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STRUCTURED SENTENCING IN ENGLAND AND WALES: RECENT DEVELOPMENTS AND LESSONS FOR INDIA

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Sentencing in India falls squarely within the tradition of common law jurisdictions: courts are provided with wide discretion to determine a fit sentence, with appellate review constituting the only institutional mechanism to promote consistency, fairness and principled sentencing. Until relatively recently this, arrangement existed in every common law country except the United States, where formal, numerical guidelines were introduced in the late 1970s. [4] The US guidelines are usually in the form of a two dimensional sentencing grid, with the dimensions being crime seriousness and criminal history. Each grid contains a narrow range of sentence length and courts must sentence within this range - or justify "departures", i.e., sentences outside the range. The compliance requirement is that "The sentencing judge must find, and record, substantial and compelling reasons why the presumptive guidelines sentence would be too high or too low in a given case." [5] Guidelines have proliferated in that country and now can be found in most states and at the federal level.

Elsewhere, in other common law countries such as Canada, Australia, New Zealand and South Africa, trial courts have long enjoyed, and continue to enjoy, considerable freedom to determine sentence in the absence of any formal guidelines. None of these jurisdictions has to date implemented a formal guideline system for sentences. However, this state of affairs has now changed in England and Wales, where courts must now follow a system of guidelines which has slowly evolved over the past decade. This guideline system is the subject of this essay.

PURPOSE AND OVERVIEW OF THE ARTICLE

In this article, we explore the relevance and potential utility of sentencing guidelines and of a sentencing guidelines authority (such as the Sentencing Council of England and Wales) for India, drawing upon recent experience in England and Wales. The article is structured as follows: Part I provides some preliminary comments about sentencing under the adversarial model of justice followed in common law countries. Although differences exist across criminal justice systems in different jurisdictions, with respect to sentencing there are many common elements. This section is followed in Part II by a brief discussion of sentencing structures in India today. Part III contains a description of the English sentencing guidelines which have been in existence for a decade now, and we conclude in Part IV by drawing some lessons for the sentencing process in India.

I. SENTENCING AND ADVERSARIAL JUSTICE

Sentencing in the common law world has long been characterised by its discretionary nature. [6] In most jurisdictions, offences carry unrealistically high maximum penalties, many of which were derived from the late 19th century, and which bear little relation to the seriousness of the crimes for which they may be imposed. For example, even a first conviction for domestic burglary in England and Wales (and other countries such as Canada) is punishable by any sentence up to and including life imprisonment. This wide range of potential sentences creates much discretion for a sentencing court. Under an adversarial model the

two parties depose conflicting sentence submissions and the court ultimately decides on the sanction. In all jurisdictions except England and Wales, the State prosecutor submits a clear, often detailed, sentence recommendation to the sentencing court. Prosecutors in England generally identify important sources of aggravation but do not generally comment on the appropriate disposal or make a specific sentencing recommendation. ***30***

In countries such as the US and Canada, plea bargaining is commonplace. Guilty pleas account for up to 90% of all cases, with the result that a contested trial is rare. Most guilty pleas in North America arise out of an agreement between counsel; the defendant offers to plead guilty in return for some benefit. The benefit might take the form of a common submission on sentence (a joint submission), an agreement about the facts to be considered by the sentencing court, or an agreement by the State to accept a plea to a less serious charge. These are known, respectively, as fact and plea bargaining.

Even in jurisdictions where plea discussions play a more modest role, such as in England and Wales, the existence of a powerful discount for a guilty plea plays an important role in resolving cases. The English guidelines stipulate that a reduction of one-third is the appropriate discount for offenders who plead guilty at the first opportunity to do SO. [7]

Appellate Review of Sentencing

Counsel obviously draw upon precedent in their sentencing submissions, but the case law can often sustain conflicting prior sentencing decisions. Sentencers are guided by the appellate courts as both parties enjoy the right of appeal However/ numerous academic commentators and Commissions of Inquiry have over the years identified the limitations on appellate guidance as means of ensuring consistent sentencing. Most sentence appeals address a specific point of law or provide a test for whether the sentence imposed was "manifestly unfit". Nigel Walker, for example, described the degree of guidance from the English Court of Appeal in the following way: "What emerges is the unsystematic approach of the Court of Appeal, resulting in contradictory decisions and special pleading." [8] Elsewhere, the Canadian Sentencing Commission noted that "Research undertaken by the Commission has shown that a significant number of judgement just enumerate factors without specifying whether they are considered to be aggravating or mitigating" [9]. More recently, the Court of Appeal in England and Wales has provided detailed guidance for sentencers [10] but this is less often the case in other common law jurisdictions. ***31***

Appellate review of sentencing, however, has long been subject to criticism on a number of grounds. First, few sentences are appealed; [11] this means that the Court of Appeal has few occasions on which to issue guidance by means of a guideline judgement. The reason for the relatively low rate of appeal by the offender or the prosecutor can be found in the high standard of review. Throughout the common law world a consistent position has emerged: an appellate court should not interfere with a sentence imposed by a court of first instance unless there has been an error in law or the sentence imposed was "manifestly unfit". This creates what may be termed a "high standard of review" and protects decisions by courts of first instance from frequently being overturned on appeal. A disagreement between the Court of Appeal and the trial court sentence is insufficient ground to overturn the sentence; it must be dearly out of the range. Secondly, appellate courts review only cases brought on appeal by one of the parties. This means that the appellate caseload is party-driven and this further limits the ability of appellate review to develop guidelines. Thirdly, few decisions of the courts of appeal may be considered "guideline" judgements; usually they address the sentence on appeal without providing broader guidance.

This state of affairs has long been criticised by sentencing scholars and practitioners for failing to ensure consistency of approach at sentencing. Over the years, repeated calls for legislatures to create a more

structured environment for sentencers have been made - calls which have passed unheeded in many common law countries such as Canada, South Africa, and the Caribbean states. More recently however, some jurisdictions have introduced significant reforms. New Zealand recently legislated for a sentencing council and the Law Commission in that jurisdiction has devised a comprehensive set of sentencing guidelines, although these have yet to be implemented. [12] In some Australian states such as Victoria and New South Wales sentencing advisory bodies have been created with a mandate to provide guidance to sentencers and information to the general public. [13] However, the most radical reforms (outside the United States) have ***32** emerged, somewhat improbably, in England and Wales [14]. We shall return to describe these guidelines later in this article.

II. SENTENCING IN INDIA

Indian criminal law largely has been, and indeed largely is today, based on British criminal law as it was introduced to India in the mid-19th century. It must be acknowledged that with a plethora of "localisation" through amendments over the years, Indian criminal law has acquired a more Indian character, but notwithstanding any changes, the underlying basis is still very much a creation of British law.

India's first systematic penal code was drafted in the 1830s by the First Law Commission, chaired by Lord Macaulay. The draft code subsequently underwent extensive examination and revision by Sir Barnes Peacock, Chief Justice of the Calcutta Supreme Court, before being passed into law on October 6, 1860 as the Indian Penal Code 1860. In terms of criminal procedure in India, one of the earlier vestiges of a British criminal procedure code (although by no means the earliest criminal procedure per se) was the Regulating Act 1773, which, inter alia, established various supreme courts around India (for example Calcutta/ Madras and Bombay) to adjudicate upon the cases of British citizens using British procedure. The accompanying criminal procedure statute to the Indian Penal Code 1860 was the Indian Criminal Procedure Code 1861 and, like the 1860 Code in regard to substantive criminal law, it was very much the bedrock of Indian criminal procedure for over 100 years before it was replaced by the Criminal Procedure Code 1973, following successive consultations and reports from the Indian Law Commission (1958,1967 and 1969).

However, even with the revisions to the criminal procedure codes subsequent to 1861 (the major ones being in 1969 and then the 1973 replacement), the sentencing system in India does not appear to have modernised in either of the two classic directions used today-namely the flexible guideline system (as is in force in/ for example, England and Wales and which is described below) or the more restrictive grid-based system (as used, for example, in the state of Minnesota, USA). Indeed, the Indian sentencing system appears to have somewhat stagnated ***33** and, with an infrequent caveat here or there, is very much more akin to the British sentencing model of the early to mid-19th century that was imported into India, namely one of wide unfettered discretion in which various minima and maxima are provided for with little by way of guidance between these two poles.

A preliminary observation to make on the sentencing regime in India, indicative of its nascent and underdeveloped state, is that sentencing does not have a separate or distinct chapter under the provisions of the Criminal Procedure Code 1973, resulting in the precise procedure being scattered around the 1973 Code - a Code that contains 484 sections, 2 schedules, and 56 forms. There are several such provisions related to sentencing. Collecting these provisions together within a single statute would, in our view, might prove to be very beneficial.

A Sentencing Framework in India

The general procedure for post-conviction hearings on sentence is set out in section 235 of the 1973 Code,

which provides that:

235. Judgement of acquittal or conviction

1) After hearing arguments and points of law (if any), the Judge shall give a judgement in the case.

2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.

This is consistent with sentencing procedure in most jurisdictions where the offender has the opportunity to make representations to the sentencing judge (whether or not he is the trial judge), prior to the sentence being imposed, in order to mitigate the sentence that they will ultimately receive. The effect of this section (namely sentence post conviction and after representations from the convicted individual) is mirrored in other parts of the 1973 Code. The sentencing judge is instructed to "hear" the accused on the issue of sentence and then must pass the sentence in accordance with the statutory punishments as set out for the range of criminal offences. It is thus for the judge to adjudicate upon relevant mitigating factors and aggravating factors, with little or no guidance other than judicial experience and limited submissions from counsel.

S. 325 provides for the committal of the convicted person for sentence to a Chief Judicial Magistrate if the sentencing judge is of the opinion that his or her ***34*** legal powers of sentence are not great enough to provide for the imposition of a sufficiently severe sentence. S. 325 of the 1973 Code provides that:

325. Procedure when Magistrate cannot pass sufficiently severe sentence.(l) Whenever a Magistrate is of the opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceeding, forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

However, as under s. 235, there is no guidance as to how a magistrate may form such an opinion, namely that the powers of sentence available to them are insufficient to adequately punish the convicted person.

S. 360(1) of the 1973 Code legislates for situations in which the offender has no previous convictions and (a) the offender is under 21 years of age and the offence is one punishable with less than life imprisonment or the death penalty, or (b) the offender is a woman and the offence is one punishable with less than life imprisonment or the death penalty, or (c) where the offender is over 21 and the offence is one punishable with seven years imprisonment or less. In such situations, the sentencing judge may, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, release the offender with a bond (with or without sureties) to keep the peace if it appears to the court that it is expedient to do so. Section 360(3) legislates for situations in which a first-time offender is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code 1860 punishable with not more than two years imprisonment or any offence punishable with a fine only. In such situations the court may, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, release the offender after "due admonition".

Finally, s. 361 of the 1973 Code imposes a duty on the sentencing judge to provide reasons for the sentence that they have elected to impose in cases in which the offender might have been dealt with under the Probation of Offenders Act 1958, or the Children's Act 1960. Both of these Acts provide for alternative sentences rather than the conventional sentences in accordance with the statutory ***35*** minima and/or maxima as set out by statute, with the 1958 Act providing for sentences of probation/supervision for certain

offenders in some circumstances at the discretion of the court/ and the 1960 Act providing for detention in special schools/ safe custody, and the sentencing of delinquent children.

B. Judicial implementation

What is apparent from the foregoing is that aside from the limited restrictions created by statutory maxima and/or minima, sentencing judges essentially exercise unfettered discretion with regard to the choice of sentence they wish to impose on an offender after hearing any pleas in mitigation on their behalf or aggravation as against them. Indeed, where there is a primary alternative disposition available in relation to an offender, for example as can be seen in ss. 360(1) and (3) of the 1973 Code where the judge has a prerogative to award an alternative sentence other than the norm, there is no guidance as to how that prerogative can and should be exercised. These issues can be illustrated by examining, for example, s. 379 of the Indian Penal Code 1860, which provides for the offence of theft that "Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both."

With the lack of judicial guidance for this offence, two similar first-time offenders perhaps having been found guilty of joint-enterprise theft may easily be sentenced to vastly differing sentences in terms of punitiveness, with Offender A, say, given 3 years imprisonment, and Offender B released to keep the peace without a surety. That is not to say that this discretion automatically offends the principles of sentencing per se. In our example, one offender may have significant mitigation which may render an appreciably lower sentence entirely appropriate. However, the lack of guidance as to levels of severity (as is present in the England and Wales guidelines system/ for example in cases of robbery - see subsequent sections of this paper) and mitigation, may result in an offender with the same or very similar profile as Offender B being sentenced to 3 years imprisonment by another judge in another court.

The system of unfettered discretion leaves the sentencing system open to the vagaries of individual judges, negating nationwide or even courthouse-wide consistency - the consistency that is a cardinal aim in any sentencing model. It thus seems that the primary controlling influence on sentences that are imposed by Indian trial courts is that of appellate review, as provided for in the 1973 Code in circumstances in where a sentence passed is excessive, where a sentence is insufficient, or where there has been an error of law in the sentencing process. ***36** This is consistent with the high standard of review at sentencing found in all common law jurisdictions (see earlier sections of this paper).

The considerable discretion enjoyed by courts at sentencing has also meant that it takes a long time before a case is resolved. Judicial officers are keen to satisfy themselves that they have paid dose attention to every evidential aspect of the case before a decision is taken. This also affords the defence ample opportunity to delay trials by insisting that courts deliberate over even the minutest details of the criminal act in question. This state of affairs has resulted in a huge backlog of cases and a judicial logjam that has assumed near epic proportions. [15] It can take up to five years before a case has its first appearance before a trial court. If the accused is detained in custody he stands to lose several years of his freedom even if he is ultimately found not guilty. Efforts to remedy the situation have been made at several levels, all of which have had a bearing on both sentencing procedure and doctrine.

The most significant step in this direction was the Criminal Law (Amendment) Act 2005, passed in the winter session of the current Parliament, which for the first time introduced the concept of plea bargaining in India through the formal, statutory recognition of a discount for offenders who plead guilty. It is interesting that the reform was introduced despite signs that judicial opinion was opposed to the concept. In State Uttar Pradesh v. Chandrika 1999 Indlaw SC 802, [16] the Supreme Court said: "It is settled law that on the basis of plea

bargaining courts cannot dispose criminal cases. The court has to decide it on merits. If the accused confesses to guilt, appropriate sentence is required to be implemented." The court further held in the same case: "Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused [claim] that since he is pleading guilty the sentence be reduced."

However, in 2005, the Government added sections 265-A to 26S-L to the Code of Criminal Procedure 1973 to provide for plea bargaining in certain types of cases. Currently, it is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years, but does not apply to offences that affect the socio-economic condition of the country, or which have been committed against a woman or a child below the age of 14 years. ***37**

An accused who enters a guilty plea can expect to serve as little as one fourth of the minimum sentence associated with his offence. First-time offenders can also be released on probation. Enthusiastic support for the concept of a guilty plea discount has come from prisoners [17] and the judiciary alike, with a serving judge of the Bombay High Court even visiting a local prison to encourage individuals to take advantage of this criminal law reform. [18] That the change has been well received was evident in the observation of a division bench of the Gujarat High Court in State of Gujarat v. Natwar Harchanji Thakor 2005 Indlaw GUJ 73[19] where it said: the very of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases..."

At this point we review developments in sentencing in England and Wales.

III. STRUCTURED SENTENCING IN ENGLAND AND WALES

In 1998, the Crime and Disorder Act created a statutory body to devise sentencing guidance for the Court of Appeal. The Sentencing Advisory Panel issued its first guideline in 1999, and further guidelines were issued over the next decade. [20] In 2009, sweeping reforms to the sentencing guideline arrangements were made, and these changes are the subject of the rest of this article.

Sentencing in England and Wales entered another era in 2010 as a result of reforms introduced by the Coroners and Justice Act 2009. A new statutory body, the Sentencing Council for England and Wales, headed by Lord Justice Leveson, replaces two previous organisations, the Sentencing Advisory Panel and the Sentencing Guidelines Council. The creation of a single guidelines authority will undoubtedly promote more effective development and dissemination of guidelines. A great deal has changed as a result of the latest legislation -for example, the Sentencing Council has a significantly wider range of duties than its predecessors (see below). These reforms are a creation of the Coroners and Justice Act 2009.

A. Recent Developments

The reforms introduced by the Coroners and Justice Act 2009 may be traced to two recent developments. First, the high and rising prison population in England and Wales prompted the government to commission a review of the use of imprisonment and of sentencing guidelines. [21] The second development was a Working Group which recommended a revamp of the current arrangements rather than adoption of a completely new system of guidelines. [22] US-style sentencing grids were rejected by the Sentencing Commission Working Group as being inappropriately restrictive for sentencing in this country.

(i) Duties of the Sentencing Council

Sentencing guidelines authorities around the world have functions and responsibilities far beyond providing guidance for courts, and the English Council is no exception. The Coroners and Justice Act 2009 imposes a wide range of duties on the new Council in addition to the obvious function of producing guidelines. The

Council also has to publish a resource assessment of, as well as monitor the operation and effects of its guidelines. In addition it must draw conclusions about the factors which influence sentences imposed by the courts, the effect of the guidelines on consistency in sentencing and the effect of the guidelines on public confidence in the criminal justice system. Promoting public confidence is likely to be a priority for the new Council. A number of commentators [23] regard this as a central function of a sentencing guidelines authority. It has been argued that sentencing councils and commissions need to do more than simply devise and distribute guidelines - they have to be promoted to stakeholders in the field of sentencing as well as to the general public.

The Coroners and Justice Act 2009 also states that the Council "may promote awareness of matters relating to the sentencing of offender...in particular the costs of different sentences, and their relative effectiveness in preventing re-offending". The Sentencing Council is further required to publish a report about "non-sentencing factors" which are likely to have an impact on the resources needed for sentencing. These ***39** non-sentencing factors include (but are not limited to): recalls of prisoners released to the community; breaches of community orders; patterns of re-offending; decisions taken by the Parole Board of England and Wales/ and considerations relating to the remand prison population. Finally, the Council is also charged with a duty to assess the impact of all government policy proposals (or proposals for legislation) which may affect the provision for prison places, probation and youth justice services. Taken together, the tasks represent a radical departure from the far more restricted duties of the previous organisations responsible for devising and disseminating sentencing guidelines.

(ii) Size and Composition of Sentencing Council

Despite its expanded range of duties, the new Council is a smaller body than its predecessors. The SAP-SGC had a combined membership of up to 25 members while the new Council is composed of 14 individuals. Judicial members constitute a majority on the new council. Some commentators have argued in favour of a Council with more non-judicial members. However, the predominance of judicial members will not mean that the judiciary will dominate the nature and direction of the guidelines; indeed, the new Chair has made it clear that non-judicial members "will play an equal role on the Council." [24]

B. Nature of the English Sentencing Guidelines

The guidelines are designed to provide courts with guidance regarding the nature and severity of sentence - but without unduly restricting a court's ability to impose a fit sentence. The Coroners and Justice Act 2009 introduced changes to the requirements for courts with respect to sentencing guidelines. The critical element of any sentencing guideline scheme is the degree of constraint imposed upon courts. A rigid system prevents courts from sentencing outside a specific range, unless exceptional circumstances justify a departure. Yet if the guidelines adopt a very relaxed approach to sentencing outside their ranges, consistency of approach in sentencing is hard to achieve. In evaluating the recent changes to the compliance requirement, it may be helpful to consider a specific guideline. Figure 1 summarises the definitive guideline ranges for robbery in England and Wales. As with many offences for which definitive guidelines exist/ this one is divided into three sub-categories based on crime seriousness. ***40***

Figure 1: Definitive Sentencing Guideline for Robbery in England and Wales

Category of Robbery	Starting Point	Sentence
Threat or use of minimal force	1 year custody	Up to 3 years custody

removal of property		
A weapon is produced and used threaten, and/or force is u resulting in injury to the victim	4 years custody	2-7 years custody
Victim is caused serious phys injury by the use of significant fo and/or use of weapon	8 years custody	7-12 years custody

(Source: Sentencing Council of England and Wales [25])

C. Previous Statutory Compliance Requirement: Duty of a Court at Sentencing

Until 2009/ the compliance requirement in England and Wales was the following: courts were directed that in sentencing an offender, they "must have regard to any guidelines which are relevant to the offender's case" as per section 172(1) of the Criminal Justice Act 2003. In addition, section 174(2) of the same Act stated that: "Where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court's reasons for deciding on a sentence of a different kind or outside that range". In short, a court simply had to consider ("have regard to") the Council's guidelines and to give reasons in the event that a "departure" sentence was imposed.

D. The new test for compliance (duty of a court at sentencing) in England and Wales

The provisions attracted considerable debate during the course of Parliamentary review of the Coroners and Justice Act 2009. The version of the Bill ultimately proclaimed into law adopts the following formulation:

Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.

The new statutory language is more directive than that which it replaces. Thus, from merely a duty to have regard to any relevant guideline, courts must now "follow" any relevant definitive guideline. The more forceful language is, of course, qualified by the words creating the discretion to impose some other sentence in the event that the court is satisfied that imposing a disposal consistent with the guideline would be contrary to the interests of justice.

The innovation of the Coroners and Justice Act 2009 is to be found in subsequent sections which provide further clarification. Recall the three levels of seriousness found in the robbery guideline, with separate (but overlapping) sentence length ranges for each level (see Figure 1). S.12S(3)(b) of the Act makes it clear that the duty of the court is to impose a sentence within the overall offence range, not the more restrictive category range. In the event that the court imposes a sentence outside the overall range in the interests of justice, it must give reasons for its decision. The new provisions focus a court's attention on the relevance of the guidelines, yet also allow judicial discretion to impose a fit sentence.

Where do these latest reforms leave us? Three conclusions may reasonably be drawn. First, the broader remit of the new Sentencing Council suggests that it will be more engaged in community outreach than its predecessors. It is likely that the Council will seek to promote public awareness and increase public knowledge of the sentencing process. Secondly, the new test for compliance in England and Wales is likely to create a heightened expectation that courts will impose a sentence consistent with any definitive guidelines issued by the Sentencing Council or its predecessors. Thirdly, the new Sentencing Council will be responsible for producing a far more comprehensive portrait of sentencing decisions in this jurisdiction, and this will benefit sentencers, criminal justice professionals, crime victims and indeed anyone with a stake in the sentencing process.

IV. LESSONS FROM THE ENGLISH EXPERIENCE

What lessons for common law countries such as India may be drawn from recent experiences in England and Wales? First, there is a consensus now among legal scholars around the common law world that consistency of approach at sentencing cannot be achieved by appellate review alone; some form of guidelines scheme is desirable, even necessary. Beyond this, there is far less agreement. The US jurisdictions favour relatively rigid two dimensional sentencing grids which compel courts to impose sentence within a relatively narrow range, or justify why a departure sentence outside the range is appropriate. This model of structuring discretion at sentencing has proved unpopular in other countries. Canada rejected the grid based system in 1987, Western Australia in 2000, New Zealand in 2002, and England and Wales in 2008. In our view, the US-style systems are too restrictive, and therefore have no utility for India.

Secondly, whether formal guidelines are adopted along the lines of those used in the United States or England and Wales, there is considerable utility in creating some kind of sentencing commission. Although the English guidelines have not been subject to any formal evaluation and many questions remain unanswered/ it is dear that sentencers benefit from a detailed and comprehensive system of guidance. This guidance relates to general issues, such as the appropriate discount for a guilty plea, the determination of offence seriousness and so forth, as well as the appropriate sentence for specific offences. Yet the guidelines preserve judicial discretion. Each offence-specific guideline contains considerable latitude with respect to the appropriate sentence. This means that courts can impose a relatively wide range of dispositions, and remain within the guidelines. On the other hand, if a court wishes to impose a sentence outside the guidelines range, this merely requires it to give reasons why it would be contrary to the interests of justice to follow the guidelines.

A number of Australian jurisdictions have created a sentencing advisory council which, although without the mandate to issue guidelines, serves a very useful function in terms of promoting public awareness of sentencing and conducing and disseminating research in sentencing. We are not the first to call for creation of some form of sentencing commission in India. [26] Creation of some form of council or commission would prove of great utility to sentencers in India, and indeed the wider justice community and general public.

Thirdly, guidelines are particularly beneficial and, we would argue, even necessary in a vast jurisdiction such as India, where local variation is likely to significantly threaten consistency. [27] This is not to argue for uniformity of sentencing without any local or regional variation. The perceived gravity of offences will vary from one part of the country to another, and some allowance for this variability must be made. However/ in a unitary jurisdiction such as India or England and Wales, it is important to set a national standard/ and then allow limited departures from that standard.

Fourthly, sentencing guidelines are capable of bringing other benefits besides promoting consistency. Although the English guidelines were not designed to act as a control upon the prison population, in other jurisdictions such as several US states, overcrowding in prison is controlled by making adjustments to the

sentencing guidelines. While the overall rate of prisoners per population in India is relatively low by western standards - 32 per 100/000 adult population according to the latest statistics [28] - there is still a problem. Custodial facilities in India have for years housed more inmates than is desirable, at least in male correctional facilities. For example, the latest statistics show that for male institutions, the occupancy rate in 2008 was 132%. [29]

The burgeoning prison population of the country [30] largely consists of males charged with petty offences. [31] Most of these offenders come from the impoverished strata of society and are unable to fulfil even bail conditions imposed by courts, much less be able to afford a lawyer to represent them during a lengthy criminal trial. There is general agreement around the common law world that prison should be reserved for the most serious cases, hence the custodial threshold in England and Wales. [32] But a statutory custodial threshold is seldom sufficient to constrain sentencers. [33] For this reason, sentencing guidelines, which specify the kinds of cases that normally should attract a custodial penalty, are useful.

The experience with guidelines in other jurisdictions clearly demonstrates the benefits of providing guidance regarding the kinds of cases which should result in custody. For example, in many US jurisdictions including Minnesota, guidelines accomplished a transformation in the prison population: fewer offenders convicted of less serious property crimes were imprisoned, and custody became a more likely outcome for offenders convicted of crimes of violence. [34]

Since the Supreme Court declared in 2004 that life imprisonment in India means a prisoner is sent to jail for the rest of his or her natural life, [35] the nature of punishment has undergone a drastic change from when life imprisonment meant detention for only 14 years. In practical terms, those imprisoned for life can still be released after serving 14 years behind bars, but they are now at the mercy of the government and prison administration to give them adequate remission on the basis of their conduct in jail. Only last year the State Government of Maharashtra declared that the offenders sentenced to life imprisonment in connection with the 1993 terrorist attack on Mumbai will have to serve a minimum of 60 years in prison before their plea for release is even considered. Given that a number of offences in India carry a maximum penalty of life imprisonment, guidance for judges from a sentencing council would be welcome.

Another practical problem that exists in India is that few prosecutors, judges and defence advocates in local courts are aware of latest criminal law reforms. For example, the option of plea bargaining has remained largely unused and five years after its introduction, very few courts have had such applications filed before them. Similarly, the option of release on probation had not been heard of by several lawyers when a famous Bollywood actor found guilty of illegal arms possession made a similar plea before the judge. [36] A sentencing council in India along the lines of the Council in England and Wales would also serve the purpose of generating greater awareness of sentencing among members of the legal profession. Without such a reform, even well-meaning criminal law amendments will remain ineffective, and the problems of sentencing will continue.

Finally, India should be concerned about the rising cost of legal assistance [37] which means that only a selected few defendants - those with ample financial resources at their disposal - are able to take their case through every stage of appeal. It is a country with a vast geographical area and population, but only one bench of the Supreme Court in Delhi. There have been persistent demands that the Supreme Court establish benches in at least the four major cities so that appellants do not have to travel large distances for their cases to be filed. [38] Until now, the Indian Supreme Court has rejected all such calls. A sentencing council would ensure that at trial court level, prisoners are treated with a degree of fairness, so that even if they are unable to move up in appeal, they have not been unduly prejudiced in terms of their sentence.

CONCLUSION

We have argued in this essay that India has little to fear and much to gain from introducing some form of sentencing guidelines. Such a step would need to be preceded by creating a statutory body such as a sentencing council or commission to devise, consult upon and disseminate guidelines. The experience in England and Wales offers clear evidence of the benefits of more structure sentencing. These benefits include greater transparency in terms of the sentencing process, more consistent sentencing and greater public confidence in sentencers.

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4. Minnesota was the first state to introduce presumptively-binding sentencing guidelines; see R. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in CRIME AND JUSTICE Tonry ed., 2005).

5. Minnesota Sentencing Commission, Minnesota Sentencing Guidelines and Commentary (2010).

6. See J.Y. Roberts and E. Baker, Sentencing in Common Law Jurisdictions, in INTERNATIONAL HANDBOOK OF PENOLOGY AND CRIMINAL JUSTICE (S. Shoham, O. Beck, and M. Kett eds., 2007); A. Ashworth, Sentencing, in THE OXFORD HANDBOOK Of CRIMINOLOGY (2007).

7. See, The Sentencing Council for England and Wales, Reduction in Sentence for a Guilty Plea. Definitive Guideline, available at www.sentencingcouncil.org.uk.

8. N. WALKER, SENTENCING THEORY, LAW AND PRTICE43 (1985).

9. CANADIAN SENTENCING COMMISSION SENTENCING REFORM: A CANADOAN APPROACH 321 (1987).

10. See, e.g., R. v. Saw and Others, [2009] EWCA Crim. 1 : [2009] 2 Cr. App. R. (S.) 54 (which sets out a list of factors for the offence of domestic burglary).

11. In 2009/2010, 2,136 sentence appeals were heard by the Court of Appeal, an infinitesimal fraction of all sentences imposed within a jurisdiction of 65 million. Of these appeals, 44% were dismissed. See, Court of Appeal Criminal Division, Review of the Legal Year, 2009/2010, Royal Courts of Justice (2010).

12. For further information, see, W. and A. King, Addressing problematic sentencing factors in the development of guidelines, AND AGGRAVATION AT SENTENCING (J.Y. Roberts ed., 2011); and W. Young and C. Browning New Zealand's Sentencing Council, CRIM. L. REV. 287-298 (Apr., 2008).

13. See, e.g., Sentencing Advisory Council, Annual Report, 2008-2009 (2010); PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY (Victorian Sentencing Advisory Council, A. Freiberg and K. Gelb eds., Willan 2008).

14. For further information see, Ch. 6: Structuring Sentencing Discretion, in A. VON HIRSCH, A. ASHWORTH AND J.V. ROBERTS, PRINCIPLED SENTENCING. READINGS ON THEORY AND POLICY (3rdedn., 2009).

15. In March 2010, 54,864 cases were pending in the Supreme Court, 41,08,555 in various High Courts and 2,73,74,908 in subordinate courts. Full data available http://164.100.47.132/LssN ew/psearch/QResult15.aspx? qref=99860.

16. State of Uttar Pradesh v. Chandrika, AIR 1999 SC 164 1999 Indlaw SC 802 (Supreme Court of India).

17. See, Jailbirds readily admit guilt for faster freedom, TIMES OF INDIA, Dec. 29, 2008.

18. HC judge tells inmates to take plea bargaining route to freedom, THE TIMES Of INDIA, Nov. 16, 2009.

19. State of Gujarat v. Natwar Harchanji Thakor, (2005) Cr. L.J. 2957 2005 Indlaw GUJ 73 (Supreme Court of India).

20. For a review of developments from 1998 to 2009, see A. Ashworth and M. Wasik, The Story of the Panel and Council, in Sentencing Guidelines Council, Annual Report, 2009-2010, available at http://www.sentencingeouncil.org.uk

(2010).

21. See, Lord Carter, Securing the Future Ministry of Justice (Dec., 2007), available at http://www.justice.gov.uk/publications/docs/securing-future.pdf.

22. Sentencing Commission Working Group, Sentencing Guidelines in England and Wales: An Evolutionary Approach (July, 2008), available at http://www.justice.gov.uk/pub lica tions/ d oes/sentencing -guidelines-evo 1u tionary -a pproaeh. pdf

23. See, e.g., M. Hough and J. Jacobson, Creating a Sentencing Commission for England and Wales, Prison Reform Trust, London (2008), available at http://www.kd.ac.uk/depsta/law/research/icpr/publieations/FINAL_SENTENCING.pdf.

24. Lord Justice Leveson, Remarks to the Criminal Bar Association Conference (2010), available at http://www.sentencingcouncil.org.uk/professional/speeches-articles/2010/05/08.htm.

25. All the definitive English sentencing guidelines are available at www.sentencing.council.org.

26. See, R.K Raghavan, Sentencing Guidelines, THE HINDU, Apr. 15, 2003.

27. On this point, see M.K. Chawla, Sentencing disparities bet between judges and disproportionally, in SENTENCING STRUCTURE AND POLICY IN INDIA - UNAFEI RESOURCE MATERIAL 54-57 (1976); and M.Z. Siddiqi, Problem of Disparity in Sentencing, 9(2) INDIAN J. CRIMINOLOGY 120-127 (1981).

