committing the crime, though extenuating factors concerning the criminal, his age, criminal tendencies etc. were not ignored. In the majority judgment in *Rajendra Prasad's* case (supra), nothing new has been said except that more emphasis on factors concerning the criminal is indicated. But in the great enthusiasm for doing so, the pendulum has swung to

A the other extreme and the guideline given is that the 'special reasons' must relate *"not* to the crime as such *but* to the criminal" for which there is no warrant in s. 354(3) of the Code of Criminal Procedure.

I may also venture to say, the obsession to get the death penalty abolished from the Statute Book, i.e., Indian Penal Code, 1860, is so great that an interdict against it is surprisingly spelt out from the Constitution itself because right to life has been regarded as 'very valuable, sacrosanct and fundamental' therein, though in *Jagmohan Singh's case*(1) this Court by unanimous judgment of five Judges held that the death penalty and the judicial discretion vested in the Court regarding its imposition on an accused are constitutionally valid. That decision, it may incidentally be pointed out, has adverted to the "well-settled principles" which have all these years governed the exercise of proper judicial discretion. In my view, therefore, so long as the extreme penalty is retained on the Statute Book, it would be impermissible for any Judge to advocate its abolition in judicial pronouncements. The forum for that is elsewhere.

There is increasing concern today about the judiciary transgressing its limits by usurping the function of the legislature. Many critics think that the courts should 'apply', but not 'make', the law and that they should not intrude into the field of policy-making. The problem appears to be also acute in the United States of America. In a recent article, a learned writer(2) views the complex situation with deep concern, stating :

> "Today many Americans do resent an ever-more activist judiciary. Beware, warns a vocal group of scholars : *The Imperial Presidency might have faded, but now an Imperial Judiciary has the Republic in its clutches"* (Emphasis supplied)."

He then goes on to say :

> "For all their power, Judges remain remarkably unaccountable and unknown."

Mr. Justice Robert Jackson, Associated Justice of the Supreme Court of the United States in the Roosevelt and Truman years, delineates the correct picture :

> "We are not final because we are infallible, but we are infallible because we are final."

In the end, that means relying on Judges themselves to exercise self-restraint.

(1) [1973] 1 S. C. C. 20

(2) Evan Thomas, "Have the Judges Done Too Much?" Time Essay, Time, January 22, 1979, pp. 49-50.

Reverting to the appeal before me, I cannot say that the award of death sentence to any of the two appellants, Dalbir Singh and Kulwant Singh was not proper or uncalled for. Though the dispute was over the 'turns of water', that would hardly furnish any justification for the commission of the pre-planned triple murder. The appellant Dalbir Singh fired two gun shots hitting the deceased Sardul Singh on the chest, resulting in his instantaneous death. When the deceased Jagir Singh stooped forward to lift Sardul Singh, he was fired at by the appellant Kulwant Singh with his gun which hit him on the fore-head. This also resulted in his immediate death. When the deceased Piara Singh came forward to rescue Jagir Singh, both the appellants Kulwant Singh and Dalbir Singh again fired at him from their guns, as a result of which he fell down and succumbed to his injuries on the spot. Thereafter, both the appellants continued firing their guns at the complainant's party and Kapoor Singh PW 14 and no other alternative but to bring out his licensed gun from his house. Thereupon, both sides started firing and a number of persons sustained gun shot injuries on their person. Baga Singh, lambardar of the village in the midst of this firing appeared on the scene and made an attempt to pecify both the sides, but he also received gun shot injuries as a result of which he died two days later. The dastardly act of the appellants resulted in the loss of three precious lives. That leaves out of account the fourth, Baga Singh, who made a dying declaration that he had also been shot by the appellants, but the High Court felt that he might have been caught between the cross-fire which subsequently ensued after the three had fallen. These were nothing but intentional, cold-blooded and brutal murders.

In my view, the High Court was justified in confirming the death sentences passed under s. 368(a) of the Code, being satisfied that there were "special reasons" within the meaning of s. 354, sub-s. (3) of the Code of Criminal procedure, 1973, I would say that on the facts and circumstances of the case, the award of death sentence to the two appellants was neither 'erroneous in principle' nor was 'arbitrary or excessive', or 'indicative of an improper exercise of discretion'. For my part, I have no sympathy for these trigger-happy gentlemen and the sentence imposed on them is well-merited.

I would, therefore, dismiss the appeal leaving the appellants to Executive clemency.

N.V.K. *Appeal allowed.*