A SANTOSH KUMAR SATISHBHUSHAN BARIYAR

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 1478 of 2005)

MAY 13, 2009

B

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973;

C *Sections 306, 307 - Tender of pardon to accomplice - Power to direct - Discussed - On the facts of the case Held: The pardon granted by the Sessions Judge was legal and valid.*

SENTENCING:

D

Death sentence - Rarest of rare cases - Special reasons - Mitigating factors - Discussed - On the facts of the case **Held:** *There are no special reasons to record the death penalty and the mitigating factors are sufficient to place it out* E *of the rarest of rare category - Thus, it is not a case where death penalty should be imposed - Instead of death penalty appellant to undergo rigorous imprisonment for life - Code of Criminal Procedure, 1973, Sections 235(2) and 354(3) - Constitution of India, Articles 14, 21.*

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DOCTRINES:

Doctrine of Prudence - Doctrine of Proportionality - Applicability of.

G **In these appeals, the principal questions which arose for consideration were:**

(i) Whether the Sessions Judge acted illegally in granting pardon to an accomplice (PW1); and

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(ii) Whether the case falls under 'rarest of rare cases' so as to enable the Courts below to award death penalty. A

Dismissing the appeals and reducing the death sentence to rigorous imprisonment for life, the Court B

HELD: 1.1. The order of Sessions Judge dated 3rd April, 2002 shows that the Judge not only applied his mind on the application (Ext. P-7) for grant of pardon filed by the Investigating Officer but also examined the appellant by putting relevant questions to him. The C Sessions Judge, therefore, did not pass the order dated 3rd April, 2002 only on the basis of the purported confessional statement made by PW-1 on 1st November, 2001. It was not done mechanically. If in law it was not necessary for the Magistrate to forward a copy of the D confessional statement made by PW-1 under Section 164 of the Code of Criminal Procedure or to record a separate statement of the said witness for the purpose of complying with the provisions of Section 306 of the Code of Criminal Procedure, the question as to whether he had E retracted from his confession or not would not be of much relevance as regards exercise of power by the Sessions Judge under Section 307 of the Code. [Para 9] [126-A-D]

1.2. Magistrate in his evidence categorically opined F that PW-1 had told him that he had not signed the said application retracting his confession. It may be that the said fact was not borne out from the judicial records, which were sent to the Sessions Judge with the order of committal, but then there is no reason to disbelieve the G statement of the Magistrate. [Para 9] [126-D-F]

1.3. If it is to be held that in each and every case pardon can only be granted at the initial stage, the power conferred upon the Sessions Judge to grant under H

A **Section 307 of the Code of Criminal Procedure for all intent and purport shall become otiose. [Para 9] [128-E-F]**

1.4. In the instant case, the order of the judge granting B **pardon to the Approver, is legal and valid. [Para 9] [128-F-G]**

Narayan Chetanram Chaudhary and Another v. State of Maharashtra **(2000) 8 SCC 457, relied on.**

C *Rampal Pithwa Rahidas and Others v. State of Maharashtra* **1994 Supp (2) SCC 73, distinguished.**

2. For an effective compliance of sentencing procedure under section 354(3) and section 235(2) Cr.P.C, D **sufficient discretion is a pre-condition. Strict channeling of discretion would also go against the founding principles of sentencing as it will prevent the sentencing court to identify and weigh various factors relating to the crime and the criminal such as culpability, impact on the society, gravity of offence, motive behind the crime etc.** E **[Para 11] [129-F-G]**

Bachan Singh v. State of Punjab **(1980) 2 SCC 684, relied on.**

F *Rajendra Prasad v. State of Uttar Pradesh* **(1979) 3 SCC 646;** *Saibanna v. State of Karnataka* **(2005) 4 SCC 165 and** *Mithu v. State of Punjab* **AIR 1983 SC 473 - relied on.**

Furman v. Georgia, **408 U.S. 238 (1972);** *Reyes v. R.* **(2002) UKPC 11 : 12 BHRC 219;** *Hughes, R. v. (Saint Lucia)* G **(2002) UKPC 12;** *Fox v. The Queen* **(2002) 2 AC 284;** *Bowe v. The Queen* **(2006) 1 WLR 1623 and** *Coard & Ors. v. The Attorney General (Grenada),* **(2007) UKPC 7, referred to.**

3. It is accepted that rarest of rare case is to be H **determined in the facts and circumstance of a given case**

and there is no hard and fast rule for that purpose. There are no strict guidelines. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of rarest of rare dictum. Therefore, it is to be read with Article 21 and 14. [Para 12] [133-A-C]

Swamy Shraddananda @ Murali Manohar Mishra v. State of Karantaka **2008 (10) SCALE 669, referred to.**

4. Under section 235(2) and 354 (3) of the Criminal Procedure Code, there is a mandate as to a full fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance to both the provisions. A scrupulous compliance of both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage. [Para 13] [133-C-E]

Santa Singh v. State of Punjab, **AIR 1956 SC 526;** *Malkiat Singh and Ors. v. State of Punjab,* **(1991) 4 SCC 341;** *Allaudin Mian v. State of Bihar,* **AIR 1989 SC 1456;** *Muniappan v. State of Tamil Nadu,* **(1981) 3 SCC 11;** *Jumman Khan v. State of U.P,* **(1991) 1 SCC 752 and** *Anshad and Ors. v. State of Karnataka,* **(1994) 4 SCC 381, referred to.**

5. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict etc. Quality of evidence adduced is also a relevant factor. [Para 14] [133-G-H; 134-A]

A *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684, relied on.**

"Law Commission's **48th Report", referred to.**

6. "Rarest of rare cases" is an exceptionally narrow
B **opening provided in the domain of this negative precept. This opening is also qualified by another condition in form of "when the alternative option is unquestionably foreclosed". Thus, in essence, rarest of rare dictum imposes a wide-ranging embargo on award of death**
C **punishment, which can only be revoked if the facts of the case successfully satisfy the double qualification viz. 1. that the case belongs to the rarest of rare category 2. and the alternative option of life imprisonment will just not suffice in the facts of the case. Rarest of rare dictum**
D **serves as a guideline in enforcing section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the rarest of rare dictum**
E **places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum. The background analysis leading to the conclusion that the**
F **case belongs to rarest of rare category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the rarest of rare aspect with respect to a matter shall entail identification of**
G **aggravating and mitigating circumstances relating both to the crime and the criminal. [Para 15] [135-C-G]**

Ravji alias Ram Chandra v. State of Rajasthan, **(1996) 2 SCC 175;** *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra,* **AIR 2009 SC 56;** *Mohan Anna Chavan v. State*
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of Maharashtra **(2008) 11 SCC 113;** *Bantu v. The State of U.P.,* **(2008) 11 SCC 113;** *Surja Ram v. State of Rajasthan,* **(1996) 6 SCC 271;** *Dayanidhi Bisoi v. State of Orissa,* **(2003) 9 SCC 310;** *State of U.P. v. Sattan @ Satyendra and Ors.,* **2009 (3) SCALE 394, referred to.**

7.1. *Bachan Singh* **suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose, death punishment, qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability. Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution - all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end anything to do with the life. This is the big difference between two punishments. Before imposing death penalty, therefore, it is imperative to consider the same. Rarest of rare dictum, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? Life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigor when the court**

A **focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but *Bachan Singh* sets the bar very high by introduction of Rarest of rare doctrine. [Para 16] [137-D-H; 138-A-D]**

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7.2. *Bachan Singh* while enunciating rarest of rare doctrine, did not deal with the role and responsibility of sentencing court and the appellate court separately. For that matter, this court did not specify any review standards for High Court and the Supreme Court. In that
C **event, all courts, be it trial court, High Court or this court, are duty bound to ensure that the ratio laid down therein is scrupulously followed. Same standard of rigor and fairness are to be followed by the courts. If anything, inverse pyramid of responsibility is applicable in death**
D **penalty cases. [Para 17] [140-B-D]**

7.3. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and
E **heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors**
F **which may not have been recorded. [Para 18] [140-F-H; 141-A]**

7.4. There is no consensus in the court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from
G ***Bachan Singh* in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on**
H **the aforementioned counts, is a must. The courts while**

adjudging on life and death must ensure that rigor and fairness are given primacy over sentiments and emotions. [Para 18] [140-F-H; 141-A] A

7.5. Article 14 and 21 are constitutional safeguards and define the framework for State in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment, challenge with respect to procedure to be invoked by the State in its dealings with people in various capacities, including as a convict. The position is, if the State is precariously placed to administer a policy within the confines of Articles 21 and 14, it should be applied most sparingly. This view flows from *Bachan Singh* and Constitution does not permit to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument. [Para 19] [146-B-D] B C D

7.6. The fact that this Court is dealing with safeguards entrenched in the Constitution should materially change the way it look for reasons while awarding the death punishment. The arguments which may be relevant for sentencing with respect to various other punishments may cease to apply in light of the constitutional safeguards which come into operation when the question relates to extinguishment of life. If there are two considerations, the one which has a constitutional origin shall be favoured. [Para 19] [146-D-F] E F

7.7. The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent this Court plays a countermajoritarian role. And this part of debate is not only relevant in the annals of judicial review, but also to criminal jurisprudence. [Para 19] [148-A-B] G

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A **7.8. Public Opinion may also run counter to the Rule of law and constitutionalism. Bhagalpur Blinding case or the recent spate of attacks on right to trial of the accused in the Bombay Blast Case are recent examples. This Court is also not oblivious to the danger of capital** B **sentencing becoming a spectacle in media. If media trial is a possibility, sentencing by media can not be ruled out. [Para 19] [148-E-F]**

7.9. Capital sentencing is one such field where the safeguards continuously take strength from the C **Constitution, and on that end this Court is of the view that public opinion does not have any role to play. In fact, the case where there is overwhelming public opinion favouring death penalty would be an acid test of the constitutional propriety of capital sentencing process.** D **[Para 19] [150-C-D]**

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Panchhi v. State of U.P.* **(1998) 7 SCC 177;** *State of Maharashtra v. Sindhi,* **(1975) 1 SCC 647;** *Vashram* E *Narshibhai Rajpara v. State of Gujarat* **(2002) 9 SCC 168;** *Om Prakash v. State of Haryana,* **(1999) 3 SCC 19 and** *Dharmendrasinh v. State of Gujarat,* **(2002) 4 SCC 679, relied on.**