28. International Centre for Prison Studies, World Prison Brief; available at www.kcl.ac.uk.

29. National Crime Records Bureau, Crime In India (2009), Table 2.1.

30. Number of Jails, available capacity and inmate population in State/UTs as on 31.12.2007, Data tabled in Parliament in response to Lok Sabha Unstarred Question No. 2368, available at http://164.100.47.132/Annexture/1sq15/2/au2368.htm.

31. See, Jailed, RTI activist takes up languishing convicts' case, TIMES OF INDIA, Sept. 24, 2009.

32. According to § 152(2) of the Criminal Justice Act 2003, a court must not pass a custodial sentence unless the offence "was so serious that neither a fine alone nor a community sentence can be justified for the offence". Similar statutory provisions exist in other common law jurisdictions.

33. The English experience is again illustrative. Despite the existence of a statutory threshold which must be met before a term of imprisonment is imposed, the size of the prison population has risen continuously over the period 1993-2009.

34. Frase, supra, n. 1.

35. Life term means jail till death, INDIAN EXPRESS, Sept. 20, 2005.

36. Dutt Files Plea Seeking Release on Probation, INDIAN EXPRESS, Jan. 16, 2007.

37. Check rising cost of litigation, says PM, TIMES OF INDIA, May 8, 2010.

38. Starred Question No. 297 on Supreme Court Benches, raised before the Lok Sabha (answered on Apr. 15, 2010, available at http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=88956.

CHAPTER NINE

SENTENCING AND PUNISHMENT

The judicial trend in awarding punishment

1. Over the years, courts in India have consistently held that sexual offences ought to be dealt with sternly and severely as undue sympathy to impose inadequate sentence would do more harm to the system and undermine public confidence in the efficacy of law. We cite a few cases in support:

2. In Mahesh v. State of M. P.[1], the Supreme Court observed that:

> "It will be a mockery of justice to permit these appellants [the accused] to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon". [Emphasis supplied]

3. Sevaka Perumal v. State of T.N.[2], is also in the same vein:

> "Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

4. Later in Dhananjoy Chatterjee v. State of W.B.[3], the Supreme Court opined that:

> "…shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that

[1] (1987) 3 SCC 80
[2] (1991) 3 SCC 471
[3] (1994) 2 SCC 220

the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment".

5. Then, in Ravji v. State of Rajasthan, (1996) 2 SCC 175, the Supreme Court observed that:

"It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance".

6. Similarly, in State of Karnataka v. Puttaraja[4], the Supreme Court held that:

"The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women like the case at hand, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact and serious repercussions on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time or considerations personal to the accused only in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence inbuilt in the sentencing system".

[4] (2004) 1 SCC 475

7. And, in State of M.P. v. Munna Choubey[5], it was said that the:

> "Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system"

8. The same was the opinion in Jugendra Singh v. State of U.P.[6], where the Supreme Court said that:

> "Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposed the sentence as per law."

9. In fact, it is interesting to note that in Swami Sharaddananda v. State of Karnataka[7], the Supreme Court lamented at paragraph 92 that:

> "The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in

[5] (2005) 2 SCC 710
[6] (2012) 6 SCC 297
[7] (2008) 13 SCC 787

endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all".

10. It therefore becomes important to review the punishments provided under our penal laws.

11. Punishments for crimes involving sexual offences can be broadly classified into two categories: term sentences (e.g. imprisonment for 10 years) and life imprisonment. Of course, in appropriate cases, death penalty may be awarded if the evidence indicates that the crime in question falls within the scope of section 302 of the Indian Penal Code.

On term sentences

12. As far as term sentences are concerned, section 376 of the Indian Penal Code currently provides for punishment of either description for a term which shall not be less than 7 years but which may be for life or for a term which may extend to 10 years.
We however recommend that in the proposed Criminal Law Amendment Bill, 2012, the minimum sentence should be enhanced to 10 years with a maximum punishment being life imprisonment.

On life imprisonment

13. Before making our recommendation on this subject, we would like to briefly examine the meaning of the expression "life" in the term "life imprisonment", which has attracted considerable judicial attention.

14. Mohd. Munna v. Union of India[8] reiterates the wellsettled judicial opinion that a sentence of imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convict's natural life. This opinion was recently restated in Rameshbhai Chandubhai Rathode v. State of Gujarat[9], and State of U.P. v. Sanjay Kumar[10], where the Supreme Court affirmed that life imprisonment cannot be equivalent to imprisonment for 14 or 20 years, and that it actually means (and has always meant) imprisonment for the whole natural life of the convict.

15. We therefore recommend a legislative clarification that life imprisonment must always mean imprisonment for 'the entire natural life of the convict'.

On death penalty

16. Justice Stewart in Furman v. Georgia[11], seminally noted that:

> "The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity".

17. These words have formed the broad foundation for the evolution of modern jurisprudence on 'death penalty' and have prompted us to deliberate at length on this issue.

18. The Indian law on punishment with death has been concretized in a few leading judgments which narrow down the award of death sentences to the 'rarest of the rare' cases. The criteria for determining whether a given case is so rare can be found in Bachhan Singh v. State of Punjab[12], which was later cited with approval in Macchi Singh v. State[13], and recently in Mulla v. State of U.P.[14]. The said criteria are as follows (see Macchi Singh):

> "I. Manner of commission of murder

[8] (2005) 7 SCC 417. See also Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440
[9] (2011) 2 SCC 764
[10] (2012) 8 SCC 537
[11] 408 U.S. 238
[12] (1980) 2 SCC 684
[13] (1983) 3 SCC 470
[14] (2010) 3 SCC 508

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house;

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death;

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner;

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course of betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of ‘bride burning’ and what are known as ‘dowry deaths’ or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37.When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38.In this background the guidelines indicated in Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] :

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39.In order to apply these guidelines inter alia the following questions may be asked and answered: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40.If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions

posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

19. The philosophy behind the aforesaid tests was also explained in Macchi Singh: every member of the community is able to live his/her life because of the protection afforded by the community and rule of law. But, when one member of the community shows 'ingratitude' to the community by killing a fellow member of the community or when the community feels that its very existence is under threat, then for the purposes of self-preservation, the community withdraws its protection. This withdrawal of protection results in imposition of death penalty. The court further elaborated that the community will only do so –

> "in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

20. The 'rarest of rare' doctrine has been intrinsically linked with the need to mandatorily give 'special reasons' before imposing a penalty as specified under Section 354 (1) of the Cr. P.C. Bachhan Singh has clarified the law by saying that 'special reasons' implies 'exceptional reasons' (at para. 161). We also notice that punishment with death is given only in the rarest of rare cases when the alternative option of reformation and rehabilitation of the convict is unquestionably foreclosed.

21. To sum up, the following are the tests for determining whether the accused deserves a death sentence (see Mulla v. State of U.P.):

    (a) The gruesome nature of the crime;
    (b) The mitigating and aggravating circumstances in the case. These must take into consideration the position of the criminal, and
    (c) Whether any other punishment would be completely inadequate. This rule emerges from the dictum of this Court that life imprisonment is the rule and death penalty an exception. Therefore, the court must satisfy itself that death penalty would be the only punishment which can be meted out to the convict.

22. While we believe that enhanced penalties in a substantial number of sexual assault cases can be adjudged on the basis of the law laid down in the aforesaid cases, certain

situations warrant a specific treatment. We believe that where the offence of sexual assault, particularly 'gang rapes',
is accompanied by such brutality and violence that it leads to death or a Persistent Vegetative State (or 'PVS' in medical terminology), punishment must be severe – with the minimum punishment being life imprisonment. While we appreciate the argument that where such offences result in death, the case may also be tried under Section 302 of the IPC as a 'rarest of the rare' case, we must acknowledge that many such cases may actually fall within the ambit of Section 304 (Part II) since the 'intention to kill' may often not be established. In the case of violence resulting in Persistent Vegetative State is concerned, we are reminded of the moving story of Aruna Shanbagh, the young nurse who was brutally raped and lived the rest of her life (i.e. almost 36 years) in a Persistent Vegetative State.

23. In our opinion, such situations must be treated differently because the concerted effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376 (3) should be inserted in the Indian Penal Code to deal with the offence of "rape followed by death or resulting in a Persistent Vegetative State".

24. In our considered view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women's' organisations, and other stakeholders, there is a strong submission that the seeking of death penalty would be a regressive step in the field of sentencing and reformation. We, having bestowed considerable thought on the subject, and having provided for enhanced sentences (short of death) in respect of the above-noted aggravated forms of sexual assault, in the larger interests of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, we are not inclined to recommend the death penalty.

25. We must therefore end this topic with a note of caution. Undoubtedly, rape deserves serious punishment. It is a highly reprehensible crime in the moral sense, and demonstrates a total contempt for the personal integrity and autonomy of the victim. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force or the threat of force or intimidation to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the victim and can also inflict mental and psychological damage.
We have no doubt that it undermines the communicating sense of security and there is public injury. However, we believe that such offences need to be graded. There

are instances where the victim/survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death.

26. The Working Group on Human Rights in India and the UN has made a submission before us. We have examined the submission carefully. We have noticed in the said submission that the Group has suggested that there should be no amendment to the existing law to either provide death penalty and/or chemical castration for the offence of rape or sexual assault.

27. The Group has placed emphasis on Article 6 of the International Covenant on Civil and Political
Rights which provides:-

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of commission of crime and not contrary to the provisions of the present Covenant…."

28. It has also been observed that death penalty will not be imposed on persons below 18 years and observes that:-

"Nothing in this Article should be invoked to delay or prevent the abolition of capital punishment…."

29. Article 7 of the Covenant provides that:-

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in particular, no one shall be subjected without his free consent to medical or scientific experimentation."[15]

30. This Committee is conscious of the provisions of the ICCPR[16], the Universal Declaration of Human Rights[17], the Convention on the rights of child, Convention

[15] Article 7, Part 3 ICCPR 1966
[16] Atricle 6 and 7, ICCPR 1966
[17] Article 5, UDHR 1948

against torture and other cruel, inhuman and degrading treatment or punishment and other international Conventions.

31. We note that one of the standards before us is that the UN Commission on Human Rights has adopted the four resolutions to impose a moratorium on death penalty until such time as death penalty is fully abolished. The first such resolution is dated 18th December 2007. The resolution calls upon States which still retain the death penalty to "progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed". The abolition of death penalty and the reduction of number of offences in statute books which notify capital punishment are stated to be a part of international customary law. It has also been pointed out that the UN Human Rights Committee in its concluding deliberations on 4th August 1997 observed that:-

"The Committee expresses concern of the lack of compliance of the Penal Code with Article 6, paragraphs 2 and 5 of the Covenant. Therefore, the Committee recommends that the State party abolish by law the imposition of the death penalty on minors and limit the offences carrying the death penalty in the most serious crimes with a view to its ultimate abolition…."

32. We also have noted the report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions with reference to his India mission in 2012.

"It is a matter of concern that the death penalty may be imposed for (seemingly a growing number of crimes that cannot be regarded as the most serious crimes referred to in Article 6 of the ICCPR as internationally understood, namely, crimes involving intentional killing)"[18]

33. The phrase 'rarest of rare cases' taken from Bachhan Singh v. State of Punjab is often used to describe the Indian approach to the death penalty. However, this may create a wrong impression since the list of crimes for which sentence may be imposed is still much wider than the one provided for under international law. Accordingly, he has recommended that India places a moratorium on the death penalty in accordance with General Assembly Resolution 65/206.

[18] (Press Statement – Country Mission to India 2012 available at http://www.ohcr.org):-

34. This Committee is aware that over 150 States in the world have abolished death penalty or do not practice death penalty. The Committee is also aware that several States in the United States of America retain and implement the death penalty. We are aware that there is a movement in the United States of America to impose death penalty for rape. The US Supreme Court has struck down the death penalty for rape as contrary to the US Constitution. We look at the judgment in Coker v. Georgia,[19] where the US Supreme Court struck down the sentence of death for a convicted felon who had committed rape holding that the sentence of death for rape was disproportionate, violative of the 8th and 14th Amendments to the US Constitution and was also "barbaric and excessive". It may be noted that this was a case of aggravated sexual assault.

35. We also note the decision in Kennedy v. Louisiana where the constitutional validity of a Louisiana statute permitted death penalty for raping a child under 12 years was challenged. It was noted that the crime of the petitioner was one which was revulsive to society and was full of horror and hurt. Yet, the US Supreme Court reached a finding that the death penalty for rape of a minor was unconstitutional and violative of the 8th Amendment being in the nature of "cruel and unusual punishment".[20]

36. Kennedy, J. observed that:-

> "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule….."
>
> As we shall discuss, punishment is justified under one or more or three principal rationales – rehabilitation, deterrence and retribution. It is the last of this retribution that most often can contradict the laws' own ends. This is of particular concern when the Court interprets the meaning of the 8th Amendment in capital cases. When the law punishes by death, it risks its own dissent into brutality transgressing the constitutional commitment to decency and restraint.

37. Thus, there is a strong case which is made out before us that in India in the context of international law as well as the law as explained in the American Courts, it would be a regressive step to introduce death penalty for rape even where such punishment is restricted to the rarest of rare cases. It is also stated that there is considerable

[19] 433 US 584

[20] 554 US 407 (2008)

evidence that the deterrent effect of death penalty on serious crimes is actually a myth. According to the Working Group on Human Rights, the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since 1980. Hence we do take note of the argument that introduction of death penalty for rape may not have a deterrent effect. However, we have enhanced the punishment to mean the remainder of life.

Castration

38. On the question of chemical castration as a cruel and unusual punishment, we find that chemical castration is an injection for sex offenders with drugs such as Depo-Provera which has the effect of reducing the levels of testosterone and thereby controlling libidinous urges. There are varying groups of drugs that effect libidinous urges, these have been categorized in the following way:

"For patients with obsessive sexual fantasies, antidepressants from the family of SSRIs that includes Prozac, often prescribed to treat obsessive compulsive disorder, can help them control their sexual thoughts. The second and more radical approach is an antiandrogen drug, such as leuprorelin, which reduces testosterone levels to those of a prepubescent boy, and makes the patient impotent."[21]

39. It is important to understand that unlike surgical castration, the effects of chemical castration are temporary and therefore repeated monitored doses at regular intervals is a necessary prerequisite. It is pointed out before us that 9 States in the United States of America have introduced legislation which has permitted chemical castration of sex offenders, making it discretionary for the first time offenders and mandatory for repeat offenders as a pre-condition for release from imprisonment and/or release on parole. Till date, a challenge to the constitutionality of these laws has not been considered by the US Supreme Court. It is the stand of the Working Group on Human Rights that mandatory chemical castration for sex offenders is unconstitutional as it would violate the fundamental right to privacy and the right to refuse invasive medical treatment and would constitute a violation of the prohibition against "cruel and unusual punishment" contained in numerous international covenants including the ICCPR and CAT.

[21] Decca Aitkenhead, Chemical Castration: The Soft Option. The Guardian, January 18, 2013. http://www.guardian.co.uk/society/2013/jan/18/chemicalcastration-soft-option-sex-offenders

40. We note that it would be unconstitutional and inconsistent with basic human rights treaties for the State to expose any citizen without their consent to potentially dangerous medical side effects. For this reason we do not recommend mandatory chemical castration of any type as a punishment for sex offenders. For the same reason the government of India also does not prescribe chemical castration as a family planning method.

41. However, we note that in the UK, sex offender treatment programs sometimes offer chemical castration of one of the two types mentioned to convicted sex offenders as a form of psychiatric treatment. This is done in consultation with doctors and psychiatrists with the consent of the sex offender. We recommend further research and study on the matter before commenting on its applicability or effectiveness in the Indian context.

42. We also notice from literature that side effects of chemical substances like Depo-Provera may include osteoporosis, hypertension, fatigue, weight gain, nightmares, muscle weakness and apart from that the long term side effects are still not known. We are further of the opinion that chemical castration fails to treat the social foundations of rape which is about power and sexually deviant behaviour. We therefore to hold that mandatory chemical castration as a punishment contradicts human rights standards.

43. We, therefore, reject the possibility of chemical castration as a means of punishment. We must take on record a suggestion from a leading doctor for permanent surgical castration. We think that a mutilation of the body is not permitted by the Constitution. 'Death' is a known form of penalty but mutilation has not been recognised in progressive jurisprudence as prescribed punitive action.

Reduction of age in respect of juveniles

44. We have heard experts on the question of reduction of the age of a juvenile from 18 to 16 for the purpose of being tried for offences under various laws of the country. We must confess that the degree of maturity displayed by all the women's organizations, the academics and a large body of thinking people have viewed this incident both in the criminological as well as societal perspective humbles us.

45. Assuming that a person at the age of 16 is sent to life imprisonment, he would be released sometimes in the mid-30s. There is little assurance that the convict would emerge a reformed person, who will not commit the same crime that he was imprisoned for (or, for that matter, any other crime). The attempt made by Ms. Kiran Bedi to reform Tihar Jail inmates was, and continues to be,
a successful experiment. But we are afraid that that is only a flash in the pan. Our jails do not have reformatory and rehabilitation policies. We do not engage with inmates as human beings. We do not bring about transformation. We, therefore, breed more criminals including juveniles) in our prison and reformatory system by ghettoing them in juvenile homes and protective homes where they are told that the State will protect and provide for them, but which promise is a fruitless one.

46. Children, who have been deprived of parental guidance and education, have very little chances of mainstreaming and rehabilitations, with the provisions of the Juvenile Justice Act being reduced to words on paper.

47. We are of the view that the 3 year period (for which delinquent children are kept in the custody of special home) is cause for correction with respect to the damage done to the personality of the child. We are completely dissatisfied with the operation of children's' institutions and it is only the magistrate (as presiding officer of the Juvenile Justice Board) who seems to be taking an interest in the situation. The sheer lack of counselors and therapy has divided the younger society into 'I' and 'them'.

48. We have also taken note of the fact that considering the recidivism being 8.2% in the year 2010, as against 6.9% during 2011, we are not inclined to reduce the age of a juvenile to 16.

49. It is time that the State invested in reformation for juvenile offenders and destitute juveniles. There are numerous jurisdictions like the United Kingdom, Thailand, and South Africa where children are corrected and rehabilitated; restorative justice is done and abuse is prevented. We think this is possible in India but it requires a determination of a higher order.

50. Further, we Articles 37 and 38 of the Convention on the Rights of Child clearly provide as follows:-

"37. States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort
and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

38. (1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

(4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible

measures to ensure protection and care of children who are affected by an armed conflict.

51. We have also taken certain scientific factors into account. Having regard to the development in neurosciences, we are of the view that adolescent brain development is one of the important issues in public policy. We have taken note of the reasons stated by the US Supreme Court for abolishing death penalty for juveniles in Roper v.
Simmons[22] wherein it was quoted as follows:-

"When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.
… … …

Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."

52. We have also noted the decision of the US Supreme Court in Graham v. Florida[23] as follows:-

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

[22] 543 U.S. 551 (2005)
[23] 560 U. S. ____ (2010)

53. We must also take note of the neurological state of the adolescent brain. Studies show that adolescence is a period of significant changes in the brain structure and function. There is consensus among developmental neuroscientists on the nature of this change, which is aptly set out
in Laurence Steinberg's 'A Social Neuroscience Perspective on Adolescence Risk-Taking[24]' –

> "(i) There is a decrease in grey matter in prefrontal regions of the brain, reflective of synaptic pruning, the process through which unused connections between neurons are eliminated. The elimination of these unused synapses occurs mainly during preadolescence and early adolescence, the period during which major improvements in basic cognitive abilities and logical reasoning are seen, in part due to these very anatomical changes.
>
> (ii) Important changes in activity involving the neurotransmitter dopamine occur during early adolescence, especially around puberty. There are substantial changes in the density and distribution of dopamine receptors in pathways that connect the limbic system, which is where emotions are processed and rewards and punishments experienced, and the prefrontal cortex, which is the brain's chief executive officer. There is more dopaminergic activity in these pathways during the first part of adolescence than at any other time in development. Because dopamine plays a critical role in how humans experience pleasure, these changes have important implications for sensation-seeking.
>
> (iii) There is an increase in white matter in the prefrontal cortex during adolescence. This is largely the result of myelination, the process through which nerve fibres become sheathed in myelin, a white, fatty substance that improves the efficiency of brain circuits. Unlike the synaptic pruning of the prefrontal areas, which is mainly finished by midadolescence, myelination continues well into late adolescence and early adulthood. More efficient neural connections within the prefrontal cortex are important for higher-order cognitive functions— planning ahead, weighing risks and rewards, and making complicated decisions, among others—that are regulated by multiple prefrontal areas working in concert.
>
> (iv) There is an increase in the strength of connections between the prefrontal cortex and the limbic system. This anatomical change is especially important for emotion regulation, which is facilitated by increased connectivity between

[24] A social neuroscience perspective on adolescent risk-taking. L Steinberg - Developmental Review, 2008 – Elsevier.

regions important in the processing of emotional information and those important in self-control. These connections permit different brain systems to communicate with each other more effectively, and these gains also are on-going well into late adolescence.

54. We are of the view that the material before is sufficient for us to reach the conclusion that the age of 'juveniles' ought not to be reduced to 16 years.

Sentencing Guidelines

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April 2014

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India

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SUMMARY In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

I. Absence of Structured Sentencing Guidelines

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating,

> [t]he Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.[1]

The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative."[2] In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines.[3] In an October 2010 news report, the Law Minister is quoted as having

[1] I GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REPORT 170 (Mar. 2003), http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf.

[2] *Id.* at 171.

[3] *Id.* at 18–19.

stated that the government is looking into establishing a "uniform sentencing policy" in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.[4]

In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.*, also noted the absence of judiciary-driven guidelines in India's criminal justice system, stating, "[i]n our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts[,] except [for] making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines."[5] The Court stated that the superior courts have come across a large number of cases that "show anomalies as regards the policy of sentencing," [6] adding, "[w]hereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where [the] same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine[s]."[7] In 2013 the Supreme Court, in the case of *Soman v. State of Kerala*, also observed the absence of structured guidelines:

> Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.[8]

However, in describing India's sentencing approach the Court has also asserted that "[t]he impossibility of laying down standards is at the very core of the Criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment."[9]

Sentencing procedure is established under the Code of Criminal Procedure, which provides broad discretionary sentencing powers to judges.[10] In a 2007 paper on the need for sentencing policy in India, author R. Niruphama asserted that, in the absence of an adequate sentencing policy or guidelines, it comes down to the judges to decide which factors to take into account and

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[4] *Govt for a Uniform Sentencing Policy by Courts*, ZEENEWS (Oct. 7, 2010), http://zeenews.india.com/news/nation/govt-for-a-uniform-sentencing-policy-by-courts_660232.html.

[5] State of Punjab v. Prem Sagar & Ors., (2008) 7 S.C.C. 550, para. 2, http://judis.nic.in/supremecourt/imgs1.aspx?filename=31541.

[6] *Id.* para. 8.

[7] *Id.*

[8] Soman v. State of Kerala, (2013) 11 S.C.C. 382, http://judis.nic.in/supremecourt/imgs1.aspx?filename=39837.

[9] *Jagmohan Singh* v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, para. 26, *available at* http://indiankanoon.org/doc/1837051/.

[10] CODE OF CRIMINAL PROCEDURE, No. 2 of 1974, *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf. Sentencing is covered under section(s) 235, 248, 325, 360 and 361 of the Code.

which to ignore. Moreover, he considered that broad discretion opens the sentencing process to abuse and allows personal prejudices of the judges to influence decisions.[11]

II. Crimes and Judicial Sentencing Guidance

In the Supreme Court's judgment in *Soman v. Kerala*, the Court cited a number of principles that it has taken into account "while exercising discretion in sentencing," such as proportionality, deterrence, and rehabilitation.[12] As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.[13]

In *State of M.P. v. Bablu Natt*, the Supreme Court stated that "[t]he principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."[14] Moreover, in *Alister Anthony Pareira v. State of Maharashtra*, the Court held that

> [s]entencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of [an] appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of [the] crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: [the] twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.[15]

A. Murder

The punishment for murder under India's Penal Code is life imprisonment or death and the person is also liable to a fine.[16] Guidance on the application of the death sentence was provided by the Supreme Court of India in *Jagmohan Singh v. State of Uttar Pradesh*, where the Court enunciated an approach of balancing mitigating and aggravating factors of the crime when deciding on the imposition of capital punishment.[17] However, this approach was called into question first in *Bachan Singh v. State of Punjab* where the Court emphasized that since an

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[11] For a discussion on the deficiencies of the sentencing framework established in the Code, see R. Niruphama, Need for Sentencing Policy in India: Second Critical Studies Conference – "Spheres of Justice" Paper Presentation (Sept. 20–22, 2007), http://www.mcrg.ac.in/Spheres/Niruphama.doc.

[12] Soman v. State of Kerala, (2013) 11 S.C.C. 382, para. 13.

[13] *Id*. para. 14.

[14] State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 13, http://judis.nic.in/supremecourt/imgs1.aspx?filename=33425.

[15] Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 69, *available at* http://indiankanoon.org/doc/79026890/.

[16] PEN. CODE § 302, http://punjabrevenue.nic.in/crime1.htm.

[17] *Jagmohan Singh* v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, *available at* http://indiankanoon.org/doc/1837051/.

amendment was made to India's Code of Criminal Procedure, the rule has changed so that "the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so."[18] The Court also emphasized that due consideration should not only be given to the circumstances of the crime but to the criminal also.[19] However, more recently the Court in *Sangeet & Anr. v. State of Haryana*, noted that the approach in *Bachan* has not been fully adopted subsequently,[20] that "primacy still seems to be given to the nature of the crime," and that the "circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process."[21] The Court in *Sangeet* concluded as follows:

> 1. This Court has not endorsed the approach of aggravating and mitigating circumstances in [the 1971 case of] Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.
>
> 2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.
>
> 3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.
>
> 4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.
>
> 5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.[22]

B. Theft

The punishment for theft is up to three years' imprisonment, a fine, or both.[23] No judicial guidance was found regarding sentencing for theft.

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[18] Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684, para. 165, *available at* http://indiankanoon.org/doc/909940/.

[19] *Id.*

[20] Sangeet & Anr. v. State of Haryana, (2013) 2 S.C.C. 452, paras. 29 & 52–54, http://judis.nic.in/supremecourt/imgs1. aspx?filename=39731 (citing the subsequent case of Machhi Singh and Others v. State of Punjab, (1983) 3 S.C.C. 470, http://judis.nic.in/supremecourt/imgs1.aspx? filename=9766, a post-*Bachan* decision that reaffirmed the balance sheet approach of weighing aggravating and mitigating circumstances of the crime).

[21] *Id*. para. 34.

[22] *Id*. para. 80 (citing Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684).

C. Manslaughter

Causing death by negligence is punishable by imprisonment of up to two years, a fine, or both.[24] Other crimes similar to manslaughter include punishment for culpable homicide not amounting to murder, addressed in section 304 of the Penal Code:

> Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with [a] fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.[25]

The Supreme Court looked at the question of sentencing involving sections 304 and 304A in a drunken driving case and found that punishment must be commensurate with the crime and that deterrence was a primary consideration when deciding on the severity of the sentence where rash or negligent driving was involved.[26]

D. Rape

Recent changes have been made to the crime of rape in India's Penal Code. Absent any aggravating factors, the section stipulates a minimum punishment of imprisonment for seven years up to a maximum of life, and a mandatory fine. In situations where certain aggravated situations occur, punishment is for a minimum term of ten years up to a maximum of life imprisonment, and a mandatory fine. The new amended section on rape reads as follows:

> **Punishment for rape.**
>
> 376. (*1*) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (*2*) Whoever,—
>
> (a) being a police officer, commits rape—
>
> (i) within the limits of the police station to which such police officer is appointed; or

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[23] PEN. CODE § 379.

[24] *Id.* § 304A.

[25] *Id.* § 304 (footnote in original omitted).

[26] Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 86–98, *available at* http://indiankanoon.org/doc/79026890/.

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.[27]

In the previous section on the crime of rape, there was a proviso that empowered the Court to award a sentence that was less than the minimum for adequate and special reasons stipulated in the judgment. The Supreme Court provided direction in several cases on how such discretion should be exercised.[28]

[27] PEN. CODE § 376, *amended by* Criminal Law (Amendment) Act, 2013, Gazette of India, section II(1) (Apr. 2, 2013), http://indiacode.nic.in/acts-in-pdf/132013.pdf.

[28] State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 14, *available at* http://www.indiankanoon.org/doc/1155765/.

E. Trafficking of Persons

The level of punishment under the new trafficking of persons crime set forth in section 370 of the Penal Code depends on the number of persons that have been trafficked, whether the victim was a minor, and whether the assailant was a public official:

> (2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.
>
> (3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.
>
> (7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.[29]

Other sections of the Code may also be used to prosecute traffickers, including sections 366A and 372. Section 5B of the Immoral Trafficking Prevention Act (ITPA) also punishes trafficking in persons with "rigorous imprisonment for a term which shall not be less than seven years and in the event of a second or subsequent conviction with imprisonment for life."[30]

[29] PEN. CODE § 370, *amended by* Criminal Law (Amendment) Act, 2013, Gazette of India, section II(1) (Apr. 2, 2013), http://indiacode.nic.in/acts-in-pdf/132013.pdf.

[30] Immoral Trafficking (Prevention) Act (ITPA), No. 104 of 1956, http://wcd.nic.in/act/itpa1956.htm.

TOPIC : Latest view of sentencing policy with reference to the judgment of the Hon'ble Supreme Court & High Court.

INTRODUCTION

1] In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating,

The Indian Penal Code prescribe offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum is prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are

lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.

The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative." In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines. In an October 2010 news report, the Law Minister is quoted as having stated that the government is looking into establishing a "uniform sentencing policy" in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.

In India no uniform sentencing policy exists and sentence awarded to an offender reflect the individual philosophy of the judges. This is evident from the following facts.

2] The following statements given by the three prominent judges of India shows the present condition of sentencing policy of India.

"**Every saint has a past, every sinner has a future.**"-- Krishna Iyer J

"**Theory of reformation through punishment is grounded on the sublime philosophy that every man is born good, but circumstances transform him into a criminal.**"-- K T Thomas J

"**Reformative theory is certainly important but too much stress to my mind cannot be laid down on it that basic tenets of punishment altogether vanish**".-- D P Wadhwa J

3] Section 53 of the I.P.C in Chapter III deals with the kinds of punishments which can be inflicted on the offenders. They are as follows:

1. Death penalty,
2. Imprisonment for life,
3. Imprisonment,
4. Forfeiture of property and
5. Fine.

The main objectives of the criminal justice system can be categorized as follows:

To prevent the occurrence of crime.

To punish the transgressors and the criminals.

To rehabilitate the transgressors and the criminals.

To compensate the victims as far as possible.

To maintain law and order in the society.

To deter the offenders from committing any criminal act in the future.

RELEVANT PROVISIONS

4] In case of an offender other than a Juvenile, a Magistrate, under section 29 of Cr.P.C., may pass a sentence of imprisonment for a term not exceeding 3 years or fine not exceeding ten thousand

rupees (fifty thousand as per Mah. State amendment) or of both. Here it is important to note that under many categories of offences punishment prescribed is more than the above prescribed limit, however while passing sentence in such cases magistrate cannot exceed the sentencing limits but he has an option under S. 325 Cr.P.C. to forward accused to the Chief Judicial Magistrate. A sentence of imprisonment in default, as per S.30 Cr.P.C., should not be in excess of power u/s 29 Cr.P.C. and should not exceed 1/4th of the term of imprisonment which the magistrate is empowered to inflict. However, it may be in addition to substantive sentence of imprisonment for the maximum term awarded by the Magistrate u/s 29. In case of conviction of several offences at one trial, as per S.31 Cr.P.C., the court may pass separate sentences, subject to the provisions of S.71 of the I.P.C. The aggregate punishment and the length of the period of imprisonment must not exceed the limit prescribed by S.71 I.P.C. S. 71 I.P.C. provides (1) that where an offence is made up of parts each of which parts is itself an offence the offender can be punished only for one of such offences. (2) That where an offence falls under two or more definitions of offences or where several acts, each of which is a offence, constitute when combined a different offence, then the punishment could be awarded only for any one of such offences. These are rules of substantive law whereas S.31 Cr.P.C. is a procedural law.

