SENTENCING AND THE SUPREME COURT

THE QUESTION of capital punishment in general, and awarding death sentence in a particular case, have come up before the Supreme Court of India on numerous occasions during the last decade. First, it was the question of validity of the death sentence from the constitutional angle, which was ultimately upheld. Later, the court got engaged in a consideration of the circumstances in which the death sentence could be appropriately awarded. After some fluctuations of views, it more or less settled down to the criterion that the death sentence should be reserved for the rarest of rare cases. It is true that this test has not been found acceptable to many persons, but it has more or less been incorporated into judicial thinking. It is unlikely that it will be overtly modified in the near future.

This test was the judicial contribution to penology. In the meantime, Parliament had already provided in the Code of Criminal Procedure that when the court awards the death sentence by choosing between it and any other alternative punishment permissible under the law, then the reasons for doing so, are to be recorded by the court.

This provision is applicable only to capital cases. Besides this, there is another provision inserted in the Code, which calls upon the court that has convicted an accused person to give him hearing on the question of sentence. The intention underlying this provision—section 235(2) of the Code—is that the court must approach the question of sentence seriously, and endeavour to see that all relevant facts and circumstances having a bearing on the question of sentence are brought on the record, considered and reflected upon by the court, before the sentence is passed.

In this manner, the heavy duty cast by section 302 of the Indian Penal Code 1860 (IPC) (on the judge) of choosing between death and imprisonment for life for the person found guilty of murder is now expected to be discharged in a highly responsible manner, by complying with certain provisions whose object is to ensure that the principle of natural justice and fair play must continue to operate beyond the stage of conviction and hold its sway in the sphere of sentencing as well. Although the provision for recording of reasons for awarding the death sentence is contained in a Code of Procedure—section 354(2) of the Code of Criminal Procedure 1973 (CrPC)—and, although, the duty of the court to hear the accused on the question of sentence also finds a place in that Code—section 235(2)—still one must not forget, that these provisions have as much juristic importance, as the substantive criminal law. In fact, they try to mitigate the rigours of the substantive law, by trying to ensure that the most severe penalty of the law should be awarded after complying with the basic principles of justice as well as progressive penological thinking. Such provisions represent modest but positive attempts by the legislature to meet the criticism which

is often levelled, to the effect that our law and legal system do not give as much importance to the process of sentencing, as they do to the process of conviction. These provisions may be described as the Indian answer to such criticism. The theoretical prologue to some of these provisions will be found in the relevant reports of the Law Commission of India, particularly its Reports relating to capital punishment, IPC and CrPC, respectively.

It is only when one bears in mind this background, that one would be able to appreciate the importance of a recent judgment of the Supreme Court, where the significance of the procedural aspect (as mentioned above) has received due attention.[1] In that case, the heavy responsibility of the judge while choosing the sentence for conviction for murder has been brought out with some care. In doing so, the judgment of the Supreme Court concerns itself not only with the substantive criminal law, but also with the rationale of the procedural safeguards mentioned above and, above all, with the awesome consequences of a death sentence on the convict, his family and society. Travelling beyond the narrow confines of black letter law, the court has projected itself on to some of the grave social issues that the sentencing judge must face.

In the above judgment, the Supreme Court has held that when the court is called upon to choose between the convict's cry 'I want to live' and the prosecutor's demand 'he deserves to die', it goes without saying that it must show a high degree of concern and sensitiveness in the choice of sentence. It observed:

> In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment, the legislature has provided a guideline in the form of sub-section (3) of S. 354 of the Criminal P.C., 1973. ..[2]

The judgment further tries to analyse the matter from the perspective of the substantive law. It points out that even a casual glance at the provisions of IPC will show, that the punishments have been carefully graded, according to the gravity of offences. In grave wrongs, the punishments prescribed are strict, whereas, for minor offences, leniency is shown. Here again (as the court points out), there is considerable room for manoeuvre, because the choice of punishment is left to the discretion of the judge, with only the outer limits stated (*i.e.*, the maximum punishment). There are only a few cases where a minimum punishment is prescribed.

An important part of the judgment is that which concerns itself with explaining the rationale of section 354(2) of CrPC, which requires the judge

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1. *Allauddin Mian* v. *State of Bihar*, A I.R. 1989 S.C. 1456.
2. *Id.* at 1465.

to state reasons for awarding death sentence, when some other and lesser sentence can be awarded. The court stated:

> When the law casts a duty on the Judge to state reasons, it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the 'special reason clause' in the above provision implies that the court can, in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be.[3]

The most original contribution of this judgment is the emphasis which it has placed on observance of the principle of natural justice, as codified in the obligation cast on the judge by section 354(2) of CrPC to hear the accused (now convicted) on the question of sentence. The court here pointed out:

> The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused, who was hitherto concentrating on the prosecution evidence on the question of guilt, should, on being found guilty, be asked if he has anything to say, or any evidence to tender on the question of sentence.[4]

The Supreme Court has emphasised the fact that if the judge makes the choice (as was done in the instant case), without giving the accused an effective and real opportunity to place his antecedents, his social and economic background and the mitigating and extenuating circumstances before the court, its decision on the death sentence would be vulnerable. In the instant case, the trial judge was found not to have attached sufficient importance to the mandatory requirement of section 235(2) of CrPC. When the High Court confirmed the death penalty, it also had before it only the scanty material which had been placed before the sessions judge. The Supreme Court took note of this and pointed out that the absence of particulars of antecedents of the accused, their social and economic conditions, and impact of the crime, made the choice of punishment difficult.

Crossing the frontiers of the mere process of judging the facts and laying down the law, the court stressed the penological aspect. It observed :

> [I]n many cases a sentencing decision has far more serious consequences on the offender and his family members, than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair

3. *Ibid.*
4. *Id.* at 1466.

play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing, is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of S. 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record.[5]

A practical suggestion made by the court should also be referred to. It suggested that as a general rule, the trial courts should, after recording the conviction, adjourn the matter to a future date and call upon both the prosecution and the defence to place the relevant material bearing on the question of sentence before it, and thereafter pronounce the sentence to be imposed on the offender.

The judgment, if one may say so, with respect, should go a long way towards giving highly useful guidance, revealing (as it does) a practical approach backed by adequate juristic thinking.

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5. *Ibid.*

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