F *West Virginia State Board of Education v. Barnette,* **319 U.S. 624 (1943), referred to.**

Michael Hough: "Sentencing and the Climate of Opinion **(1996, Criminal Law Review), referred to.**

G **8.1. This court laid down rarest of rare dictum in** *Bachan Singh* **and thereby endorsed a broad sentencing threshold. It has been interpreted by courts in various ways. It is important to note here that principled application of rarest of rare dictum does not come in the**

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way of individualized sentencing. With necessary room for sentencing, consistency has to be achieved in the manner in which rarest of rare dictum has to be applied by courts. *Bachan Singh* expressly barred one time enunciation of minute guidelines through a judicial verdict. The court held that only executive is competent to bring in detailed guidelines to regulate discretion. On this count judicial restraint was advocated. But at the same time, it actively relied on judicial precedent in disciplining sentencing discretion to repel the argument of arbitrariness and Article 14 challenge. An embargo on introduction of judicial guidelines was put therein but organic evolution of set of principles on sentencing through judicial pronouncements was not ruled out. This is how precedent aids development of law in any branch of law and capital sentencing can not be an exception to this. [Para 20] [150-E-H; 151-A-B]

8.2. Sentencing discretion is also a kind of discretion and shall be exercised judicially in the light of the precedents. [Para 20] [151-B-C]

8.3. While dealing with a matter as to whether death penalty should be awarded or not, although the court ordinarily would look to the precedents, but, this becomes extremely difficult, if not impossible. There is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed without laying down any legal principle. [Para 23] [155-A-B]

8.4. Even the balance-sheet of aggravating and mitigating circumstances approach invoked on a case by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the *Bachan Singh* threshold of "rarest of rare cases" has been most variedly and inconsistently applied by the various High

A Courts as also this court. At this point this Court wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty - the gravest penalty arriving out of the exercise of extraordinarily wide sentencing
B discretion, which is irrevocable in nature. This extremely uneven application of *Bachan Singh* has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal
C discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either through law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to
D the legitimate aim of the measure in question. Constitution of India provides for safeguards to give the individual adequate protection against arbitrary imposition of criminal punishment. [Para 23] [157-A-E]

8.5. One cannot help but observe the global move
E away from the death penalty. Latest statistics show that 138 nations have now abolished the death penalty in either law or practice (no executions for 10 years). Our own neighbours, Nepal and Bhutan are part of these abolitionist nations while others including Philippines and
F South Korea have also recently joined the abolitionist group, in law and in practice respectively. The United Nations General Assembly adopted resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a
G view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up to date and informed discussion and

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debate on the subject. [Para 23] [157-F-H; 158-A-B] A

Bachan Singh v. State of Punjab **(1980) 2 SCC 684, relied on.**

Jagmohan Singh v. State of U.P., **(1973) 1 SCC 20;** *Ram Singh v. Sonia and Ors.* **2007 (3) SCALE 106;** *Prajeet Kumar Singh v. State of Bihar* **2008 (4) SCALE 442;** *Bantu v. State of Uttar Pradesh* **2008 (10) SCALE 336;** *State of U.P. v. Sattan,* **2009 (3) SCALE 394;** *Ujjagar Singh v. State of Punjab,* **2007 (14) SCALE 428;** *Amrit Singh v. State of Punjab* **2006 (11) SCALE 309;** *Bishnu Prasad Sinha and Anr. v. State of Assam* **2007 (2) SCALE 42;** *State of Maharashtra v. Prakash Sakha Vasave and others,* **2009 (1) SCALE 713;** *Aloke Nath Dutt and Ors. v. State of West Bengal,* **2006 (13) SCALE 467;** *Swamy Shraddananda v. State of Karnataka (Swamy Shraddananda - I)* **(2007) 12 SCC 288 and** *Machhi Singh v. State of Punjab,* **(1983) 3 SCC 470, referred to.** B C D

"Journal of the Indian Law Institute 1979" and a joint report by the Amnesty International - India and People's Union for Civil Liberties Report titled "Lethal Lottery: The Death Penalty in India, A study of Supreme Court Judgments in death penalty cases **1950-2006", referred to.** E

9.1. In one sense, the scope of *Bachan Singh* **was fully met when it practically declared death penalty (procedurally and substantively) constitutional but the Bench went on to entrench an unprecedented jurisprudence on the sentencing front. This jurisprudence, of which Rarest of rare dictum is the central part, forms the bed rock of death penalty jurisprudence. The way ahead shown by** *Bachan Singh* **is not merely in compliance of statutory safeguards under section 354(3) and section 235(2) but also of Rarest of rare dictum. Therefore, the overall legislative scheme on death penalty was cleared of constitutional challenge** F G H

A **only after it was conjoined with the Rarest of rare dictum. [Para 24]**

9.2. On a deeper reading of *Bachan Singh* it becomes clear that the court was operating under two fundamental constraints while dealing with the constitutionality challenge. Firstly, death penalty is mentioned in the Constitution (for instance under Article 161 and Article 72(1)(c). Constitutional recognition was taken to be a primary signal for the legitimacy for section 302. Secondly, owing to separation of power doctrine, the court took a deferential view towards section 354(3) which was brought in to discipline the courts on death penalty by making life imprisonment the rule and death penalty exception. Laboring under the aforementioned constraints, the death penalty was held constitutional. This affirmative response to constitutionality of death penalty presented another complicated challenge which related to administration of death penalty or in other words, sentencing of capital punishment. This has been universally considered as a vexed question of law and practice and has not been satisfactorily dealt with in any jurisdiction so far. [Para 24] [159-B-D]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684, relied on.**

Ram Deo Chauhan v. State of Assam **(2001) 5 SC 714 and** *State of Punjab v. Prem Sagar and Ors. JT* **2008 (7) SC 66, referred to.**

10.1. Justice must be the first virtue of the law of sentencing. A sentencing court must consider itself to be a "forum of principle". The central idea of such a forum is its continuing commitment to inhere a doctrinal approach around a core normative idea. "Principled reasoning" flowing from judicial precedent or legislation

is the premise from which the courts derive the power. The movement to preserve substantial judicial discretion to individualize sentences within a range of punishments also has its basis in the court's ability to give principled reasoning. [Para 25] [161-A-C]

R. v. Willaert **(1953), 105 C.C.C. 172 (Ont. C.A.), referred to.**

10.2. The sentencing process, based on precedents around *Bachan Singh* should help to determine specific, deserved sentences in particular cases. The reason as to why questions of justice play such an important part in the distribution of capital punishment, lies in the special nature of capital punishment itself. Distributive justice is a relative notion: one can never determine whether one has received one's fair share except by comparison with that which has been allocated to others. Both questions are intertwined. [Para 25] [162-D-F]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684, relied on.**

Ronald Dworkin, The Forum of Principle 56 NYU L. **Rev. 469 (1981);** *Von Hirsch and Andrew Ashworth, The Sentencing Theory Debate:Convergence in Outcomes, Divergence in Reasoning Proportionate Sentencing: Exploring The Principles, Oxford University Press, 2005 Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, in A Fragment of Government with An Introduction to the Principles of Morals and Legislation* 281 (1948) *and Marvin E. Frankel, Lawlessness in Sentencing,* 41 U. Cin. L. Rev. 1 (1972), referred to.

11.1. When the court is faced with a capital sentencing case, a comparative analysis of the case before it with other purportedly similar cases would be in the fitness of the scheme of the Constitution.

A Comparison will presuppose an identification of a pool of equivalently circumstanced capital defendants. The gravity, nature and motive relating to crime will play a role in this analysis. Next step would be to deal with the subjectivity involved in capital cases. The imprecision of B the identification of aggravating and mitigating circumstances has to be minimized. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing C discretion available to the courts but to bring in consistency in identification of various relevant circumstances. [Para 26] [166-D-G]

11.2. The aggravating and mitigating circumstances have to be separately identified under a rigorous D measure. *Bachan Singh*, when mandates principled precedent based sentencing, compels careful scrutiny of mitigating circumstances and aggravating circumstances and then factoring in a process by which aggravating and mitigating circumstances appearing from the pool of E comparable cases can be compared. The weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualized sentencing, but at the same time reasons for apportionment of weights shall be F forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness, objections in future. A sentencing hearing, comparative review of cases and similarly aggravating and mitigating circumstances analysis can only be given a go by if the G sentencing court opts for a life imprisonment. [Para 26] [166-G-H; 167-A-D]

12.1. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently a H

punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. This Court realizes the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away all, other rights cease to exist. [Para 28] [167-H; 168-A-C]

12.2. In the context of punishments, the protections emanating from Article 14 and Article 21 have to be applied in the strictest possible terms. At this juncture, it is best to point out that the ensuing discussion, although applicable in constitutionality context, is carried out in the context of sentencing of death punishment. In every capital sentence case, it must be borne in mind that the threshold of rarest of rare cases is informed by Articles 14 and 21, owing to the inherent nature of death penalty. Post *Bachan Singh*, capital sentencing has come into the folds of constitutional adjudication. This is by virtue of the safeguards entrenched in Articles 14 and 21 of our constitution. [Para 28] [169-C-F]

***Shankarlal Gyarasilal Dixit v. State of Maharashtra* (1981) 2 SCC 35, referred to.**

***S v. Makwanyane* 1994 (3) SA 868 (A); Lockett, [438 U.S. at 604 and Rummel v. Estelle, 445 U.S. 263, 272 (1980), referred to.**

12.3. With non-capital punishments, a more severe punishment for one offender than another is commonly accepted, even in similar circumstances. The infinite gradations of guilt and the limits of human capacity to

A judge causes one to overlook differential treatment of apparently similar convicts. As the relative severity of punishment increases, however, it becomes more difficult to overlook sentencing disparities. Death is the most severe of all punishments. [Para 29] [169-G-H; 170-A]

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13.1. During the sentencing process, the sentencing court or the appellate court for that matter, has to reach to a finding of a rational and objective connection between capital punishment and the purpose for which it is prescribed. In sentencing terms, "special reasons" C as envisaged under section 354(3) Cr.P.C. have to satisfy the comparative utility which capital sentence would serve over life imprisonment in the particular case. [Para 30] [171-B-D]

D 13.2. Principle of prudence, enunciated by *Bachan Singh* is sound counsel whenever in the given circumstances, there is difference of opinion with respect to any sentencing prop/rationale, or subjectivity involved in the determining factors, or lack of thoroughness in E complying with the sentencing procedure, it would be advisable to fall in favour of the "rule" of life imprisonment rather than invoking the "exception" of death punishment. [Para 30] [172-E-F]

F *R. v. Oakes,* [1986] 1 S.C.R. 103 and *R. v. Chaulk,* [1990] 3 S.C.R. 1303, referred to.