In case of several sentences to run concurrently it is not necessary to send offender for trial before higher court only for the reason that aggregate punishment for several offences is in excess of punishment which the magistrate is competent to inflict on conviction of single offence. However, proviso to S.31 Cr.P.C. Provides that (a)

in no case shall such person be sentenced to imprisonment for a longer period that 14 years (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for single offence.

RELEVANT JUDGMENTS

5] In Bachansing vs State of Punjab (AIR 1980 SC 898) The hon'ble Apex court while interpreting S. 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of extreme culpability and secondly, in making the choice of sentence due regard must be paid to the circumstances of the offender also.

In **Machhi Singh v. State of Punjab** [(1983) 3 SCC 470], The hon'ble Apex court observed that the accused-appellants, as a result of a family feud and motivated by feeling of reprisal, committed as many as 17 murders of men, women and children. The Court, while justifying the death sentence imposed on the appellants, recollected with approval the principles laid down in Bachan Singh and supplemented them with a few more elaborate guidelines regarding the test of 'rarest of rare' cases as given below :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

In the rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial

power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, death sentence can be awarded.

Aggravating Circumstances:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.

9. When the crime is enormous in proportion like making an

attempt of murder of the entire family or members of a particular community.

10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent

harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the load star besides the above considerations in imposition or otherwise of the death sentence.

The Hon'ble Apex Court in Rajendra Pralhadrao Wasnik Vs. State of Maharashtra, (AIR 2012 SC 1377). held that “Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties”.

The Hon'ble Apex court in **State of Madhyapradesh-vs-Mehtab**, (Cri. Appeal no. 290/2015, dated 13.02.2015) has observed that, "we find force in the submission, it is the duty of the court to award just sentence to a convict against whom charge is proved. While mitigating and aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also the victim and the society."

In **Gurubachan Sing Vs. Satpal Singh** (AIR 1990 SC 209), the Apex Court cautioned saying that exaggerated devotion to rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion as they destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law.

In **Norbetro V/s. Mrs. Prema Nalband, (2006 (1), AIR, Bom.R,481)** The hon'ble Bombay High Court held that; "Admittedly, post dated cheques dated 30.9.1999 were given to the complainant in June of that year and till date the complainant has not received her dues except for the said sum of Rs.30,000/-. Considering the amount of cheques namely Rs.4.12 lacs, substantive sentence of five days would look lie a flee bite sentence. In my view considering the said amount of Rs.4.12 lacs substantive sentence of 15 days Simple Imprisonment could also not be considered to be adequate and considering the same in my views there is absolutely no scope for further reduction of the said sentence." In this case the Trial Court

has sentenced the accused to undergo Simple Imprisonment for a period of 15 days and awarded the compensation to the complainant from accused of Rs.50,000/-. Till the revision before the Hon'ble High Court, accused had also undergone the period of five (5) days and it was urged from the side of accused that the sentence would be reduced to the said period of five days undergone by the accused. Hon'ble High court giving above observation confirmed the sentence passed by Trial Court.

In **Suganthi Suresh Kumar-Vs-Jagdeeshan** [2002 (2) SCC 420] The Hon'ble Apex Court held that Court can impose a sentence of imprisonment on the accused in default of payment of compensation ordered u/s 357 (3) of the Code. Similarly, in **R. Mohan -Vs- A.K. Vijaya Kumar [2012 Cri.L.J. 3953]** the Hon'ble Apex Court observed that accused was convicted for an offence u/s 138 of the Negotiable Instruments Act and sentenced to undergo three month's simple imprisonment and to pay compensation of Rs. 5 lakh to the complainant u/s 357(3) of the Cr.P.C., in default to undergo two month's simple imprisonment. The Judgment was confirmed by the Sessions Judge in appeal. In revision, the High Court was of opinion that no separate sentence could be awarded in default of payment of compensation when substantive sentence of imprisonment in default of payment of compensation. The said order of the High Court was challenged and the Apex Court held that “we find no illegality in the order passed by learned Magistrate and confirmed by the Sessions Court in awarding sentence in default of payment of compensation. High Court was in error in setting aside the sentence imposed in default of payment of compensation”

While dealing with the case in respect of offence of outraging modesty of woman punishable under Sec. 354 of I.P.C., The Hon'ble Bombay High Court in **Bhagwat Ganpat Taide V/s. The State of Maharashtra, (2006 (3), A.I.R. Bom. R. 250)**, observed that; "The petitioner/accused was a teacher. Imparting knowledge is a noble profession. The petitioner was in a position of loco parentis to his pupil. Instead of imparting knowledge petitioner was indulging in molestations of young girls of tender age. If the conduct of the petitioner is considered this is not fit case for showing leniency." In this case Trial Court convicted accused for this offence sentencing him to suffer Rigorous Imprisonment for three months and fine of Rs. 2,000/- in default R.I. for 20 days. This sentence was confirmed by the Hon'ble High Court.

In **Shailesh Jasvantbhai and Another v. State of Gujarat and Others, [(2006)2 SCC 359]** The hon'ble Hon'ble Apex Court held that " In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

In **Alister Anthony Pareira Vs. State of Maharashtra** (AIR 2012 SC 3802) The hon'ble Hon'ble Apex Court held that

“Sentensing policy is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing and accused on proof of crime. The courts have evolved certain principles: twin objectives of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

In **Brajendrasingh Vs. State of Madhya Pradesh** (AIR 2012 SC 1552), The hon'ble Hon'ble Apex Court held that “ The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of *Bachan Singh* and thereafter, in the case of *Machhi Singh*. The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstance'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the

classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Code of Criminal Procedure.

In **Ankush Maruti Shinde & Ors. v. State of Maharashtra, (AIR 2009 SC 2609)** the Hon'ble Apex Court held that, protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be- as it should be- a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence.

In **State of Andhra Pradesh v. Polamala Raju @ Rajarao** [(2000) 7 SCC 75] Three-judge bench of hon'ble Apex Court set aside a judgment of the High Court for non-application of mind to the question of sentencing. And observed that "In that case, this Court reprimanded the High Court for having reduced the sentence of the accused convicted under Section 376, IPC from 10 years imprisonment to 5 years without recording any reasons for the same". This Court said:

"We are of the considered opinion that it is an obligation of the sentencing court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence.....To say the least, the order contains no reasons, much less "special or adequate reasons". The sentence has been reduced in a rather mechanical manner without proper application of mind..."

In **State of M.P. - v - Bablu Natt** **[(2009)2 S.C.C. 272]** The hon'ble Apex Court held that " Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of 13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC.

In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly

against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

In **State of Karnataka v. Raju** [2007 (11) SCALE 114], where the facts of the case were that the Trial Court imposed custodial sentence of seven years after convicting the respondent for rape of minor under Section 376 of the Indian Penal Code; on appeal, the High Court reduced the sentence of the respondent to three and half years.

The hon'ble Apex Court held that a normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' rigorous imprisonment can also be awarded. It was, thus, opined that socio-economic status, religion, race, caste or creed of the accused or

the victim are irrelevant considerations in sentencing policy. To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question.

In **State of Punjab -Versus -Prem Sagar & Ors.** (CRIMINAL APPEAL [Arising out of SLP (Crl.) No.4285 of 2007]) The hon'ble Apex Court held that Respondents herein were convicted for commission of an offence under Section 61(1) of the Punjab Excise Act for carrying 2000 litres of rectified spirit. They were sentenced to undergo an imprisonment for a period of one year.

The High Court, however, by reason of the impugned judgment purported to be upon taking into consideration the fact that the offence was committed in the year 1987 and the appeal was dismissed in the year 1992, thought it fit to give an opportunity to the respondents to reform themselves, observing:

"The accused have suffered lot of agony of protracted trial. They having joined the main stream must have expressed repentance over the misdeed done by them about 19 years back. In the aforesaid circumstances and in the absence of any of their bad antecedents, it will not be appropriate to deny them to the benefit of probation under the Probation of Offenders Act, 1958 and to send them to jail at this stage."

We have noticed the development of law in this behalf in other countries only to emphasise that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind.

“Although ordinarily, we would not interfere the quantum of sentence in exercise of our jurisdiction under Article 136 of the

Constitution of India, but in a case of this nature we are of the opinion that the High Court having committed a serious error, interest of justice would be subserved if the decision of the High Court is set aside and the respondent is sentenced to undergo simple imprisonment for a period of six months and a fine of Rs. 5,000/- is imposed, in default to undergo imprisonment for a further period of one month.

In State (Government of NCT of Delhi) vs. Prem Raj, (2003) 7 SCC 121) Prem Raj, the accused respondent before the court was convicted by the trial court under Section 7 read with Section 13(1) (d) and 13(2) of the Prevention of Corruption Act and was sentenced to undergo rigorous imprisonment for two years and a fine of Rs. 500/- under Section 7. He was additionally sentenced to undergo imprisonment for 3-1/2 years and a fine of Rs.1, 000/- under Section 13(2) of the Act, subject to the direction that the two sentences would run concurrently. In appeal, on a plea made on the question of sentence, a learned Single Judge of the High Court enhanced the amount of fine to Rs.15, 000/- in lieu of the sentences of imprisonment and directed that on deposit of the amount of fine the State government, being the appropriate government' would formalize the matter by passing an appropriate order under Section 433 (c) of the Code of Criminal Procedure. This Court, on appeal by the State, held that the question of remission lay within the domain of the appropriate government and it was not open to the High Court to give a direction of that kind.

In **Ishardas v/s St. of Punjab** **(AIR 1972 SC 1295)** the hon'ble Apex court observed that the prevention of food Adulteration Act is enacted with aim of eradicating antisocial evil against public health

and court should not lightly resort to the provisions of probation of offenders Act. The 47th report of the Law Commission has recommended the exclusion of the probation Act to social and economic offences.

In **Pyarali K. Tejani vs Mahadeo Ramchandra Dange** (1974 SCR (2) 154) Five Judge bench of the hon'ble Apex Court held that "A successful prosecution for a food offence ended in a conviction of the accused, followed by a flea- bite fine of Rs. 100/-. Two criminal revisions ensued at the, instance of the State and the Food Inspector separately since they were dissatisfied with the magisterial leniency. (Why two revision proceedings should have been instituted, involving duplication of cases and avoidable expenditure from the public exchequer is for the authorities to examine and inhibit in. future). The High Court heard the accused against the conviction itself but upheld the guilt and enhanced the punishment to the statutory minimum of six months imprisonment and one thousand rupees fine.
The finale in every criminal trial is sentence. Let us take stock of the social and personal facts, the features of the crime and the culprit. The Prevention of Food Adulteration Act, 1954, is meant to save society, and Parliament has by repeated amendments emphasized the statutory determination to stamp out food offenses by severe sentences. Indeed, dissatisfied with the indulgent exercise of judicial discretion, the legislature has deprived the court of its power to be lenient. In the light of escalating food adulteration this is understandable. Even so, there are violations and violations. Scented supari is neither a staple deit nor popular 'With the poor, being an expensive item. Nor is saccharm poisonous but prohibited more as a precaution. That may be the reason for the prosecution not leading

evidence of its injurious properties. The circular bearing on saccharin in supari, though irrelevant to nullify the rule, suggests that it is not so grave a danger and may perhaps be permitted again. Cyclamate stands on a somewhat different footing, although in a practical sense, the menace to health from it is not too serious except where unusually massive doses are consumed. The accused's non-knowledge has been rejected by us but he alleges that he has retired from the firm. He has undergone a week in jail and is. not shown to be a repeater.

The Court has jurisdiction to bring down the sentence to less than the minimum prescribed in s. 16(1) provided there are adequate and special reasons in that behalf. The normal minimum is six months in jail and a thousand rupees fine. We find no good reason to depart from the proposition that generally food offenses must be deterrently dealt with. The High Court under the erroneous impression that the offence fell under S. 7 (i) read with s. 16 (1) (a) (i) actually it comes under s.7 (v) read with S. 16 (1) (a) (ii) did not address itself to the quantum of sentence. Even so the punishment fits the crime and the criminal.

In **Gopal Singh vs. State of Uttarakhand, (AIR 2013 SC 3048),** the Hon'ble Apex Court while reducing the sentence of three years of imprisonment to one year, for the offence under section 324 of the Indian Penal Code, 1860 observed that apart from other circumstances sometimes lapse of time in commission of the crime is a ground for reduction of the sentence.

In **State of M.P. v. Babulal,(2013 (10) SCALE 230)** the Hon'ble Supreme Court found fault with the Hon'ble High Court's

decision reducing the sentence to the period already undergone on the ground that a period of more than 7 years had elapsed from the date of the incident and observed that taking such a lenient view in awarding the sentence on the ground of delay in legal proceedings "tantamounts to doing injustice of a crude form against the innocent victims and the society as a whole".

In **Shyam Narain v. The State of NCT of Delhi,(AIR 2013 SC 2209)**, the Hon'ble Apex Court while dealing with the imposition of sentence on a rape convict observed that "the fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes." This observation sounds that the Hon'ble Supreme Court has been moving towards crime control model of criminal justice and retributive theory of punishment, at least in the cases of the crimes committed against women.

The Hon'ble Supreme Court in **Shimbhu v. State of Haryana, (AIR 2014 SC 739)** disapproved the reduction of sentence, than the prescribed minimum, in case of rape convicts, on the ground that the accused was "unsophisticated and illiterate citizen belonging to a weaker section of the society" that he was "a chronic addict to drinking" and had committed rape on the girl while in state of "intoxication" and that his family comprising of "an old mother, wife and children" were dependent upon him. These factors, the court said, did not justify recourse to the proviso to Section 376(2) of the

I.P.C. to impose a sentence less than the prescribed minimum. In this judgment the court did not consider the compromise arrived between the victim and the accused as a ground for reduction of sentence.

In **State of M.P. v. Najab Khan (AIR 2013 SC 2997)** also the court did not consider the compromise between the convict of the offence under section 326 of the I.P.C., and victim as a ground for reduction of sentence.

In **Shankar Kisanrao Khade v. State of Maharashtra, [2013 Cri.LJ 2595(SC)]**, the Hon'ble Apex Court held that, an attempt was made to do away with the preparation of balance sheet of aggravating and mitigating circumstances for arriving at a decision on death sentence by substituting the said exercise with "Crime test", "Criminal test", and "PR test." While restating the "rarest of rare case" rule, Hon'ble Justice K.S.P. Radahakrishnan opined that to award death sentence the crime test has to be fully satisfied i.e. 100% and the criminal test shall be 0% and later it shall pass through "PR test." One doubts whether there can be any such cases where there will be 100% and 0% of crime test and criminal test respectively.

In **Sunil Dutt Sharma v. State (Govt of NCT of Delhi), (AIR 2013 SC (Cri) 2342)** the Hon'ble Apex Court has dealt with sentencing jurisprudence at length and opined that the principles of sentencing evolved by this Court over the years, though largely in the context of the death penalty, will be applicable to all lesser sentences so long as the sentencing Judge is vested with the discretion to award a lesser or a higher sentence. Thus the Hon'ble Supreme Court

evolved new principles on sentencing practices during 2013.

In **Laxmi v. Union of India, (2013 (9) SCALE 291)** the Hon'ble Apex court has taken note of increasing acid attacks on women and the need for regulating of the sale of acid and issued directions to the government to take appropriate action. The court also has found disparity in compensation provided to the victims of acid attacks in different States and directed that a minimum of three lakh rupees shall be fixed as compensation in such cases.

The Hon'ble Supreme Court in "**Surya Baksh Singh Vs. State of Uttar Pradesh**", [2014(1) Bom. C.R. (Criminal) 26] has observed that "Recent judgments of the Court contain a perceptible dilution of legal principles such as the right of silence of the accused. The Supreme Court has, in several cases, departed from this rule in enunciating, inter alia, that the accused are duty bound to give a valid explanation of facts within their specific and personal knowledge in order to dispel doubts on their complicity.

In **Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India, (**2014 Cri.L.J. 4598**),** The Hon'ble Apex Court observed that Crime and punishment are two sides of the same coin. Punishment must fit to the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in

the matter of sentencing.

In **State of Madhya Pradesh Vs. Surendra Singh**, ***(AIR 2015 SC 3980***, based on the theory of proportionality, it is laid down by Hon'ble Apex Court that, "Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence".

Compensation to Victims of Crime

6] Criminal law, which reflects the social ambitions and norms of the society, is designed to punish as well as to reform the criminals, but it hardly takes any notice of by product of crime- i.e. its victim.

The poor victims of crime are entirely overlooked in misplaced sympathy for the criminal. The guilty man is lodged, fed, clothed, warmed, lighted, and entertained in a model cell at the expense of the state, from the taxes that the victim pays to the treasury. And, the victim, instead of being looked after, is contributing towards the care of prisoners during his stay in the prison. In fact, it is a weakness of our criminal jurisprudence that the victims of crime don't attract due attention.

The code of criminal procedure, 1973, sec.357, 357A and Probation of Offenders Act, 1958, sec.5; empowers the court to provide compensation to the victims of crime. However it is noted with regret that the courts seldom resort to exercising their powers liberally and award adequate compensation to the victim, particularly when an accused is released on admonition, probation or when the parties enter into a compromise.

The 2008 amendments introduced Section 357A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where " the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation.

Besides above enactments, the Juvenile Justice (Care and

Protection of Children) Act, 2000 also provides for the release of children who have committed offences to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, or any fit institution as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years.

The object of the criminal justice system is to reform the offender, and to ensure the society its security, and the security of its people by taking steps against the offender. It is thus a correctional measure. This purpose is not fulfilled only by incarceration, other alternative measures like parole, admonition with fine and probation fulfill the purpose equally well.

The benefit of Probation can also be usefully applied to cases where persons on account of family discord, destitution, loss of near relatives, or other causes of like nature, attempt to put an end to their own lives.

In **Sangeet & Anr. v. State of Haryana** [(2013) 2 SCC 452] the hon'ble Apex Court held that"In the sentencing process, both the crime and the criminal are equally important. We have unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing."

Section 357 Cr.P.C. confers a duty on the Court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the Court must disclose that it has applied its mind to

this question in every criminal case.

In **State of Himachal Pradesh v. Ram Pal** (2015) 42 SCD 438) the hon'ble Apex Court held that “On appeal, the view taken by the trial Court was reversed. It was held that even if the vehicle was going at slow speed and uphill, the vehicle could have been stopped and its striking to the girl could have been prevented. Undoubtedly, the death was because of vehicle hitting the girl which in the circumstances was clear result of rash and negligent act of driving. Accordingly, the appellate Court convicted the respondent under Section 279 and 304 A IPC and awarded sentence of imprisonment for six months and fine of Rs.1000, in default further imprisonment of one month under Section 304 A IPC and concurrent imprisonment for three months and fine of Rs.500, in default further imprisonment of fifteen days under Section 279 IPC.”

In our view, the sentence of mere fine of Rs.40,000/- imposed by the High Court is not adequate and proportionate to the offence. We have been informed that a sum of Rs.3,60,000/- has been awarded as compensation by the insurance company to the heirs of the deceased. We are also of the view that where the accused is unable to pay adequate compensation to the victim or his heir, the Court ought to have awarded compensation under Section 357A against the State from the funds available under the Victim Compensation Scheme framed under the said section. Accordingly, we modify the impugned order passed by the High Court and enhance the compensation to be paid by the respondent accused to Rs.1 lakh to be paid within four months failing which the sentence awarded by the Court of Session shall stand revived. In addition, we direct the State of Himachal Pradesh to pay interim compensation of Rs.3 lakhs. In case the

respondent fails to pay any part of the compensation, that part of compensation will also be paid by the State so that the heirs of the victim get total sum of Rs. 4 lakhs towards compensation. The amount already paid may be adjusted.

CONCLUSION

7] The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in S.235, S.248, S.325, S.360 and S.361. S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgment of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime. The section provides a quasi trial to ensure that the convict is given a chance to speak for himself and give opinion on the sentence to be imposed on him. The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if none of these will affect the sentence. Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work. This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed.

Thus, imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the

criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

Thus, the law on the issue of sentencing policy can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

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Vasanta Sampat Dupare v State of Maharashtra

2017(5) SCALE 724

Bench : Uday Umesh Lalit, Dipak Misra, Rohinton Fali Nariman

The Judgment was delivered by : Uday Umesh Lalit, J.

1. These Review Petitions are directed against the Judgment and Order dated 26.11.2014 passed by this Court in Criminal Appeal Nos.2486-87 of 2014 affirming conviction of the petitioner for the offences punishable under Sections 302, 363, 367, 376(2)(f) and 201 IPC and various sentences imposed upon the petitioner including death sentence under Section 302 IPC and life imprisonment under Section 376(2)(f) IPC. In view of the decision of this Court in Mohd. Arif @ Ashfaq v. Registrar, Supreme Court of India and others (2014) 9 SCC 737, these review petitions were listed in Court for oral hearing.

2. The facts leading to the filing of criminal appeals in this Court including the nature and quality of evidence on record have been dealt with and considered in the Judgment of this Court dated 26.11.2014, (2015) 1 SCC 253. The charge against the petitioner was that the victim, a minor girl of four years was raped and battered to death by the petitioner. The petitioner allegedly lured the victim by giving her chocolates, kidnapped her and after satisfying his lust caused crushing injuries to her with the help of stones weighing about 8.5 kg and 7.5 kg. The prosecution relied upon the evidence of PW2 Manisha, PW3 Minal, PW5 Vandana and PW6 Baby Sharma who had seen the petitioner taking away the victim on a bicycle on the fateful day. In his disclosure statement under Section 27 of the Evidence Act the petitioner had shown the place where dead body of the victim was lying and the tap where he had washed his blood stained clothes. The medical evidence on record was dealt with in the Judgment under review as under:-

3. After taking into account the evidence and the circumstances on record, this Court in the Judgment under review concluded as under:-

"On a critical analysis of the evidence on record, we are convinced that the circumstances that have been clearly established are that the appellant was seen in the courtyard where the minor girl and other children were playing; that the appellant was seen taking the deceased on his bicycle; that he had gone to the grocery shop owned by PW-6 to buy Mint chocolate along with her; that the accused had told PW2 that the child was the daughter of his friend and he was going to 'Tekdi-Wadi' along with the girl; that the appellant had led to discovery of the dead body of the deceased, the place where he had washed his clothes and at his instance the stones smeared with blood were recovered; that the medical report clearly indicates about the injuries sustained by the deceased on her body; that the injuries sustained on the private parts have been stated by the doctor to have been caused by forcible sexual intercourse; that the stones that were seized were smeared with blood and the medical evidence corroborates the fact that injuries could have been caused by battering with stones; that the chemical analysis report shows that the blood group found on the clothes of the appellant; that the appellant has not offered any explanation with regard to the recovery made at his instance; and that nothing has been stated in his examination under Section 313 CrPC *that there was any justifiable reason to implicate him in the crime in question. Thus, we find that each of the incriminating circumstances has been clearly established and the chain of circumstances are conclusive in nature to exclude any kind of hypothesis, but the one proposed to be proved, and lead to a definite conclusion that the crime was committed by the accused. Therefore, we have no hesitation in affirming the judgment of conviction rendered by the learned trial Judge and affirmed by the High Court."*

4. On the issue of death sentence awarded to the petitioner, this Court first considered the principles governing the matter in issue as under:-

"39. Now we shall proceed to deal with the facet of sentence. In Bachan Singh v. State of Punjab3 1980 Indlaw SC 624, *the Court held thus:*

"(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence."

40. In Bachan Singh case (1980) 2 SCC 684, the Court referred to the decision in Furman v. Georgia 33

L.Ed. 2d 346 = 408 US 238 (1972) and noted the suggestion given by the learned counsel about the aggravating and the mitigating circumstances. While discussing about the aggravating circumstances, the Court noted the aggravating circumstances suggested by the counsel which read as follows: (Bachan Singh 1980 Indlaw SC 624 *case)*

"Aggravating circumstances.-A court may, however, in the following cases impose the penalty of death in its discretion:
(a) if the murder has been committed after previous planning and involves extreme brutality; or
(b) if the murder involves exceptional depravity; or
(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-
(i) while such member or public servant was on duty; or
(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973*, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code." After reproducing the same, the Court opined:*

"203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other."

41. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances: (Bachan Singh 1980 Indlaw SC 624 *case)*

"Mitigating circumstances.-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances.-
(1) That the offence was committed under the influence of extreme mental or emotional disturbance.
(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
(4) The probability that the accused can be reformed and rehabilitated.
The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above.
(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
(6) That the accused acted under the duress or domination of another person.
(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

After reproducing the above, the Court observed:

"207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

42. In the said case, the Court has also held thus: (Bachan Singh 1980 Indlaw SC 624 *case)*

"209. ... It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

43. In Machhi Singh and others v. State of Punjab (1983) 3 SCC 470 1983 Indlaw SC 116 *a three-Judge Bench has explained the concept of rarest of the rare cases by stating that:*

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."

44. Thereafter, after adverting to the aspects of the feeling of the community and its desire for self-preservation, the Court opined that the community may well withdraw the protection by sanctioning the death penalty. The Court in that regard ruled thus: (Machhi Singh 1983 Indlaw SC 116 *case)*

"32. ... But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

It is apt to state here that in the said case, emphasis was laid on certain aspects, namely, manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of the victim of murder.

45. After so enumerating, the propositions that emerged out from Bachan Singh 1980 Indlaw SC 6243 *were culled out which are as follows: (Machhi Singh* 1983 Indlaw SC 116 *case)*

"38. ... The following propositions emerge from Bachan Singh 1980 Indlaw SC 624 *case:*

'(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

46. Thereafter, the three-Judge Bench opined that to apply the said guidelines, the following questions are required to be answered: (Machhi Singh 1983 Indlaw SC 116 *case)*

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons."

5. In the light of the principles as stated above, the facts of the present matter were considered by this Court in the Judgment under review as under:-

"57. Keeping in view the aforesaid authorities, we shall proceed to adumbrate what is the duty of the Court when the collective conscience is shocked because of the crime committed. When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the intense indignation at the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away by any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to the rarest of the rare case. We are also required to pose two questions that have been stated in Machhi Singh 1983 Indlaw SC 116 *case.*

58. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year

girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life-spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.

60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid-fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances."

6. The above quoted observations of this Court in Judgment under review show that the aggravating facts were considered in paragraphs 58 and 60 and the entirety of the matter including the mitigating circumstances were dealt with more particularly in paragraph 61. The aggravating facts not only showed the extreme depravity but in the opinion of this Court they brought to the fore the diabolical and barbaric manner in which the crime was committed. The Court did not find any mitigating circumstances in favour of the accused to tilt the balance in his favour for awarding lesser punishment.

7. At this juncture, it may be noted that the decision of this Court in Machhi Singh 1983 Indlaw SC 116 (supra) shows that after having laid down oft-quoted principles, this Court considered individual cases of accused Machhi Singh, Jagir Singh and Kashmir Singh. As regards Machhi Singh 1983 Indlaw SC 116, it was observed in paragraph 42:-

".....The offence committed was of an exceptionally depraved and heinous character. The manner of its execution and its design would put it at the level of extreme atrocity and cruelty.

.....The crime committed carries features which could be utterly horrendous especially when we know the weapons and the manner of their use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel.

.....The crime was gruesome and cold-blooded revealing the propensity of the accused appellants to commit murder."

Similarly as regards Jagir Singh it was observed,

".....The crime committed carries features which could be utterly horrendous especially when we know the weapons and their manner of use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel.

.....The helpless state of the victims and the circumstances of the case lead us to confirm the death sentence."

8. Further, paragraphs 44 and 45 show that one of the accused namely Kashmir Singh had caused the death of a defenceless child of six years and the matter as regards said accused Kashmir Singh in particular and with regard to all the accused in general, was dealt with as under:-

"44. Insofar as appellant Kashmir Singh s/o Arjan Singh is concerned death sentence has been imposed on him by the Sessions Court and confirmed by the High Court for the following reasons:

Similarly, Kashmir Singh appellant caused the death of a child Balbir Singh aged six years while asleep, a poor defenceless life put off by a depraved mind reflecting grave propensity to commit murder.

45. We are of the opinion that insofar as these three appellants are concerned the rarest of rare cases rule prescribed in Bachan Singh 1980 Indlaw SC 624 *case is clearly attracted and sentence of death is called for. We are unable to persuade ourselves that a sentence of imprisonment for life will be adequate in the circumstances of the crime. We therefore fully uphold the view concurrently taken by the Sessions Court and the High Court that extreme penalty of death requires to be imposed on appellants (1) Machhi Singh* 1983 Indlaw SC 116 *(2) Kashmir Singh s/o Arjan Singh (3) Jagir Singh. We accordingly confirm the death sentence imposed on them and dismiss their appeals."*

9. The assessment and the consideration bestowed by this Court in Machhi Singh 1983 Indlaw SC 116 (supra) shows that the aggravating circumstances namely the manner in which the crime was committed, the brutality and barbaric manner of execution, the status and helplessness of victims and the fact that the crime was gruesome and cold blooded were given due weightage. These facts themselves were found to be tilting the balance against the concerned accused. In the present case a minor girl of four years was raped and battered to death by the petitioner. The brutality and diabolical nature of the crime and the fact that the victim had reposed trust and confidence in the petitioner was taken into account and this Court found the aggravating circumstances completely outweighing the other factors. The evidence and circumstances were dealt with in the Judgment under review in great detail and this Court had no hesitation in affirming the death sentence.

10. In the present Review Petition, Mr. Anup Bhambhani, learned Senior Advocate appearing for the petitioner, at the outset, raised a grievance that in the light of principles laid down in Bachan Singh 1980 Indlaw SC 624 and Machhi Singh 1983 Indlaw SC 116 (supra) mitigating factors ought to have been taken into account and that proper and effective hearing in that behalf was not extended to the petitioner. This Court therefore by Order dated 31.08.2016 permitted the petitioner to file material to indicate mitigating factors for conversion of the death sentence to life imprisonment. This was in keeping with the principles laid down by this Court in Dagdu and Others v. State of Maharashtra (1977) 3 SCC 68 1977 Indlaw SC 74 wherein three Judge Bench of this Court had observed:-

"79 .....The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence."

80. .....For a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction.....Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases."

11. The petitioner thereafter filed Crl.M.P. Nos.16369-70 of 2016 placing on record certain facts and material. It was submitted:-

"Education and Activities undertaken by the Petitioner in Jail

(i) The Petitioner submits that he had to discontinue school after class 6th during childhood. Thereafter he worked in various jobs such as electrician, construction labourer, nursery worker, security guard. Death row prisoners in Maharashtra are not permitted to work, but the Petitioner as an undertial has worked in the jail nursery. During incarceration, the Petitioner has undertaken studies, art competitions as well as several programmes aimed at reforming himself. The Petitioner's counsel is informed that his drawings are exhibited in jail as well.

(ii) The Petitioner has in 2015 successfully completed the Bachelors Preparatory Programme offered by the Indira Gandhi National Open University. This course enables people who have discontinued schooling before matriculation to prepare for bachelors-level studies.

(iii) The Petitioner in 2015 also successfully completed the Gandhi Vichar Pariksha (Examination on Gandhian Thoughts). This examination seeks to rehabilitate prisoners who have committed violent crimes, by learning from the life and teaching of M.K. Gandhi. The course includes classes on the teachings of M.K. Gandhi, reading his autobiography, and a descriptive exam.

(iv) The Petitioner is quite proficient in drawing and has also participated in a drawing competition organized by the Nagpur Municipal Corporation and Kalajarn Foundation on 10.01.2016.

(v) It is therefore submitted that the Petitioner is on the path to reformation and rehabilitation and therefore the death sentence imposed on him deserves to be commuted to imprisonment for life."

The application then set out that the Disciplinary Record of the Petitioner in Jail was without any blemish and that there were no criminal antecedents.

12. The matter was thereafter posted for hearing. Mr. Anup Bhambhani, learned Senior Advocate principally submitted:-

a. The judgment of conviction and order of sentence were passed by the trial court on the same day namely on 23.02.2012 which was completely opposed to the law laid down by this Court in Allauddin Mian and Others v. State of Bihar (1989) 3 SCC 5 1989 Indlaw SC 577 and against the spirit of Section 235(2) of the CrPC.

b. As laid down in para 206 of Bachan Singh 1980 Indlaw SC 624 (supra) "the probability that the accused can be reformed" was an important facet and the burden was on the State to prove by evidence that the accused could not possibly be reformed. However, such burden was not discharged by the State and no evidence was led. In the absence of such evidence by the State, no death sentence could be awarded or confirmed.

