To Hang or Not to: A Case Comment on Mulla v. State of UP

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A CASE COMMENT ON MULLA v. STATE OF UP\(^1\)

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Many that live deserve death. And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgement. For even the very wise cannot see all ends.

J.R.R Tolkien

What is the sufficient punishment for a crime is a question that has flummoxed law makers and courts for most of legal history. Does one punish the offender solely based on the crime committed or does one also take into account external influences and circumstances which invariably play a role in every human action, be it criminal or otherwise. These are but two of the most important questions that the Supreme Court has attempted to answer in the impugned judgment. While these have been decided upon, debated and examined many a times before, they remain as contentious as ever. It is therefore only proper that a full summary of the facts be examined before an analysis of the judgment is made.

Facts

On the night of the 21\(^{st}\) of December, 1995, a group of eight farmers including a woman were accosted in their field by a gang of eight, armed miscreants who demanded ten thousand rupees from each. When the former expressed their inability to do so, they were assaulted by the latter who forced five of them to come along and warned the remaining three that if the money was not paid the abductees would be killed. The panic stricken trio rushed to their village and narrated the whole incident there. The hour of the day and fear of the bandits kept the villagers at home till daybreak when they lodged an FIR at the local police station and organised search parties to find the abducted people. Their grisly fate was soon clear. While one man had been killed some distance away from the place he had been abducted from, the others (including the woman) had been killed a further kilometre away and the bodies dumped near a pond. All of them had their throats slit.

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\(^1\) Criminal Appeal No. 396 of 2008, Decided on the 8\(^{th}\) of February, 2010
The Police acted soon enough and within a fortnight had apprehended four of the accused. They were Mulla, Tula, Guddu and Asha Ram. A country made gun, cartridges as well as a knife were seized from them. The Prosecution mainly relied on the evidence of the three persons they had left alive and who recognized them in the identification parade. Reliance was also placed *inter alia* on medical evidence and the testimony of a girl whom they had abducted prior to the offence and who was an eyewitness to the brutal killings. Based on this the Trial Court convicted Mulla and Guddu under Sections 365, 148, 149 and 302 of the Indian Penal Code, 1860. They were sentenced to death under the last two sections and to various terms of imprisonment plus fine for the other offences. The mandatory appeal to the High Court gave the convicts no relief as the High Court in 2006 confirmed the conviction and the sentence passed. It was then that they preferred an appeal to the Supreme Court where it was heard by a two judge bench comprising of Sathasivam and Dattu JJ.

**The Law**

The written text of the law on the subject of death penalty is remarkably short and crisp for the amount of dust and fury that the issue generates. It is primarily through case law that jurisprudence on the subject has developed in India. Section 302, used to punish the accused here, runs thus “Whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine”. While a prima facie reading of this provision gives the impression that punishment is entirely at the discretion of the judges, in practice the Supreme Court has laid down elaborate rules that govern the crime and punishment of murder.

Prior to *Bachan Singh v. State of Punjab*\(^2\) (hereinafter referred to as *Bachan Singh*), the awarding of the death sentence was a whole lot commoner in India. For example in the four year period between 1974 and 1978 no less than 29 people were executed by the State.\(^3\) The only guidelines available were in Section 354(3) of the Criminal Procedure Code, 1973. It stated that *Bachan Singh* for the first time laid down comprehensive guidelines and conditions for awarding the death sentence. It was also the genesis of the famous ‘Rarest of the rare’ doctrine. The legal

\(^2\) (1980) 2 SCC 684: AIR 1980 SC 898  
\(^3\) Kehar Singh v. Union of India, (1989) 1 SCC 204, at 218
position as decided therein and reaffirmed in *Macchi Singh and Ors v. State of Punjab*\(^4\) is as under

a) Death sentence is the exception and life imprisonment is the rule.

b) The death sentence is to be given only in the “rarest of rare cases when the collective conscience (of the community) is so shocked that it will expect the judiciary...to inflict death penalty.”\(^5\)

The Court further expounded this doctrine in the latter case by defining what it meant by rarest of the rare. This includes burning alive or torturing and dismembering the victim, using hired assassins to commit the offence, murder committed in the course of treason, killing a member of the minority communities or the Scheduled Castes and Tribes in order to terrorize them, bride burning or the murder of a person who was either helpless, a minor or who trusted the murderer.\(^6\)

The list is not exhaustive and the Court mentions all of these as instances where the doctrine may apply. Along with this the Court also took into account the circumstances of the offender (his age, his chances of reforming &c)\(^7\) and recommended drawing up a balance sheet of aggravating or mitigating circumstances according to which the punishment may be decided. Ultimately death sentence may be awarded only if the Court feels that life sentence will not do and “there is no alternative but to impose death penalty even after giving maximum weightage to the mitigating circumstances.”\(^8\)

This in brief is the law relating to the imposition of death penalty under Indian law. Subsequent to *Machhi Singh*, the Apex Court in very many judgments has reiterated this position. A few of the important ones include *Asharfi Lal and Ors v. State of Uttar Pradesh*\(^9\), *Union of India v. Devendra Nath Rai*\(^10\) and *Ram Singh v. Sonia and Ors*.\(^11\) It was in light of these precedents then that the impugned judgment was delivered.