"Anthony Bottoms, The Philosophy and Politics of Punishment and Sentencing, in The Politics of Sentencing Reform" 20 (C.M.V. Clarkson & R. Morgan eds., 1995), G referred to.

14.1. The doctrine of proportionality, which appears to be the premise whereupon the trial judge as also the High Court laid its foundation for awarding death penalty H on the appellant herein, provides for justifiable reasoning

for awarding death penalty. However while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand falls within the rarest of the rare case. The reasons assigned by the courts below, do not satisfy *Bachan Singh* Test. Section 354 (3) of the Code provides for an exception. General rule of doctrine of proportionality, therefore, would not apply. One must read the said provision in the light of Article 21 of the Constitution of India. [Para 31] [176-E-H; 177-A]

14.2. Law laid down by *Bachan Singh* and Machhi Singh interpreting Section 354 (3) of the Code should be taken to be a part of our constitutional scheme. Although the Constitutional Bench judgment of the Supreme Court in *Bachan Singh* did not lay down any guidelines on determining which cases fall within the 'rarest of rare' category, yet the mitigating circumstances listed in and endorsed by the judgment gives reform and rehabilitation great importance, even requiring the State to prove that this would not be possible, as a precondition before the court awarded a death sentence. One cannot therefore determine punishment on grounds of proportionality alone. There is nothing before this Court that shows that the appellant cannot reform and be rehabilitated. [Para 31] [177-A-D]

14.3. Indisputably, the manner and method of disposal of the dead body of the deceased was abhorrent and goes a long way in making the present case a most foul and despicable case of murder. However, the mere mode of disposal of a dead body may not by itself be made the ground for inclusion of a case in the "rarest of rare" category for the purpose of imposition of the death sentence. [Para 31] [178-A-B]

14.4. Most research on this issue shows that the relationship between deterrence and severity of punishment is complicated. It is not obvious how deterrence relates to severity and certainty. Furthermore criminal policy must be evidence-led rather than based on intuitions, which research around the world has shown too often to be wrong. In the absence of any significant empirical attention to this question by Indian criminologists, one cannot assume that severity of punishment correlates to deterrence to an extent which justifies the restriction of the most fundamental human right through the imposition of the death penalty. The goal of crime reduction can be achieved by better police and prosecution service to the same or at least to a great extent than by the imposition of the death penalty. [Para 31] [178-F-H; 179-A]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Dhananjoy Chatterjee v. State of W.B.* **(1994) 4 SCC 220;** *Mohan and Others v. State of T.N.* **(1998) 5 SCC 336 and** *Ravindra Trimbak Chouthmal v. State of Maharashtra* **(1996) 4 SCC 148, referred to.**

Kennedy v. Lousiana **128 S. Ct. 2641, referred to.**

Roger Hood, The Death Penalty: A World-wide Perspective, Oxford, Clarendon Press, **third edition, 2002, p. 230, referred to.**

15.1. In the instant case, the entire prosecution case hinges on the evidence of the approver. For the purpose of imposing death penalty, that factor may have to be kept in mind. Assuming that in Swamy Shraddananda, this Court did not lay down a firm law that in a case involving circumstantial evidence, imposition of death penalty would not be permissible. But, even in relation thereto the question which would arise would be whether

in arriving at a conclusion some surmises, some hypothesis would be necessary in regard to the manner in which the offence was committed as contra-distinguished from a case where the manner of occurrence had no role to play. Even where sentence of death is to be imposed on the basis of the circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case. In a case of this nature where the entire prosecution case revolves round the statement of an approver or dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of sentencing evaluation of evidence would not be permissible, the courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view of evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser punishment. A statement of approver in regard to the manner in which crime has been committed vis-a-vis the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine. [Para 32] [179-F-H; 180-A-D]

15.2. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs. [Para 32] [180-E-F]

15.3. Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on accused No. 2 and 3, the same standard should have been applied to the case of the appellant also who was

A only two years older and still a young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was B only executed when all the persons involved gave their consent thereto. [Para 32] [180-F-H; 181-A]

15.4. It must be noted that the discretion given to the court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the C irrevocable character of death penalty. One of the principles which this Court thinks is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that D reformation is not possible, death sentence may be imposed. [Para 32] [181-A-C]

15.5. Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an E 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 thereof. The reasons assigned by the F courts below do not disclose any special reason to uphold the death penalty. The discretion granted to the courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality. [Para 33] [181-G C-E]

15.6. Judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, H one must nevertheless reiterate the basic principle, stated

repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the `rarest of rare' case where reform is not possible. Keeping in mind at least this principle this Court does not think that any of the factors in the present case warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, are sufficient to place it out of the "rarest of rare" category. Thus, this Court is of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. [Paras 34 and 35] [181-E-H; 182-A-B]

Swamy Shraddananda @ Murali Manohar Mishra v. State of Karantaka **2008 (10) SCALE 669, referred to.**

Case Law Reference:

(2000) 8 SCC 457	relied on	Para 9
1994 Supp (2) SCC 73	distinguished	Para 9
(1980) 2 SCC 684	relied on	Para 10
(1979) 3 SCC 646	relied on	Para 10
(2005) 4 SCC 165	relied on	Para 11
AIR 1983 SC 473	relied on	Para 11
408 U.S. 238 (1972)	referred to	Para 11
(2002) UKPC 11 :12 BHRC 219	referred to	Para 11
(2002) UKPC 12	referred to	Para 11
(2002) 2 AC 284	referred to	Para 11

(2006) 1 WLR 1623	referred to	Para 11
(2007) UKPC 7	referred to	Para 11
2008 (10) SCALE 669	referred to	Para 12
AIR 1956 SC 526	referred to	Para 13
(1991) 4 SCC 341	referred to	Para 13
AIR 1989 SC 1456	referred to	Para 13
(1981) 3 SCC 11	referred to	Para 13
(1991) 1 SCC 752	referred to	Para 13
(1994) 4 SCC 381	referred to	Para 13
(1996) 2 SCC 175	referred to	Para 15
AIR 2009 SC 56	referred to	Para 15
(2008) 11 SCC 113	referred to	Para 15
(1996) 6 SCC 271	referred to	Para 15
(2003) 9 SCC 310	referred to	Para 15
2009 (3) SCALE 394	referred to	Para 15
(1998) 7 SCC 177	relied on	Para 16
(1975) 1 SCC 647	relied on	Para 17
(2002) 9 SCC 168	relied on	Para 18
(1999) 3 SCC 19	relied on	Para 18
(2002) 4 SCC 679	relied on	Para 18
319 U.S. 624 (1943)	referred to	Para 19
(1973) 1 SCC 20	referred to	Para 20
2007 (3) SCALE 106	referred to	Para 21
2008 (4) SCALE 442	referred to	Para 21

2008 (10) SCALE 336	**referred to**	**Para 21**
2009 (3) SCALE 394	**referred to**	**Para 21**
2007 (14) SCALE 428	**referred to**	**Para 22**
2006 (11) SCALE 309	**referred to**	**Para 22**
2007 (2) SCALE 42	**referred to**	**Para 22**
2009 (1) SCALE 713	**referred to**	**Para 22**
2006 (13) SCALE 467	**referred to**	**Para 23**
(2007) 12 SCC 288	**referred to**	**Para 23**
(1983) 3 SCC 470	**referred to**	**Para 23**
(2001) 5 SC 714	**referred to**	**Para 24**
(1953), 105 C.C.C.172 (Ont.C.A.)	**referred to**	**Para 25**
(1981) 2 SCC 35	**referred to**	**Para 28**
1994 (3) SA 868 (A)	**referred to**	**Para 28**
438 U.S. at 604	**referred to**	**Para 29**
445 U.S. 263, 272 (1980)	**referred to**	**Para 29**
[1986] 1 S.C.R. 103	**referred to**	**Para 30**
[1990] 3 S.C.R. 1303	**referred to**	**Para 30**
(1994) 4 SCC 220	**referred to**	**Para 31**
(1998) 5 SCC 336	**referred to**	**Para 31**
(1996) 4 SCC 148	**referred to**	**Para 31**
128 S. Ct. 2641	**referred to**	**Para 31**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1478 of 2005.

From the Judgment Order dated 12.08.2005 passed by

A the High Court of judicature at Bombay in Criminal Appeal No. 754 of 2004.

Sushil Kumar Prabhash Kr. Yadav, V.K. Manga, C.P. Yadav, Aditya Kumar, Menakshi Kumar, Vinay Arora and
B Sudarshan Singh Rawat for the Appellant.

Ravindra K. Adure, Anjani Kumar Mishra, Gautam Godara (for V.N. Radhuparthy) and Rana Rami Singh for the Respondents.

C The Judgment of the Court was delivered by

S.B. SINHA, J.

INTRODUCTION

D 1. These two appeals arise out of a common judgment of conviction and sentence dated 12th August, 2005 passed by the High Court of Judicature at Bombay in Confirmation Case No.2 of 2004 and three connected appeals; one filed by the State and two by the accused, whereby and whereunder it
E confirmed and accepted the reference made to it in terms of Section 366 of the Code of Criminal Procedure, 1973 in the case of Santoshkumar Satishbhushan Bariyar (appellant in Criminal Case No.1478 of 2005), and upheld the conviction and sentence of life imprisonment in the case of the other accused
F (respondents in Criminal Appeal No.452 of 2006).

Whereas Criminal Appeal No.1478 of 2005 has been preferred by Santoshkumar Satishbhushan Bariyar (A1) (hereinafter referred to as "the appellant"), the State has filed Criminal Appeal No.452 of 2006 praying for enhancement of
G sentence for Sanjeev Kumar Mahendraprasad Roy (A2) and Sanotshkumar Shrijailal Roy (A3).

