

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NOS. 1396-97 OF 2012**

Swapan Kumar Jha @ Sapan Kumar .. Appellant

Versus

State of Jharkhand &Anr. .. Respondents

WITH

**Criminal Appeal No.1453 of 2018**  
**(@SLP (Crl.) No.7902 of 2012)**

WITH

**Criminal Appeal No.1435 of 2012**

**J U D G M E N T**

Leave granted in SLP (Criminal) No.7902 of 2012.

2. The instant appeals have been filed against the final common judgment and order dated 29.07.2011 of the High Court of Jharkhand at Ranchi in a batch of three appeals (Criminal Appeal No. 669 of 2010, Criminal Appeal No. 905 of 2010 and Criminal Appeal No. 779 of 2010) and Death Reference No. 2 of 2010.

3. By the impugned judgment, the High Court dismissed the aforementioned appeals arising out of the judgment and order of conviction and sentence dated 1.07.2010 and 7.07.2010 of the Additional Sessions Judge, Dhanbad in Sessions Trial No. 88/200. The Sessions Court had convicted the three accused for offences punishable under Sections 364-A, 302 and 201/34, IPC for kidnapping for ransom and murder of Sumit Kumar Ojha @ Govind, a 19-year-old student, and causing disappearance of evidence (i.e the body of the deceased).

Vide the judgment of the Sessions Court, the appellant Swapan Kumar Jha @ Sapan Kumar (hereinafter “appellant Swapan Kumar”), was sentenced to death, and the appellant Amarendra Kumar Sharma @ Vicky (hereinafter “appellant Vicky”) and the appellant Rocky Dutta herein (hereinafter “appellant Rocky”) were sentenced to R.I. for life and fine of Rs. 10,000 each (6 months’ R.I. in case of default) for the offences punishable under S. 364-A and 302, IPC. All the three accused were further sentenced to 7 years’ rigorous imprisonment and fine of Rs. 10,000 each (6 months’ R.I. in case of default) for the offence punishable under Section 201/34, IPC.

4. Criminal Appeal No. 1396-97 of 2012 arises out of the order of confirmation of the conviction and sentence of the appellant Swapan Kumar by the High Court in Death Reference No. 2 of 2010 and Crl. Appeal No. 905 of 2010. At the same time, Criminal Appeal No. 1435 of 2012 and Criminal Appeal arising out of SLP (Criminal) 7902/2012 by the convicted accused Vicky and Rocky respectively arise out of the confirmation of their conviction and sentence by the High Court in Crl. Appeal Nos. 905 and 779 of 2010.

5. The case for the prosecution in brief is that on 28.09.2008 at about 4.30 p.m., the deceased Sumit left his home after receiving a phone call, stating that he would be back within half an hour, but did not return. Eventually, a missing person's report was lodged at the Jharia Police Station on 29.09.2008 by the informant, the deceased's father. On the morning of 1.10.2008, an unidentified ransom call for Rs. 20 lakhs was received at the landline telephone at the deceased's house, pursuant to which a written report was lodged at Jharia Police Station under section 364-A, IPC. On the basis of call records, two mobile phones were seized and the accused were arrested. Based on the confessional statements of the accused, the deceased's body was recovered, after which Section 302/201/34, IPC were also added, on

23.10.2008. During the investigation, a white Indica car used by the accused was also seized.

6. According to the prosecution, the appellant Swapan Kumar and the appellant Vicky had initially attempted to kidnap Gautam (PW6), the older brother of the deceased. These brothers were the sons of the appellant Swapan Kumar's mother's brother, i.e. the informant. The accused Swapan Kumar & Vicky had travelled to Kolkata, in a hired Indica (driven by the driver DulalMahto (PW2)), where Gautam was studying, and invited him to go for a ride with them, on the pretext that they had purchased a new car. But they dropped their plans of kidnapping him once he informed his roommate over SMS that he was in their company. Next, they set sights on the deceased, inducing him to meet up with them. They picked him up in their Indica at Children's Park, Jharia. They visited a place called Khalsa Hotel for drinking alcohol, where the deceased refused to drink, and the two accused later purchased more liquor and forced him to drink, and took him to the appellant Vicky's house at Giridih, where the appellant Rocky also joined them. Here, the deceased was drugged, and then was taken towards Kolkata. They then made a call demanding Rs. 20 lakhs as ransom from the informant.