13. Para 10 of the decision of this Court in Allauddin Mian v. State of Bihar 1989 Indlaw SC 577 (supra) on which reliance was placed, is to the following effect:-

"10. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:

If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

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. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of ***sentencing****. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in 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 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 Section 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. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think 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 as well as 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. In the present case, as pointed out earlier, we are afraid that the learned trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code."*

14. Sub-section (2) of Section 235 of Cr.P.C obliges the Court to hear the accused on the question of sentence and normally it is expected that after recording the conviction, the matter be adjourned to a future

date calling upon both the prosecution as well as the defence to place relevant material having bearing on the question of sentence. The effect of recording of the conviction and imposition of death sentence on the same day, was also considered by a bench of three learned Judges of this Court in Malkiat Singh and others v. State of Punjab (1991) 4 SCC 341 1991 Indlaw SC 1040. In that case, this Court did not deem it expedient to remand the matter after six years and converted the sentence of death to imprisonment for life. It was observed:-

"18. On finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the court facts and material relating to various factors on the question of sentence, and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. No doubt the accused declined to adduce oral evidence. But it does not prevent to show the grounds to impose lesser sentence on A-1. This Court in the aforestated Allauddin and Anguswamy (1989) 3 SCC 33 1989 Indlaw SC 587 *cases held that the sentence awarded on the same day of finding guilt is not in accordance with the law. That would normally have the effect of remanding the case to the Special Court for reconsideration. But in the view of the fact that A-1 was in incarceration for long term of six years from the date of conviction, in our considered view it needs no remand for further evidence. It is sufficient that the sentence of death awarded to A-1 is converted into rigorous imprisonment for life. The sentences of death is accordingly modified and A-1 is sentenced to undergo rigorous imprisonment for life for causing the deaths of all four deceased."*

15. In a recent Judgment rendered by three learned Judges of this Court in B.A. Umesh v. High Court of Karnataka (2016) 9 SCALE 600, the facts were more or less similar, in that no separate date for hearing on sentence was given after recording conviction. Para 8 of that decision of this Court is quoted for ready reference:-

"8. In addition to above, it is contended on behalf of the petitioner (Review Applicant) that since no separate date for hearing on sentence was given in the present case by the trial court, as such for violation of Section 235(2) Cr.P.C, *the sentence of death cannot be affirmed. We have considered the argument of Ms. Suri. It is true that the convict has a right to be heard before sentence. There is no mandate in Section 235(2)* Cr.P.C *to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Had any party pressed for separate date for hearing on the sentence, or both of them wanted to be heard on some other date, situation could have been different. In the present case, the parties were heard on sentence by both the courts below, and finally by this Court, as is apparent from the Judgment under review. As such, merely for the reason that no separate date is given for hearing on the sentence, the Review Petition cannot be allowed."*

This Court then relied on the principle laid down in Dagdu v. State of Maharashtra 1977 Indlaw SC 74 (supra) which was followed subsequently by another Bench of three learned Judges in Tarlok Singh v. State of Punjab (1977) 3 SCC 218. In the circumstances, merely because no separate date was given for hearing on sentence, we cannot find the entire exercise to be flawed or vitiated. Since we had allowed the petitioner to place the relevant material on record in the light of the principles laid down in Dagdu v. State of Maharashtra 1977 Indlaw SC 74 (supra), we will proceed to consider the material so placed on record and weigh these factors and the aggravating circumstances as found by the Court in the Judgment under review.

16. However, before such consideration we must deal with the second submission advanced by Mr. Bhambhani, learned Senior Advocate. In his submission, in terms of paragraph 206 of the decision of this Court in Bachan Singh 1980 Indlaw SC 624 (supra) the burden was upon the State in respect of conditions (3) and (4), which burden was not discharged at all. Consequently, according to him, the sentence of death would be required to be converted to life imprisonment. Paragraph 206 of the decision of this Court in Bachan Singh 1980 Indlaw SC 624 (supra) detailed certain mitigating circumstances and while dealing with conditions (3) and (4), this Court observed that it would be for the State to prove by evidence that the accused did not satisfy conditions (3) and (4). However, subsequent paragraphs show that those circumstances would certainly be relevant and great weight be attached to them but it was the cumulative effect of the mitigating circumstances on one hand and the aggravating facts on the other, which would be weighed to come to the final conclusion whether the case satisfied the requirement of being "rarest of rare". It is not as if mere failure on part of the State to lead such evidence would clinch the issue in favour of the

accused.

17. Mr. Bhambhani, learned Senior Advocate then relied on the decision of this Court in Rajesh Kumar v. State through Government of NCT of Delhi (2011) 13 SCC 706 2011 Indlaw SC 678, particularly paragraphs 73 and 74 thereof which paragraphs are as under:

"73. In the instant case the State has failed to show that the appellant is a continuing threat to the society or that he is beyond reform and rehabilitation. On the other hand, in para 77 of the impugned judgment the High Court observed as follows:

"We have no evidence that the appellant is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance."

74. It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in the society and the High Court has considered the same as a neutral circumstance. In our view the High Court was clearly in error. The very fact that the accused can be rehabilitated in the society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the appellant is not a continuing threat to the society in the absence of any evidence to the contrary. Therefore, in para 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court has only considered that the appellant is a first time offender and he has a family to look after. We are, therefore, constrained to observe that the High Court's view of mitigating circumstances has been very truncated and narrow insofar as the appellant is concerned."

The discussion shows that this Court found that mitigating circumstances in favour of the appellant were not properly considered and in the ultimate analysis the case did not satisfy being "rarest of rare" and therefore, this Court substituted the sentence of imprisonment for life to that of death sentence. The discussion in paragraphs 73 and 74 does not indicate that in the absence of any evidence led by the State in connection with conditions (3) and (4) as stated in paragraph 206 of Bachan Singh 1980 Indlaw SC 624 (supra), the entire exercise gets vitiated and the matter must always be answered in favour of the accused. It is undoubtedly a relevant consideration which will be weighed by the Court together with other circumstances on record. We, therefore, do not find any merit in the second submission.

18. In Ramnaresh and Others v. State of Chhattisgarh (2012) 4 SCC 257 this Court considered the import of governing principles regarding death sentence and summed up that it is the cumulative effect of both the aggravating and mitigating circumstances that need to be taken into account. Paragraphs 76 to 81 of the decision are as under:-

"76. The law enunciated by this Court in its recent Judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh 1980 Indlaw SC 624 *and thereafter, in Machhi Singh* 1983 Indlaw SC 116. *The aforesaid Judgments, primarily dissect these principles into two different compartments-one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3)* Cr.P.C

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful

discharge of his duty under Section 43 CrPC.
(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
(11) When murder is committed for a motive which evidences total depravity and meanness.
(12) When there is a cold-blooded murder without provocation.
(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances
(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.
(2) The age of the accused is a relevant consideration but not a determinative factor by itself.
(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles
(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.
(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.
(3) Life imprisonment is the rule and death sentence is an exception.
(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.
(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

79. The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of "just deserts" that serves as the foundation of every criminal sentence that is justifiable. In other words, the "doctrine of proportionality" has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly bring the case within the ambit of "rarest of rare" cases and the court

finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the court may award death penalty. Wherever, the case falls in any of the exceptions to the "rarest of rare" cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

19. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.

20. The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in Bachan Singh 1980 Indlaw SC 624 (supra) but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the Judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present Review Petitions.

Order accordingly

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(1) Mukesh and another; (2) Vinay Sharma and another v State for (NCT of Delhi)
2017(5) SCALE 506

Bench : Dipak Misra, Ashok Bhushan, R. Banumathi

Relevant Part of Judgment on Sentencing

The Judgment was delivered by : Dipak Misra, J.

1. The cold evening of Delhi on 16th December, 2012 could not have even remotely planted the feeling in the twenty-three year old lady, a para-medical student, who had gone with her friend to watch a film at PVR Select City Walk Mall, Saket, that in the next few hours, the shattering cold night that was gradually stepping in would bring with it the devastating hour of darkness when she, alongwith her friend, would get into a bus at Munirka bus stand to be dropped at a particular place; and possibly could not have imagined that she would be a prey to the savage lust of a gang of six, face brutal assault and become a playful thing that could be tossed around at their wild whim and her private parts would be ruptured to give vent to their pervert sexual appetite, unthinkable and sadistic pleasure. What the victims had not conceived of, it all happened, as the chronology of events would unroll. The attitude, perception, the beastial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide. The death took place at a hospital in Singapore where she had been taken to with the hope that her life could be saved.

464. The prosecution has established the presence of the accused in the bus and the heinous act of gang rape committed on the prosecutrix by the accused by the ample evidence - by the multiple dying declaration of the victim and also by the evidence of PW-1 and medical evidence and also by arrest and recovery of incriminating articles of the victim and that of PW-1 complainant. The scientific evidence in particular DNA analysis report clearly brings home the guilt of the accused.

465. Section 235(2), Criminal Procedure Code: Once the conviction of the accused persons is affirmed, what remains to be decided is the question of appropriate punishment imposed on them. On the aspect of sentencing, we were very effectively assisted by the learned Amicus Curiae. Accused were convicted vide judgment and order dated 10.09.2013 and on the very next day of judgment i.e. on 11.09.2013, the arguments on sentencing were concluded. Thereafter, a separate order on sentence was pronounced on 13.09.2013.

467. Section 235 Cr.P.C. deals with the judgments of acquittal or conviction. Under Section 235(2) Cr.P.C., where the accused is convicted, save in cases of admonition or release on good conduct, the Judge shall hear the accused on the question of sentence and then pass sentence in accordance with law. Section 235(2) Cr.P.C. imposes duty on the court to hear the accused on the question of sentence and then pass sentence on him in accordance with law. The only exception to the said rule is created in case of applicability of Section 360 Cr.P.C. i.e. when the court finds the accused eligible to be released on probation of good conduct or after admonition.

468. Section 354 Cr.P.C. specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) Cr.P.C. deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. Section 354(3) Cr.P.C. mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

469. The statutory duty to state special reasons under Section 354(3) Cr.P.C. can be meaningfully carried out only if the hearing on sentence under Section 235(2) Cr.P.C. is effective and procedurally fair. To afford an effective opportunity to the accused, the Court must hear on the question of sentence to know about (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any; (iv) possibility of reformation, if any; and (v) such other relevant factors. The major deficiency in the complex criminal justice system is that important factors which have a bearing on sentence are not placed before the Court. Resultantly, the Courts are constantly faced with the dilemma to impose an appropriate sentence. In this context, hearing of the accused under Section 235(2) Cr.P.C. on the question of sentencing is a crucial exercise which is intended to enable the accused to place before the Court all the mitigating circumstances in his favour viz. his social and economic backwardness, young age etc. The mandate of Section 235(2) Cr.P.C. becomes more crucial when the accused is found guilty of an offence punishable with death penalty or with the life imprisonment.

470. It is well-settled that Section 235(2) Cr.P.C. is intended to give an opportunity of hearing to the prosecution as well as the accused on the question of sentence. The Court while awarding the sentence has to take into consideration various factors having a bearing on the question of sentence. In case, Section 235(2) Cr.P.C. is not complied with, as held in Dagdu's case, the appellate Court can either send back the case to the Sessions Court for complying with Section 235(2) Cr.P.C. so as to enable the accused to adduce materials; or, in order to avoid delay, the appellate Court may by itself give an opportunity to the parties in terms of Section 235(2) Cr.P.C. to produce the materials they wish to adduce instead of sending the matter back to the trial Court for hearing on sentence. In the present case, we felt it appropriate to adopt the latter course and accordingly asked the counsel appearing for the appellants to file affidavits/materials on the question of sentence. Consequently, vide order dated 03.02.2017, we directed the learned counsel for the accused to place in writing, before this Court, their submissions, whatever they desired to place on the question of sentence. In compliance with the order, Mr. M.L. Sharma, learned counsel on behalf of the accused A-2 Mukesh and A-5 Pawan and Mr. A.P. Singh, learned counsel on behalf of the accused Akshay Kumar Singh, Vinay Sharma and Pawan Gupta filed the individual affidavits of the accused.

471. Accused Mukesh (A-2) in his affidavit has stated that he was picked up from his house at Karoli, Rajasthan and brought to Delhi and reiterated that he is innocent and he denied his involvement in the occurrence. In their affidavits, accused Akshay Kumar Singh (A-3), accused Vinay Sharma (A-4) and accused Pawan Gupta (A-5) submitted in their individual affidavits have stated that they hail from an ordinary/ poor background and are not much educated. They have also stated that they have aged parents and other family members who are dependent on them and they are to be supported by them. Accused have also stated that they have no criminal antecedents and that after their confinement in Tihar Jail they have maintained good behavior.

472. Learned counsel Mr. M.L. Sharma submitted that accused Mukesh (A-2) is innocent and he has been falsely implicated only because he is the brother of accused Ram Singh.

473. Taking us through the affidavits filed by the accused, learned counsel Mr. A.P. Singh submitted that the accused namely Akshay Kumar Singh, Pawan Gupta and Vinay Sharma hail from very poor background; and have got large families to support; and have no criminal antecedents. It has been contended that having regard to the fact that the three accused have no prior criminal antecedents and are not hardened criminals, the case will not fall under "rarest of rare cases" to affirm the death sentence.

474. Supplementing the affidavits filed by the accused, the learned amicus and senior counsel Mr. Raju Ramachandran and Mr. Sanjay Hegde submitted that assuming that the conviction of the appellants are confirmed, the accused who hail from very ordinary poor background and having no criminal antecedents, the death sentence be commuted to life imprisonment.

475. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

478. Whether the Case falls under rarest of rare cases: Law relating to award of death sentence in India has evolved through massive policy reforms-nationally as well as internationally and through a catena of judicial pronouncements, showcasing distinct phases of our view towards imposition of death penalty. Undoubtedly, continuing prominence of reformative approach in sentencing and India's international obligations have been majorly instrumental in facilitating a visible shift in court's view towards restricting imposition of death sentence. While closing the shutter of deterrent approach of sentencing in India, the small window of 'award of death sentence' was left open in the category of 'rarest of rare case' in Bachan Singh v. State of Punjab (1980) 2 SCC 684, by a Constitution Bench of this Court.

479. In Bachan Singh 1980 Indlaw SC 624 (supra), while upholding the constitutional validity of capital sentence, this Court revisited the law relating to death sentence at that point of time, by thoroughly discussing the law laid down in Jagmohan Singh v. State of U.P. (1973) 1 SCC 20; Rajendra Prasad v. State of U.P. (1979) 3 SCR 646 and other cases. The principles laid down in Bachan Singh's case 1980 Indlaw SC 624 is that, normal

rule is awarding of 'life sentence', imposition of death sentence being justified, only in rarest of rare case, when the option of awarding sentence of life imprisonment is unquestionably foreclosed'. By virtue of Bachan Singh 1980 Indlaw SC 624 (supra), 'life imprisonment' became the rule and 'death sentence' an exception. The focus was shifted from 'crime' to the 'crime and criminal' i.e. now the nature and gravity of the crime needs to be analysed juxtaposed to the peculiar circumstances attending the societal existence of the criminal. The principles laid down in Bachan Singh's case 1980 Indlaw SC 624 were considered in Machhi Singh and Ors. v. State of Punjab (1983) 3 SCC 470 1983 Indlaw SC 116 and was summarised as under:-

"38. In this background the guidelines indicated in Bachan Singh's case 1980 Indlaw SC 624 *(supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case* 1980 Indlaw SC 624 *(supra):*

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

480. In Machhi Singh's case 1983 Indlaw SC 116, this Court took the view that in every case where death penalty is a question, a balance sheet of aggravating and mitigating circumstances must be drawn up before arriving at the decision. The Court held that for practical application of the doctrine of 'rarest of rare case', it must be understood broadly in the background of five categories of cases crafted thereon that is 'Manner of commission of crime', 'Motive', 'Anti-social or socially abhorrent nature of the crime', 'Magnitude of crime', and 'Personality of victim of murder'. These five categories are elaborated in para nos. 32 to 37 as under:-

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) hen the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

481. The principle laid down in Bachan Singh 1980 Indlaw SC 624 (supra) and Machhi Singh 1983 Indlaw SC 116 (supra) came to be discussed and applied in all the cases relating to imposition of death penalty for committing heinous offences. However, lately, it was felt that the courts have not correctly applied the law laid down in Bachan Singh 1980 Indlaw SC 624 (supra) and Machhi Singh 1983 Indlaw SC 116 (supra), which has led to inconsistency in sentencing process in India; also it was observed that the list of categories of murder crafted in Machhi Singh 1983 Indlaw SC 116 (supra), in which death sentence ought to be awarded are not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario. In Swamy Shradhananda alias Murali Manohar Mishra (2) v. State of Karnataka (2008) 13 SCC 767 2008 Indlaw SC 1128; a three-Judge Bench of this Court, observed as under in this regard:-

"43. In Machhi Singh the Court crafted the categories of murder in which 'the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. *At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself."*

482. A milestone in the sentencing policy is the concept of 'life imprisonment till the remainder of life' evolved in Swamy Shradhananda (2) 2008 Indlaw SC 1128 (supra). In this case, a man committed murder of his wife for usurping her property in a cold-blooded, calculated and diabolic manner. The trial court convicted the accused and death penalty was imposed on him which was affirmed by the High Court. Though the conviction was

affirmed by this Court also on the point of sentencing, the views of a two-Judge Bench of this Court, in Swamy Shradhananda v. State of Karnataka (2007) 12 SCC 282 differed, and consequently, the matter was listed before a three-Judge Bench, wherein a mid way was carved. The three-Judge Bench, was of the view that even though the murder was diabolic, presence of certain circumstances in favour of the accused, viz. no mental or physical pain being inflicted on the victim, confession of the accused before the High Court etc., made them reluctant to award death sentence. However, the Court also realised that award of life imprisonment, which euphemistically means imprisonment for a term of 14 years (consequent to exercise of power of commutation by the executive), would be equally disproportionate punishment to the crime committed. Hence, in Swamy Shradhananda (2) 2008 Indlaw SC 1128 (supra) the Court directed that the accused shall not be released from the prison till the rest of his life. Relevant extract from the judgment reads as under:

"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all."

483. After referring to a catena of judicial pronouncements post Bachan Singh 1980 Indlaw SC 624 (supra) and Machhi Singh 1983 Indlaw SC 116 (supra), in the case of Ramnaresh and Ors. v. State of Chhattisgarh (2012) 4 SCC 257 2012 Indlaw SC 81, this Court, tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances.

It would be apposite to refer to the same here:

"Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. *When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.*

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

484. Similarly, this Court in Sangeet and Another v. State of Haryana (2013) 2 SCC 452, extensively analysed the evolution of sentencing policy in India and stressed on the need for further evolution. In para (77), this Court emphasized on making the sentencing process a principled one, rather than Judge-centric one and held that a re-look is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court.

485. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded. Reference may be made to Holiram Bordoloi v. State of Assam (2005) 3 SCC 793 2005 Indlaw SC 263 [Para 15-17], Ankush Maruti Shinde and Ors. v. State of Maharashtra (2009) 6 SCC 667 2009 Indlaw SC 825 (para 31-34), Kamta Tiwari v. State of Madhya Pradesh (1996) 6 SCC 250 1996 Indlaw SC 2125 (para 7-8), State of U.P. v. Satish (2005) 3 SCC 114 2005 Indlaw SC 83 (para 24-31), Sundar alias Sundarajan v. State by Inspector of Police and Anr. (2013) 3 SCC 215 2013 Indlaw SC 65 (para 36-38, 42-42.7, 43), Sevaka Perumal and Anr. v. State of Tamil Nadu (1991) 3 SCC 471 1991 Indlaw SC 683 (para 8-10, 12), Mohfil Khan and Anr. v. State of Jharkhand (2015) 1 SCC 67 2014 Indlaw SCO 494 (para 63-65).

486. Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of Bhagwan Swarup v. State of U.P. (1971) 3 SCC 759 (para 5), Deepak Rai v. State of Bihar (2013) 10 SCC 421 (para 91-100) and Shabhnam v. State of Uttar Pradesh (2015) 6 SCC 632 (para 36).

487. Let me now refer to a few cases of rape and murder where this Court has confirmed the sentence of death. In Molai & Anr. v. State of M.P. (1999) 9 SCC 581 1999 Indlaw SC 786, death sentence awarded to both the accused for committing offences under Sections 376(2)(g) IPC, 302 read with Section 34 IPC and 201 IPC, was confirmed by this Court. The accused had committed gang rape on the victim, strangulated her thereafter and threw away her body into the septic tank with the cycle, after causing stab injuries. It was held as under:

"36.....It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under-garment and thereafter took her to the septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into

the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

488. In Bantu v. State of Uttar Pradesh (2008) 11 SCC 113, the victim aged about five years was not only raped, but was murdered in a diabolic manner. The Court awarded extreme punishment of death, holding that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed must be delicately balanced by the Court in a dispassionate manner.

489. In Ankush Maruti Shinde and Ors. v. State of Maharashtra (2009) 6 SCC 667, concerned accused were found guilty of offences under Sections 307 IPC, 376(2)(g) IPC and 397 read with 395 and 396 of IPC. This Court declined to interfere with the concurrent findings of the courts below and upheld death penalty awarded to the accused, taking into account the brutality of the incident, tender age of the deceased, and the fact of a minor girl being mercilessly gang raped and then put to death. The court also noted that there was no provocation from the deceased's side and the two surviving eye witnesses had fully corroborated the case of the prosecution.

490. In Mehboob Batcha and Ors. v. State rep. by Supdt. of Police (2011) 7 SCC 45 2011 Indlaw SC 193, accused were policemen who had wrongfully confined one Nandagopal in police custody in Police Station Annamalai Nagar on suspicion of theft from 30.05.1992 till 02.06.1992 and had beaten him to death there with lathis, and had also gang raped his wife Padmini in a barbaric manner. This Court could not award death penalty due to omission of the courts below in framing charge under Section 302, IPC. However, the observations made by this Court are worth quoting here:

"Bane hain ahal-e-hawas muddai bhi munsif bhi Kise vakeel karein kisse munsifi chaahen -- Faiz Ahmed Faiz

1. If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC *was framed against the accused by the Courts below.*

9. We have held in Satya Narain Tiwari @ Jolly and Anr. v. State of U.P. (2010) 13 SCC 689 2010 Indlaw SCO 362 *and in Sukhdev Singh v. State of Punjab, (2010) 13 SCC 656* 2010 Indlaw SCO 374 *that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment....."*

491. In Mohd. Mannan @ Abdul Mannan v. State of Bihar (2011) 5 SCC 317 2011 Indlaw SC 275, this Court upheld award of death sentence to a 43 year old accused who brutally raped and murdered a minor girl, while holding a position of trust. Relevant considerations of the Court while affirming the death sentence are extracted as under:

"26....The postmortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The Appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenseless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that Appellant is a menace to the society and shall continue to be so and he can not be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court."

In Shivaji @ Dadya Shankar Alhat v. State of Maharashtra (2008) 15 SCC 269; Rajendra Pralhadrao Wasnik v. The State of Maharashtra (2012) 4 SCC 37 2012 Indlaw SC 76 award of death penalty in case of rape and murder was upheld, finding the incident brutal and accused a menace for the society.

492. In Dhananjoy Chatterjee alias Dhana v. State of W.B. (1994) 2 SCC 220 1994 Indlaw SC 1743, a security guard who was entrusted with the security of a residential apartment had raped and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. and 5.45 p.m. The entire case of the

prosecution was based on circumstantial evidence. However, Court found that it was a fit case for imposing death penalty. Following observation of the Court while imposing death penalty is worth quoting:-

"14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

(emphasis added)

493. In a landmark judgment Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546, Justice Madan B. Lokur (Concurring) after analysing various cases of rape and murder, wherein death sentence was confirmed by this Court, in para (122) briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under:-

"122. The principal reasons for confirming the death penalty in the above cases include:

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan v. State of U.P. (1991) 1 SCC 752, Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220, Laxman Naik v. State of Orissa (1994) 3 SCC 381, Kamta Tewari v. State of M.P. (1996) 6 SCC 250, Nirmal Singh v. State of Haryana (1999) 3 SCC 670, Jai Kumar v. State of M.P. (1999) 5 SCC 1, State of U.P. v. Satish (2005) 3 SCC 114 2005 Indlaw SC 83*, Bantu v. State of U.P. (2008) 11 SCC 113, Ankush Maruti Shinde v. State of Maharashtra (2009) 6 SCC 667, B.A. Umesh v. State of Karnataka (2011) 3 SCC 85, Mohd. Mannan v. State of Bihar (2011) 5 SCC 317* 2011 Indlaw SC 275 *and Rajendra Pralhadrao Wasnik v. State of Maharashtra (2012) 4 SCC 37);*

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee (1994) 2 SCC 220 1994 Indlaw SC 1743*, Jai Kumar (1999) 5 SCC 1, Ankush Maruti Shinde (2009) 6 SCC 667 and Mohd. Mannan (2011) 5 SCC 317;*

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar(1999) 5 SCC 1, B.A. Umesh (2011) 3 SCC 85 and Mohd. Mannan (2011) 5 SCC 317) 2011 Indlaw SC 275*;*

(4) the victims were defenceless (Dhananjoy Chatterjee (1994) 2 SCC 220, Laxman Naik (1994) 3 SCC 381, Kamta Tewari (1996) 6 SCC 250, Ankush Maruti Shinde (2009) 6 SCC 667, Mohd. Mannan (2011) 5 SCC 317 and Rajendra Pralhadrao Wasnik (2012) 4 SCC 37);

(5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee (1994) 2 SCC 220, Laxman Naik (1994) 3 SCC 381, Kamta Tewari (1996) 6 SCC 250, Nirmal Singh (1999) 3 SCC 670, Jai Kumar (1999) 5 SCC 1, Ankush Maruti Shinde (2009) 6 SCC 667, B.A. Umesh (2011) 3 SCC 85 and Mohd. Mannan (2011) 5 SCC 317) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu v. High Court of Karnataka (2007) 4 SCC 713, B.A. Umesh (2011) 3 SCC 85 2011 Indlaw SC 101 *and Rajendra Pralhadrao Wasnik (2012) 4 SCC 37)."*

494. We also refer to para (106) of Shankar Kisanrao Khade's case where Justice Madan B. Lokur (Concurring) has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation.
Para (106) reads as under:-

"106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused [Amit v. State of Maharashtra (2003) 8 SCC 93 aged 20 years, Rahul v. State of Maharashtra (2005) 10 SCC 322 aged 24 years, Santosh Kumar Singh v. State (2010) 9 SCC 747 aged 24 years, Rameshbhai Chandubhai Rathod (2) (2011) 2 SCC 764 aged 28 years and Amit v. State of U.P.(2012) 4 SCC 107 aged 28 years];

(2) the possibility of reforming and rehabilitating the accused (in Santosh Kumar Singh (2010) 9 SCC 747 and Amit
v. State of U.P.(2012) 4 SCC 107 the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (Nirmal Singh (1999) 3 SCC 670, Raju (2001) 9 SCC 50, Bantu (2001) 9 SCC 615, Amit v. State of Maharashtra (2003) 8 SCC 93, Surendra Pal Shivbalakpal (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and Amit v. State of U.P (2012) 4 SCC 107);

(4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh (1999) 3 SCC 670, Mohd. Chaman (2001) 2 SCC 28, Raju (2001) 9 SCC 50, Bantu (2001) 9 SCC 615, Surendra Pal Shivbalakpal (2005) 3 SCC 127, Rahul (2005) 10 SCC 322 and Amit v. State of U.P. (2012) 4 SCC 107).

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (State of T.N. v. Suresh (1998) 2 SCC 372, State of Maharashtra v. Suresh (2000) 1 SCC 471, State of Maharashtra v. Bharat Fakira Dhiwar (2002) 1 SCC 622, State of Maharashtra v. Mansingh (2005) 3 SCC 131 and Santosh Kumar Singh (2010) 9 SCC 747);

(6) the crime was not premeditated (Kumudi Lal v. State of U.P. (1999) 4 SCC 108, Akhtar v. State of U.P. (1999) 6

SCC 60, Raju v. State of Haryana (2001) 9 SCC 50 and Amrit Singh v. State of Punjab (2006) 12 SCC 79);

(7) the case was one of circumstantial evidence (Mansingh (2005) 3 SCC 131 2004 Indlaw SC 1550 *and Bishnu Prasad Sinha (2007) 11 SCC 467).*

In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (Kumudi Lal (1999) 4 SCC 108) 1999 Indlaw SC 1670 *and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput)* 2011 Indlaw SC 595.*"*

495. In the same judgment in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546, Justice Madan B. Lokur (concurring) while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under:

"148. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."

In Shankar Kisanrao's case, it was observed by Justice Madan B. Lokur that Dhananjay Chatterjee's case was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

496. Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in Machhi Singh 1983 Indlaw SC 116 (Supra) and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: Gurvail Singh @

Gala and Anr. v. State of Punjab (2013) 2 SCC 713; Mohfil Khan and Anr. v. State of Jharkhand (2015) 1 SCC 67; Purushottam Dashrath Borate and Anr. v. State of Maharashtra (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In Mohfil Khan 2014 Indlaw SC 494 (supra), this Court specifically observed that 'it would be the paramount duty of the Court to provide justice to the incidental victims of the crime - the family members of the deceased persons.

497. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above-stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim's family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- 'death sentence', life sentence commutable to 14 years' or 'life imprisonment for the rest of the life'.

498. The question would be whether the present case could be one of the rarest of rare cases warranting death penalty. Before the court proceed to make a choice whether to award death sentence or life imprisonment, the court is to draw up a balance-sheet of aggravating and mitigating circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered:- (i) Is there something uncommon about the crimes which regard sentence of imprisonment for life inadequate; (ii) Whether there is no alternative punishment suitable except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.

499. We are here concerned with the award of an appropriate sentence in case of brutal gang-rape and murder of a young lady, involving most gruesome and barbaric act of inserting iron rods in the private parts of the victim. The act was committed in connivance and collusion of six who were on a notorious spree running a bus, showcasing as a public transport, with the intent of attracting passengers and committing crime with them. The victim and her friend were picked up from the Munirka bus stand with the mala fide intent of ravishing and torturing her. The accused not only abducted the victim, but gang-raped her, committed unnatural offence by compelling her for oral sex, bit her lips, cheeks, breast and caused horrifying injuries to her private parts by inserting iron rod which ruptured the vaginal rectum, jejunum and rectum. The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the wintery night, with grievous injuries.

500. If we look at the aggravating circumstances in the present case, following factors would emerge:

- Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang-rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (PW-1) naked in the cold wintery night and trying to run the bus over them.

- The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.

- The horrific acts reflecting the in-human extent to which the accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity.

- The acts committed so shook the conscience of the society.

501. As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/appellants namely A-3 Akshay, A-4 Vinay and A-5 Pawan placed on record, through their individual affidavits dated 23.03.2017, following mitigating circumstances:- (a) Family circumstances such as poverty and rural background,

(b) Young age,

(c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,

(d) Absence of criminal antecedents,

(e) Conduct in jail, and

(f) Likelihood of reformation.

In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.

502. In Purushottam Dashrath Borate and Anr. v. State of Maharashtra (2015) 6 SCC 652 2015 Indlaw SC 338, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

503. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in Om Prakash v. State of Haryana (1999) 3 SCC 19 1999 Indlaw SC 972, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

504. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "rarest of rare cases". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

505. **In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to 'life imprisonment for the rest of the life'.** The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang-rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of 'rarest of rare case' where the question of any other punishment is 'unquestionably foreclosed'. If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the 'rarest of rare category', then one may wonder what else would fall in that category. On these reasoning recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons.

506. The incident of gang-rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nation-wide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang-rape like the present one surfaces, it causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.

507. The statistics of National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.

508. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement "to end violence against women" and "respect for women and her dignity" and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same. Order accordingly

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State of Himachal Pradesh v Nirmala Devi

2017 Indlaw SC 473

Bench: A.K. Sikri, Ashok Bhushan

The Judgment was delivered by : A.K. Sikri, J.

2. Respondent herein faced trial for offence covered by Sections 328, 392, 397 read with Section 34 of the Indian Penal Code (IPC) alongwith co-accused Krishan Lal Sharma. When the trial was underway, both the accused persons were released on bail, pending trial. 12 prosecution witnesses (PWs) were examined and some more were yet to be examined. At that stage, respondent absented from court and was declared a proclaimed offender. Thereafter, trial proceeded against Krishan Lal Sharma, who was convicted for committing offences under the aforesaid provisions, for which he was charged, vide judgment dated 19th April, 2002. Later on, the respondent was apprehended and brought to trial and testimony of remaining prosecution witnesses were recorded in her case. It culminated in the judgment dated 27th February, 2003 whereby the Sessions Judge convicted the respondent also for the offences punishable under Sections 328, 307, 392 read with Section 34, IPC. As a consequence, order of sentence was passed on 5th March, 2003. She was inflicted with the punishments of simple imprisonment for a period of two years and fine in the sum of Rs. 2,000/-, in default of payment of which to undergo imprisonment for a further period of three months, for the offence each punishable under Sections 328, 307 and 392 IPC with direction that all the substantive sentences were to run concurrently. Fine of Rs. 6,000/- was directed to be paid to the complainant, Ramesh Kumar as compensation. A sum of Rs. 12,000/- was recovered from the respondent which was also ordered to be released to the complainant.