Leave in these matters was granted by this Court by orders dated 28th October, 2005 and 17th April, 2006
H respectively.

BACKGROUND FACTS

2. The facts in brief are that the accused were said to have hatched a conspiracy to abduct either one Abhijeet Kothari or one Kartikraj (the deceased) and to demand a ransom of Rs. 10 lacs from the victim's family. Kartikraj was the one who was eventually kidnapped. He was working as a junior clerk in Central Railways at Pune. Ramraj, his father (PW-49) was, at the relevant time, working as Manager in NABARD, Hyderabad. Santosh Ramraj (PW-50), the younger brother of the deceased was staying with his father.

Santosh Ramraj received a phone call on 8th August, 2001 at his residential telephone number disclosed by the caller, that his brother Kartikraj was in his custody. Ransom for a sum of Rs. 10 lacs was allegedly demanded. He was threatened that if the said amount was not paid within 24 hours then Kartikraj would be killed. The family of the deceased is said to have received some more threatening calls thereafter. Ramraj (PW-49), the father of the deceased also talked to the caller and asked him to give them time till the next day morning so that he could make arrangements for the money.

Ramraj (PW-49) thereafter talked to his friend Dattatraya Bhandange (PW-2) who, at the relevant time, was working as Manger in NABARD, Pune. Bhandange (PW-2) did his best to trace out Kartikraj but failed in his attempts.

A draft of the First Information Report was faxed by Ramraj to Bhandange's (PW-2)'s Pune office, requesting him to lodge the same at the concerned Police Station. A photograph of Kartikraj was also sent along.

Pursuant thereto, a First Information Report was lodged for offences punishable under Sections 363 and 387 of the Indian Penal Code. The investigation was handed over to the Crime Branch. Santoshraj (PW-2) informed the Investigating Officer, API Lotlikar on telephone that he had again received a phone

A call from the kidnappers, asking him to come to Bombay with Rs.10 lacs and a mobile phone. To this API Lotlikar asked him to inform the caller that instead of going himself, he would be sending a friend of his to Bombay with the money. He told him to tell to the caller that the friend's name was Sham Naidu and B that his mobile number was 9822******. Santoshraj acted accordingly. Kidnappers thereafter started calling API Lotlikar on his mobile phone thinking him to be Sham Naidu. Thus, keeping the kidnappers engaged in one conversation or the other, a trap was laid for them at Juhu on 12th August, 2001. C Pursuant thereto Kumar Gaurav (PW-1), the approver and Accused Nos.2 and 3, Sanjeevkumar Mahendraprasad Roy and Sanothskumar Shrijailal Roy were arrested. Accused No.1, Santosh Kumar Satishbhushan Bariyar, was arrested at Andheri Railway Station. Whereabouts of Kartikraj was, D however, not disclosed. The accused were thereafter produced before the Police Inspector, Dilip Bhaskar Shinde (PW-53) on 13th August, 2001 in his office at Pune and were subsequently arrested.

One of the accused Kumar Gaurav, who has since been E granted pardon, addressed a letter to the Commissioner of Police, Pune City on or about 29th October, 2001 stating that Kartikraj had been murdered by the accused on 8th August, 2001. He expressed his repentance. He also expressed his desire to make a confession. He was produced before F J.M.F.C., Pune at 2.00 p.m. on 31st October, 2001. He was produced again on 1st November, 2001 when he made a statement under Section 164 of the Code of Criminal Procedure, which was recorded.

G Upon completion of investigation, a chargesheet was filed whereupon cognizance of the offence was taken. The case was ultimately committed to the Court of Sessions by the learned Magistrate by an order dated 3rd January, 2002.

Before the learned Sessions Judge, Police Inspector Dilip H Bhaskar Shinde (PW-53) made an application purported to be

under Section 307 of the Code of Criminal Procedure on or about 21st March, 2002 praying for grant of pardon to Kumar Gaurav (PW-1). The learned Sessions Judge passed an order on 3rd April, 2002 granting pardon to him.

PROSECUTION CASE

3. As per the statement of the Kumar Gaurav (PW-1) on which the prosecution principally relies upon, he himself, Santosh Kumar Roy (A3) and Sanjeeb Kumar Roy (A2) were in search of better career prospects and all three of them decided to try their luck in the city of Bombay. Since they had no place to stay, Sanjeeb Kumar Roy (A2) contacted the appellant who was, at the relevant time, living in Pune. He was able to arrange a temporary accommodation for all of them at Kudale Patil Aangan Society in Pune.

As per Kumar Gaurav (PW-1), they hatched a plan to earn around 10 to 15 lacs by kidnapping two Santosh Kumar Bariyar's (A1's) friends by demanding ransom from their families. Appellant is said to be the master mind behind the entire plan; it was he who had floated the idea of kidnapping. According to him, he had two friends of his in mind, namely Abhijeet Kothari, whose father was a doctor, and Kartikraj, (the deceased) whose father was the Manager in NABARD. Both the families, as per the appellant, being rich, it was expected that they would be able to get a hefty sum of money as ransom upon kidnapping either of them. As per his plan if any difficulties arose they would kill the victim. He told them that they would cut the body into pieces and throw them at some place after putting them in different bags. He asked all three, whether they were ready for such a plan. All of them consented.

Once all of them agreed, Santosh Kumar Bariyar (A1) asked Kumar Gaurav (PW-1) to prepare a list of articles they would require for putting this plan of theirs into action. On the list were Hacksaw Blades and a sickle in case they had to cut

A the body. Also on it were ropes for tying up the victim; Polythene bags for putting in pieces of the dead body; rexin bags for putting in the polythene bags containing the pieces of the dead body; Sim cards for using mobile phones to contact the family of the victim and lastly Dettol to be used as a deodorant.

B

The day thereafter Santosh Kumar Bariyar (A1) also showed them the place they would be able to dispose of the body in case any need arose therefor. On the same day, in the evening, all the accused shifted to Amarpali Society which was provided to them by an agent of the appellant. It was at the said C place that they decided to put their plan into action. They spent the rest of the day purchasing the items on the list they had prepared the night before, requisite amount wherefor was provided by the appellant.

D Thereafter on 6th August, the appellant tried to contact both Abhijeet Kothari and Kartikraj. He could not get in touch with Abhijeet Kothari, but he was able to procure the contact number of the deceased. He assured all three of them that by the next day he would be able to bring Kartikraj to the flat. When asked E by others, how he could be so sure, he explained that he had promised him a party in connection with his marriage and, according to him, Kartikraj would never refuse, if he is invited to a party.

F 4. Next day, i.e., on the 7th August, Santosh Kumar Bariyar (A1) contacted Kartikraj (the deceased) and convinced him to come to his place. In the night he brought Kartikraj to his Apartment. Kartikraj, believing that he had been invited to celebrate his friends' marriage watched movies with them till almost midnight. Around midnight the appellant gave a G purported signal to Sanjeeb Kumar Roy (A2) to execute the plan. Appellant then went behind the deceased and placed a sickle on his neck. There after both the hands of the deceased were tied with a rope and his mouth with a napkin. The deceased was then dragged to the toilet where he was

H

assaulted with kicks and blows. All this went on for two hours. Then the accused called up the family of the deceased and asked them to pay a ransom of Rs. 10 lacs if they wanted to see Kartikraj alive again.

However the life of the deceased could have been saved had the landlord of the apartment who had come to check up on his flat the next morning suspected anything foul in the house, but unfortunately he did not. Apprehending that they might be caught, Santosh Kumar Bariyar (A1) and Kumar Gaurav (PW1) decided that it would no longer be safe to keep the deceased alive and that it was in their best interest to kill him. To end his life the appellant and Sanjeeb Kumar Roy (A2) tied a rope around his neck and pulled at it from both ends. The deceased tried to struggle but his movement stopped after sometime. His dead body was then dragged to the toilet. Santosh Kumar Bariyar (A1) then separated the head of the deceased with the hacksaw blade and a sickle. He then kept the head in a polythene bag. Thereafter he separated both the hands of the deceased. The hands too were kept in polythene bags. He then asked Sanjeeb Kumar Roy (A2) to cut the legs of the deceased, which he did. Kumar Gaurav (PW-1) and Sanjeeb Kumar Roy (A2) packed the legs into separate bags.

Approximately two hours were spent in cutting the body of the deceased. They then disposed of these bags containing the body parts of the deceased at different places. They also disposed of the belongings of the deceased in a similar fashion. They thereafter also cleared off all the items from the flat.

The next day they again called up the family of the deceased demanding ransom from them even though they had already killed their victim. They were assured by the family that they would get the ransom money but needed some more time to arrange it. It was this greed of theirs which ultimately lead to their arrest.

A **JUDGMENT OF THE TRIAL JUDGE**

5. The prosecution examined 54 witnesses while two witnesses were examined by the defence. Relying primarily on the said evidence, the judgment of conviction and sentence was recorded by the learned Sessions Judge. The learned Sessions Judge convicted accused No.1 of the offences punishable under Section 302 read with Section 120-B as also under Sections 364-A read with 120-B of the Indian Penal Code. He was sentenced to death. Accused Nos. 2 and 3 were convicted of the offences punishable under Section 302 read with Section 120-B as also under Sections 364-A read with 120-B of the Indian Penal Code. They were sentenced to suffer rigorous imprisonment for life. Besides, all the accused were found guilty of the offences under Sections 387 read with 120-B ; 201 read with 120-B of the Indian Penal Code and Sections 4 and 25 of the Indian Arms Act and were sentenced for various terms accordingly.

CONTENTIONS RAISED

6. Mr. Sushil Kumar, learned senior counsel appearing on behalf of the appellant in Criminal Appeal No.1478 of 2005, would submit :-

(i) The courts below committed a serious illegality in recording the judgment and conviction primarily on the basis of the evidence of PW-1, Kumar Gaurav, despite the fact that he had retracted his confession, as would appear from his letter dated 6th November, 2001 (Article B).