The dead body of Sumit was recovered from the graveyard at Bhandaridih, district Giridih on 19.10.2008, in the presence of an Executive Magistrate, witnesses and several other members of the public, on the basis of the statement of the appellant Swapan Kumar. The process of exhumation was videographed. The body was identified by the deceased's parents, brother and uncle (PW 9, 8, 6 and 1). Though the body was somewhat putrefied, the witnesses identified the victim's clothes and *janeoandmauli* (holy threads) and noticed surgical marks on the body for an appendix removal operation, which had been performed on the deceased at an earlier age. Later, the absence of the appendix was confirmed through the testimony of the doctor who conducted the post mortem (PW10), speaking about the post mortem report (Exhibit 4). The cause of death was found to be asphyxia caused by strangulation.

7. The Trial Court, upon a meticulous examination of the evidence, proceeded to convict the appellants for kidnapping for ransom, murder and causing disappearance of evidence. Notably, under S. 364-A and 302, IPC the appellant Swapan Kumar was sentenced to death, but the two other accused were awarded life imprisonment. The High Court confirmed the judgment and order of conviction and

sentence after looking at the material on record. Both Courts found that there was an unbroken chain of circumstance pointing towards the guilt of the appellants. It is worthwhile to note that the High Court agreed with the Trial Court on the aspect of the prominence of the role played by the appellant Swapan Kumar.

8. Heard the counsel on both the sides.

9. On a close reading of the evidence on record, as well as the judgments of the Trial Court and the High Court, it is evident that those Courts had sufficient reasons to conclude that the three appellants were guilty of the offences of kidnapping for ransom, murder and disappearance of evidence.

As far as the offence of kidnapping is concerned, the testimony of the family of the victim (especially his father, the informant (PW9), his mother (PW8), and his brother (PW6)), as well as the testimony of the driver of the hired Indica (PW2), clearly establishes that the victim was last seen in the company of the accused, and points to the manner in which the informant's sons were identified to target him for ransom, and the victim enticed by the appellants. While PW8 and 9 described how the victim had left to meet a "friend" on receiving a call at home, PW4 and 5 (persons who knew the victim) witnessed him

getting into a white Indica with three occupants. The testimony of PW2 has been crucial in indicating how the appellants had first attempted to kidnap PW6, before moving on to the victim. This is also corroborated by the testimony of PW6, who described how he was dropped back by the appellants after he informed his roommate of his whereabouts. According to PW2, after this attempt, he had eventually driven the appellants Swapan Kumar and Vicky to Jharia, where they called and picked up the victim. PW2 has described in detail the events of the evening, which culminated in the appellants Swapan Kumar and Vicky taking the victim to the house of the appellant Vicky, where the appellant Rocky joined them.

The evidence pertaining to the call records and phones and SIM cards seized from the accused also establishes that they made several ransom calls to the informant's house. This is also corroborated by the discussion about ransom overheard by the driver, and the testimony of the parents of the victim.

As rightly observed by the Trial Court, though the appellants have confessed to kidnapping the victim, the confession of the appellants is to be relied upon only to the extent of the recovery of the deceased's body, as per Section 27 of the Evidence Act. This strongly

points towards their involvement in hiding the body and causing disappearance of the evidence, as the body was recovered from a spot of which only they could have had knowledge—buried deep into the ground in a graveyard, hidden below layers of soil and wood. The factum of recovery was also substantiated by the evidence of the investigating officers, constables, and the authority in charge of the graveyard where the body was found, and the electronic evidence of the videotape of the recovery.