4. The respondent filed an appeal against the judgment dated 5th March, 2003 passed by the Sessions Judge in the High Court. The High Court has affirmed the conviction. However, insofar as award of sentence is concerned, it is drastically modified by removing imprisonment part of the sentence and substituting the same with fine simplicitor of Rs. 30,000/-. Concluding paragraph of the impugned judgment giving reasons for taking this course of action is reproduced below:

"I have given careful consideration to the submission made by the learned counsel appearing for the appellant, who submits that the appellant is a lady and looking after her three minor sons out of them two are mentally unsound and in these circumstances, the Court should take a lenient view. This fact was also urged before the learned trial court which has taken a lenient view of the case. What I find further is that the appellant has also absconded during the trial and cannot be considered to be such an innocent person. However, on the conspectus of the material on record, it would be in the fitness of things in the case the sentence of imprisonment under each head is set aside and instead a fine of Rs. 30,0/- is imposed upon the appellant with a direction that the amount be deposited in the Court of learned Sessions Judge, Chamba, Division Chamba within a period of six months from today failing which the sentence of imprisonment shall revive. On deposit of such fine, it shall be paid to the complainant. A direction is issued to the learned Sessions Judge, Chamba to comply with this judgment."

5. Respondent has not challenged the order against that part of the judgment whereby her conviction has been upheld by the High Court. To that extent, the judgment of the High Court has attained finality. On the contrary, it is the State which has filed the Special Leave Petition under Article 136 of the Constitution (out of which present appeal arises), questioning the validity, propriety and justification of the impugned order whereby the sentence of imprisonment is set aside and substituted by fine of Rs. 30,000/-. Therefore, the learned counsel for the parties confined their submissions on this aspect alone.

6. Before examining the issue raised, it would be apposite to take note of the prosecution case against the respondent for which she stands convicted. The case originated on the basis of complaint filed by the complainant, Ramesh Kumar (PW-13), resulting into registration of the FIR (Exh. PL). He stated therein that on 22nd August, 2000, he left his house situated at Preet Nagar, Jammu at around 8.40 A.M. in the morning to withdraw a sum of Rs. 27,000/- from his Bank account from the Bank Satbari for the purposes of purchasing an auto-tempo which he wanted to use for transporting children studying in his school. On way to the bank, he met Krishan Lal accused, who was driving Maruti Van No. JK-02M-4392, an old acquaintance of the complainant. He asked the complainant as to where he was going whereupon he disclosed that he was going to withdraw a sum of Rs. 27,000/- for purchasing an auto-tempo from Pathankot. At that point of time, the complainant had a sum of Rs. 4,000/- in his pocket. Accused Krishan Lal told him that he would get him a discount from an authorized auto-tempo dealer at Pathankot and that

he was willing to drive him to that place. Both went to the bank where the complainant withdrew a sum of Rs. 27,000/-. Thereafter, accused Krishan Lal took him to his house where he was offered a cup of tea. Then, Krishan Lal took him to the house of one lady (respondent herein). He informed the complainant that this lady would also go to Pathankot and they would go there together. The accused offered a glass of water and thereafter a cup of tea after which the complainant, Ramesh Kumar, suspected that he had been made to ingest some intoxicant. They boarded the Van where after the complainant lost consciousness. He regained his senses/consciousness in the Civil Hospital at Dalhousie in the early hours of 24th August, 2000. He had lost all the currency. The case is that the money had been looted from the complainant; he had been beaten up badly and dumped in a Nullah somewhere near Dalhousie.

7. It is on the aforesaid allegations that the respondent along with Krishan Lal were fasten with the charges under Sections 328, 392, 307 read with Section 34 of the IPC. As pointed above, prosecution was able to substantiate the aforesaid allegations resulting into the conviction of the respondent. To put it in nutshell, the prosecution succeeded in proving, beyond reasonable doubt, that respondent in furtherance of common intention with her co-accused had administered stupefying intoxicating substance to the complainant with intent to commission of offence, that is, theft of currency notes of the complainant and in the process attempted to kill the complainant as well.

9. At this juncture, I would like to reproduce the provisions under which the respondent has been convicted.

10. As is clear from the bare reading of the aforesaid sections, offence mentioned therein are of serious nature. Maximum 'imprisonment' for committing offence under Section 328 IPC is 10 years as well as fine. Likewise, the punishment stipulated in Section 392 IPC is 'rigorous imprisonment' for a term which may extend to 10 years, as well as fine. In case of highway robbery between sunset and sunrise, imprisonment can be extended even to 14 years, though that is not the case here. Insofar as Section 307 IPC is concerned, which relates to commission of offence by attempting to murder, again maximum sentence of imprisonment of either description (i.e. simple or rigorous) upto 10 years can be awarded, in addition to making the convict liable to pay fine. This punishment can go upto life imprisonment if hurt is caused to any person by an act which is done with the intention or knowledge that it may cause death.

11. In the instant case, hurt is caused. Following aspects are clearly discernible from the reading of these provisions:

(a) The offences mentioned under all these Sections are of serious nature.

(b) Maximum penalty, under normal circumstances, is 10 years which under certain circumstances can even be life imprisonment (Section 307 IPC) or 14 years (under Section 392 IPC)

(c) Whereas imprisonment under Sections 307 IPC and 328 IPC can be of either description, namely, 'simple imprisonment' or 'rigorous imprisonment' and, therefore, it is left to the discretion of the trial court to award any of these depending upon the circumstances of a case, insofar as punishment under Section 392 IPC is concerned there is no such discretion and the imprisonment has to be rigorous in nature.

12. In the instant case, as noticed above, trial court awarded imprisonment of two years, that too, simple imprisonment for all the three offences which was to run concurrently. The record shows that it was pleaded before the trial court that respondent is a lady and further that she had three minor sons. These considerations persuaded the trial court to take a lenient view. In the appeal filed by the respondent before the High Court, on the question of sentence same very circumstances were pleaded, which resulted in mellowing the High Court further by setting aside the imprisonment part of sentencing and modifying the sentence to that of fine of Rs. 30,000/- alone.

13. In this context and factual background, two points arise for consideration, viz.:

(i) Whether the High Court was permitted, in law, to do away with the punishment of imprisonment altogether and substitutes the same with fine alone?

(ii) Whether the circumstances pleaded by the respondent were so mitigating that punishment of fine alone could be justified?

14. Coming to the first question, as can be seen from the language of Sections 307, 328 and 392 of IPC, all

these sections provide for imprisonment 'and' fine. In fact, after specifying particular term of imprisonment, all these sections use the words 'and shall also be liable to fine'. This expression came up for consideration in Zunjarrao Bhikaji Nagarkar v. Union of India & Ors. (1999) 7 SCC 409 1999 Indlaw SC 97 and the Court explained that in such circumstances, it is imperative to impose both the sentences i.e. imprisonment as well as fine. Thus, there has to be punishment of imprisonment in respect of these offences, and in addition, the convict is also liable to pay fine. Therefore, awarding the punishment of imprisonment is a must and there cannot be a situation where no imprisonment is imposed at all. The High Court was, therefore, clearly wrong in not inflicting a sentence of imprisonment, by modifying the sentence awarded by the trial court and obliterating the sentence of imprisonment altogether. Thus, the very approach of the High Court in substituting the sentence by fine alone is impermissible in law.

15. Section 386 of the Code of Criminal Procedure enlists the powers of the appellate court while hearing the appeals from the trial court. In an appeal from conviction, if the conviction is maintained, the appellate court has the power to alter the nature or the extent, or the nature and extent, of the sentence (though it cannot enhance the same). However, such a power has to be exercised in terms of the provisions of Indian Penal Code etc. for which the accused has been convicted. Power to alter the sentence would not extend to exercising the powers contrary to law. It clearly follows that the High Court committed a legal error in doing away with the sentence of imprisonment altogether.

16. The second question is as to whether the circumstances pleaded by the respondent justify taking a lenient view in the matter. The acts committed by the respondent constitute heinous offences. Having common intention along with co-accused, she administered poison like substance to the complainant; robbed him of his money; and even attempted to kill him. As already held, award of sentence is imprisonment is a must. The question is, in the wake of the commission of crime of this nature, to what extent the mitigating factor viz. the respondent being a woman and having three minor children, be taken for the purposes of sentencing?

18. The offences for which the respondent is convicted prescribe maximum imprisonment and there is no provision for minimum imprisonment. Thus, there is a wide discretion given to the Court to impose any imprisonment which may be from one day (or even till the rising of the court) to ten years/life. However, at the same time, the judicial discretion which has been conferred upon the Court, has to be exercised in a fair manner keeping in view the well established judicial principles which have been laid down from time to time, the prime consideration being reason and fair play.

19. Likewise, stressing upon the principle of proportionality in sentencing in the case of Hazara Singh v. Raj Kumar & Ors. (2013) 9 SCC 516, this Court stressed that special reasons must be assigned for taking lenient view and undue sympathy for accused is not justified. It was equally important to keep in mind rights of victim as well as society at large and the corrective theory on the one hand and deterrence principle on the other hand should be adopted on the basis of factual matrix.

20. Following principles can be deduced from the reading of the aforesaid judgment:

(i) Imprisonment is one of the methods used to handle the convicts in such a way to protect and prevent them to commit further crimes for a specific period of time and also to prevent others from committing crime on them out of vengeance. The concept of punishing the criminals by imprisonment has recently been changed to treatment and rehabilitation with a view to modify the criminal tendency among them.

(ii) There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

(iii) Notwithstanding the above theories of punishment, when it comes to sentencing a person for committing a heinous crime, the deterrence theory as a rationale for punishing the offender becomes more relevant. In such cases, the role of mercy, forgiveness and compassion becomes secondary.

(iv) In such cases where the deterrence theory has to prevail, while determining the quantum of sentence, discretion lies with the Court. While exercising such a discretion, the Court has to govern itself by reason and fair play, and discretion is not to be exercised according to whim and caprice. It is the duty of the Court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the

society and a legitimate response to the collective conscience.

(v) While considering as to what would be the appropriate quantum of imprisonment, the Court is empowered to take into consideration mitigating circumstances, as well as aggravating circumstances.

21. When the Indian Penal Code provides discretion to Indian Judges while awarding the sentence, the Court will have undoubtedly regard to extenuating and mitigating circumstances. In this backdrop, the question is as to whether the respondent being a lady and having three minor children will be extenuating reasons? I may observe that in many countries of the world, gender is not a mitigating factor. Some jurists also stress that in this world of gender equality, women should be treated at par with men even as regards equal offences committed by them. Women are competing men in the criminal world; they are emulating them in all the crimes; and even surpassing men at times.

Therefore, concept of criminal justice is not necessarily synonymous with social justice. Eugene Mc Laughlin shows a middle path. She finds that predominant thinking is that 'paper justice' would demand giving similar penalty for similar offences. However, when it comes to doing 'real justice', element of taking the consequences of a penalty cannot be ignored. Here, while doing 'real justice' consequences of awarding punishment to a female offender are to be seen. According to her, 'real justice' would consider the likelihood that a child might suffer more from a mother's imprisonment than that of his father's. Insofar as Indian judicial mind is concerned, I find that in certain decisions of this Court, gender is taken as the relevant circumstance while fixing the quantum of sentence. I may add that it would depend upon the facts of each case, whether it should be treated as a relevant consideration and no hard and fast rule can be laid down. For example, where a woman has committed a crime being a part of a terrorist group, mercy or compassion may not be shown.

22. In the present case, two mitigating circumstances which are pressed into service by the respondent are that she is a woman and she is having three minor children. This has to be balanced with the nature of crime which the respondent has committed. As can be seen, these circumstances were taken into consideration by the trial court and on that basis, the trial court took a lenient view by awarding imprisonment for two years in respect of each of the offences under Sections 307, 328 and 392 of the IPC, which were to be run concurrently. There was no reason to show any further mercy by the High Court. Further, as found above, removing the element of imprisonment altogether was, in any case, erroneous in law. I, thus, allow this appeal and set aside the sentencing part of the judgment of the High Court and restore the judgment of the trial court.

ORDER OF THE COURT

The appeal is allowed. Judgment of the High Court is set aside to the extent it modifies the sentence and the sentence of imprisonment as awarded by the trial court is restored herewith. The respondent shall be taken into custody to serve the sentence.

Ravada Sasikala v State of Andhra Pradesh and another
AIR 2017 SC 1166

Bench : Dipak Misra, R. Banumathi

The Judgment was delivered by : Dipak Misra, J.

3. The necessary facts. On the basis of the statement of the injured, an FIR under Sections 448 and 307 of the Indian Penal Code (IPC) was registered at police station Vallampudi. The injuries sustained by the victim-informant required long treatment and eventually after recording the statements of the witnesses, collecting various materials from the spot and taking other aspects into consideration of the crime, the investigating agency filed the charge sheet for the offences that were originally registered under the FIR before the competent court which, in turn, committed the matter to the Court of Session, Vizianagaram. The accused abjured his guilt and expressed his desire to face the trial.

5. The learned Assistant Sessions Judge, Vizianagaram did not find the accused guilty under Section 307 IPC but held him guilty under Section 326 and 448 IPC. At the time of hearing of the sentence under Section 235(2) of the Code of Criminal Procedure (CrPC), the convict pleaded for mercy on the foundation of his support to the old parents, the economic status, social strata to which he belongs and certain other factors. The learned trial judge, upon hearing him, sentenced him to suffer rigorous imprisonment for one year and directed to pay a fine of Rs. 5,000/- with a default clause under Section 326 IPC and sentenced him to pay a fine of Rs. 1000/- for the offence under Section 448 IPC with a default clause.

6. The State preferred Criminal Appeal No. 1731 of 2007 under Section 377(1) CrPC before the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh for enhancement of sentence. Being grieved by the judgment of conviction and order of sentence, the accused-respondent had preferred Criminal Appeal No. 15 of 2006 before the Sessions Judge, Vizianagaram which was later on transferred to the High Court and registered as Transferred Criminal Appeal No. 1052 of 2013.

7. Both the appeals were heard together by the learned Single Judge who concurred with the view taken by the learned trial judge as regards the conviction. While dealing with the quantum of sentence, the learned Judge opined thus:-

"However, the sentence of imprisonment imposed by the trial Court for the offence under Section 326 I.P.C. *is modified to the period which the accused has already undergone, while maintaining the sentence of fine for both the offences."*

8. At the outset, we must note that the State has not assailed the said judgment. The appellant, after obtaining permission of this Court, filed the special leave petition which we entertained for the pure reason it has been asserted that the period of custody suffered by the accused is 30 days. It is apt to note here that the accused-respondent has not challenged the conviction and, therefore, it has to be assumed that apart from accepting the judgment of conviction, he must have celebrated the delight and jubilation of liberty inasmuch as despite the sustenance of the judgment of conviction, he was not required to suffer any further imprisonment.

9. The centripodal question, indubitably a disquieting one, **whether the High Court has kept itself alive to the precedents pertaining to sentencing or has been guided by some kind of unfathomable and incomprehensible sense of individual mercy absolutely ignoring the plight and the pain of the victim**; a young girl who had sustained an acid attack, a horrendous assault on the physical autonomy of an individual that gets more accentuated when the victim is a young woman. Not for nothing, it has been stated stains of acid has roots forever.

10. As the factual matrix gets unfolded from the judgment of the learned trial Judge, the appellant after completion of her intermediate course had accompanied her brother to Amalapuram of East Godavari District where he was working as an Assistant Professor in B.V.C. Engineering College, Vodalacheruvu and stayed with him about a week prior to the occurrence. Thereafter, she along with her brother went to his native place Sompuram. At that time, the elder brother of the accused proposed a marriage alliance between the accused and the appellant for which her family expressed unwillingness. The reason for expressing the unwillingness is not borne out on record but the said aspect, needless to say, is absolutely irrelevant. What matters to be stated is that the proposal for marriage was not accepted. It is evincible from

the material brought on record that the morning of 24.05.2003 became the darkest and blackest one in her life as the appellant having a head bath had put a towel on her head to dry, the accused trespassed into her house and poured a bottle of acid over her head. It has been established beyond a trace of doubt by the ocular testimony and the medical evidence that some part of her body was disfigured and the disfiguration is due to the acid attack.

11. In this backdrop, the heart of the matter is whether the imposition of sentence by the learned Single Judge is proportionate to the crime in question.

14. We have noted earlier that the conviction under Section 326 IPC stands established. The singular issue is the appropriateness of the quantum of sentence. Almost 27 years back in Sham Sunder v. Puran and another (1990) 4 SCC 731, the accused-appellant therein was convicted under Section 304 Part I IPC and while imposing the sentence, the appellate court reduced the sentence to the term of imprisonment already undergone, i.e., six months. However, it enhanced the fine. This Court ruled that sentence awarded was nadequate. Proceeding further, it opined that:-

"No particular reason has been given by the High Court for awarding such sentence. The court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence. The sentence imposed by the High Court appears to be so grossly and entirely inadequate as to involve a failure of justice. We are of opinion that to meet the ends of justice, the sentence has to be enhanced."

After so stating the Court enhanced the sentence to one of rigorous imprisonment for a period of five years.

15. In Shyam Narain v. State (NCT of Delhi) (2013) 7 SCC 77, it has been ruled that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. The Court further observed that on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has to be borne in mind that while carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

16. In State of Madhya Pradesh v. Najab Khan and others (2013) 9 SCC 509, the High Court of Madhya Pradesh, while maintaining the conviction under Section 326 IPC read with Section 34 IPC, had reduced the sentence to the period already undergone, i.e., 14 days. The two-Judge Bench referred to the authorities in Shailesh Jasvantbhai v. State of Gujarat (2006) 2 SCC 359, Ahmed Hussain Vali Mohammed Saiyed v. State of Gujarat (2009) 7 SCC 254, Jameel v. State of Uttar Pradesh (2010) 12 SCC 532 and Guru Basavaraj v. State of Karnataka (2012) 8 SCC 734 2012 Indlaw SC 262 and held thus:-

"In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

In the said case, the Court ultimately set aside the sentence imposed by the High Court and restored that of the trial Judge, whereby he had convicted the accused to suffer rigorous imprisonment for three years.

17. In Sumer Singh v. Surajbhan Singh & others (2014) 7 SCC 323, while elaborating on the duty of the Court while imposing sentence for an offence, it has been ruled that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding

laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. The Court further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined and law does not tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court ruled:-

"We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society."

18. In State of Punjab v. Bawa Singh (2015) 3 SCC 441, this Court, after referring to the decisions in State of Madhya Pradesh v. Bablu (2014) 9 SCC 281 and State of Madhya Pradesh v. Surendra Singh(2015) 1 SCC 222, reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the nature of crime regard being had to the manner in which the offence is committed. It has been further held that one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it would shock the conscience of the society. Emphasis was laid on the solemn duty of the court to strike a proper balance while awarding the sentence as imposition of lesser sentence encourages a criminal and resultantly the society suffers.

19. Recently, in Raj Bala v. State of Haryana and others (2016) 1 SCC 463, on reduction of sentence by the High Court to the period already undergone, the Court ruled thus:-

"Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardozo, "Justice, though due to the accused, is due to the accuser too" and follow an extremely liberal sentencing policy which has neither legal permissibility nor social acceptability."

And again:-

"A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked."

20. Though we have referred to the decisions covering a period of almost three decades, it does not necessarily convey that there had been no deliberation much prior to that. There had been. In B.G. Goswami v. Delhi Administration (1974) 3 SCC 85, the Court while delving into the issue of punishment had observed that punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of awarding appropriate sentence.

21. The purpose of referring to the aforesaid precedents is that they are to be kept in mind and adequately weighed while exercising the discretion pertaining to awarding of sentence. Protection of society on the one hand and the reformation of an individual are the facets to be kept in view. In Shanti Lal Meena v. State (NCT of Delhi) (2015) 6 SCC 185, the Court has held that as far as punishment for offence under the Prevention of Corruption Act, 1988 is concerned, there is no serious scope for reforming the convicted

public servant. Therefore, it shall depend upon the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected. The case at hand is an example of uncivilized and heartless crime committed by the respondent No. 2. It is completely unacceptable that concept of leniency can be conceived of in such a crime. A crime of this nature does not deserve any kind of clemency. It is individually as well as collectively intolerable. The respondent No. 2 might have felt that his ego had been hurt by such a denial to the proposal or he might have suffered a sense of hollowness to his exaggerated sense of honour or might have been guided by the idea that revenge is the sweetest thing that one can be wedded to when there is no response to the unrequited love but, whatever may be the situation, the criminal act, by no stretch of imagination, deserves any leniency or mercy. The respondent No. 2 might not have suffered emotional distress by the denial, yet the said feeling could not to be converted into vengeance to have the licence to act in a manner like he has done.

22. In view of what we have stated, the approach of the High Court shocks us and we have no hesitation in saying so. When there is medical evidence that there was an acid attack on the young girl and the circumstances having brought home by cogent evidence and the conviction is given the stamp of approval, there was no justification to reduce the sentence to the period already undergone. We are at a loss to understand whether the learned Judge has been guided by some unknown notion of mercy or remaining oblivious of the precedents relating to sentence or for that matter, not careful about the expectation of the collective from the court, for the society at large eagerly waits for justice to be done in accordance with law, has reduced the sentence. When a substantive sentence of thirty days is imposed, in the crime of present nature, that is, acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vanaprastha". It is wholly impermissible.

23. In view of our analysis, we are compelled to set aside the sentence imposed by the High Court and restore that of the trial court. In addition to the aforesaid, we are disposed to address on victim compensation. We are of the considered opinion that the appellant is entitled to compensation that is awardable to a victim under the CrPC. In Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC 770 the two-Judge Bench referred to the amended provision, 154th Law Commission Report that has devoted entire chapter to victimology, wherein the growing emphasis was on the victim.

24. In Laxmi v. Union of India and others (2014) 4 SCC 427, this Court observed thus:-

"12. Section 357-A came to be inserted in the Code of Criminal Procedure, 1973 *by Act 5 of 2009 w.e.f. 31-12-2009. Inter alia, this section provides for preparation of a scheme for providing funds for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime and who require rehabilitation.*

13. We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared "Victim Compensation Scheme" (for short "the Scheme"). As regards the victims of acid attacks, the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs 25,000 in such Scheme, the State of Rajasthan has provided for Rs 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, the learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at least Rs 3 lakhs as the aftercare and rehabilitation cost. The suggestion of the learned Solicitor General is very fair."

25. The Court further directed that the acid attack victims shall be paid compensation of at least Rs 3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh was directed to be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs.2 lakhs was directed to be paid as expeditiously as possible and positively within two months thereafter and compliance thereof was directed to be ensured by the Chief Secretaries of the States and the Administrators of the Union Territories.

26. In State of M.P. v. Mehtaab (2015) 5 SCC 197, the Court directed compensation of Rs.2 lakhs to be fixed regard being had to the limited final resources of the accused despite the fact that the occurrence took place in 1997. It observed that the said compensation was not adequate and accordingly, in addition to the said compensation to be paid by the accused, held that the State was required to pay compensation under Section 357-A CrPC. For the said purpose, reliance was placed on the decision in Suresh v. State of Haryana (2015) 2 SCC 227.

27. In State of Himachal Pradesh v. Ram Pal (2015) 11 SCC 584, the Court opined that compensation of Rs. 40,000/- was inadequate regard being had to the fact that life of a young girl aged 20 years was lost. Bestowing anxious consideration the Court, placing reliance on Suresh 2014 Indlaw SC 815 (supra), Manohar Singh v. State of Rajasthan and Ors. (2015) 3 SCC 449 and Mehtaab 2015 Indlaw SC 95 (supra), directed that ends of justice shall be best subserved if the accused is required to pay a total sum of Rs.1 lakh and the State to pay a sum of Rs.3 lakhs as compensation.

28. Regard being had to the aforesaid decisions, we direct the accused-respondent No. 2 to pay a compensation of Rs.50,000/- and the State to pay a compensation of Rs.3 lakhs. If the accused does not pay the compensation amount within six months, he shall suffer further rigorous imprisonment of six months, in addition to what has been imposed by the trial court. The State shall deposit the amount before the trial court within three months and the learned trial Judge on proper identification of the victim, shall disburse it in her favour. The criminal appeals are allowed to the extent indicated above.

Vikas Yadav v State of U. P. and others
AIR 2016 SC 4614

Bench : Dipak Misra, C. Nagappan

The Judgment was delivered by : Dipak Misra, J.

1. The appellants in this batch of appeals stand convicted for the offences under Sections 302, 364, 201 read with Section 34 of the Indian Penal Code (IPC). This Court while hearing the special leave petitions on 17.08.2015 had passed the following order:-

"Delay condoned.
Having heard learned senior counsel for the petitioners at great length, we are of the view, that the impugned orders call for no interference whatsoever insofar as the conviction of the petitioners is concerned. The conviction of the three petitioners, as recorded by the courts below, is accordingly upheld.
Issue notice, on the quantum of sentence, returnable after six weeks."

2. On 16.06.2015 leave was granted. Thus, we are only concerned with the legal defensibility and the justifiability of the imposition of sentence.

3. The arguments in these appeals commenced on issues of law. Mr. U.R. Lalit and Mr. Shekhar Naphade, learned senior counsel appearing for the appellant in Criminal Appeal Nos. 1531-1533 of 2015 and Mr. Atul Nanda, learned senior counsel appearing for the appellant in Criminal Appeal Nos. 1528-1530 of 2015 questioned the propriety of the sentence as the High Court has imposed a fixed term sentence, i.e., 25 years for the offence under Section 302 IPC and 5 years for offence under Section 201 IPC with the stipulation that both the sentences would run consecutively. It is apt to note here that separate sentences have been imposed in respect of other offences but they have been directed to be concurrent. After advancing the arguments relating to the jurisdiction of the High Court as well as this Court on imposition of fixed term/period sentence, more so when the trial court has not imposed death sentence, the learned counsel argued that the factual score in the instant case did not warrant such harsh delineation as a consequence disproportionate sentences have been imposed.

4. Keeping in view the chronology of advancement of arguments, we think it apt to deal with the jurisdictional facet. If we negative the proposition advanced by the learned counsel for the appellants, then only we shall be required to proceed to deal with the facts as requisite to be stated for the purpose of adjudicating the justifiability of imposition of such sentence. If we accede to the first submission, then the second aspect would not call for any deliberation. At this juncture, it is necessary to state that the learned trial judge by order dated 30.05.2008 sentenced Vikas Yadav and Vishal Yadav to life imprisonment as well as fine of one lakh each under Section 302 IPC and, in default of payment of fine, to undergo simple imprisonment for one year. They were sentenced to undergo simple imprisonment for ten years and fine of Rs. 50,000/- each for their conviction under Section 364/34 IPC, in default to undergo simple imprisonment for six months and rigorous imprisonment for five years and fine of Rs. 10,000/- each under Section 201/34 IPC, in default, simple imprisonment for three months.

All sentences were directed to run concurrently. Sukhdev Yadav @ Pehalwan who was tried separately because of his abscondence in SC No. 76 of 2008 was convicted for the offences under Sections 302/364/34 IPC and Section 201 and by order dated 12.07.2011, he was sentenced to undergo life imprisonment and fine of Rs. 10,000/- for commission of the offence under Section 302 IPC, in default, to undergo rigorous imprisonment for two years; rigorous imprisonment for seven years and fine of Rs. 5,000/- for commission of the offence under Section 364 IPC, in default, to suffer rigorous imprisonment for six months; rigorous imprisonment for three years and fine of Rs. 5,000/- for his conviction under Section 201 IPC, in default, to undergo further rigorous imprisonment for six months. All sentences were directed to be concurrent.

5. Be it noted, the prosecution, - State of NCT of Delhi preferred an appeal under Section 377 CrPC for enhancement of sentence of imprisonment of life to one of death for the offence under Section 302 IPC.

The High Court addressed to number of issues, namely, (a) statutory provisions and jurisprudence regarding imposition of the death penalty; (b) death sentence jurisprudence - divergence in views; (c) life imprisonment - meaning and nature of; (d) the authority of the judiciary to regulate the power of the executive to remit the sentence or to put in other words jurisdiction of the court to direct minimum term sentence in excess of imposition of 14 years; (e) if there are convictions for multiple offences in one case, does the court have the option of directing that the sentences imposed thereon shall run consecutively and not concurrently; (f) honour killing - whether penalty of only the death sentence; (g) contours of the jurisdiction of the High Court to enhance a sentence imposed by the trial court and competency to pass orders under Section 357 of the CrPC in the appeal by the State or revision by a complainant seeking enhancement of sentence; (h) sentencing procedure and pre-sentencing hearing nature of; (i) concerns for the victims - award of compensation to heal and as a method of reconciling victim to the offender; (j) State's liability to pay compensation; (k) fine and compensation - constituents, reasonability and adequacy; (l) sentencing principles; (m) jurisdiction of the appellate court while considering a prayer for enhancement of the sentence; (n) if not death penalty, what would be an adequate sentence in the present case; and (o) what ought to be the fitnes in the present case.

6. Apart from the said aspects, the High Court also addressed to certain aspects which are specific to the case at hand to which we will advert to at a later stage. The High Court, after addressing the aspects which we have catalogued and some other fact specific

8. We think it appropriate to deal with the aspect of legal permissibility of the imposition of sentence first as the learned senior counsel appearing for the appellants had argued quite astutely with regard to the non-acceptability of such fixed term sentences and other facets relating to it. After we answer the said issue, if needed, we shall dwell upon the sustainability and warrantableness of the sentences in the facts of the case.

17. We shall first see how the Constitution Bench in V. Sriharan 2015 Indlaw SC 879 (supra) has dealt with this aspect. The three-Judge Bench in Union of India v. V. Sriharan alias Murugan and others (2014) 11 SCC 1 2014 Indlaw SC 304 framed certain questions for consideration by the Constitution Bench. The Constitution Bench in V. Sriharan 2015 Indlaw SC 879 (supra) reproduced the said questions and thereafter formulated the core questions for answering the same. After adverting to the same, the Court observed that the issues raised were of utmost critical concern for the whole country as the decision on the questions would determine the procedure for awarding sentence and the criminal justice system. Thereafter, the Court referred to the authority in Swamy Shraddananda (2) v. State of Maharashtra (2008) 13 SCC 767 2008 Indlaw SC 1128 and framed the following questions:-

"2.1. Maintainability of this writ petition under Article 32 of the Constitution *by the Union of India.*
2.2. (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?
(ii) Whether as held in Shraddananda case (2), a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?
2.3. Whether the appropriate Government is permitted to grant remission under Sections 432/433 of the Criminal Procedure Code, 1973 *after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its constitutional power(s) under Article 32?*
2.4. Whether the Union or the State has primacy for the exercise of power under Section 432(7) over the subject-matter enlisted in List III of the Seventh Schedule for grant of remission?
2.5. Whether there can be two appropriate Governments under Section 432(7) of the Code?
2.6. Whether the power under Section 432(1) can be exercised suo motu, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not?
2.7. Whether the expression "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?"

18. We have reproduced the entire paragraph for the sake of completeness and understanding. The issues that have been raised by Mr. Lalit and Mr. Naphade fundamentally relate to the issues in para 2.2. The majority in the Constitution Bench, after referring to the decisions in Maru Ram v. Union of India and others (1981) 1 SCC 107, Gopal Vinayak Godse v. State of Maharashtra and others AIR 1961 SC 600 and State of Madhya Pradesh v. Ratan Singh and others (1976) 3 SCC 470, opined that the legal position is quite settled that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Criminal Procedure Code by the appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz. the President or the Governor of the

State respectively. The Court referred to the decision in Ashok Kumar alias Golu v. Union of India and others (1991) 3 SCC 498, wherein it was specifically ruled that the decision in Bhagirath v. Delhi Administration (1985) 2 SCC 580 does not run counter to Godse (supra) and Maru Ram 1980 Indlaw SC 577 (supra).

19. Referring to Section 57 IPC, the decision in Ashok Kumar 1991 Indlaw SC 58 (supra) reiterated the legal position as under:-

'9. ... The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose.'

20. It has been held in V. Sriharan 2015 Indlaw SC 879 (supra) that the said observations are consistent with the ratio laid down in Godse 1961 Indlaw SC 227 (supra) and Maru Ram 1980 Indlaw SC 577 (supra).