(ii) The evidence of learned Magistrate (PW-54) could not have been relied upon by the learned Sessions Judge inasmuch there were enough materials to show that when the charge sheet was filed on 9th November, 2001 none of the accused was produced, during the period 9.11.2001 and

1.1.2002. Since PW-1 was not produced in Court there was no occasion for him to inform the Magistrate that he was not the author of Article B. A

(iii) The learned Sessions Judge could not have exercised its jurisdiction under Section 307 of the Code of Criminal Procedure having regard to the fact that the requirements as contained in sub-section (4) of Section 306 of the Code of Criminal Procedure had not been complied with. B

(iv) As grant of pardon to Kumar Gaurav (PW-1) was illegal, his evidence could not have been taken into consideration as a witness examined on behalf of the prosecution and the same should have been considered to be a statement made by the accused against his other co-accused only as envisaged under Section 30 of the Indian Evidence Act. C D

(v) As the prosecution case hinges on the statement of Kumar Gaurav (PW-1) and the circumstantial evidence, whereupon the courts below have relied upon being not consistent with guilt of the accused; the appellant is entitled to acquittal. E

(vi) In any view of the matter the quality of the evidence adduced by the prosecution is such for which the death penalty could not be imposed, particularly in view of the fact that the trial court had erroneously held that there was no mitigating circumstances therefor. F

The learned counsel for the State, however, supported the impugned judgment as regards the death penalty on the appellant. In support of Criminal Appeal No. 452 of 2006 relating to Sanjeevkumar Mahendraprasad Roy (A2) and Sanothskumar Shrijailal Roy (A3) it was argued that the sentence awarded to them was shockingly inadequate and that G H

A the same be enhanced to penalty of death, since the crime they had committed falls within the purview of 'rarest of the rare cases'.

It was urged that Sanjeeb Kumar Roy (A2) and Santosh Kumar Roy (A3), being equal party to the crime, having had played similar role in the commission thereof, they also deserved award of death penalty. It was furthermore argued that there was not a single mitigating circumstance in favour of the accused to award to them the lesser penalty of life imprisonment.

C

QUESTIONS INVOLVED

7. Two principal questions, therefore, which arise for our consideration are :-

D

(A) Whether the learned Sessions Judge acted illegally in granting pardon to Kumar Gaurav (PW-1); and

(B) Whether the case in hand can be said to be a 'rarest of rare cases' so as to enable the courts E below to award the death penalty.

LEGALITY OF THE ORDER GRANTING PARDON

8. We shall first deal with the order of the learned Sessions Judge granting pardon to Kumar Gaurav (PW 1).

F

Sections 306 and 307 of the Code of Criminal Procedure, 1973, which are relevant for our purpose, read as under:

"306. Tender of pardon to accomplice:- (1) With a view G to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this Section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into, or trying the H

offence, at any stage of the inquiry or trial, may tender pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This Section applies to—

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing

(b) whether the tender was or was not accepted by the person to whom it was made; and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)-

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-

A section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case-

(a) commit it for trial-

B (i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate ;

(ii) to a Court of Special Judge appointed under the C Criminal Law Amendment Act, 1952, (46 of 1952), if the offence is triable exclusively by that Court ;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

D *307. Power to direct tender of pardon :-* At any time after commitment of a case but before judgement is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, E or privy to, any such offence, tender a pardon on the same condition to such person."

Section 306, thus, empowers the Chief Judicial Magistrate or a Metropolitan Magistrate or a Magistrate of the First class F inquiring into or trying the offence to tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. The said provision indisputably applies to the cases triable exclusively G by a Court of Sessions.

The Magistrate tendering pardon is required to record his reasons for so doing and to further record whether the tender was or was not accepted by the person to whom it was made. H Sub-section (4) of Section 306 of the Code of Criminal

Procedure mandates that such a person accepting tender of pardon must be examined as a witness in the trial. Sub-section (5) of Section 306 of the Code of Criminal Procedure provides that where a person has accepted tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall commit it for trial, without making any further inquiry in the case.

Whether the terms "on the same condition" occurring in Section 307 of the Code of Criminal Procedure refer to sub-section (4) of Section 306 thereof and as in the instant case apart from the purported statement made by Kumar Gaurav (PW-1) under Section 164 of the Code of Criminal Procedure, which had been retracted, as no other statement had been taken from him by the learned Magistrate, the order granting pardon in his favour was illegal, is the question.

In our opinion, the submission of Mr. Sushil Kumar does not merit acceptance.

9. Sub-section (4) of Section 306 is procedural in nature. It is necessary to be followed only by a Magistrate as he would not have any jurisdiction to try the case himself. The learned Sessions Judge before whom the case is committed for trial must be informed as to on what basis pardon had been tendered.

Section 307 does not contain any such condition. The power of the learned Sessions Judge is independent of the provisions contained in Section 306 thereof. The condition mentioned in Section 307 refers to the condition laid down in sub-section (1) of Section 306, namely that the person in whose favour the pardon has been tendered, will make a full and true disclosure of the whole of the circumstances within his knowledge. The power of a Sessions Court is not hedged with any other condition.

A The order of learned Sessions Judge dated 3rd April, 2002 shows that the learned Judge not only applied his mind on the application (Ext. P-7) for grant of pardon filed by the Investigating Officer but also examined the appellant by putting relevant questions to him.

B The learned Sessions Judge, therefore, did not pass the order dated 3rd April, 2002 only on the basis of the purported confessional statement made by Kumar Gaurav (PW-1) on 1st November, 2001. It was not done mechanically. If in law it was not necessary for the learned Magistrate to forward a copy of C the confessional statement made by Kumar Gaurav (PW-1) under Section 164 of the Code of Criminal Procedure or to record a separate statement of the said witness for the purpose of complying with the provisions of Section 306 of the Code of Criminal Procedure, the question as to whether he had retracted D from his confession or not would not be of much relevance as regards exercise of power by the learned Sessions Judge under Section 307 of the Code.

We may, however, notice that the learned Magistrate in his E evidence categorically opined that Kumar Gaurav (PW-1) had told him that he had not signed the said application retracting his confession. It may be that the said fact was not borne out from the judicial records, which were sent to the learned Sessions Judge with the order of committal, but then we have F no reason to disbelieve the statement of the learned Magistrate.

Strong reliance has been placed by the learned senior counsel upon a judgment of this Court in *Rampal Pithwa Rahidas and Others v. State of Maharashtra* [1994 Supp (2) G SCC 73] and in particular the following passage:

> "...We find ourselves unable to place any reliance on his untrustworthy and unreliable evidence and in that view of the matter, we refrain even from expressing any opinion H about the effect of the alleged non-compliance with the

provisions of Section 306(4) IPC read with Section 307 IPC, as admittedly after the grant of pardon by the order dated 24.4.1987, no statement of Ramcharan approver was recorded till he appeared at the trial as PW 49. It is only after the grant of pardon that the status of an accused is changed into that of a witness and the law enjoins upon the Courts to record the statement of the approver immediately after pardon is granted to him so that he may consider himself bound by that statement and failure to do so at the trial would render him liable for prosecution. That exercise was not performed in this case."

It was contended that it was obligatory on the part of the learned Sessions Judge to comply with the requirements of Sub-section (4) of Section 306 of the Code of Criminal Procedure. We, with respect, could not find that any such proposition of law was laid down in the said judgment as such.

A bare perusal of the said decision clearly goes to show that the evidence of approver was found to be wholly untrustworthy and unreliable. In that situation, the court refrained itself from expressing any opinion about the effect of the alleged non-compliance with the provisions of Section 306(4) of the Code of Criminal Procedure read with Section 307 thereof.

In the case before us the pardon granted by the learned Sessions Judge was legal. Whereas the pardon was granted on 3.04.2002, PW-1 was examined on 29.07.2002. Thus, his evidence was recorded only after grant of pardon.

In *Narayan Chetanram Chaudhary and Another v. State of Maharashtra* [(2000) 8 SCC 457], a Division Bench of this Court, in an almost similar situation, viz., where the confessional statement was kept in a sealed cover and wherein also the learned Sessions Judge granted pardon, declined to hold that only because some delay had occurred in granting pardon, no reliance could be placed thereupon. It was furthermore opined that what was mandatory was the examination of the

A accomplice. Non-examination of the approver at the committal stage by the committing Magistrate, if rectified later, would not lead to any prejudice to the accused, stating:

> "27. There is no legal obligation on the Trial Court or a right in favour of the accused to insist for the compliance with the requirement of Section 306(4) of the Cr.PC. Section 307 provides a complete procedure for recording the statement of an accomplice subject only to compliance of conditions specified in Sub-section (1) of Section 306. The law mandates the satisfaction of the Court granting pardon, that the accused would make a full and true disclosure of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. It is not necessary to comply with the requirement of Section 306(4) when the pardon is tendered by the Trial Court. The Trial Court, in this case has taken all precautions in complying with the provisions of the Section 306(1) before tendering pardon to accused Raju, who later appeared as PW. 2. We do not find any violation of law or illegality in the procedure for tendering the pardon and recording the statement of PW.2."

If it is to be held that in each and every case pardon can only be granted at the initial stage, the power conferred upon the Sessions Judge to grant under Section 307 of the Code of Criminal Procedure for all intent and purport shall become otiose.

The order of the learned judge granting pardon to the Approver, Kumar Gaurav is, therefore, legal and valid.

LAW ON DEATH PENALTY

10. A Constitution Bench of this Court in *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684] repelled the challenge of constitutionality to death penalty by laying down the

framework law on this point. *Bachan Singh* (supra) serves as a watershed moment in the history of death penalty jurisprudence in India as it severed Indian judiciary's normative ambivalence on the subject.

It was pronounced after the new legislative policy (in form of section 354(3) of the Code of Criminal Procedure, 1973) came into force. The impact of this legislative change was variously interpreted by this court, and this disparity in interpretation triggered *Bachan Singh* (supra). One such case, which had laid down an interpretation of section 354(3) was Rajendra *Prasad v. State of Uttar Pradesh* [(1979) 3 SCC 646].

Bachan Singh court noted that death penalty is acknowledged in the constitution. Also the new sentencing procedures were held to be to be in the nature of safeguards and as a guidance sentencing. The sentencing procedure was taken to be orienting the death punishment towards application in very selective situations. On the aforementioned reasoning, the court upheld death punishment, substantively and procedurally.

There are three broad values emerging from *Bachan Singh* (supra):

1. INDIVIDUALIZED SENTENCING

11. For an effective compliance of sentencing procedure under section 354(3) and section 235(2) Cr.P.C, sufficient discretion is a pre-condition. Strict channeling of discretion would also go against the founding principles of sentencing as it will prevent the sentencing court to identify and weigh various factors relating to the crime and the criminal such as culpability, impact on the society, gravity of offence, motive behind the crime etc. *Bachan Singh* (supra) also holds the same view. It was held in *Bachan Singh* (supra) that:

> "173. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take

A account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty.