Although the role of the appellants in the murder of the victim has not been established based on any direct evidence, it can be inferred beyond doubt from the circumstances pertaining to the entire sequence of events, which in turn have been proved through the testimony of several witnesses, and the necessity for the accused to kill the victim to avoid the detection of their crime. The Courts have rightly concluded that there is an unbroken chain of circumstances pointing unequivocally towards the guilt of the appellants, from the point when the appellants hired the car for the offence till the point of the recovery and due identification of the deceased's body, with particular reference to the testimony of the driver who saw the victim last in the company of the appellants.



10. We are also in agreement with the Courts on the point of sentencing of the appellant Vicky and the appellant Rocky. Moreover, it may be noted that there is no appeal by the state for enhancement of sentence against the appellants Vicky and Rocky.

The sole point on which we find ourselves in disagreement with the Trial Court and the High Court is the sentence of death awarded to the appellant Swapan Kumar.

Before we proceed further, it would be useful to recall the well-settled legal proposition first enunciated in ***Bachan Singh v. State of Punjab***, (1980) 2 SCC 684, that the death penalty is to be imposed only when the alternative of life imprisonment is totally inadequate, and therefore unquestionably foreclosed, i.e. if it is the only inevitable conclusion. While determining the sentence, it is equally important for the Court to consider the aggravating circumstances of the crime as well as the mitigating circumstances. Since the decision in ***Machhi Singh v. State of Punjab***, (1983) 3 SCC 470, a balancing approach of such aggravating and mitigating circumstances has been adopted by the courts to see if the crime is among the rarest of rare cases. Thus, it cannot be doubted that life imprisonment is the rule and the death penalty is the exception.

11. We have considered each of the circumstances of the crime as well as the planned crime of the appellant carefully. Though we acknowledge the gravity of the offence, we have been unable to satisfy ourselves that the offence involves exceptional depravity or heinousness. The offence has undoubtedly been committed in the premeditated manner, and involved the heartless betrayal of trust of the victim, who was a first cousin of the appellant Swapan Kumar, but this is not a sufficient reason to bring it within the ambit of the rarest of rare cases, especially when there is nothing to show that the offence itself was not committed in an unspeakably brutal manner. This is clear if we consider the entire sequence of events as reconstructed from the testimony of the prosecution witnesses, from which we can infer that the victim was not aware of the devious designs of the appellants even up to the point of reaching the house of the appellant Rocky. Moreover, the murder of the victim seems to have taken place by throttling, as is indicated by the medical evidence. Even on this point it is difficult to conclude that the murder was committed in an exceptionally heinous manner. However, we must emphasize that we do not intend to undermine the plight that the victim must have felt when he realized the truth, nor to undermine the gravity of the crime itself.

At the same time, we feel that the Trial Court and the High Court have not given due weight to the mitigating circumstances of the appellant Swapan Kumar. To begin with, the crime was committed at a young age, when it is easy for people to get swayed by the lure of short-cuts to earn money. In fact, he is still a young person, and there is nothing to show that he is absolutely beyond reform and rehabilitation. It is worth noting at this point that the Trial Court considered this to be a mitigating factor in favour of the other accused, but held that the appellant Swapan Kumar's role in the entire narrative discloses that he is beyond reform. We find ourselves unable to agree with this view. Though it is indeed a deeply condemnable act to destroy one's own family for short-term pecuniary gain, it is a dangerous presumption that a perpetrator of such an act is incapable of reform and rehabilitation just by virtue of having committed the crime, and indeed flies in the face of the concept of reform to begin with.

Moreover, we also do not find that the appellant Swapan Kumar poses such a menace to society that he cannot be allowed to stay alive.

In such circumstances, we are of the view that the above mitigating factors outweigh the aggravating circumstances of the crime, and the same cannot be brought into the ambit of the rarest of rare cases. Therefore, we find it fit to commute the death sentence of the appellant Swapan Kumar to life imprisonment.