21. Thereafter, the majority in V. Sriharan 2015 Indlaw SC 879 (supra) quoted a paragraph from Bhagirath's case 1985 Indlaw SC 427 (supra) which pertained to set-off under Section 428 CrPC which is to the following effect:-

"11. ... The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life."

22. Thereafter, the Court in V. Sriharan 2015 Indlaw SC 879 (supra) observed:-
"We fail to see any departure from the ratio of Godse case 1961 Indlaw SC 227*; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the Court while allowing the appeal/writ petition. The Court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that orders have been passed by the appropriate authority under Section 433 of the* Criminal Procedure Code*'.*

These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set-off the period of detention as undertrial would enure to the benefit of the convict provided the appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of Bhagirath case 1985 Indlaw SC 427*, therefore, does not run counter to the ratio of this Court in Godse or Maru Ram.*

61. Having noted the abovereferred to two Constitution Bench decisions in Godse and Maru Ram which were consistently followed in the subsequent decisions in Sambha Ji Krishan Ji (1974) 1 SCC 196 1973 Indlaw SC 392*, Ratan Singh* 1976 Indlaw SC 590*, Ranjit Singh (1984) 1 SCC 31* 1983 Indlaw SC 322*, Ashok Kumar* 1991 Indlaw SC 58 *and Subash Chander (2001) 4 SCC 458* 2001 Indlaw SC 20876*. The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the* Penal Code *only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the* Constitution *to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the* Criminal Procedure Code*".*

23. After so stating, the majority addressed to the concept of remission. It opined that:-
"As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant rules based on his/her good behaviour or such other stipulations prescribed therein. The other remission is the grant of it by the appropriate Government in exercise of its power under Section 432 of the Criminal Procedure Code*. Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid down in Swamy Shraddananda (2)."*

24. After dwelling upon the said aspect, the Court referred to the principles stated in paragraphs 91 and 92 in Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra). It adverted to the facts in Swamy Shraddananda

(2) 2008 Indlaw SC 1128 (supra) and analysed that this Court had made a detailed reference to the decisions in Bachan Singh v. State of Punjab (1980) 2 SCC 684, Machhi Singh and others v. State of Punjab (1983) 3 SCC 470, and Jagmohan Singh v. State of U.P. (1973) 1 SCC 20 where the principle of rarest of the rare case was formulated. After referring to the said decisions, the majority reproduced paragraphs 34, 36, 43, 45, and 47 of Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra) and came to hold that:-

"66. After noting the above principles, particularly culled out from the decision in which the very principle, namely, "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of the rare case principle nor Machhi Singh categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, Aloke Nath Dutta v. State of W.B. (2007) 12 SCC 230 2006 Indlaw SC 1278 *This Court in Swamy Shraddananda (2) also made a reference to a report called "Lethal Lottery, The Death Penalty in India" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puducherry wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred to and one of the main facets made in the Report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such inconsistencies and lamented over the same in the following words in para: [Swamy Shraddananda case, SCC p. 790]*

"The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus, the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

25. The larger Bench endorsed the anguish expressed by the Court and opined that the situation is a matter of serious concern for this Court and it wished to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. Be it noted, the three-Judge Bench in Swamy Shraddananda 2008 Indlaw SC 1128 (supra) took note of the plan devised by the accused, the betrayal of trust, the magnitude of criminality and the brutality shown in the commission of the ghastly crime and the manner in which the deceased was sedated and buried while she was alive. The Court, taking into consideration the materials brought on record in entirety, imposed the sentence of fixed term imprisonment instead of sentence of death.

26. The issue arose before the Constitution Bench with regard to the mandate of Section 433 CrPC. The majority took note of the fact that the said provision was considered at length and detailed reference was made to Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the IPC in Swamy Shraddananda(2) 2008 Indlaw SC 1128 (supra) to understand the sentencing procedure prevalent in the Court. Thereafter, the majority reproduced paragraphs 91 and 92 from the said judgment which we think are required to be reproduced to appreciate the controversy:-

"91. The legal position as enunciated in Kishori Lal Kishori Lal v. King Emperor, 1914 SCC OnLine PC 81, Gopal Vinayak Godse 1961 Indlaw SC 227*, Maru Ram* 1980 Indlaw SC 577*, Ratan Singh* 1976 Indlaw SC 590 *and Shri Bhagwan (2001) 6 SCC 296* 2001 Indlaw SC 20087 *and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category 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 the application of remission.*

*92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and*

the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."
[Emphasis supplied]

27. Thereafter, the majority adverted to the concurring opinion of Fazal Ali, J. in Maru Ram's case 1980 Indlaw SC 577 and reproduced copiously from it and opined thus:-

"Keeping the above hard reality in mind, when we examine the issue, the question is "whether as held in Shraddananda (2), a special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is good in law? When we analyse the issue in the light of the principles laid down in very many judgments starting from Godse, Maru Ram, Sambha Ji Krishan Ji, Ratan Singh, it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's lifespan".

28. At that juncture, the issue arose with regard to the interpretation of Section 433-A CrPC. In that context, the majority opined:-

"In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A CrPC *assumes significance. His contention was that under Section 433-A* CrPC *what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and up to the end of one's lifespan. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person shall not be released from prison unless he had served at least fourteen years of imprisonment" (emphasis supplied). Therefore, when the minimum imprisonment is prescribed under the statute, there will be every justification for the court which considers the nature of offence for which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases. For a statutory authority competent to consider a case for remission after the imposition of punishment by court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his mens rea to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict."*
(Emphasis Supplied)

29. As we notice, there has been advertence to various provisions of IPC, namely, Sections 120-B(1), 121, 132, 194, 195-A, 302, 305, 307 (Second Part), 376-A, 376-E, 396 and 364-A and certain other provisions of other Acts. The Court observed that death sentence is an exception rather than a rule and where even after applying such great precautionary prescription when the trial courts reach a conclusion to impose the maximum punishment of death, further safeguards are provided under the Criminal Procedure Code and the special Acts to make a still more concretised effort by the higher courts to ensure that no stone is left unturned before the imposition of such capital punishments. After so stating, the majority referred to the report of Justice Malimath Committee and Justice Verma Committee, and in that context, observed that:-

"91. We also note that when the Report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in Swamy Shraddananda (2). Insofar as Justice Verma Committee Report of 2013 is concerned, the amendments introduced after the said Report in Sections 370(6), 376-A, 376-D and 376-E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well-thought out principles stated in Swamy Shraddananda (2). In fact, Justice Verma Committee Report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to Mohd. Munna (2005) 7 SCC 764, Rameshbhai Chandubhai Rathod (2) v. State of Gujarat (2011) 2 SCC 764 2011 Indlaw SC 62 *and State of U.P. v. Sanjay Kumar (2012) 8 SCC 537* 2012 Indlaw SCO 172 *and nothing more. Further, the said amendment can only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end of the convict's lifespan.*

30. The purpose of referring to the aforesaid analysis is only to understand the gravity and magnitude of a

case and the duty of the Court regard being had to the precedents and also the sanction of law.
31. Dealing with the procedure as a substantive part, the majority opined that:-

"Such prescription contained in the Criminal Procedure Code*, though procedural, the substantive part rests in the Penal Code for the ultimate confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the* Criminal Procedure Code *and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal Code and the* Criminal Procedure Code*, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment".*

32. We need not advert to other aspects that have been dwelt upon by the Constitution Bench, for we are not concerned with the same. The submission of the learned senior counsel for the appellants is that there is an apparent error in the Constitution Bench decision as it has treated the provisions of CrPC as procedural. On a reading of the decision, it is manifest that the majority has explained how there is cohesive co-existence of CrPC and IPC. We may explain it in this manner.

Section 28 CrPC empowers the court to impose sentence authorized by law. Section 302 IPC authorizes the court to either award life imprisonment or death. As rightly submitted by Mr. Lalit and Mr. Naphade, there is a minimum and maximum. Life imprisonment as held in Gopal Vinayak Godse 1961 Indlaw SC 227 (supra), Ratan Singh 1976 Indlaw SC 590 (supra), Sohan Lal v. Asha Ram and others (1981) 1 SCC 106 1980 Indlaw SC 434 and Zahid Hussein and others v. State of W.B. and another (2001) 3 SCC 750 2001 Indlaw SC 20686 means the whole of the remaining period of the convict's natural life. The convict is compelled to live in prison till the end of his life. Sentence of death brings extinction of life on a fixed day after the legal procedure is over, including the ground of pardon or remission which are provided under Articles 71 and 161 of the Constitution. There is a distinction between the conferment of power by a statute and conferment of power under the Constitution. The same has been explained in Maru Ram 1980 Indlaw SC 577 (supra) and V. Sriharan 2015 Indlaw SC 879 (supra).

Recently, a two-Judge Bench in State of Gujarat & Anr. v. Lal Singh @ Manjit Singh & Ors. AIR 2016 SC 3197 : 2016 (6) SCALE 105 in that context has observed thus:-

"In Maru Ram 1980 Indlaw SC 577 *(supra) the constitutional validity of Section 433-A* CrPC *which had been brought in the statute book in the year 1978 was called in question. Section 433-A* CrPC *imposed restrictions on powers of remission or commutation in certain cases. It stipulates that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment. The majority in Maru Ram* 1980 Indlaw SC 577 *(supra) upheld the constitutional validity of the provision. The Court distinguished the statutory exercise of power of remission and exercise of power by the constitutional authorities under the* Constitution*, that is, Articles 72 and 161. In that context, the Court observed that the power which is the creature of the Code cannot be equated with a high prerogative vested by the* Constitution *in the highest functionaries of the Union and the States, for the source is different and the substance is different. The Court observed that Section 433-A* CrPC *cannot be invalidated as indirectly violative of Articles 72 and 161 of the* Constitution*. Elaborating further, the majority spoke to the following effect:-*

"... Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. ..."

33. In Kehar Singh and another v. Union of India and another (1989)1 SCC 204 the Constitution Bench has opined that the power to pardon is part of the constitutional scheme and it should be so treated in the Indian Republic. There has been further observation that it is a constitutional responsibility of great significance to be exercised when the occasion arises in accordance with the discretion contemplated by the context. The Court has also held that exercise of the said power squarely falls within the judicial

domain and can be exercised by the court by judicial review.

34. We have referred to the aforesaid aspect extensively as it has been clearly held that the power of the constitutional authorities under Article 71 and Article 161 of the Constitution has to remain sacrosanct but the power under Section 433-A CrPC which casts a restriction on the appropriate functionary of the Government can judicially be dealt with.

35. To elaborate, though the power exercised under Article 71 and Article 161 of the Constitution is amenable to judicial review in a limited sense, yet the Court cannot exercise such power. As far as the statutory power under Section 433-A is concerned, it can be curtailed when the Court is of the considered opinion that the fact situation deserves a sentence of incarceration which be for a fixed term so that power of remission is not exercised. There are many an authority to support that there is imposition of fixed term sentence to curtail the power of remission and scuttle the application for consideration of remission by the convict. It is because in a particular fact situation, it becomes a penological necessity which is permissible within the concept of maximum and the minimum. There is no dispute over the maximum, that is, death sentence. However, as far as minimum is concerned the submission of the learned counsel for the appellants is courts can say "imprisonment for life" and nothing else. It cannot be kept in such a strait-jacket formula. The court, as in the case at hand, when dealing with an appeal for enhancement of sentence from imprisonment of life to death, can definitely say that the convict shall suffer actual incarceration for a specific period. It is within the domain of judiciary and such an interpretation is permissible. Be it noted, the Court cannot grant a lesser punishment than the minimum but can impose a punishment which is lesser than the maximum. It is within the domain of sentencing and constitutionally permissible.

36. We must immediately proceed to state that similar conclusion has been reached by the majority in V. Sriharan 2015 Indlaw SC 879 (supra) and other cases, Mr. Lalit and Mr. Naphade would submit that the said decision having not taken note of the principles stated in K.M. Nanavati 1960 Indlaw SC 186 (supra) and Sarat Chandra Rabha 1960 Indlaw SC 434 (supra) is not a binding precedent. In K.M. Nanavati 1960 Indlaw SC 186 (supra), the question that arose before the Constitution Bench pertained to the extent of the power conferred on the Governor of a State under Article 161 of the Constitution; and whether the order of the Governor can impinge on the judicial power of this Court with particular reference to its power under Article 142 of the Constitution. Be it stated, the petitioner therein was convicted under Section 302 IPC and sentenced to imprisonment for life. After the judgment was delivered by the High Court and the writ was received by the Sessions Judge, he issued warrant of arrest of the accused for the purpose of sending him to the police officer in-charge of the City Sessions Court. The warrant was returned unserved with the report that it could not be served in view of the order passed by the Governor of Bombay suspending the sentence upon the petitioner. In the meantime, an application for leave to appeal to Supreme Court was made soon after the judgment was pronounced by the High Court and the matter was fixed for hearing. On that day, an unexecuted warrant was placed before the concerned Bench which directed that the matter is to be heard by a larger Bench in view of the unusual and unprecedented situation. A Special Bench of five Judges of the High Court heard the matter and the High Court ultimately held that as the sentence passed upon the accused had been suspended, it was not necessary for the accused to surrender and, therefore, Order XXI Rule 5 of the Supreme Court Rules would not apply to the case. The High Court opined that the order passed by the Governor was not found to be unconstitutional. A petition was filed for special leave challenging the conviction and sentence and an application was filed seeking exemption stating all the facts. The matter was ultimately referred to the Constitution Bench, and the larger Bench analyzing various facets of the Constitution, came to hold thus:-

"21. In the present case, the question is limited to the exercise by the Governor of his powers under Article 161 of the Constitution *suspending the sentence during the pendency of the special leave petition and the appeal to this court; and the controversy has narrowed down to whether for the period when this court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence for the period when this court is in seizin of the case could have been granted by this court itself. If in respect of the same period the Governor also has*

power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. *But it was contended by Mr Seervai that the words of the* Constitution, *namely, Article 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument insofar as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Sections 401 and 426 of the* Code of Criminal Procedure *and Articles 142 and 161 of the* Constitution. *If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Article 142 is not covered by Article 161 and similarly what is covered by Section 426 is not covered by Section 401. On that interpretation Mr Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending cage judicially."*
And again:-

"As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became sub judice in this court on the filing of the petition for special leave to appeal. After the filing of such a petition this court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply Rule 5 of Order 21 or to exempt the petitioner from the operation of that Rule. It would be for this court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this court."

37. Relying on the same, it is urged that when a constitutional court adds a third category of sentence, it actually enters into the realm of Section 433-A CrPC which rests with the statutory authority. According to the learned senior counsel for the appellants, after the conviction is recorded and sentence is imposed, the court has no role at the subsequent stage. But when higher sentence is imposed, there is an encroachment with the role of the executive. In this context, learned senior counsel have drawn our attention to the principles stated in another Constitution Bench judgment in Sarat Chandra Rabha 1960 Indlaw SC 434 (supra), wherein it has been held that the effect of pardon is different than remission which stands on a different footing altogether. The Constitution Bench, explaining the same, proceeded to state thus:-

"4. ... In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's Constitutional Law on the effect of reprieves and pardons vis-a-vis the judgment passed by the court imposing punishment, at p. 176, para 134:

"A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. 'The judicial power and the executive power over sentences are readily distinguishable,' observed Justice Sutherland. To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment'."
Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment, and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was. Therefore the terms of Section 7(b) would be satisfied in the present case and the appellant being a person convicted and sentenced to three years' rigorous imprisonment would be disqualified, as five years had not passed since his release and as the Election Commission had not removed his disqualification."

38. The analysis made in the aforesaid passage is to be appropriately appreciated. In the said case, the controversy arose with regard to the rejection of the nomination paper of the returned candidate on the ground that he was not disqualified under Section 7(b) of the Representation of the People Act, 1951. The Election Tribunal came to hold that the nomination paper of the candidate was wrongly rejected and the allegation pertaining to corrupt practice was not established. On the first count, the election was set aside. The successful candidate preferred an appeal before the High Court which came to hold that the nomination paper of the respondent before it was properly rejected. However, it concurred with the view expressed as regards corrupt practice by the tribunal. The rejection of nomination paper of the candidate was found to be justified by the High Court as he had been sentenced to undergo rigorous imprisonment for three years and five years had not passed since his release. He was sentenced to three years but the sentence was remitted by the government in exercise of power under Section 401 of old CrPC. The contention of the appellant before the tribunal was that in view of the remission, sentence, in effect, was reduced to a period of less than two years and, therefore, he could not be said to have incurred disqualification within the meaning of Section 7(b) of the said Act. The High Court formed the opinion that the remission of sentence did not have the same effect as free pardon and would not have the effect on reducing the sentence passed on the appellant. In that context, this Court has held what we have quoted hereinabove. What is being sought to be argued on the basis of the aforequoted passage is that the court does not have any role in the matter of remission. It is strictly within the domain of the executive.

39. On a careful reading of both the decisions, we have no iota of doubt in our mind that they are not precedents for the proposition that the court cannot impose a fixed term sentence. The power to grant remission is an executive power and it cannot affect the appeal or revisional power of the court. The powers are definitely distinct. However, the language of Section 433-A CrPC empowers the executive to grant remission after expiry of 14 years and it only enables the convict to apply for remission. There can be a situation as visualized in Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra).

40. Learned senior counsel would submit that it is a judicial innovation or creation without sanction of law and according to them, the majority view of the Constitution Bench is not a seemly appreciation of Section 433-A CrPC. In our considered opinion, the majority view is absolutely correct and binding on us being the view of the Constitution Bench and that apart, we do not have any reason to disagree with the same for referring it to a larger Bench. We are of the convinced opinion that the situation that has been projected in Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra) and approved in V. Sriharan 2015 Indlaw SC 879 (supra) speaks eloquently of judicial experience and the fixed term sentence cannot be said to be unauthorized in law. Section 302 IPC authorizes imposition of death sentence. The minimum sentence is imprisonment for life which means till the entire period of natural life of the convict is over. The courts cannot embark upon the power to be exercised by the Executive Heads of the State under Article 71 and Article 161 of the Constitution. That remains in a different sphere and it has its independent legal sanctity. The court while imposing the sentence of life makes it clear that it means in law whole of life. The executive has been granted power by the legislature to grant remission after expiry of certain period. The court could have imposed the death sentence. However, in a case where the court does not intend to impose a death sentence because of certain factors, it may impose fixed term sentence keeping in view the public concept with regard to deterrent punishment. It really adopts the view of "expanded option", lesser than the maximum and within the expanded option of the minimum, for grant of remission does not come in after expiry of 14 years. It strikes a balance regard being had to the gravity of the offence. We, therefore, repel the submission advanced by the learned senior counsel for the appellants.

41. In this context, another submission deserves to be noted. It is canvassed by the learned senior counsel for the appellants that the issue of enhancement and scope of enhancement was not referred to the Constitution Bench. The reference order which has been quoted in V. Sriharan 2015 Indlaw SC 879 (supra) has been brought to our notice to highlight the point that in the absence of a reference by the concerned Bench, the Constitution Bench could not have adverted to the said aspect. The said submission is noted only to be rejected. The larger Bench has framed the issues which deserve to be answered and, as seen from the entire tenor of the judgment, it felt that it is obliged to address the issue regard being had to the controversy that arises in number of cases. In fact, as is evincible, question Nos. (i) and (ii) of paragraph 2.2 have been specifically posed in this manner. We do not think that there is any impediment on the part of the Constitution Bench to have traversed on the said issues. In fact, in our view, the Constitution Bench has

correctly adverted to the same and clarified the legal position and we are bound by it.

42. The next contention which is canvassed on behalf of the appellants is that when the High Court exercised the power under Section 368 CrPC and thinks of commuting the death sentence, then only it can pass a fixed term sentence and not otherwise. In this regard, we have been commended to the authorities in Sahib Hussain 2013 Indlaw SC 256 (supra) and Gurvail Singh 2013 Indlaw SCO 1493 (supra). In Sahib Hussain 2013 Indlaw SC 256 (supra), the Court took note of the decision in Shri Bhagwan v. State of Rajasthan (2001) 6 SCC 296 wherein this Court had commuted the death sentence imposed on the appellant therein and directed that the appellant shall undergo the sentence of imprisonment for life with the further direction that the appellant shall not be released from the prison unless he had served out at least 20 years of imprisonment including the period already undergone by him. The authority in Prakash Dhawal Khairnar (Patil) v. State of Maharashtra (2002) 2 SCC was noticed wherein the Court set aside the death sentence and directed that the appellant therein shall suffer imprisonment for life but he shall not be released unless he had served out at least 20 years of imprisonment including the period already undergone by him.

The two-Judge Bench referred to Ram Anup Singh and others v. State of Bihar (2002) 6 SCC 686, Nazir Khan and others vs. State of Delhi (2003) 8 SCC 461, Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra), Haru Ghosh v. State of West Bengal (2009) 15 SCC 551, Ramraj v. State of Chhattisgarh (2010) 1 SCC 573, Neel Kumar alias Anil Kumar v. State of Haryana (2012) 5 SCC 766, Sandeep v. State of U.P. (2012) 6 SCC 107 and Gurvail Singh 2013 Indlaw SCO 1493 (supra) and held that:-

"It is clear that since more than a decade, in many cases, whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, this Court reiterated minimum years of imprisonment of 20 years or 25 years or 30 years or 35 years, mentioning thereby, if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period...."

Thereafter, the Court referred to Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra) and the pronouncement in Shri Bhagwan 2001 Indlaw SC 20087 (supra) and opined thus:-

"36. It is clear that in Swamy Shraddananda, this Court noted the observations made by this Court in Jagmohan Singh v. State of U.P. 1972 Indlaw SC 736 *and five years after the judgment in Jagmohan case, Section 433-A was inserted in the Code imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433-A another Constitution Bench of this Court in Bachan Singh v. State of Punjab* 1980 Indlaw SC 624*, with reference to power with regard to Section 433-A which restricts the power of remission and commutation conferred on the appropriate Government, noted various provisions of the* Prisons Act*, Jail Manual, etc. and concluded that reasonable and proper course would be to expand the option between 14 years' imprisonment and death. The larger Bench has also emphasised that: [Swamy Shraddananda (2) case* 2008 Indlaw SC 1128*, SCC p. 805, para 92]*

"92. ... the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."
In the light of the detailed discussion by the larger Bench, we are of the view that the observations made in Sangeet case42 2012 Indlaw SC 466 *are not warranted. Even otherwise, the above principles, as enunciated in Swamy Shraddananda are applicable only when death sentence is commuted to life imprisonment and not in all cases where the Court imposes sentence for life."*

43. Learned senior counsel have emphasized on the last part of the aforequoted passage to buttress the stand that when the trial judge had not imposed the death sentence, the question of commutation did not arise and hence the 42 Sangeet v. State of Haryana, (2013) 2 SCC 452 2012 Indlaw SC 466 High Court could not have imposed a fixed term sentence and could have only affirmed the sentence of imprisonment for life.

44. In Gurvail Singh 2013 Indlaw SCO 1493 (supra), the Court was dealing with the petition under Article 32 of the Constitution for issue of a direction to convert the sentence of the petitioner from 30 years without remission to a sentence of life imprisonment and further to declare that this Court is not competent to fix a particular number of years (with or without remission) when it commutes the death sentence to life

imprisonment while upholding the conviction of the accused under Section 302 IPC. The two-Judge Bench referred to the decision in Sangeet 2012 Indlaw SC 466 (supra) which has also been referred in Sahib Hussain 2013 Indlaw SC 256 (supra) and, thereafter, the Court observed:-

"6. The issue involved herein has been raised before this Court time and again. Two-Judge as well as three-Judge Benches have several times explained the powers of this Court in this regard and it has consistently been held that the Court cannot interfere with the clemency powers enshrined under Articles 72 and 161 of the Constitution of India *or any rule framed thereunder except in exceptional circumstances. So far as the remissions, etc. are concerned, these are executive powers of the State under which, the Court may issue such directions if required in the facts and circumstances of a particular case."*

After so stating, the Court referred to Swamy Shraddananda 2008 Indlaw SC 1128 (supra) and State of Uttar Pradesh. v. Sanjay Kumar (2012) 8 SCC 537 2012 Indlaw SCO 172 and reproduced a passage from Sanjay Kumar 2012 Indlaw SCO 172 (supra) which we think seemly to quote:-

"24. ... The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the 'rarest of rare cases', warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution *do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A of the* Code of Criminal Procedure.*"*

45. Thereafter, the two-Judge Bench referred to the pronouncement in Sahib Hussain 2013 Indlaw SC 256 (supra) and opined thus:-

"12. Thus, it is evident that the issue raised in this petition has been considered by another Bench and after reconsidering all the relevant judgments on the issue the Court found that the observations made in Sangeet were unwarranted i.e. no such observations should have been made. This Court issued orders to deprive a convict from the benefit of remissions only in cases where the death sentence has been commuted to life imprisonment and it does not apply in all the cases wherein the person has been sentenced to life imprisonment."

47. In the instant case, the prosecution had preferred an appeal under Section 377 CrPC before the High Court for enhancement of sentence of imposition of life to one of death. On a reading of the said provision, there can be no trace of doubt that the High Court could have enhanced the sentence of imposition of life to death. In this context, we may usefully refer to Jashubha Bharatsinh Gohil and others v. State of Gujarat (1994) 4 SCC 353 1994 Indlaw SC 1475 wherein it has been ruled thus:-

"12. It is needless for us to go into the principles laid down by this Court regarding the enhancement of sentence as also about the award of sentence of death, as the law on both these subjects is now well settled. There is undoubtedly power of enhancement available with the High Court which, however, has to be sparingly exercised. No hard and fast rule can be laid down as to in which case the High Court may enhance the sentence from life imprisonment to death. ..."

Thus, the power is there but it has to be very sparingly used. In the instant case, the High Court has thought it appropriate instead of imposing death sentence to impose the sentence as it has done. Therefore, the sentence imposed by the High Court cannot be found fault on that score.

48. At this stage we think it appropriate to deal with another facet of the said submission. It is strenuously urged that the High Court can impose the punishment what the trial court can impose. In Jagat Bahadur 1965 Indlaw SC 275 (supra) it has been held that:-

"An appeal court is after all 'a Court of error', that is, a court established for correcting an error. If, while purporting to correct an error, the court were to do something which was beyond the competence of the trying court, how could it be said to be correcting an error of the trying court? No case has been cited before us in which it has been held that the High Court, after setting aside an acquittal, can pass a sentence beyond the competence of the trying court. Therefore, both on principle and authority it is clear that the power of the appellate court to pass a sentence must be measured by the power of the court from whose judgment an appeal has- been brought before it."

49. In Jadhav 1969 Indlaw SC 496 (supra) the Court ruled that:-

"An appeal is a creature of a statute and the powers and jurisdiction of the appellate court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial court. It cannot and ought not to do something which the trial court was not competent to do. There does not seem to be any fetter to its power to do what the trial court could do."

50. We have reproduced the said passages as the learned senior counsel appearing for the appellant would contend as the court of appeal is only a "Court of error" and its jurisdiction should be co-extensive with that of the trial court. Both the decisions dealt with different kind of offences where the sentence has been prescribed to be imposed for a particular by the trial court and in that context the Court held that the appellate court could not have imposed a sentence beyond the competence of the trial court. If the trial court has no jurisdiction to impose such a sentence, the High Court as a "Court of error" cannot pass a different harsher sentence. There can be no dispute over the proposition stated in the said two authorities. But in the case at hand, the appellants were convicted under section 302 IPC and the trial court could have been impose the sentence of death and that apart, the appeal has been preferred by the State. Thus, the ratio laid down in the said authorities is not applicable to the case at hand.

51. The next submission that is put forth is that the decision in V. Sriharan 2015 Indlaw SC 879 (supra) runs counter to the principles stated in A.R. Antulay 1988 Indlaw SC 467 (supra). Explicating the said stand, it is argued that in the said case the Constitution Bench had directed that the case of the petitioner should be tried by the learned Judge of the High Court as he was tried for the offence under the Prevention of Corruption Act, 1988. The Bench of seven-Judges recalled that order on three counts, namely, a trial under the Prevention of Corruption Act, 1988 has to be held by a special Judge appointed under the said Act and this Court has no jurisdiction to direct the trial to be held by a High Court Judge; that the statutory right of the petitioner for filing an appeal to the High Court could not be taken away by this Court; and that the earlier direction abridged the right of the petitioner therein under Articles 14 and 21 of the Constitution. Drawing an analogy it is contended that V. Sriharan 2015 Indlaw SC 879 (supra) takes away the statutory right of the convict to apply for commutation/remission under Sections 432 and 433 CrPC, and also affects the right under Article 21 of the Constitution. Learned senior counsel for the appellants would contend that the principles stated in A.R. Antulay 1988 Indlaw SC 467 (supra) have not been kept in view in V. Sriharan 2015 Indlaw SC 879 (supra) and, therefore, it is not a binding precedent and a two-Judge Bench should either say that it is per incuriam or refer it to a larger Bench. With regard to declaring a larger Bench judgment per incuriam, learned senior counsel for the appellants have drawn inspiration from the authority in Fibre Boards Private Limited, Bangalore v. Commissioner of Income-Tax, Bangalore (2015) 10 SCC 333 2015 Indlaw SC 552. In that case, the two-Judge Bench referred to Mamleshwar Prasad v. Kanhaiya Lal (1975) 2 SCC 232 1975 Indlaw SC 415 and State of U.P. and another v. Synthetics and Chemicals Ltd. and another (1991) 4 SCC 139 1991 Indlaw SC 702 and took note of the earlier Constitution Bench judgment in State of Orissa v. M.A. Tulloch and Co. (1964) 4 SCR 461 1964 Indlaw SC 325, and held thus:-

"35. The two later Constitution Bench judgments in Rayala Corpn. (P) Ltd. v. Director of Enforcement (1969) 2 SCC 412 1969 Indlaw SC 146 *and Kolhapur Canesugar Works Ltd. v. Union of India (2000) 2 SCC 536* 2000 Indlaw SC 39 *also did not have the benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression "repeal" in Section 6 of the* General Clauses Act. *This is for the reason given by the Constitution Bench in M.A. Tulloch & Co. that only the form of repeal differs but there is no difference in intent*

or substance. If even an implied repeal is covered by the expression "repeal", it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act*."*

52. Be it noted, the Court followed the principles stated in M.A. Tulloch and Co. 1964 Indlaw SC 325 (supra) and not in Rayala Corpn. (P) Ltd. 1969 Indlaw SC 146 (supra). In State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139 1991 Indlaw SC 702 a two-Judge Bench of this Court held that one particular conclusion of a Bench of seven-Judges in Synthetics and Chemicals Ltd. and others v. State of U.P. and others (1990) 1 SCC 109 1989 Indlaw SC 286 as per incuriam. The two-Judge Bench in Synthetics and Chemicals Ltd. 1991 Indlaw SC 702 (supra) opined thus:-

"36. The High Court, in our view, was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. We are firmly of the view that the decision of this Court in Synthetics (1990) 1 SCC 109 1989 Indlaw SC 286 *is not an authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Orders made by the Central Government under the* IDR Act *imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or per incuriam and has, therefore, no effect on the impugned levy."*

53. The observations speak for themselves. We are not inclined to enter into the doctrine of precedents and the principle of per incuriam in the instant case. Suffice it to say that the grounds on which it is urged that the Constitution Bench decision in V. Sriharan 2015 Indlaw SC 879 (supra) runs counter to the larger Bench decision in A.R. Antulay 1988 Indlaw SC 467 (supra) are fallacious. In A.R. Antulay 1988 Indlaw SC 467 (supra), the High Court had no jurisdiction to try the case under the Prevention of Corruption Act, 1988 and consequently, by virtue of a direction the accused was losing the right to appeal. Both could not have been done and that is why, the larger Bench reviewed the Constitution Bench judgment. For better appreciation, we may reproduce what Mukherjee, J. (as His Lordship then was) speaking for three learned Judges had to say:-

".. By reason of giving the directions on February 16, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution *by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "actus curiae neminem gravabit" - an act of the court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law."*

And again:-
"In the aforesaid view of the matter the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16-2-1984 as indicated before are set aside and quashed. The trial shall proceed in accordance with law, that is to say under the Act of 1952 as mentioned hereinbefore."
The majority concurred with the said opinion.

54. In the case at hand, the question of forum of trial does not arise. What is fundamentally argued is that the right of the appellants to submit an application is abrogated. An attempt has been made to elevate the same to a constitutional right. The right of an appeal and abrogation thereof by a direction of this Court is totally different and that is the principle which compelled the larger Bench to recall its order. They applied the principle of ex debito justitiae and passed the order reproduced hereinabove.