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174. Fourthly, standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that is encompassed by the broad contours delineated in Section 354(3), the court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do."

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D The court while discussing Furman v. Georgia, 408 U.S. 238 (1972) in this regard held the following:

"192. It appears to us that in *Gregg v. Georgia* and the companion cases, the Supreme Court of U.S.A. was obliged to read down the requirements of Furman and to accept these broadly worded, loose-ended and not-all-inclusive 'standards' because in the area of sentencing discretion, if it was to retain its judicial character, exhaustive standardisation or perfect regulation was neither feasible nor desirable."

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In this context, *Saibanna v. State of Karnataka* [(2005) 4 SCC 165] makes an interesting reading. The accused therein was a life convict. While on parole, he committed murder of his wife and daughter. This Court sentenced him to death on a G reasoning, which effectively made death punishment mandatory for the category of offenders serving life sentence, opining:

"....A prisoner sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence is commuted or remitted and that such sentence could not

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be equated with any fixed term. (See *Gopal Vinayak Godse vs. State of Maharashtra* [(1961) 3 SCR 440]. If that be so, there could be no imposition of a second life term on the appellant before us as it would be a meaningless exercise.

18. In the teeth of Section 427(2) of the Code of Criminal Procedure, 1973 it is doubtful whether a person already undergoing sentence of imprisonment for life can be visited with another term of imprisonment for life to run consecutively with the previous one.

Mandatory death punishment (prescribed under section 303 of Indian Penal Code) was stuck down as unconstitutional by this court in *Mithu v. State of Punjab* [AIR 1983 SC 473]. This court observed:

"...If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. The ratio of *Bachan Singh*, therefore, is that, death sentence is Constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life."

Justice O. Chinnappa Reddy, J. in his concurring opinion agreed with the majority opinion and observed:

"25. Judged in the light shed by Maneka Gandhi and *Bachan Singh*, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales

A of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable [sic irresuscitable] is the sentence of death that no law which provides for it without involvement of the judicial mind can B be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as C unconstitutional."

{See also *Reyes v. R.* [(2002) UKPC 11 : 12 BHRC 219], *Hughes, R. v. (Saint Lucia)* [(2002) UKPC 12], *Fox v. The Queen* (2002) 2 AC 284, *Bowe v. The Queen* (2006) 1 WLR 1623 and *Coard & Ors. v. The Attorney General (Grenada),* D (2007) UKPC 7}

Saibanna (supra) to that extent is inconsistent with *Mithu* (supra) and *Bachan Singh* (supra).

E **2. THRESHOLD OF RAREST OF RARE**

2(A). Sentencing Procedure

12. The analytical tangle relating to sentencing procedure deserves some attention here. Sentencing procedure deserves F an articulate and judicial administration. In this regard, all courts are equally responsible. Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty. The selection of penalty must not require a judge to reflect on his/her personal G perception of crime. In *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karantaka* [2008 (10) SCALE 669], the court notes that the awarding of sentence of death "depends a good deal on the personal predilection of the judges constituting the bench." This is a serious admission on the part of this court. In so far as this aspect is considered, there H

is inconsistency in how *Bachan Singh* (supra) has been implemented, as *Bachan Singh* (supra) mandated principled sentencing and not judge centric sentencing.

There are two sides of the debate. It is accepted that rarest of rare case is to be determined in the facts and circumstance of a given case and there is no hard and fast rule for that purpose. There are no strict guidelines. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of *rarest of rare* dictum. Therefore, it is to be read with Article 21 and 14.

Pre-sentence Hearing and "Special Reasons"

13. Under section 235(2) and 354 (3) of the Criminal Procedure Code, there is a mandate as to a full fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance to both the provisions. A scrupulous compliance of both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage. Please see *Santa Singh v. State of Punjab,* [AIR 1956 SC 526], *Malkiat Singh and Ors. v. State of Punjab,* [(1991) 4 SCC 341], *Allaudin Mian v. State of Bihar,* [AIR 1989 SC 1456], *Muniappan v. State of Tamil Nadu,* [(1981) 3 SCC 11], *Jumman Khan v. State of U.P.,* [(1991)1 SCC 752], *Anshad and Ors. v. State of Karnataka,* [(1994) 4 SCC 381] on this.

Nature of Information to be Collated at Pre-sentence Hearing

14. At this stage, *Bachan Singh* (supra) informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at his stage.

A Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on B circumstantial evidence or child witness plays an important role in the sentencing analysis.

But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also C raised in the 48th report of the Law Commission. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this D context, guideline no. 4 in the list of Mitigating Circumstances as borne out by *Bachan Singh* (supra) is relevant. The court held:

> (4) The probability that the accused can be reformed and E rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

In fine, *Bachan Singh* (supra) mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing. F

2(B) Nature of Content of *Rarest of rare* Dictum

15. *Rarest of rare* dictum breathes life in "special reasons" under section 354(3). In this context, *Bachan Singh* (supra) laid G down a fundamental threshold in the following terms:

> "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 H unquestionably foreclosed."

An analytical reading of this formulation would reveal it to be an authoritative negative precept. *"Rarest of rare cases"* is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in form of "when the alternative option is unquestionably foreclosed". Thus, in essence, *rarest of rare* dictum imposes a wide-ranging embargo on award of death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification enumerated below:

1. that the case belongs to the rarest of rare category
2. and the alternative option of life imprisonment will just not suffice in the facts of the case

Rarest of rare dictum serves as a guideline in enforcing section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the *rarest of rare* dictum places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the *rarest of rare* dictum. The background analysis leading to the conclusion that the case belongs to *rarest of rare* category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception.

A conclusion as to the *rarest of rare* aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted:

> "The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case *relating to the crime as well as the criminal"*

A Curiously in *Ravji alias Ram Chandra v. State of Rajasthan,* [(1996) 2 SCC 175] this court held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, stating:

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> "...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. 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
> C 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
> D 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"..."

E We are not oblivious that this case has been followed in at least 6 decisions of this court in which death punishment has been awarded in last 9 years, but, in our opinion, it was rendered per incuriam. *Bachan Singh* (supra) specifically noted the following on this point:

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> "...The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration
> G "principally" or *merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal"*

Shivaji @ Dadya Shankar Alhat v. The State of
H *Maharashtra,* [AIR 2009 SC 56], *Mohan Anna Chavan v.*

State of Maharashtra [(2008) 11 SCC 113], *Bantu v. The State of U.P.*, [(2008) 11 SCC 113], *Surja Ram v. State of Rajasthan*, [(1996) 6 SCC 271], *Dayanidhi Bisoi v. State of Orissa*, [(2003)9 SCC 310], *State of U.P. v. Sattan @ Satyendra and Ors.*, [2009 (3) SCALE 394] are the decisions where *Ravji Rao* (supra) has been followed. It does not appear that this court has considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that *Ravji Rao* (supra) has not only been considered but also relied upon as authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent.

2(B) Alternative Option is foreclosed

16. Another aspect of *rarest of rare* doctrine which needs serious consideration is interpretation of latter part of the dictum – "that ought not to be done save in the *rarest of rare* cases when the *alternative option is unquestionably foreclosed.*" *Bachan Singh* (supra) suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose death punishment, as will be discussed in detail a little later, qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability.

Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution – all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end anything to do with the life. This is the big difference between two punishments. Before imposing death penalty, therefore, it is imperative to consider the same.

A *Rarest of rare* dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason B in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be *completely futile*, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the *rarest of rare* doctrine, the court will have to provide clear C evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigor when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but *Bachan Singh* D (supra) sets the bar very high by introduction of *Rarest of rare* doctrine.

In *Panchhi v. State of U.P.*, [(1998) 7 SCC 177], this Court also elucidates on "when the alternative option is foreclosed" benchmark in the following terms:

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> 16. When the Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in *Bachan Singh v. State of Punjab* this Court took particular care to say that death sentence shall not normally F be awarded for the offence of murder and that it must be confined to the *rarest of rare* cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid freaks wherein the lesser sentence would be, by any account, wholly inadequate. In *Machhi Singh v. State* G *of Punjab* a three-Judge Bench of this Court while following the ratio in *Bachan Singh* case laid down certain guidelines among which the following is relevant in the present case: (SCC p. 489, para 38)

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factors which may not have been recorded.

We must also point out, in this context, that there is no consensus in the court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from *Bachan Singh* (supra) in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigor and fairness are given primacy over sentiments and emotions.

In *Panchhi* (supra), the court downplayed the heinous nature of crime and relied on mitigating circumstances in the final opinion. The court held:

> "20. We have extracted the above reasons of the two courts only to point out that it is the savagery or brutal manner in which the killers perpetrated the acts on the victims including one little child which had persuaded the two courts to choose death sentence for the four persons. No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the *"rarest of rare cases"* as indicated in *Bachan Singh* case. In a way, every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."

In *Vashram Narshibhai Rajpara v. State of Gujarat* [(2002) 9 SCC 168], this court relied on the dictum of Panchhi

A and further explained the approach:

> "....As to what category a particular case would fall depends, invariably on varying facts of each case and no absolute rule for invariable application or yardstick as a ready reckoner can be formulated. In *Panchhi v. State of U.P.* it has been observed that the brutality of the manner in which the murder was perpetrated may not be the sole ground for judging whether the case is one of the *"rarest of rare cases"*, as indicated in *Bachan Singh v. State of Punjab* and that every murder being *per se* brutal, the distinguishing factors should really be the mitigating or aggravating features surrounding the murder. The intensity of bitterness, which prevailed, and the escalation of simmering thoughts into a thirst for revenge or retaliation were held to be also a relevant factor."