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\(^4\) (1983) 3 SCC 470  
\(^5\) Ibid, para 32  
\(^6\) Id, para 33-36  
\(^7\) This was originally laid down in *Bachan Singh* (supra), para 206  
\(^8\) Id, para 39  
\(^9\) (1987) 3 SCC 224  
\(^10\) (2006) 2 SCC 243  
\(^11\) (2007) 3 SCC 1
The Judgment

The first issue that the Court dealt with was regarding the delay in holding the identification parade. It was stated by the Counsel for the petitioners that there was a lapse of close to two months between the arrest of the accused-petitioners and the identification parade. It was contended therefore that the identification by the Prosecution witnesses was invalid. The Court refused to buy this argument however and referring to its earlier judgments\textsuperscript{12} said that the parade should ideally be conducted as soon as possible in order to avoid any mistake on part of the witnesses, but mere non compliance with this condition will not invalidate the identification if the delay can be properly explained with a sound justification. What constitutes sound justification is of course very subjective and should be decided on a case to case basis. Also, it is the duty of the authorities to make sure that the delay does not lead to the exposure of the accused which may lead to mistakes on the part of witnesses. In the present case, though there was a delay in holding the identification parade, the same was conducted in accordance with the established procedure and hence cannot be called invalid. The challenge to evidence blunted, it was held that the guilt of both the accused had been proven beyond reasonable doubt and the facts of the case as stated by the Prosecution were held to be true.

The second issue, that was also the crux of the appeal dealt with the matter of sentencing. Sathavisam J comprehensively stated the legal position on the subject from \textit{Bachan Singh} onwards as has already been discussed earlier in this paper. He culled out from \textit{Machhi Singh} the three conditions for determining rarest of the rare viz. the crime’s gruesomeness, the mitigating and aggravating conditions along with the position of the criminal and whether death is the only punishment befitting the crime.\textsuperscript{13}

Based on the pleadings and contentions advanced by both the parties the Court proceeded to list the aggravating and mitigating circumstances in this case. The aggravating circumstances were—cold blooded murder of five defenceless people, lack of any provocation or resistance from the hapless victims and murder for ransom when fully aware that the murdered were too poor to pay


\textsuperscript{13} Originally stated by Thakkar J. on para 38 in \textit{Machhi Singh}; Rephased and adapted in para 48 of the impugned judgment
the amount demanded.\textsuperscript{14} At the same time the mitigating circumstances were- the accused had already undergone imprisonment for fourteen years, their advanced age and their circumstances generally (\textit{sic}).\textsuperscript{15}

Referring to \textit{Bachan Singh} (supra) and \textit{Swami Shraddhananda v. State of Karnataka}\textsuperscript{16}, the Honourable Court stated that old age has been accepted as one of the mitigating factors while awarding death penalty. Coupled with this is the fact that they have been incarcerated for the last fourteen years, which is the period many life convicts serve before becoming eligible for parole.\textsuperscript{17} The 48\textsuperscript{th} Law Commission Report had suggested that many a times crime is the result of socio-economic factors. While not a justification for crime, such reasons may be counted among the mitigating circumstances in the Court’s opinion. The Court also ventured its opinion that socio-economic emancipation may lead to the criminal’s reform. To quote from the judgment, “...they have committed these heinous crimes for want of money. Though we are shocked by their deeds, we find no reason why they cannot be reformed over a period of time.”\textsuperscript{18}

Once it had made up its mind regarding the non imposition of death penalty in this case, the Honourable Court entered into a brief discussion on the length of life imprisonment. In \textit{Subash Chander v. Krishan Lal}\textsuperscript{19}, it had been held, relying on earlier cases like \textit{Gopal Vinayak Godse v. State of Maharashtra and Ors}\textsuperscript{20}, \textit{Pandit Kishori Lal v. King Emperor}\textsuperscript{21} and \textit{State of Madhya Pradesh v. Ratan Singh and Ors}\textsuperscript{22} that life imprisonment means imprisonment for the rest of the convict’s life unless the State Government decides to remit it to twenty years. This was further clarified in \textit{Ramraj v. State of Chhattisgarh}\textsuperscript{23} that while the release of a life convict is entirely at the discretion of the State government, in no case should that translate to a term of less than fourteen years in the light of Section 433A of the Criminal Procedure Code, 1973.

\textsuperscript{14} Para 51 of the judgment
\textsuperscript{15} Para 52 of the judgment
\textsuperscript{16} (2008) 13 SCC 767
\textsuperscript{17} Para 53 of the judgment
\textsuperscript{18} Ibid, Para 55
\textsuperscript{19} (2001) 4 SCC 458
\textsuperscript{20} AIR 1960 SC 600
\textsuperscript{21} 1944 (1) 72 LR Ind Ap
\textsuperscript{22} 1976 CriLJ 1192
\textsuperscript{23} 2009 (14) SCALE 533
The Honourable Court ended by commuting the death sentences of both the convicts to life imprisonment in light of the mitigating circumstances discussed. It also directed that they should serve the rest of their lives in prison unless the State Government remits the sentence by providing sufficient reasons.