55. Having adverted to the factual scenario, we have to understand the obtaining situation. In the present context, a convict is not permitted to submit an application under Section 433-A CrPC because of sentence imposed by a Court. There is no abrogation of any fundamental or statutory right. If the imposition of sentence is justified, as a natural corollary the principle of remission does not arise. The principle for applying remission arises only after expiry of 14 years if the Court imposes sentence of imprisonment for life. When there is exercise of expanded option of sentence between imprisonment for life and death sentence, it comes within the sphere or arena of sentencing, We have already held that the said exercise of expanded option is permissible as has been held in many a judgment of this Court and finally by the Constitution Bench. The said exercise, on a set of facts, has a rationale. It is based on a sound principle.

Series of judgments have been delivered by this Court stating in categorical terms that imprisonment for life means remaining of the whole period of natural life of the convict.

The principle of exercise of expanded expansion has received acceptance because the Court when it does not intend to extinguish the spark of life of the convict by imposing the death sentence. We have already discussed that facet earlier and not accepted the submission to refer the matter to the larger Bench. We have no hesitation in holding that the principles stated in A.R. Antulay 1988 Indlaw SC 467 (supra) do not apply to the application to be preferred under Section 433-A CrPC, and, therefore, the judgment in V. Sriharan 2015 Indlaw SC 879 (supra) is a binding precedent.

56. The next aspect that is required to be deliberated upon is the factual score of the case that would include the genesis of crime, the nature of involvement, the manner in which it has been executed, the antecedents of the appellants, the motive that has moved the appellants to do away with a young life, the gravity and the social impact of the crime, the suffering of the family of the victim, the fear of the collective when such a crime takes place, the category to which the High Court has fitted it, after expressing its disinclination not to impose the death sentence and other connected factors.

57. It is submitted by the learned counsel for the appellants that the imposition of fixed term sentence is highly disproportionate and unjustified in the particular facts of the case, for as the conviction is based on the circumstantial evidence and as per the materials brought on record only a single blow was inflicted not by any lethal weapon but by a hammer. Though the High Court has referred to various aggravating and mitigating circumstances, yet, it has misdirected itself by holding that the motive of crime is "honour killing". That apart, the High Court has taken into consideration the false plea of alibi, intimidation of witnesses, misleading of the police in the matter of recovery, intimidation of the public prosecutor, the factum of abscondence, conviction in another case, the inhuman treatment of the deceased, commission of murder while the appellants had the trust of the deceased, the depravity of the mind, reflection of cold bloodedness in commission of the crime, the brutality that shocks the judicial conscience, absence of probability of reformation of the convicts and such other aspects of which some are not relevant and some have not been duly considered while imposing such harsh punishment.

58. It is urged by them, the approach of the High Court dealing with death penalty and arriving at the conclusion that the case is not a rarest of rare one has completely misdirected itself and, therefore, the imposition of fixed term sentence is wholly unsustainable. They have commended us to the authorities in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546, Oma alias Omprakash and another v. State of Tamil Nadu (2013) 3 SCC 440, Mohd. Farooq Abdul Gafur and another v. State of Maharashtra (2010) 14 SCC 641, Mohinder Singh v. State of Punjab (2013) 3 SCC 294 and Mangesh v. State of Maharashtra (2011) 2 SCC 123.

59. Learned counsel for the State submits that the crime was premeditated and diabolic in nature and the same is evincible from the discussion of the judgment of conviction of the High Court and the said findings are beyond assail as no leave has been granted in that regard and the Special Leave Petition has been dismissed. According to the learned counsel for the State, the said findings which find place in the judgment of conviction are not subject to criticism and can be relied upon to describe the nature of commission of crime. Mr. Krishnan, would further submit that the sentence imposed is not disproportionate.

60. On a careful scrutiny of the judgment of conviction, it is seen that the High Court has taken note of the facts that the deceased Nitish Katara and Bharti Yadav (sister of Vikas Yadav; first cousin sister of Vishal Yadav and; daughter of Shri D.P. Yadav who was also the employer of Sukhdev @ Pehalwan) were in an intimate relationship aiming towards permanency; that the family members of Bharti Yadav, including Vikas and Vishal Yadav, were opposed to this relationship; that the aversion stemmed from the reason that Nitish Katara did not belong to the same caste as that of Bharti Yadav, that his family belonged to the service class and belonged to economically lower strata; that Vishal Yadav and Sukhdev @ Pehalwan had not been invited to the wedding and had no reason for being there, other than perpetration of the crime; that Nitish Katara was abducted from the wedding venue by the appellants with the common intention to murder him; that in furtherance of their common intention Nitish Katara was thereafter murdered by the appellants; that after murdering Nitish Katara, the appellants removed his clothes, wrist watch and mobile

from his person and set aflame his dead body with the intention of preventing identification of the body and destroying evidence of the commission of the offence; that immediately after the incident, the three appellants absconded; that the dead body of Nitish Katara was found at 9.30 a.m. in the morning of 17th February, 2002 in a completely burnt, naked and unidentifiable condition on the Shikharpur Road which was recovered by the Khurja Police; that the body was having a lacerated wound on the head, a fracture in the skull, laceration and hematoma in the brain immediately below the fracture; that Vikas and Vishal Yadav deliberately misled the police and took them to three places in Alwar (Rajasthan) to search for Tata Safari vehicle which was obviously not there; that Vikas and Vishal Yadav jointly misled the police to the taxi stand behind Shamshan Ghat(cremation ground) in Panipat to search for the Tata Safari which was again not there, and, enroute to Chandigarh for the same purpose, got recovered the Tata Safari Vehicle bearing registration No. PB-07H 0085 recovered from the burnt down factory premises of M/s. A.B. Coltex Limited; that the appellant Sukhdev @ Pehalwan absconded for over three and half years despite extensive searches, raids, issuance of coercive process, attachment even at his native village and that he could be arrested only on the 23rd of February, 2005 after he fired at police patrol party.

61. From the aforesaid findings recorded by the High Court it is vivid that crime was committed in a planned and cold blooded manner with the motive that has emanated due to feeling of some kind uncalled for and unwarranted superiority based on caste feeling that has blinded the thought of "choice available" to a sister - a representative of women as a class. The High Court in its judgment of conviction has unequivocally held that it is a "honour killing" and the said findings apart from being put to rest, also gets support from the evidence brought on record. The circumstantial evidence by which the crime has been established, clearly lead to one singular conclusion that the anger of the brother on the involvement of the sister with the deceased, was the only motive behind crime. While dwelling upon the facet of honour killing the High Court in the judgment of conviction has held:-

"2023. The instant case manifests that even in a household belonging to the highest class in society, (one in which you can make day trips with friends from Ghaziabad to Mumbai just to celebrate a birthday; owns multiple businesses and properties, luxury vehicles etc.) what can happen to even a young, educated, articulate daughter if she attempted to break away from the conventional caste confines and explored a lifetime alliance with a member of another caste. Especially one who was also perceived to be of a lesser economic status.

2024. We have found that immediately after Shivani Gaur's wedding, Bharti was completely segregated and confined by her family. On the 17th of February 2002 itself, she was spirited away from her residence in Ghaziabad to Faridabad. The police could record her statement under Section 161 of the Cr.P.C. *only on the 2nd of March 2002 that too under the eagle eye of her father, a seasoned politician. Shortly thereafter, she was sent out of India to U.K. and kept out of court for over three and a half years. Her testimony is evidence of the influence of her brothers and family as she prevaricates over trivial matters and denies established facts borne out by documentary evidence. Finally, when she must have been stretched to the utmost, she succumbs to their pressures when she concedes a deviously put suggestion.*

2025. Undoubtedly, the family of Nitish Katara has suffered at his demise and thereafter. Having given our thought to this issue, we are of the view that apart from the deceased and his family, there is one more victim in an "honour killing"."

66. Be it stated, though the High Court treated the murder as "honour killing", yet regard being had to other factors did not think appropriate to impose extreme penalty of death sentence. We may hasten to clarify that we have highlighted the factum of "honour killing", as that is a seminal ground for imposing the fixed term sentence of twenty-five years for the offences under section 302/34 IPC on the two accused persons, who though highly educated in good educational institutions, had not cultivated the ability to abandon the depricable feelings and attitude for centuries. Perhaps, they have harboured the fancy that it is an idea of which time had arrived from time immemorial and ought to stay till eternity.

67. One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman be a wife or sister or daughter or mother cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so

called brotherly or fatherly honor or class honor by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions.

68. Apart from the issue of honour killing, the High Court has also adjudicated to the brutal manner in which the crime has been committed. Mr. Lalit, learned senior counsel has highlighted on infliction of a single blow. The High Court appreciating the material brought on record, has given a graphic description. 69. The High Court has also taken note of the impact of post-offence events and observed that the deceased was burnt to such a point that his own mother could only suggest the identification from the small size of one unburnt palm with fingers of the hand that the body appeared to be that of her deceased son. The identification had to be confirmed by DNA testing. While imposing the sentence, the High Court has been compelled to observe that the magnitude of vengeance of the accused and the extent to which they had gone to destroy the body of the deceased after his murder shows the brutality involved in the crime and the maladroit efforts that were made to destroy the evidence. From the evidence brought on record as well as the analysis made by the High Court, it is demonstrable about the criminal proclivity of the accused persons, for they have neither the respect for human life nor did they have any concern for the dignity of a dead person. They had deliberately comatosed the feeling that even in death a person has dignity and when one is dead deserves to be treated with dignity. That is the basic human right. The brutality that has been displayed by the accused persons clearly exposes the depraved state of mind.

70. The conduct during the trial has also been emphasized by the High Court because it is not an effect to protect one-self, but the arrogance and the impunity shown in which they set up false defense and instilled shivering fear in the mind and heard of witnesses with the evil design of defeating the prosecution case. In fact, as has been recorded by the High Court, the public prosecutor was also not spared. The factum of abscondance and non-cooperation with the investigating team and also an maladroit effort to mislead the investigators have been treated as aggravating circumstances on the basis of authorities in Praveen Kumar v State of Karnataka (2003) 12 SCC 199 and Yakub Abdul Razak Memon v State of Maharashtra (2013) 13 SCC 1.

71. The criminal antecedents of accused Vikas Yadav has been referred to in detail by the High Court. He was prosecuted in "Jesica Lal murder case" and convicted under Section 201/120-B IPC and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.2000 and, in default, of payment of fine, to further undergo imprisonment for three months. This Court in Sidhartha Vashisht alias Manu Sharma v State (NCT of Delhi) (2010) 6 SCC 1 2010 Indlaw SC 296 affirmed the conviction. The conclusion reached while affirming the decision of the High Court, is as follows:-

"303. (9) The High Court has rightly convicted the other two accused, namely, Amardeep Singh Gill @ Tony Gill and Vikas Yadav after appreciation of the evidence of PWs 30 and 101."

During the period, the said Vikas Yadav was on bail, he committed the present crime.

74. The next contention that is canvassed pertains to non-application of mind by the High Court while imposing the sentence, for two accused persons have been sentenced for twenty-five years and Sukhdev, the other appellant, has been sentenced to twenty years. The High Court, while dealing with Vikas Yadav and Vishal Yadav has opined that they had misused the process of law while in jail and in their conduct there is no sign of any kind of remorse or regret. As far as the Sukhdev is concerned, the High Court has taken his conduct in jail which had been chastened and punishment was imposed once. The High Court has taken note of the fact that Sukhdev was the employee of the father of Vikas Yadav and he is a married man with five children and on account of his incarceration, his family is in dire stress. A finding has been returned that he is not a person of substantial means and has lesser paying capacity. On the basis of these facts and circumstances, the High Court has drawn a distinction and imposed slightly lesser sentence in respect of Sukhdev.

74A. Thus analyzed, we find that the imposition of fixed term sentence on the appellants by the High Court cannot be found fault with. In this regard a reference may be made to a passage from Guru Basavaraj vs State of Karnataka (2013) 7 SCC 545, wherein while discussing about the concept of appropriate sentence, the Court has expressed thus:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crimeincarcination meaning] has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in conceptual essence of just punishment."

75. Judged on the aforesaid parameters, we reiterate that the imposition of fixed terms sentence is justified.

76. The next submission pertains to the direction by the High Court with regard to the sentence imposed under Section 201 to run consecutively. Learned counsel for the appellants have drawn our attention to the Constitution Bench decision in V. Sriharan 2015 Indlaw SC 879 (supra) . The larger Bench was dealing with the following question:-

"Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial?"

77. Learned counsel appearing for the appellants have drawn out attention to the analysis whether a person sentenced to undergo imprisonment for life when visited with the "term sentence" should suffer them consecutively or concurrently. The larger Bench in that context has held thus:-

"We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. *The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence."*

78. In the instant case, the trial Court has imposed the life sentence and directed all the sentences to be concurrent. The High Court has declined to enhance the sentence from imprisonment for life to death, but has imposed a fixed term sentence. It curtails the power of remission after fourteen years as envisaged under Section 433-A. In such a situation, we are inclined to think that the principle stated by the aforesaid Constitution Bench would apply on all fours. The High Court has not directed that the sentence under Section 201/34 IPC shall run first and, thereafter, the fixed term sentence will commence. Mr. Dayan Krishnan, learned senior counsel appearing for the State has argued that this Court should modify the sentence and direct that the appellants shall suffer rigorous imprisonment for the offence punishable under Section 201/34 IPC and, thereafter, suffer the fixed term sentences. Similar argument has been made in the written submission by the learned counsel for the informant. As the High Court has not done it, we do not think that it will be appropriate on the part of this Court in the appeal preferred by the appellants to do so. Therefore, on this score we accept the submission of the learned counsel for the appellants and direct that the sentence imposed for the offence punishable under Section 201/34 IPC shall run concurrently with the sentence imposed for other offences by the High Court.

79. The last plank of submission advanced by the learned counsel for the appellant pertains to imposition of fine by the High Court. The High Court has already given the reasons and also adverted to the paying capacities. The concept of victim compensation cannot be marginalized. Adequate compensation is required to be granted. The High Court has considered all the aspects and enhanced the fine, determined the compensation and prescribed the default clause. We are not inclined to interfere with the same.

80. Consequently, the appeals are disposed of with the singular modification in the sentence i.e. the sentence under Section 201/34 IPC shall run concurrently. Needless to say, all other sentences and directions will remain intact. Appeals disposed of

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(2019)7SCC1

Accused 'x'
Vs.
State of Maharashtra

Judges/Coram:
N.V. Ramana, Mohan M. Shantanagoudar and Indira Banerjee, JJ.

CaseNote:
Criminal - Death sentence - Mental illness - Mitigating circumstance - Sections 201, 363, 376 and 302 of Indian Penal Code, 1860 (IPC) and Section 235 (2) of Code of Criminal Procedure, 1973 (CrPC) - Present appeal was against confirmation to sentence of punishment with death as confirmed to Accused - How could culpability be assessed for sentencing those with mental illness - Whether sentence of death awarded to Petitioner was commuted to imprisonment for remainder of his life.

Facts:

The instant proceedings pertain to the reopening of Review Petition to review the final judgment passed by this Court in Criminal Appeal dismissing the appeal filed by the Review Petitioner (the Petitioner) and confirming his conviction under Sections 201, 363, 376 and 302 of IPC. Vide the impugned judgment, this Court upheld the sentence of 2 years' rigorous imprisonment each under Sections 201 and 363, 10 years' rigorous imprisonment under Section 376 and the death sentence under Section 302 of IPC imposed upon the Petitioner. This petition raises complex questions concerning the relationship between mental illness and crime. Petitioner raised only two arguments: firstly, that the Trial Court had not given the Petitioner a separate hearing while awarding the sentence, in direct contravention of Section 235(2) of the CrPC, which provides for the right of pre-sentencing hearing as affirmed by this Court in Bachan Singh v. State of Punjab, and a plethora of other decisions; and secondly, that the award of the death sentence to the Petitioner is contrary to the ratio of the three-Judge Bench decision of this Court in Shatrughan Chauhan v. Union of India, followed in a four-Judge Bench decision of this Court in Navneet Kaur v. State, which held that, the execution of persons suffering from mental illness or insanity violates Article 21 of the Indian Constitution and that such mental illness or insanity would be a supervening circumstance meriting commutation of the death sentence to life imprisonment.

Held, while allowing the petition in part

1. At the stage of hearing on sentence, generally, the Accused argues based on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State/the complainant would argue based on the aggravating circumstances against the Accused to support the contention relating to imposition of higher sentence. The object of Section 235 (2) of CrPC is to provide an opportunity for Accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfil the requirements of Section 235(2) of CrPC only by adjourning the matter for one or two days to hear the parties on sentence. If the Accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well. [33]

2. As long as the spirit and purpose of Section 235(2) is met, as the Accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day as the pre-conviction hearing. Depending on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so. [34]

3. The Trial Court heard the Petitioner on the aspect of imposition of sentence separately. Trial Court has fully complied with the requirement of Section 235(2) of CrPC, While coming to its conclusion, the Court held that the aggravating circumstances of the crime, i.e. the magnitude and manner of commission of the crime in the form of the kidnapping, rape and murder of two minor girls, outweighed the mitigating circumstances of the Accused, i.e. the dependency of his aged mother on him, and his young age. The Court also gave weightage to the prior convictions of the Accused for the same kind of offence, i.e. for the offence of rape of a nine-year-old girl child under Sections 376 and 506 of IPC and Section 57 of the Bombay Children Act, as well as for the kidnapping and rape of a seven-year-old girl child Under Sections 363 and 366 of IPC. In light of his two prior convictions, the Trial Court also gave him an opportunity to be heard on the question of Section 75 of IPC, which pertains to enhance punishment for certain offences under Chapter XII or XVII of IPC after previous conviction, but the factum of these convictions was also not contested by the Petitioner. [40]

4. Before the High Court as well, further material was brought on record by the Petitioner regarding his discharge in one case related to offences of the same nature, which the Court found to not be in the nature of a mitigating circumstance. The High Court was of the opinion that, the dependency of aged parents could also not be considered as a mitigating circumstance to begin with, and that the Accused was not young enough for his age to be considered as a mitigating circumstance. The High Court noted the absence of any extreme mental or emotional disturbance leading to the commission of the offence, and observed that given the past offending history of the Accused, there was no hope of his reform or rehabilitation. The Court also noted the barbaric nature of the offence, as the Petitioner had cold-bloodedly raped and murdered two innocent and defenceless girls by abusing the faith that they had reposed in him as their neighbour, and concluded that he would pose a threat to society even if released for the smallest period of time, and might commit similar acts in the future. On this basis, the High Court affirmed the death penalty awarded to the Accused. [41]

5. The Supreme Court, in appeal, being Criminal Appeal also determined the case to fall into the category of the rarest of rare cases. [42]

6. The record in the instant matter therefore clearly shows that, the Accused was accorded a real and effective opportunity at the trial stage itself. It may further be stated that, the opportunity granted to the Petitioner by the High Court to adduce further material on this aspect was above and beyond the requirement of Section 235(2). The Courts had taken all the attendant circumstances into account before reaching the conclusion of awarding the death penalty. It is also not the case that, the Accused made a request for hearing on sentencing on a separate date and the same was refused. In such circumstances, contention that the procedure envisaged in Section 235(2) of CrPC was not complied with in the present case is rejected. [43]

7. The Accused has now pleaded an entirely new ground of post-conviction mental illness for the first time herein, which obliges Court to go into the aspect of sentencing afresh. It is also brought to notice that, the Appellant has been a death row convict for almost 17 years, mandating present Court to resolve the issue of sentencing herein. [46]

8. There appear to be no set disorders/disabilities for evaluating the 'severe mental illness', however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore, the test envisaged herein predicates that, the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia. [68]

9. Directions need to be followed in the future cases that, the post-conviction severe mental illness will be a mitigating factor and appellate Court, in appropriate cases, needs to consider while sentencing an Accused to death penalty. The assessment of such disability should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in Accused's particular mental illness. The burden is on the Accused to prove by a preponderance of clear evidence that, he is suffering with severe mental illness. The Accused has to demonstrate active, residual or prodromal symptoms that the severe mental disability was manifesting. The State may offer evidence to rebut such claim. Court in appropriate cases could setup a panel to submit an expert report. 'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the Accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment. [69]

10. The Accused has submitted a report of the Class-I Psychiatrist, Yerawada Central Prison, indicating that he was suffering from some sort of mental illness without providing any objective factors for such assessment. [70]

11. Present Accused has been reeling under bouts of some form of mental irritability since 1994, as apparent from the records placed. Moreover, he has suffered long incarceration as well as a death row convict. In the totality of circumstances, it is not appropriate to constitute a panel for re-assessment of his mental condition, in the facts and circumstances of this case. [72]

12. Given the barbaric and brutal manner of commission of the crime, the gravity of the offence itself, the abuse of the victims' trust by the Petitioner, and his tendency to commit such offences as is evident from his past conduct, it is clear that the Petitioner poses such a grave threat to society that he cannot be allowed to roam free. In this view of the matter, it is deemed fit to direct that, the Petitioner shall remain in prison for the remainder of his life. [73]

13. The petition is allowed to the extent that the sentence of death awarded to the Petitioner is commuted to imprisonment for the remainder of his life sans any right to remission. [74]

14. Therefore, the State Government is directed to consider the case of 'Accused x' under the appropriate provisions of the Mental Healthcare Act, 2017 and if found entitled, provide for his rights under that enactment. [77]

78. Review petition partly allowed. [78]

JUDGMENT

N.V. Ramana, J.

1. The instant proceedings pertain to the reopening of Review Petition (Crl.) No. 301 of 2008 to review the final judgment and Order dated 16.05.2008 passed by this Court in Criminal Appeal No. 680 of 2007 dismissing the appeal filed by the Review Petitioner (hereinafter "the Petitioner") and confirming his conviction Under Sections 201, 363, 376 and 302 of the Indian Penal Code (in short, "the IPC"). Vide the impugned judgment, this Court upheld the sentence of 2 years' rigorous imprisonment each Under Sections 201 and 363, 10 years' rigorous imprisonment Under Section 376 and the death sentence Under Section 302, Indian Penal Code imposed upon the Petitioner.

2. This petition raises complex questions concerning the relationship between mental illness and crime. How can culpability be assessed for sentencing those with mental illness? Is treatment better suited than punishment? These are some of the questions we need to reflect upon in this case at hand.

3. In line with Section 23 (1) of the Mental Healthcare Act, 2017, (Act 10 of 2017) and the right to privacy of the Accused herein, while taking further action on this judgment, we direct the Registry to not disclose the actual name of the Accused and other pertinent information which could lead to his identification as it concerns confidential information. In this context we shall address the Accused herein as 'Accused x'.

4. Brief facts giving rise to the present petition are as follows; the two deceased, viz. victim-1 (studying in the 4th standard) and victim-2 (studying in the 1st standard) were cousins staying at Gulumb, Maharashtra, in a locality of homeless people (Beghar Vasti) at the house of Ramdas Jadhav (PW-13, victim-1's father).

The Petitioner lived in the adjacent house with his family. On 13.12.1999, at about 6 p.m., the Petitioner had gone to the grocery shop run by Sunil (PW-6), with his daughter, Reshma (PW-8), where he met the two deceased girls, and on the pretext of offering sweets, he led the girls to accompany him. Thereafter, he committed the rape and murder of both girls, and threw victim-2's body in a well situated in the field of the father of Sakharam Bhiku Yadav (PW-11), and concealed the body of victim-1 in a "kalkache bet" (place where bamboo trees and shrubs grow together thickly).

5. The Petitioner was apprehended by the villagers on the next day, i.e. 14.12.1999, before whom he made an extra judicial confession about the murder of victim-2. The same day, he also led the police to the recovery of the bodies of the deceased as well as the discovery of the spot of commission of rape, from where bloodstained earth and plants, half-burnt bidis and broken bangles were recovered. The blood-stained clothes worn by the Petitioner at the time of arrest were also seized. The clothes of the deceased were recovered at his instance on 25.12.1999. The FIR came to be lodged by Jaysing Dinkar Jadhav, PW10, the brother of the grandfather of the deceased.

6. The Trial Court in Sessions Case No. 142 of 2000 convicted the Petitioner for the offences stated supra on the basis of the 'last seen' evidence; motive of the Accused; seizure of blood-stained clothes worn by the Accused; the Chemical Analysis Report showing that "A" group blood was found on the shirt and pant of the Petitioner as well as in his nail clippings, which was the blood group of both the deceased; recovery of the bodies of the deceased at the instance of the Accused; discovery of the spot of commission of rape of the two deceased wherefrom blood-stained earth and other incriminating articles were seized; extra-judicial confession of the Petitioner; recovery of frocks at his instance; and the false explanation given by the Petitioner. The Trial Court found that all these circumstances formed a complete chain pointing to the guilt of the Petitioner.

7. The High Court in Criminal Appeal No. 652 of 2001 and Confirmation Case No. 3 of 2001, confirmed the conviction and sentence as awarded by the Trial Court, including the sentence of death, relying upon all the aforementioned circumstances except for the alleged extra-judicial confession. This Court, in appeal, being Criminal Appeal No. 680 of 2007, confirmed the same, holding that the case at hand falls into the category of the rarest of rare cases warranting punishment with death. Review Petition (Crl.) No. 301 of 2008 filed by the Petitioner against the above judgment and Order of this Court was dismissed vide order dated 19.11.2008 by the same three-Judge Bench which had rendered the judgment in appeal, who after considering the matter by way of circulation held that there was no merit in the petition.

8. A criminal miscellaneous petition being Crl. M.P. No. 5584 of 2015 was filed by the Petitioner seeking reopening of this review petition, placing reliance on the decision of this Court dated 02.09.2014 in W.P. (Crl.) No. 77 of 2014 in Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India, MANU/SC/0754/2014 : (2014) 9 SCC 737, which held that in light of Article 21 of the Indian Constitution, review petitions in death sentence cases were required to be heard orally by a three-Judge Bench, and specifically permitted the reopening of review petitions in all cases where review petitions had been dismissed by circulation.

9. In light of the above decision, this Court has heard the review petition filed by the Petitioner orally in the open Court.

10. Learned Counsel for the Petitioner, Ms. Nitya Ramakrishnan, did not raise any argument concerning the merits of the case, however raised only the following two arguments: firstly, that the Trial Court had not given the Petitioner a separate hearing while awarding the sentence, in direct contravention of Section 235(2) of the Code of Criminal Procedure (in short, "CrPC"), which provides for the right of pre-sentencing hearing as affirmed by this Court in Bachan Singh v. State of Punjab, MANU/SC/0111/1980 : (1980) 2 SCC 684 and a plethora of other decisions; and secondly, that the award of the death sentence to the Petitioner is contrary to the ratio of the three-Judge Bench decision of this Court in Shatrughan Chauhan v. Union of India, MANU/SC/0043/2014 : (2014) 3 SCC 1, followed in a four-Judge Bench decision of this Court in Navneet Kaur v. State (NCT of Delhi), MANU/SC/0253/2014 : (2014) 7 SCC 264, which held that the execution of persons suffering from mental illness or insanity violates Article 21 of the Indian Constitution and that such mental illness or insanity would be a supervening circumstance meriting commutation of the death sentence to life imprisonment.

11. Learned Counsel for the Respondent, i.e. the State of Maharashtra, Mr. Nishant Ramakantrao Katneshwarkar, on the other hand, highlighted that the pre-sentencing hearing as envisaged Under Section 235(2) of the Code of Criminal Procedure need not be conducted on a separate date, and the sentence awarded by the Trial Court does not stand vitiated merely because the sentence with respect to hearing was not conducted on a separate date. To that end, the counsel relied on the three-Judge Bench decision of this Court in Vasanta Sampat Dupare v. State of Maharashtra, MANU/SC/0570/2017 : (2017) 6 SCC 631. He also submitted that the Petitioner is not suffering from any mental illness so as to warrant commutation of the death sentence, and to that effect submitted certain medical reports.

12. On hearing this petition, this Court was of the opinion that there was no merit in the Petitioner's submissions against the order of conviction, and it was therefore decided that this Court would hear only on the aspects of sentencing pertaining to two issues.

13. The first relates to the implications of non-compliance of Section 235 (2) of Code of Criminal Procedure during the sentencing

process before the Trial Court. The second issue concerns the mental illness of 'Accused x', which was raised for the first time in this Review Petition, after the judgment of this Court in the earlier round.

14. On the first issue, the learned Counsel on behalf of the Petitioner contended that considering the fact that the procedural right of Pre-Sentence Hearing, as envisaged Under Section 235 (2) of Code of Criminal Procedure, was never provided to the Accused, this mandated a fresh hearing before the trial court on the sentencing aspect. In the instant case before us, the principle argument advanced by the counsel for the Petitioner was that, since the order of conviction and the order of sentence in the present case were passed on the same day, no opportunity was awarded to the Petitioner with regard to the sentence imposed upon him. Therefore, the counsel contended that the order of sentence passed in the present case is in violation of Section 235 (2) of the Code of Criminal Procedure, which is an illegality vitiating the entire sentence. The counsel vehemently argued that a holistic reading of Section 235 (2) of the Code of Criminal Procedure would indicate that the Accused should be given ample opportunity to produce materials in his favour so as to place on record the mitigating circumstances which mandate the imposition of lesser penalty.

15. It is pertinent at this point of time to note that countries following the common law tradition, prosecution historically did not play any part in the sentencing process and that it was mostly left for the judge to decide. In India, under the old Code, no opportunity was provided, post-conviction, for the Accused to place relevant facts before the court. It was only after the introduction of the present Code in 1973 that such a hearing was provided for in accordance with modern penological practices. At this stage it may be necessary to quote Section 235 of Code of Criminal Procedure, which provides for Pre-Sentence Hearing, among other things.

235. Judgment of acquittal or conviction.

...

(2) If the Accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the Accused on the question of sentence, and then pass sentence on him according to law.

Section 235 (2) of Code of Criminal Procedure implies that once the judgment of conviction is pronounced, the Court will hear the Accused on the question of sentence and at that stage, it is open to the Accused to produce such material on record as is available to show the mitigating circumstances in his favor. In other words, the Accused at this stage argues for imposition of lesser sentence based on such mitigating circumstances as brought to the notice of the Court by him.

16. Section 235 (2) of Code of Criminal Procedure mandates Pre-Sentence Hearing for the Accused and imbibes a cardinal principle that the sentence should be based on 'reliable, comprehensive information relevant to what the Court seeks to do'. In the case at hand, the Accused argues that his right to fair trial stands extinguished as he was not provided a separate hearing for sentencing. This issue can be resolved directly by relying on the interpretation of Section 235 (2) of Code of Criminal Procedure and this Court's jurisprudence built around Pre-Sentence Hearing.

17. As also highlighted by the Petitioner, this requirement has also been affirmed by the five-Judge Bench of this Court in Bachan Singh v. State of Punjab (supra), wherein it was also held that at the stage of Pre-Sentence Hearing, the Accused can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, may have a bearing on the choice of sentence.

18. The first case on this point is Santa Singh v. The State of Punjab, MANU/SC/0167/1976 : (1976) 4 SCC 190, which was decided by a Division Bench of this Court presided by Justice Bhagwati (as His Lordship then was) and Justice Fazal Ali. This case revolved on the fact that an Accused in a double murder case was sentenced to death without providing an opportunity of 'hearing' Under Section 235 (2) of Code of Criminal Procedure, which was the only ground of appeal before the Supreme Court. This Court, by two concurrent opinions, remanded the matter back to the trial court for fresh consideration on sentencing after giving an opportunity of 'hearing' to the Accused. Justice Bhagwati interpreted Section 235 (2) of Code of Criminal Procedure in the following manner-

This material may be placed before the court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, an opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing such material on record. **The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties** and particularly to the Accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court.

...

We are therefore of the view that the hearing contemplated by Section 235 (2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the Accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. **Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings.**

(Emphasis supplied)

Justice Fazal Ali, agreed with the aforesaid conclusion, and made observations along the same lines.

19. The aforesaid ruling came to be questioned in Dagdu and Ors. v. State of Maharashtra, MANU/SC/0086/1977 : (1977) 3 SCC 68, wherein a similar question came before this Court. This Court, while repelling the submission of the counsel for the Accused therein, who argued that the ratio in Santa Singh Case (supra) mandated compulsory remand of the case to the trial court, held as under-

But we are unable to read the judgment in Santa Singh (supra) as laying down that the failure on the part of the Court, which convicts an Accused, to 'hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the Accused an opportunity to. be heard on the question of sentence. The Court, on convicting an Accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the Accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the Accused on the question of sentence. That opportunity has to be real and effective, which means that the Accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The Accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. **The Court may, in appropriate**

cases, have to adjourn the matter in order to give to the Accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

Bhagwati J. has observed in his judgment that care ought to be taken to ensure that the opportunity of a hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings.