This court also gave primacy to mitigating circumstances in the final analysis:

> "10. Considering the facts of the case presented before us, it is on evidence that despite his economic condition and earnest attempt to purchase a house for the family after raising loans, the wife and daughters were stated to be not pleased and were engaging in quarrels constantly with the appellant. Though they were all living together the continuous harassment and constant nagging could have very well affected his mental balance and such sustained provocation could have reached a boiling point resulting in the dastardly act. As noticed even by the High Court the appellant though hailing from a poor family had no criminal background and it could not be reasonably postulated that he will not get rehabilitated or that he would be a menace to the society. The boy of tender age would also once for all be deprived of the parental protection. Keeping in view all these aspects, in our view, it could not be said that the imposition of life imprisonment would not adequately meet the requirements of the case or that only an imposition of

"(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."

In *Bachan Singh* (supra), it was stated:

"206. Dr Chitale has suggested these mitigating factors:

"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 the 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.

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."

2(C) Role and Responsibility of Courts

17. *Bachan Singh* (supra) while enunciating *rarest of rare* doctrine, did not deal with the role and responsibility of sentencing court and the appellate court separately. For that matter, this court did not specify any review standards for High Court and the Supreme Court. In that event, all courts, be it trial court, High Court or this court, are duty bound to ensure that the ratio laid down therein is scrupulously followed. Same standard of rigor and fairness are to be followed by the courts. If anything, inverse pyramid of responsibility is applicable in death penalty cases.

In *State of Maharashtra v. Sindhi,* [(1975) 1 SCC 647] this Court reiterated, with emphasis, that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge.

2(D) Sentencing Justifications in Heinous Crimes

18. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other

the extreme punishment alone would do real or effective justice. Consequently, we direct the modification of the sentence of death into one of rigorous imprisonment for life, by partly allowing the appeal to that extent. In other respects the appeal shall stand dismissed. The appellant shall undergo the remaining period of sentence as above." A B

In *Om Prakash v. State of Haryana,* [(1999) 3 SCC 19], K.T. Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the *Bachan Singh* (supra) dictum of balancing the "mitigating and aggravating circumstances". The court was of the view that the sentencing court is bound by *Bachan Singh* (supra) and not in specific terms to the incoherent and fluid responses of society: C

7. It is true that court must respond to the cry of the society and to settle what would be a deterrent punishment for an abominable crime. It is equally true that a large number of criminals go unpunished thereby increasing criminals in the society and law losing its deterrent effect. It is also a truism as observed in the case of *State of M.P. v. Shyamsunder Trivedi* [SCC at p.273] that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice delivery system a suspect; in the ultimate analysis, the society suffers and a criminal gets encouraged. Sometimes it is stated that only rights of the criminals are kept in mind, the victims are forgotten. Despite this it should be kept in mind that while imposing the *rarest of rare* punishment, i.e., death penalty, the court must balance the mitigating and aggravating circumstances of the crime and it would depend upon particular and peculiar facts and circumstances of each case." D E F G

In *Dharmendrasinh v. State of Gujarat,* [(2002) 4 SCC H

679], the court acknowledged that the crime committed was "no doubt heinous and unpardonable" and that two innocent children lost their lives for no fault of their, but the court chose to give force to mitigating circumstances in the following terms:

> "The offence was obviously not committed for lust of power or otherwise or with a view to grab any property nor in pursuance of any organized criminal or anti-social activity. Chances of repetition of such criminal acts at his hands making the society further vulnerable are also not apparent. He had no previous criminal record."

The court also stated the law in the following terms:

> "20. Every murder is a heinous crime. Apart from personal implications, it is also a crime against the society but in every case of murder death penalty is not to be awarded. Under the present legal position, imprisonment for life is the normal rule for punishing crime of murder and sentence of death, as held in different cases referred to above, would be awarded only in the *rarest of rare* cases. A number of factors are to be taken into account namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying any kind of lust, greed or in pursuance of anti-social activity or by way of organized crime, drug trafficking or the like. Chances of inflicting the society with a similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future and ultimately as held in several cases, mitigating and aggravating circumstances of each case have to be considered and a balance has to be struck. The learned State counsel as indicated earlier has already indicated the aggravating circumstances by reason of which it has been vehemently urged that sentence of death deserves to be confirmed."

Whether primacy should be accorded to aggravating circumstances or mitigating circumstances is not the question. Court is duty bound by virtue of *Bachan Singh* (supra) to equally consider both and then to arrive at a conclusion as to respective weights to be accorded. We are also bound by the spirit of Article 14 and Article 21 which forces us to adopt a principled approach to sentencing. This overarching policy flowing from *Bachan Singh* (supra) applies to heinous crimes as much as it applies to relatively less brutal murders. The court in this regard held:

> "Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. 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."

2(E). Public Opinion in Capital Sentencing

19. It is also to be pointed out that public opinion is difficult to fit in the *rarest of rare* matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of *Bachan Singh* (supra).

Rarest of rare policy and legislative policy on death punishment may not be essentially tuned to public opinion. Even

A if presume that the general populace favours a liberal DP policy, although there is no evidence to this effect, we can not take note of it. We are governed by the dictum of *Bachan Singh* (supra) according to which life imprisonment is the rule and death punishment is an exception. We are also governed B by the Constitution of India. Article 14 and 21 are constitutional safeguards and define the framework for state in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked C by the state in its dealings with people in various capacities, including as a convict. The position is, if the state is precariously placed to administer a policy within the confines of Article 21 and 14, it should be applied most sparingly. This view flows from *Bachan Singh* (supra) and it this light, we are afraid that D Constitution does not permit us to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument.

The fact that we are here dealing with safeguards entrenched in the Constitution should materially change the way E we look for reasons while awarding the death punishment. The arguments which may be relevant for sentencing with respect to various other punishments may cease to apply in light of the constitutional safeguards which come into operation when the question relates to extinguishment of life. If there are two F considerations, the one which has a constitutional origin shall be favoured.

An inherent problem with consideration of public opinion is its inarticulate state. *Bachan Singh* (supra) noted that judges G are ill-equipped to capture public opinion:

> "125. Incidentally, the rejection by the people of the approach adopted by the two learned Judges in Furman, furnishes proof of the fact that judicial opinion does not necessarily reflect the moral attitudes of the people. At the H same time, it is a reminder that Judges should not take

upon themselves the responsibility of becoming oracles or spokesmen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.

..."The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits." As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted. judicial "made-to-order* standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair-play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting; down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may very from Judge to Judge.." '

Justice Powell's dissent in *Furman* (supra) also bears repetition in this regard:

"But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery not the core of the judicial

A process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function."

The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent we play a countermajoritarian role. And this part of debate is not only relevant in the annals of judicial review, but also to criminal jurisprudence. Justice Jackson in *West Virginia State Board of Education v. Barnette,* [319 U.S. 624 (1943)] also opined on similar lines:

> "The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Public Opinion may also run counter to the Rule of law and constitutionalism. Bhagalpur Blinding case or the recent spate of attacks on right to trial of the accused in the Bombay Blast Case are recent examples. We are also not oblivious to the danger of capital sentencing becoming a spectacle in media. If media trial is a possibility, sentencing by media can not be ruled out. Andrew Ashworth, a leading academic in the field of sentencing, who has been at the center of sentencing reforms in U.K., educates us of the problems in factoring in public opinion in the sentencing. He (with Michael Hough), observes in an article, *Sentencing and the Climate of Opinion* (1996, Criminal Law Review):

> "The views of sentencing held by people outside the criminal justice system— "the general public"—will always be important even if they should not be determinative in

court. Unfortunately, the concept of public opinion in relation to sentencing practices is often employed in a superficial or simplistic way. In this short article we have identified two major difficulties with the use of the concept. First, members of the public have insufficient knowledge of actual sentencing practices. Second, there is a significant but much-neglected distinction between people's sweeping impressions of sentencing and their views in relation to particular cases of which they know the facts. When it is proclaimed that the public think the courts are too lenient, both these difficulties are usually suppressed.

To construct sentencing policy on this flawed and partial notion of public opinion is irresponsible. Certainly, the argument is hard to resist that public confidence in the law must be maintained. It is also hard to resist the proposition that public confidence in sentencing is low and probably falling. However, since the causes of this lie not in sentencing practice but in misinformation and misunderstanding, and (arguably) in factors only distantly related to criminal justice, ratcheting up the sentencing tariff is hardly a rational way of regaining public confidence.

This is not to deny that there is political capital to be made, at least in the short term, by espousing sentencing policies which have the trappings of tough, decisive action. However, the underlying source of public cynicism will not have been addressed; and once politicians embark on this route, they may be committing themselves long-term to a treadmill of toughness, "decisiveness", and high public expenditure. The political costs of withdrawing from tough policies, once embarked on, may be too high for politicians of any hue to contemplate. The United States serves as an example.

If the source of falling public confidence in sentencing lies in lack of knowledge and understanding, the obvious corrective policy is to explain and to educate, rather than

A to adapt sentencing policy to fit a flawed conception of public opinion. But who should be the target of such explanation and education? We have serious doubts whether attempts to reach the ordinary citizen directly will have any impact at all. On the other hand, we think it B feasible, within limits, to educate those who shape public opinion. Newspaper and television journalists, for example, responded well to the initiatives in the 1980s intended to curb the reporting of crime in ways that needlessly fuelled fear of crime. A similar initiative should now be mounted C in relation to sentencing."

Capital sentencing is one such field where the safeguards continuously take strength from the Constitution, and on that end we are of the view that public opinion does not have any role to play. In fact, the case where there is overwhelming public D opinion favouring death penalty would be an acid test of the constitutional propriety of capital sentencing process.

3. PRINCIPLED SENTENCING

E *3(A). Mandate of Bachan Singh (supra) on Value of Precedents*

20. This court laid down *rarest of rare* dictum therein and thereby endorsed a broad sentencing threshold. It has been interpreted by courts in various ways.

F

It is important to note here that principled application of *rarest of rare* dictum does not come in the way of individualized sentencing. With necessary room for sentencing, consistency has to be achieved in the manner in which *rarest of rare* dictum G has to be applied by courts.

Bachan Singh (supra) expressly barred one time enunciation of minute guidelines through a judicial verdict. The court held that only executive is competent to bring in detailed guidelines to regulate discretion. On this count judicial restraint

H

was advocated. But at the same time, it actively relied on judicial precedent in disciplining sentencing discretion to repel the argument of arbitrariness and Article 14 challenge. An embargo on introduction of judicial guidelines was put therein but organic evolution of set of principles on sentencing through judicial pronouncements was not ruled out. This is how precedent aids development of law in any branch of law and capital sentencing can not be an exception to this.