Analysis

A remarkable judgment in many ways, *Mulla* represents the first instance where socio-economic factors were used as a ground to commute a death sentence. However like most of the other decisions of the Indian judiciary on this subject, it too is marred by what would be called arbitrariness. The problem does not lie with the Court but with the very institution of death penalty and the way it is administered in India. Before entering into a discussion on that subject, the researchers wish to undertake a paragraph by paragraph study of the substantive part of the judgment.

Bound by precedent on the matter of the constitutional validity of Section 302, the Court had little space to improvise. In Paragraph 42, the Court speaks of ‘social necessity’ and deterrence as reasons for punishment. Reforming the criminal, considered to be the objective of punishment in modern jurisprudence is left out. Thankfully the Court’s decision was not influenced by this unfortunate oversight. In Paragraph 50 too, the Court erred, in the researchers’ opinion, by discounting the previous criminal history of the accused on the ground that they had been acquitted. If that were so, it should have also overlooked the evidence of PW-4, who had alleged that she had been forcibly abducted and detained by the accused and their accomplices. Instead it accepted a part of her story and rejected the second half without giving sufficient reasons for this action.

The distinguishing facet of this case, as has already been remarked, is its addition of socio-economic factors to the list of mitigating circumstances. The ‘socio’ bit has been overlooked in the decision as Their Lordships confined themselves to discussing economic backwardness as a reason for crime in Paragraph 54. A laudable observation of the Court is their linking economic poverty with ability to reform. “It may not be misplaced to note” the Court says, “that a criminal who commits crimes due to his economic backwardness is most likely to reform.” The implications of this one statement are indeed far reaching. For the last century and a half the
punishment for crimes has been same for both rich and poor inspite of the very obvious differences in their social standing. It is humbly submitted by the researchers that economic deprivation creates a form of inequality at par if not more than what caste based disability would. The motivations for an economic crime for a poor man are usually procuring basic necessities of life for him and his family. As rightly remarked by the Court, this fact itself cannot be taken to be an excuse for crime; however it must not be lost sight of either. Where it becomes relevant is in the matter of sentencing where attempts at reform are usually very successful with the miserably poor, most of whom are first time criminals drawn to crime by necessity. Hanging a person for a hunger induced crime will be as much a miscarriage of justice as freeing him on the same count. The Court’s via media of incarcerating him for a sufficiently long period to serve the ends of justice while at the same time attempting to reform him is praiseworthy.

As is evident from this case much of the problem with death penalty in India is the result of the vague nature of the “Rarest of rare” doctrine as evolved in Bachan Singh. So much so that in Ravindra Trimbak Chouthmal v. State of Maharashtra24 the Court refused to award death in a case it labelled “most atrocious and despicable” simply because dowry deaths have become commonplace and cannot be categorised under rarest of rare! Quite evidently the Court’s understanding of ‘rarest of rare’ was limited to gruesomeness of the crime. At the other end of the spectrum are cases like Asharfi Lal25 and Mahesh s/o Ram Narain and ors. v. State of Madhya Pradesh26 where the judges solely focussed on the social necessity of death sentence and ignored the mitigating circumstances. Gentela Vijayawardhan Rao and Anr v. State of Andhra Pradesh27 saw the Court remarking that if “these type of persons escape (the death penalty)...it would result in miscarriage of justice.” Again no effort was made to understand the spirit behind Bachan Singh and social necessity was used as a convenient excuse to pass the death sentence. The decision in Mulla has in effect ignored all these conflicting precedents in the interests of justice.

24 (1996) 4 SCC 148
25 Supra, n.9
26 AIR 1987 SC 1346
27 AIR 1996 SC 2791
Conclusion

*Mulla v. State of UP* should be viewed as the first step towards answering a larger question: Whether the Indian State shall continue with the lethal lottery of death penalty? At any given trial for murder today the chances of a person being hanged or not depend solely on the whims and fancies of the judges, so much that in a recent judgment the Supreme Court has expressed the fear that arbitrary sentencing may lead to a violation of Article 14 of the Constitution. In the impugned judgment while the convicts were spared the noose owing to their having served fourteen years in jail, a very different conclusion was reached by the same Court in *Dhananjoy Chatterjee alias Dhana v. State of West Bengal* who had served an equal period in jail. The Supreme Court itself has remarked in *Aloke Nath Dutta and Ors v. State of West Bengal* on the arbitrary nature in which the death penalty is awarded or commuted. While getting into the merits and demerits of the death penalty is beyond the scope of this research, the authors would like to quote Dr. B.R Ambedkar on the issue:

“This country by and large believes in the principle of non violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principle of non violence as a moral mandate which they ought to observe as far as they possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish the death sentence altogether.”

Till that is done, judgments like the one discussed here will provide the humanitarian face to a retributive law.

28 See Lethal Lottery-The Death Penalty in India, Amnesty International and PUCL, May 2008
29 (2007) 12 SCC 288
30 (2009) 6 SCC 498
31 (2004) 9 SCC 751
32 2006 (13) SCALE 467