(Emphasis supplied)

20. In Rajendra Prasad v. State of Uttar Pradesh MANU/SC/0212/1979 : AIR 1979 SC 916, the Supreme Court expressed its concern that the mandatory Pre-Sentence Hearing had become nothing more than a repetition of the facts of the case. The Bench hoped that "the Bar will assist the Bench in fully using the resources of the new provision to ensure socio-personal justice, instead of ritualising the submissions on sentencing by reference only to materials brought on record for proof or disproof of guilt".

21. In the case of Muniappan v. State of Tamil Nadu, MANU/SC/0187/1981 : (1981) 3 SCC 11, the Supreme Court noted that the trial court had sentenced the Accused to death stating that when the Accused was asked to speak on the question of sentence, he did not say anything. In such a case the Supreme Court noted that the requirement of Section 235(2) was not discharged by merely putting a formal question to the Accused, and the court should undertake genuine efforts. The Court observed therein that, "it is the bounden duty of the judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view".

22. The question of providing sufficient time for Pre-Sentence Hearing was dealt with by the Court in Allauddin Mian v. State of Bihar, MANU/SC/0648/1988 : (1989) 3 SCC 5. The Supreme Court observed that the trial court had not provided sufficient time to the Accused for hearing on sentencing. Relevant factors, such as, the antecedents of the Accused, their socio-economic conditions, and the impact of their crime on the community had not come on record, and in the absence of such information deciding on punishment was difficult. The Supreme Court therefore recommended 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 as well as 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 aforesaid proposition was also reiterated in Malkiat Singh v. State of Punjab, MANU/SC/0622/1991 : (1991) 4 SCC 341.

23. On the other hand, in Sevaka Perumal v. State of Tamil Nadu MANU/SC/0338/1991 : AIR 1991 SC 1463, this Court upheld the death sentence even though it was argued that no time had been given to raise grounds on sentencing by the trial court. This Court observed that, during the appeal, the defence counsel had been unable to provide any additional grounds on sentence and therefore no prejudice had been caused to the Accused.

24. In State of Maharashtra v. Sukhdev Singh, MANU/SC/0416/1992 : (1992) 3 SCC 700, the Supreme Court clarified that while Section 309 of the Code of Criminal Procedure prescribed no power for adjournment of sentencing hearings, these should be provided where the Accused sought to produce materials in capital cases. In Jai Kumar v. State of Madhya Pradesh MANU/SC/0360/1999 : AIR 1999 SC 1860, this Court observed that the trial court had given an opportunity to the defence to produce materials, which they chose not to do, and had considered the mitigating circumstances raised by them. This Court opined that, in such circumstances, it was not a miscarriage of justice that the judge did not adjourn the hearing.

25. In Anshad v. State of Karnataka, MANU/SC/0733/1994 : (1994) 4 SCC 381, this Court disapprovingly noted that the trial judge had dealt with sentencing cryptically in one paragraph and this defeated the very object of Section 235(2) of Code of Criminal Procedure, exposing a "lack of sensitiveness on his part while dealing with the question of sentence". Commuting the sentences of the Appellants, the Supreme Court observed that both the lower courts did not appreciate the aggravating and mitigating circumstances and therefore their entire approach to sentencing was incorrect.

26. The aforesaid principle was further elucidated in the case of B.A. Umesh v. Registrar General, High Court of Karnataka, MANU/SC/1289/2016 : (2017) 4 SCC 124, wherein it was held that a review petition cannot be allowed merely because no separate date was given for hearing on the sentence. This Court held that Section 235(2) of Code of Criminal Procedure does not mandate separate date for the hearing of the sentence, rather, it is dependent on the facts and circumstances of the case, for instance, if parties insist to be heard on separate dates.

27. As per the order dated 03.02.2017 in Mukesh v. State (NCT of Delhi), MANU/SC/0366/2017 : (2017) 3 SCC 717, this Court, having found that there was no compliance of Section 235 (2) of Code of Criminal Procedure by the court's below, observed as under-

Having considered all the authorities, we find that there are two modes, one is to remand the matter or to direct the Accused persons to produce necessary data and advance the contention on the question of sentence. Regard being had to the nature of the case, we think it appropriate to adopt the second mode. To elaborate, we would like to give opportunity before conclusion of the hearing to the Accused persons to file affidavits along with documents stating about the mitigating circumstances. Needless to say, for the said purpose, it is necessary that the learned Counsel, Mr. M.L. Sharma and his associate Ms. Suman and Mr. A.P. Singh and his associate Mr. V.P. Singh should be allowed to visit the jail and communicate with the Accused persons and file the requisite affidavits and materials.

(Emphasis supplied)

28. In the final order of Mukesh v. State (NCT of Delhi), MANU/SC/0575/2017 : (2017) 6 SCC 1, this Court held that in the event the procedural requirements Under Section 235 (2) of the Code of Criminal Procedure are not met, the appellate court can either remit the case back to the trial court or adjourn the matter before the appellate forum for hearing on sentence after giving an opportunity to adduce evidence. On the other hand, the court also noted that any deficiency in non-compliance of Section 235 (2) of Code of Criminal Procedure can be cured by providing the opportunity at the appellate stage itself so as to curtail the delay in the proceedings. In that case, this Court had allowed the Accused to file an affidavit listing the mitigating circumstance, noticing that no pre-hearing on sentence was ever carried out.

29. Two recent three-Judge Bench decisions of this Court on this aspect merit our consideration. Firstly, in the decision dated 28.11.2018 in Chhannu Lal Verma v. State of Chhattisgarh (Criminal Appeal Nos. 1482-1483 of 2018), this Court observed that not having a separate hearing at the stage of trial was a procedural impropriety. Noting that a bifurcated hearing for conviction and sentencing was a necessary condition laid down in Santosh Kumar Satishbhushan Bariyar, MANU/SC/0801/2009 : (2009) 6 SCC 498, the Court held that by conducting the hearing for sentencing on the same day, the Trial Court failed to provide necessary time to the Appellant therein to furnish evidence relevant to sentencing and mitigation. We find that this cannot be taken to mean that this Court intended to lay down,

as a proposition of law, that hearing the Accused for sentencing on the same day as for conviction would vitiate the trial. On the contrary, in the said case, it was found on facts that the same was a procedural impropriety because the Accused was not given sufficient time to furnish evidence relevant to sentencing and mitigation.

30. Secondly, in the decision dated 12.12.2018 in Rajendra Prahladrao Wasnik v. State of Maharashtra, (Review Petition (Crl.) Nos. 306-307 of 2013), this Court made a general observation that in cases where the death penalty may be awarded, the Trial Court should give an opportunity to the Accused after conviction which is adequate for the production of relevant material on the question of the propriety of the death sentence. This is evidently at best directory in nature and cannot be taken to mean that a pre-sentence hearing on a separate date is mandatory.

31. It may also be noted that in the older three-Judge Bench decision of this Court in Malkiat Singh Case (supra), the Court observed that keeping in mind the two-Judge Bench decisions in Allauddin Mian Case (supra) and Anguswamy v. State of Tamil Nadu, MANU/SC/0029/1989 : (1989) 3 SCC 33, wherein it had been laid down that a sentence awarded on the same day as the finding of guilt is not in accordance with law, the normal course of action in case of violation of such procedure would be remand for further evidence. However, on a perusal of these two decisions we find that their import has not been correctly appreciated in Malkiat Singh Case (supra), since the observations in Allauddin Mian Case (supra), as relied upon in Anguswamy Case (supra), regarding conduct of hearings on separate dates, were only directory. Be that as it may, it must be noted that the effect of Malkiat Singh Case (supra) has already been considered by this Court in Vasanta Sampat Dupare Case (supra), wherein it was already noted that the mere non-conduct of the pre-sentence hearing on a separate date would not per se vitiate the trial if the Accused has been afforded sufficient time to place relevant material on record.

32. It may not be out of context to note that in case the minimum sentence is proposed to be imposed upon the Accused, the question of providing an opportunity Under Section 235(2) would not arise. (See Tarlok Singh v. State of Punjab, MANU/SC/0159/1977 : (1977) 3 SCC 218; Ramdeo Chauhan v. State of Assam, MANU/SC/0297/2001 : (2001) 5 SCC 714).

33. There cannot be any doubt that at the stage of hearing on sentence, generally, the Accused argues based on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State/the complainant would argue based on the aggravating circumstances against the Accused to support the contention relating to imposition of higher sentence. The object of Section 235 (2) of the Code of Criminal Procedure is to provide an opportunity for Accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfil the requirements of Section 235(2) of the Code of Criminal Procedure only by adjourning the matter for one or two days to hear the parties on sentence. If the Accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well.

34. In light of the above discussion, we are of the opinion that as long as the spirit and purpose of Section 235(2) is met, inasmuch as the Accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day as the pre-conviction hearing. Depending

on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so.

35. Now we need to consider the impact of non-compliance of procedure provided Under Section 235 (2) of Code of Criminal Procedure by the trial court. Even assuming that a procedural irregularity is committed by the trial court to a certain extent on the question of hearing on sentence, the violation can be remedied by the appellate Court by providing sufficient opportunity of being heard on sentence. It must be kept in mind that Section 465 of the Code of Criminal Procedure mandates that no finding, sentence or order passed by the Court of competent jurisdiction shall be reversed or altered by the Court of appeal on account of any error, omission or irregularity in the order, judgment and other proceedings before or during trial unless such error, omission or irregularity results in a failure of justice. Such non-compliance can be remedied by the appellate Court by either remanding the matter in appropriate cases or by itself giving an effective opportunity to the Accused.

36. The narrative provided by numerous cases on this aspect portrays a picture of the appellate Court trying to balance two important rights, viz., right to fair trial and right to speedy trial. On one side, is the procedural right granted to the Accused Under Section 235 (2) of Code of Criminal Procedure, and on the other side is the possibility of misuse to delay the trial. The experienced judges in India have enough expertise to distinguish, between the schemes for protracting trials from that of genuine causes in order to protect rights of the Accused.

37. This brings us to the role of appellate courts under our Criminal Justice System. There is no dispute that under our chosen system, that the highest discretion is provided to trial courts. Sometimes appellate courts, in order to preserve the competing factors in play, provides discretion for the trial court to operate. However, appellate court must adopt a 'cautionary approach' when providing such indulgence, which must be restricted and balanced against competing interests.[1] The narration of various court dicta, which are cited above, provide for a cautionary tale right from Santa Singh Case onwards, as the choice of solution for remedying non-compliance of Section 235 (2) of Code of Criminal Procedure provides for selection of at least two different modes.

38. As noted above, many cases have grappled with the question as to the choice between the two. The approach of this Court needs to be rationalized and understood in the light of cautionary approach discussed above. From the aforesaid discussion, following dicta emerge-

i. That the term 'hearing' occurring Under Section 235 (2) requires the Accused and prosecution at their option, to be given a meaningful opportunity.

ii. Meaningful hearing Under Section 235 (2) of Code of Criminal Procedure, in the usual course, is not conditional upon time or number of days granted for the same. It is to be measured qualitatively and not quantitatively.

iii. The trial court need to comply with the mandate of Section 235 (2) of Code of Criminal Procedure with best efforts.

iv. Non-compliance can be rectified at the appellate stage as well, by providing meaningful opportunity.

v. If such an opportunity is not provided by the trial court, the appellate court needs to balance various considerations and either afford an opportunity before itself or remand back to trial court, in appropriate case, for fresh consideration.

vi. However, the Accused need to satisfy the appellate courts, inter alia by pleading on the grounds as to existence of mitigating circumstances, for its further consideration.

vii. Being aware of certain harsh realities such as long protracted delays or jail appeals through legal aid etc., wherein the appellate court, in appropriate cases, may take recourse of independent enquiries on relevant facts ordered by the court itself.

viii. If no such grounds are brought by the Accused before the appellate courts, then it is not obligated to take recourse Under Section 235 (2) of Code of Criminal Procedure.

39. Having discussed the law on pre-sentence hearing, it would be appropriate at this juncture to revisit the decisions of the Courts, leading to this review in order to ascertain whether the Petitioner was given an effective opportunity to place material on record relevant to the quantum of sentence, in this instant case.

40. The Trial Court heard the Petitioner on the aspect of imposition of sentence separately, which is amply clear from paragraphs 79-87 of the judgment of the Trial Court. Hence, based on the material on record we are satisfied that the Trial Court has fully complied with the requirement of Section 235(2) of the Code of Criminal Procedure, While coming to its conclusion, the Court held that the aggravating circumstances of the crime, i.e. the magnitude and manner of commission of the crime in the form of the kidnapping, rape and murder of two minor girls, outweighed the mitigating circumstances of the Accused, i.e. the dependency of his aged mother on him, and his young age. The Court also gave weightage to the prior convictions of the Accused for the same kind of offence, i.e. for the offence of rape of a nine-year-old girl child Under Sections 376 and 506 of the Indian Penal Code and Section 57 of the Bombay Children Act, as well as for the kidnapping and rape of a seven-year-old girl child Under Sections 363 and 366 of the Indian Penal Code. It may be noted here itself that in light of his two prior convictions, the Trial Court also gave him an opportunity to be heard on the question of Section 75 of the Indian Penal Code, which pertains to enhance punishment for certain offences under Chapter XII or XVII of the Indian Penal Code after previous conviction, but the factum of these convictions was also not contested by the Petitioner.

41. Before the High Court as well, further material was brought on record by the Petitioner regarding his discharge in one case related to offences of the same nature, which the Court found to not be in the nature of a mitigating circumstance. The High Court was of the opinion that the dependency of aged parents could also not be considered as a mitigating circumstance to begin with, and that the Accused was not young enough for his age to be considered as a mitigating circumstance. The High Court noted the absence of any extreme mental or emotional disturbance leading to the commission of the offence, and observed that given the past offending history of the Accused, there was no hope of his reform or rehabilitation. The Court also noted the barbaric nature of the offence, inasmuch as the Petitioner had cold-bloodedly raped and murdered two innocent and defenceless girls by abusing the faith that they had reposed in him as their neighbour, and concluded that he would pose a threat to society even if released for the smallest period of time, and might commit similar acts in the future. On this basis, the High Court affirmed the death penalty awarded to the Accused.

42. The Supreme Court, in appeal, being Criminal Appeal No. 680 of 2007, also determined the case to fall into the category of the rarest of rare cases.

43. The record in the instant matter therefore clearly shows that the Accused was accorded a real and effective opportunity at the trial stage itself. It may further be stated that the

opportunity granted to the Petitioner by the High Court to adduce further material on this aspect was above and beyond the requirement of Section 235(2). The Courts had taken all the attendant circumstances into account before reaching the conclusion of awarding the death penalty. It is also not the case that the Accused made a request for hearing on sentencing on a separate date and the same was refused. In such circumstances, we reject the contention that the procedure envisaged in Section 235(2) of the Code of Criminal Procedure was not complied with in the present case.

44. Now we need to consider the second issue concerning post-conviction mental illness as a mitigating factor for converting a death sentence to life imprisonment.

45. It is pertinent for us to understand the phenomenon of post-conviction mental illness. As the phrase itself suggests, it is only after being proven guilty, that the convict has developed such illness. It is well acknowledged fact throughout the world that, prisons are difficult places to be in. The World Health Organisation and the International Red Cross, identify multiple circumstances such as overcrowding, various forms of violence, enforced solitude, lack of privacy, inadequate health care facilities, concerns about family etc, can take a toll on the mental health of the prisoners. Due to the prevailing lack of awareness about such issues, the prisoners have no recourse and their mental health keeps on degrading day by day. The prevailing argument in favour of such prisoners is that; whether the imposition of death penalty upon such prisoners is justified, who have clearly impaired their abilities to even understand the nature and purpose of such punishment and the reasons for such imposition? The aforesaid issues will be dealt at length at the later stage.

46. The Accused has now pleaded an entirely new ground of post-conviction mental illness for the first time herein, which obliges us to go into the aspect of sentencing afresh. It is also brought to our notice that the Appellant has been a death row convict for almost 17 years, mandating us to resolve the issue of sentencing herein. Before we consider the appropriate punishment for the Accused herein, a reference needs to be made to the background principles concerning sentencing policy considering that the present Petitioner is pleading a mitigating factor which has arisen post-conviction.

47. Sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch.[2] This process occurring at the end of a trial still has a large impact on the efficacy of a Criminal Justice System. It is established that sentencing is a socio-legal process, wherein a judge finds an appropriate punishment for the Accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the judges to give punishment, it becomes important to exercise the same in a principled manner. We need to appreciate that a strict fixed punishment approach in sentencing cannot be acceptable, as the judge needs to have sufficient discretion as well.

48. Before analyzing this case, we need to address the issue of the impact of reasoning in the sentencing process. The reasoning of the trial court acts as a link between the general level of sentence for the offence committed and to the facts and circumstances. The trial court is obligated to give reasons for the imposition of sentence, as firstly, it is a fundamental principle of natural justice that the adjudicators must provide reasons for reaching the decision and secondly, the reasons assume more importance as the liberty of the Accused is subject to the aforesaid reasoning. Further, the appellate court is better enabled to assess the correctness of the quantum of punishment challenged, if the trial court has justified the same with reasons. The aforesaid principle is fortified not only by the statute Under Section 235 (2) of Code of Criminal Procedure but also by judicial interpretation. Any increase or decrease in the quantum of punishment than the usual levels need to be reasoned by

the trial court. However, any reasoning dependent on moral and personal opinion/notion of a Judge about an offence needs to be avoided at all costs.

49. Sentencing in India, is a midway between judicial intuition and strict application of Rule of law. As much as we value the Rule of law, the process of sentencing needs to preserve principled discretion for a judge. In India, sentencing is mostly led by 'guideline judgments' in the death penalty context, while many other countries like United Kingdom and United States of America, provide a basic framework in sentencing guidelines.

50. Although at the outset, it is clarified that this Court may not lay down a 'definitive sentencing policy', which is rather a legislative function, however, the Courts in India have addressed this problem in a principled manner having regards to judicial standards and principles. These judicially set-principles not only serve as instructive guidelines, but also preserve the required discretion of the trial judges while sentencing. Such an effort has already been initiated by the Supreme Court, in Sunil Dutt Sharma Case, MANU/SC/1030/2013 : (2014) 4 SCC 375, when the sentencing guidelines evolved in the context of death penalty were applied to a lesser sentence as well. However, achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in.

51. Moreover, our attention is also drawn to the Malimath Committee Report on Reforms in the Criminal Justice System, which recommended creation of a statutory body for prescribing sentencing guidelines. Before concluding the aforementioned observations highlighting the dangers of sentencing discretion, we are reminded of the words of Justice Krishna Iyer, who held that "Guided missiles with lethal potential, in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process." [refer Rajendra Prasad v. State of Uttar Pradesh MANU/SC/0212/1979 : (1979) 3 SCC 646]

52. In any case, considering that a large part of the exercise of sentencing discretion is principled, a Judge in India needs to keep in mind broad purposes of punishment, which are deterrence, incapacitation, rehabilitation, retribution and reparation (wherever applicable), unless particularly specified by the legislature as to the choice. The purposes identified above, marks a shift in law from crime-oriented sentencing to a holistic approach wherein the crime, criminal and victim have to be taken into consideration collectively.

53. Having observed some of the general aspects of sentencing, it is necessary to consider the aspect of post-conviction mental illness as mitigating factor in the analysis of 'rarest of the rare' doctrine which has come into force post Bachan Singh Case (supra).

54. As a starting point we need to refer to Piare Dusadh v. King Emperor MANU/FE/0011/1943 : AIR 1944 FC 1, has already recognized post-conviction mental illness as a mitigating factor in the following manner-

Case No. 47-The Appellant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30th September 1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed. The Appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, Appellant's father. Kanchan was sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic. The evidence in this case leaves no room for doubt that the Appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the

Appellant made his aunt the victim. The prosecution alleged that the Appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before, the Special Judge he said that another uncle (P.W. 7) who according to the Appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the Appellant. In the appeal preferred by him through the jail authorities to the High Court, the Appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attentions. The previous history of this family indicates that the Appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this.

In committing the offence the Appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death.

We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal.

(Emphasis supplied)

However, this case does not provide any guidelines or the threshold for evaluating what kind of mental illness needs to be taken into consideration by the Courts.

55. We note that, usually, mitigating factors are associated with the criminal and aggravating factors are relatable to commission of the crime. These mitigating factors include considerations such as the Accused's age, socio-economic condition etc. We note that the ground claimed by 'Accused x' is arising after a long-time gap after crime and conviction. Therefore, the justification to include the same as a mitigating factor does not tie in with the equities of the case, rather the normative justification is founded in the Constitution as well as the jurisprudence of the 'rarest of the rare' doctrine. It is now settled that the death penalty can only be imposed in the rarest of the rare case which requires a consideration of the totality of circumstances. In this light, we have to assess the inclusion of post-conviction mental illness as a determining factor to disqualify as a 'rarest of the rare' case.

56. Sentencing generally involves curtailment of liberty and freedom for the Accused. Under Article 21 of the Constitution, right to life and liberty cannot be impaired unless taken by jus laws. In this case we are concerned with the death penalty, which inevitably affects right to life, and is subjected to a various substantive and procedural protections under our criminal justice system. An irreducible core of right to life is 'dignity'. [refer Navtej Singh Johar v. Union of India MANU/SC/0947/2018 : AIR 2018 SC 4321]. Right to human dignity comes in different shades and colours. [refer Common Cause v. Union of India MANU/SC/0232/2018 : AIR 2018 SC 1665]. For our purposes, the dignity of human being inheres a capacity for understanding, rational choice, and free will inherent in human nature, etc. The right to dignity of an Accused does not dry out with the judges' ink, rather, it subsists well beyond the prison gates and operates until his last breath. In the context of mentally ill prisoners it is pertinent to mention that Section 20 (1) of the Mental Health Care Act, 2017, Act No. 10 of 2017, explicitly provides that 'every person with mental illness shall have a right to live with dignity'.

57. All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them. When such disability occurs, a person may not be in a position to

understand the implications of his actions and the consequence it entails. In this situation, the execution of such a person would lower the majesty of law.

58. Article 20 (1) of the Indian Constitution imbibes the idea communication/knowledge for the Accused about the crime and its punishment. It is this communicative element, which is ingrained in the sentence (death penalty), that gives meaning to the punishments in a criminal proceeding. The notion of death penalty and the sufferance it brings along, causes incapacitation and is idealized to invoke a sense of deterrence. If the Accused is not able to understand the impact and purpose of his execution, because of his disability, then the raison d'etre for the execution itself collapses.

59. It may not be out of context to refer Atkins v. Virginia, MANU/USSC/0061/2002 : 536 U.S. 304 (2002), wherein the United States Supreme Court, while dealing with the question 'whether the execution of mentally retarded persons "cruel and unusual punishment" prohibited by the Eighth Amendment?' The Court noted that hanging mentally disabled or retarded neither increases the deterrence effect of death penalty nor does the non-execution of the mentally disabled will measurably impede the goal of deterrence.

60. Moreover, Article 20 of the Constitution guarantees individuals the right not to be subjected to excessive criminal penalty. The right flows from the basic tenet of proportionality. By protecting even those convicted of heinous crimes, this right reaffirm the duty to respect the dignity of all persons. Therefore, our Constitution embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency against which penal measures have to be evaluated. In recognizing these civilized standards, we may refer to the aspirations of India in being a signatory to the Convention on Rights of Persons with Disabilities, which endorse 'prohibition of cruel, inhuman or degrading punishments' with respect to disabled persons. Additionally, when the death penalty existed in England, there was a common law right barring execution of lunatic prisoners.[3] Additionally, there is a strong international consensus against the execution of individuals with mental illness.[4]

61. We may note that various prison Rules in India also recognizes that generally the Government has the duty to pass appropriate orders on execution, if a person is found to be lunatic. Andhra Pradesh Prison Rules, 1979, Rule 796; Gujarat Prisons (Lunatics) Rules, 1983; Delhi Prison Rules, 2018, Rule 824; Tamil Nadu Prison Rules, 1983, Rule 923; Maharashtra Prison Manual, 1979, Chapter XLII (Government Notification, Home department, No. RJM-1058 (XLVI)/12,495-XVI, dated 18.01.1971); Model Prison Manual by Ministry of Home Affairs (2016), Rule 12.36 are some of the examples of legal instruments in India which have already recognized post-conviction mental illness as a relevant factor for Government to consider under its clemency jurisdiction.

62. Having understood the normative basis for recognition of post-conviction mental illness as a mitigating factor in a death penalty case, we must mention that Shatrughan Chauhan Case (supra) had identified the same and holds as under:

86. The above materials, particularly, the directions of the United Nations international conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear, "insanity" is a relevant supervening factor for consideration by this Court.

63. Now we need to consider the test for recognizing an Accused eligible for such mitigating factor. It must be recognized that

insanity recognized under Indian Penal Code and the mental illness we are considering in the present case arise at a different stage and time. Under Indian Penal Code, Section 84 recognizes the plea of legal insanity as a defence against criminal prosecution. [refer Surendra Mishra v. State of Jharkhand, (2011) 3 SCC (Cri.) 232]. This defence is restricted in its application and is made relatable to the moment when the crime is committed. Therefore, Section 84 of Indian Penal Code relates to the mens rea at the time of commission of the crime, whereas the plea of post-conviction mental illness is based on appreciation of punishment and right to dignity. [refer Amrit Bhushan Gupta v. Union of India MANU/SC/0087/1976 : AIR 1977 SC 608] The different normative standards underpinning the above consequently mean different threshold standards as well.

64. On the other hand, considering the fact that the case is at the fag end of the process and the mitigating factors so discussed above were not emergent at the time of commission of the crime, therefore this ground needs to be utilized only in extreme cases of mental illness considering the element of marginal retribution which survives. In any case, considering that India has taken an obligation at an international forum to not punish mental patients with cruel and unusual punishments, it would be necessary for this Court to provide for a test wherein only extreme cases of convicts being mentally ill are not executed. Moreover, this Court cautions against utilization of this dicta as a ruse to escape the gallows by pleading such defense even if such aliment is not of grave severity.

65. Before we analyse this case at hand, a brief survey of classification of mental illness and its impact on death penalty needs to be considered. The Diagnostic and Statistical Manual of Mental Disorders (DSM), is one of the most well-known classification and diagnostic guides for mental disorders in America. Its fifth edition (DSM-5), published in 2013, defines mental disorder as follows: -

A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion Regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

66. 'Severe Mental Illness' under the 'International Classification of Diseases (ICD)', which is accepted Under Section 3 of the Mental Health Care Act, 2017, enerally include-

1. schizophrenic and delusional disorders

2. mood (affective) disorders, including depressive, manic and bipolar forms

3. neuroses, including phobic, panic and obsessive- compulsive disorders

4. behavioural disorders, including eating, sleep and stress disorders

5. personality disorders of different kinds.

67. American Bar Association, by its Resolution 122A passed on August 2006, notes as under-

(a) Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the

validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

68. In line with the above discussion, we note that there appear to be no set disorders/disabilities for evaluating the 'severe mental illness', however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore, the test envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia.

69. Following directions need to be followed in the future cases in light of the above discussion-

a. That the post-conviction severe mental illness will be a mitigating factor that the appellate Court, in appropriate cases, needs to consider while sentencing an Accused to death penalty.

b. The assessment of such disability should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in Accused's particular mental illness.

c. The burden is on the Accused to prove by a preponderance of clear evidence that he is suffering with severe mental illness. The Accused has to demonstrate active, residual or prodromal symptoms, that the severe mental disability was manifesting.

d. The State may offer evidence to rebut such claim.

e. Court in appropriate cases could setup a panel to submit an expert report.

f. 'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the Accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment.

70. Having said so, it needs to be considered that the Accused has submitted a report of the Class-I Psychiatrist, Yerawada Central Prison, indicating that he was suffering from some sort of mental illness without providing any objective factors for such assessment. We may reproduce the aforesaid report dated 25.09.2014, in the following manner-

Clinical impression: no delusions, no hallucinations, sleep and appetite are normal.

Remark: Taking regular medication and maintaining improvement. He is under OPD under Psychiatric treatment since 21.12.1994 and since then taking regular treatment. Currently he is on anti-psychotic drugs...

The doctor further opined that 'he is maintaining good improvement on medication, good diet. He is having psychological disturbance and symptoms like irritability emerges when the dosage is decreased.

71. Moreover, the expert opinion offered by a Psychiatrist registered with the Maharashtra Medical Council working as a coordinator of the Centre for Mental Health Law and Policy, Indian Law Society, Pune, does not provide any further clarity. We may extract the

conclusion reached by the aforesaid report as well-

While no definite opinion can be given relating to the mental health condition of Accused 'X' and the treatment being administered to him, considering that he appears to be under treatment for a severe mental illness such as schizophrenia or some type of psychosis, **there appears to be a need to review Accused x's medical records and to clinically examine him to assess his current psychiatric status.**

(Emphasis supplied).

72. Even though we are not satisfied with such statements made by the doctors as the assessment seems to be incomplete. However, it is to be noted that the present Accused has been reeling under bouts of some form of mental irritability since 1994, as apparent from the records placed before us. Moreover, he has suffered long incarceration as well as a death row convict. In the totality of circumstances, we do not consider it be appropriate to constitute a panel for re-assessment of his mental condition, in the facts and circumstances of this case.

73. At the same time, we cannot lose sight of the fact that a sentence of life imprisonment simpliciter would be grossly inadequate in the instant case. Given the barbaric and brutal manner of commission of the crime, the gravity of the offence itself, the abuse of the victims' trust by the Petitioner, and his tendency to commit such offences as is evident from his past conduct, it is extremely clear that the Petitioner poses such a grave threat to society that he cannot be allowed to roam free at any point whatsoever. In this view of the matter, we deem it fit to direct that the Petitioner shall remain in prison for the remainder of his life. It need not be stated that this Court has in a plethora of decisions held such an approach to be perfectly within its power to adopt, and that it acts as a useful via media between the imposition of the death penalty and life imprisonment simpliciter (which usually works out to 14 years in prison upon remission). (See for instance Swamy Shraddananda v. State of Karnataka, MANU/SC/3096/2008 : (2008) 13 SCC 767; Union of India v. V. Sriharan, MANU/SC/1377/2015 : (2016) 7 SCC 1; Tattu Lodhi v. State of Madhya Pradesh, MANU/SC/1015/2016 : (2016) 9 SCC 675).

74. In light of the above discussion, the petition is allowed to the extent that the sentence of death awarded to the Petitioner is commuted to imprisonment for the remainder of his life sans any right to remission.

75. Further, it is this state of 'Accused x' that obliges the State to act as parens patriae. In this state 'Accused x' cannot be ignored and left to rot away, rather, he requires care and treatment. Generally, it needs to be understood that prisoners tend to have increased affinity to mental illness.[5] Moreover, due to legal constraints on the recognition of broad-spectrum mental illness within the Criminal Justice System, prisons inevitably become home for a greater number of mentally-ill prisoners of various degrees. There is no overlooking of the fact that the realities within the prison walls may well compound and complicate these problems.[6]

76. In order to address the same, the Mental Healthcare Act, 2017 was brought into force. The aspiration of the Act was to provide mental health care facility for those who are in need including prisoners. The State Governments are obliged Under Section 103 of the Act to setup a mental health establishment in the medical wing of at least one prison in each State and Union Territory, and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.

77. Therefore, we direct the State Government to consider the case of 'Accused x' under the appropriate provisions of the Mental Healthcare Act, 2017 and if found entitled, provide for his rights under that enactment.

78. In light of the above discussion, this review petition stands partly allowed in the aforesaid terms and pending applications, if any, shall also stand disposed of.

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[1]Dame Sian Elias, Fairness in Criminal Justice (golden threads and pragmatic patches), Hamlyn Lectures (2018)
[2]Nicola Padfield, Rod Morgan and Mike Maguire, 'Out of Court, out of sight? Criminal sanctions and no-judicial decision making', The Oxford Handbook of Criminology (5th Ed.).
[3]Hale's Pleas of the Crown Vol. I - p. 33; Coke's Institutes, Vol. III, pg. 6; Black-stone's Commentaries on the Laws of England Vol. IV, pages 18 and 19;, "An Introduction to Criminal Law", by Rupert Cross, (1959), p. 67.
[4]Commission on Human Rights Resolution 2000/65 The question of the death penalty, UN Commission on Human Rights (Apr. 27, 2000); G.A. Res. 69/186, 5(d) (Feb. 4, 2015);
[5]Although statistics on the same are not available for all of Indian prisons, but we were able to compare sample studies within some Indian prisons and literature on psychiatric morbidity concurs as well.
[6]Liebling, Maruna and McAra et al., The Oxford Handbook of Criminology (6th Ed. (2017)).