12. At the same time, it cannot be doubted that the conduct of the appellant Swapan Kumar must be placed on a different footing than the other appellants, given that he betrayed the trust of his own cousin, and indeed caused agony to his own blood relations, in the most heartless manner. We agree with the view taken by the Courts that the offence was committed in a premeditated manner, and that the factum of targeting of the informant's sons is a clear indication of how the appellant Swapan Kumar must have spearheaded the entire plan. As the informant was his mother's brother, he would have had intimate knowledge of his background and prosperity. On the other hand, the other two accused seem to have played a secondary role and were possibly only lured in by the appellant Swapan Kumar with the promise of riches. Thus, it is evident that the conduct of the appellant Swapan Kumar is more culpable than that of the other accused. Indeed, placing all the three accused on the same footing

would also be insensitive to the plight that the victim's family is enduring because of their betrayal at the hands of the appellant Swapan Kumar. We are also mindful of the need to curb the menace of kidnappings for ransom, and the need to respond to such crimes with stringent punishment.

In these circumstances, we find that a sentence of life imprisonment *simpliciter* would be inadequate for the appellant Swapan Kumar, as that includes the possibility of claiming remission after the expiry of as little as 14 years. In our opinion, a mere effective sentence of 14 years would be grossly inadequate in the case of this appellant.

Due to the aforesaid reasons, we wish to adopt the *via media* that this Court has frequently resorted to in matters involving grave offences, which nonetheless do *not* fall into the realm of the rarest of rare cases so as to attract the punishment of death—i.e., the restriction of the convict to claim remission in his sentence, for a specific period.

13. This Court has elucidated this proposition in much detail in ***Swamy Shraddananda (2) v. State of Karnataka***, (2008) 13 SCC

767, and in the decision of the Constitution Bench in ***Union of India v. V. Sriharan, (2016) 7 SCC 1***. It would be useful to reproduce the conclusions reached by this Court in *Sriharan case supra*:

“Answers to the Questions Referred in seriatim

Question 52.1: Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda (2)* [*Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113*], a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Answer

**177.** Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for the rest of the life of the convict. The right to claim remission, commutation, reprieve, etc. as provided under Article 72 or Article 161 of the Constitution will always be available being constitutional remedies untouchable by the Court.

**178.** We hold that the ratio laid down in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767: (2009) 3 SCC (Cri) 113*] that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative.”

(emphasis supplied)

We may also refer to the decision of this Court in **Tattu Lodhi v. State of M.P.**, (2016) 9 SCC, explaining the utility of taking such an approach:

“11. The innovative approach reflected in the aforesaid judgments, on the one hand helps the convict in getting rid of death penalty in appropriate cases, on the other it takes care of genuine concerns of the victim including the society by ensuring that life imprisonment shall actually mean imprisonment for whole of the natural life or to a lesser extent as indicated by the court in the light of facts of a particular case. Since there is no party who is actually a loser on account of such an approach in appropriate cases, we feel no hesitation in accepting the submissions advanced by the appellant. Hence, the law is reiterated that in appropriate cases where this Court is hesitant in maintaining death sentence, it may order that the convict shall undergo imprisonment for whole of natural life or to a lesser extent as may be specified.”

14. In the given circumstances, we think that it would be in the interest of the justice to restrict the right of the appellant Swapan Kumar to claim remission in his sentence of life imprisonment for a period of 25 years. Such a minimum mandatory sentence would be commensurate with the gravity of the crime and with the heightened culpability of this appellant compared to the other accused.

15. Thus, the following order is made :

a. Criminal Appeal Nos. 1396-1397 of 2012 pertaining to the appellant Swapan Kumar Jhaare disposed of by commuting the death sentence to one of life imprisonment, out of which the said accused shall serve out mandatorily a minimum of 25 years without claiming remission.

b. Criminal Appeal No.1435 of 2012 of the appellant Amarendra Kumar Sharma @ Vickey, and Criminal Appeal arising out of SLP (Criminal) No. 7902 of 2012 of the appellant Rockey Dutta @ Rocky Dutta stand dismissed.

.....J.  
[N.V. RAMANA]

.....J.  
[MOHAN M. SHANTANAGOUDAR]

.....J.  
[M. R. SHAH]

New Delhi;  
November 15, 2018.