Sentencing discretion is also a kind of discretion and is shall be exercised judicially in light of the precedents.

It observes that the superior courts must correct wrong application of section 302. It is very obvious that appellate courts can not discharge review function without taking aid of established principles. In *Jagmohan Singh v. State of U.P.*, [(1973) 1 SCC 20], the Court's observation in this context was subsequently followed noting:

> "...The 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. The discretion in the matter of sentence is, as already pointed out, liable to be corrected by superior courts. Laying down of standards to the limited extent possible as was done in the Model Judicial Code would not serve the purpose. *The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguards for the accused.*"

Bachan Singh (supra) elaborated on "well recognized principles" in the following terms:

"197. In *Jagmohan,* this Court had held that this sentencing discretion is to be exercised judicially on well recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. *By "well recognised principles" the*

A *court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.* The legislative changes since *Jagmohan* — as we have discussed already — do not have the effect of abrogating or nullifying those B principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability; (2) In making choice of the C sentence, in addition to the circumstances, of the offence, due regard must be paid to the circumstances of the offender, also."

It continuing in the same vein held:

"Cognizant of the past experience of the administration of D death penalty in India, Parliament; in its wisdom, thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. *The* E *exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in* F *Section 354(3).*"

3(B). Cases Where Death Penalty Was Imposed/Affirmed

21. In *Ram Singh v. Sonia and Ors.* [2007 (3) SCALE 106] the accused couple had, in a most diabolic manner, ended G the lives of their family members, which included the step brother of the wife, his children and even her own father, mother and sister, all with the motive of inheriting the family property. This Court noting the cold blooded and pre meditated approach in murdering the family while they were all sleeping considered it H as a fit case for the imposition of death penalty on the couple.

In *Prajeet Kumar Singh v. State of Bihar* [2008 (4) SCALE 442] the accused had murdered the children of the family where he had been staying as a tenant for the past four years, while they were sleeping. He thereafter proceeded to attack the adult members of the family who on hearing the screams of their children had come to their rescue. The court noting the brutality of manner of the attack considered it a fit case for the imposition of death sentence.

In *Mohan Anna Chavan* (supra) the court upheld the death sentence imposed on a serial rapist. The accused had already been convicted twice for the raping a minor girl, but on the first occasion he was awarded a sentence only of two years and on the second, sentence of ten years rigorous imprisonment only. When the accused was convicted of raping and murdering two minor girls again, the court refused to interfere with the death sentence awarded bv the lower courts.

In *Bantu v. State of Uttar Pradesh* [2008 (10) SCALE 336] the accused had, after raping a six year old girl, tried to conceal his crime by inserting a stick in her vagina which ultimately resulted in causing her death. The court noted that the depraved acts of the accused only deserved a death sentence.

In *Shivaji @ Dady Shankar Alhat* (supra) the accused had raped and murdered a nine year old girl. This Court therein rejecting the argument that the conviction having been based in circumstantial evidence, death penalty should not be awarded, affirmed the death penalty awarded by the lower court.

In *State of U.P. v. Sattan,* [2009 (3) SCALE 394], six members of a family were murdered by the accused leaving only three survivors over some personal enmity. The trial court awarded them death sentence. The High Court commuted the sentence to one of life imprisonment. The Supreme Court in appeal noting the brutality of murder held that the accused deserved only a death penalty.

3(C). Cases Where Death Penalty was not Awarded/ Affirmed

22. In *Ujjagar Singh v. State of Punjab,* [2007 (14) SCALE 428] the accused had been convicted of murder and rape and accordingly sentenced to death by the lower courts. This Court in appeal, acquitting the accused only of the charge of rape because of the lack of evidence, noted that since the charge of rape formed a substantial portion of reasoning for causing the death, the death sentence on the accused could no longer be sustained, once he was acquitted on that charge. The sentence was accordingly altered to one of life imprisonment.

In *Amrit Singh v. State of Punjab* [2006 (11) SCALE 309] the accused had raped a minor girl. The victim died a painful death because of bleeding from her private parts. The court, however, noted that the accused might not have had the intention of murdering the victim, but her death was only the unfortunate inevitable consequence of the crime, hence it did not fall within the rarest of the rare cases.

In *Bishnu Prasad Sinha and Anr. v. State of Assam* [2007 (2) SCALE 42], this Court commuted the death penalty of the accused on the ground that the prosecution case was entirely based on circumstantial evidence.

In *State of Maharashtra v. Prakash Sakha Vasave and others,* [2009 (1) SCALE 713] the accused had brutally attacked with axes the husband of their sister, who was having an illicit relationship with another woman. The trial court had found two of the accused guilty and sentenced them to death. In appeal the High Court acquitted the accused because of lack of evidence. This Court in appeal set aside the judgment of acquittal passed by the High Court but noticed that the case before it did not fall in the *rarest of rare* and deserved only a life imprisonment.

3(D) Differing opinion in other cases

23. While dealing with a matter as to whether death penalty should be awarded or not, although the court ordinarily would look to the precedents, but, this becomes extremely difficult, if not impossible, in the context of the cases discussed above. There is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle.

In *Aloke Nath Dutt and Ors. v. State of West Bengal,* [2006 (13) SCALE 467] this Court after examining various judgments over the past two decades in which the issues of rarest of rare fell for consideration, admitted the failure on the part of this Court to evolve a uniform sentencing policy in capital punishment cases and conclude as to what amounted to 'rarest of rare'. Disparity in sentencing has also been noted in *Swamy Shraddananda v. State of Karnataka (Swamy Shraddananda – I)* [(2007) 12 SCC 288].

In the aforementioned backdrop, we may notice a recent three-Judge Bench decision of this Court in *Swamy Shraddananda @ Murali Manohar Mishra* (supra). Aftab Alam, J., writing the judgment for the Three-Judge Bench held:

> "33. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.
>
> 34. 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

A 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 B Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied."

C The issue of subjectivity has also been previously noticed by both academics and this Court. Professor Anthony R. Blackshield's analysis in the mid 1970s showed this trend in the pre-*Bachan Singh* period. [see Journal of the Indian Law Institute 1979]. This was also noticed by Bhagwati, J. in his D dissenting judgment in *Bachan Singh* (supra).

In the post-*Bachan Singh* period, a joint report by the Amnesty International - India and People's Union for Civil Liberties Report titled "Lethal Lottery: The Death Penalty in E India, A study of Supreme Court Judgments in death penalty cases 1950-2006" and the *Swamy Shraddananda* (supra) judgment show quite clearly that not much has changed in this respect.

To assist future benches at considering the facts of F individual cases however, the Constitution Bench in *Bachan Singh* (supra) did however note certain aggravating and mitigating factors mentioned by the *Amicus Curie* (drawn from jurisprudence from the USA as also Clauses (2)(a), (b), (c) and (d) of the already lapsed Indian Penal Code (Amendment) Bill, G 1972). The Supreme Court did however endorse them, referring to them as "undoubtedly relevant circumstances and must be given great weight in the determination of sentence".

Machhi Singh v. State of Punjab, [(1983) 3 SCC 470] H went further and made a tabular comparison of such mitigating

and aggravating circumstances.

Yet as the above discussion has clearly shown, it is now clear that even the balance-sheet of aggravating and mitigating circumstances approach invoked on a case by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the *Bachan Singh* threshold of *"rarest of rare cases"* has been most variedly and inconsistently applied by the various High Courts as also this court. At this point we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty – the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of *Bachan Singh* (supra) has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either though law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to the legitimate aim of the measure in question. Constitution of India provides for safeguards to give the individual adequate protection against arbitrary imposition of criminal punishment.

Although these questions are not under consideration and cannot be addressed here and now, we cannot help but observe the global move away from the death penalty. Latest statistics show that 138 nations have now abolished the death penalty in either law or practice (no executions for 10 years). Our own neighbours, Nepal and Bhutan are part of these abolitionist nations while others including Philippines and South Korea have also recently joined the abolitionist group, in law and in practice respectively. We are also aware that on 18 December 2007, the United Nations General Assembly adopted resolution

62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty.

India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up to date and informed discussion and debate on the subject.

CONSTITUTIONAL LANDSCAPE ON CAPITAL SENTENCING: MINIMUM SAFEGUARDS

24. We have already dealt with the ratio of *Bachan Singh* (supra) in detail but here we would focus on the backdrop to the Rarest of rare dictum and the dilemma faced by the *Bachan Singh* court in this regard. The perspective which emerges from this reading showcases the constitutional riddle which is inherent to law on capital sentencing in India.

At the very outset *Bachan Singh* (supra) delineated the scope of the matter in the following terms:

> "The principal questions that fall to be considered in this case are:
>
> (i) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional.
>
> (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Sec. 354(3) of the Code of Criminal Procedure, 1973 is unconstitutional on the ground that it invests the Court with unguided and untrammeled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life."

In the ensuing discussion, the court held that Sections *302* Penal Code and *354(3)* of the Code of Criminal Procedure, 1973 are constitutional but only after enunciating "broad guidelines and principles" which today govern the practice on capital sentence in all courts, be it trial courts or the appellate courts.

In one sense, the scope of *Bachan Singh* (supra) was fully met when it practically declared death penalty (procedurally and substantively) constitutional but the bench went on to entrench an unprecedented jurisprudence on the sentencing front. This jurisprudence, of which *Rarest of rare* dictum is the central part, forms the bed rock of death penalty jurisprudence. The way ahead shown by *Bachan Singh* (supra) is not merely in compliance of statutory safeguards under section 354(3) and section 235(2) but also of *Rarest of rare* dictum. Therefore, the overall legislative scheme on death penalty was cleared of constitutional challenge only after it was conjoined with the *Rarest of rare* dictum.

Thomas, J. also reached to a similar conclusion in *Ram Deo Chauhan v. State of Assam* [(2001) 5 SC 714]:

> "A peep into the historical background of how death penalty survived Article 21 of the Constitution would be useful in this context.
>
> Apart from the two schools of thought putting forward their respective points of view stridently - one pleading for retention of death penalty and the other for abolition of it - a serious question arose whether the law enabling the State to take away the life of a person by way of punishment would be hit by the forbid contained in Article 21 of the Constitution. In *Bachan Singh vs. State of Punjab* (supra) the majority Judges of the Constitution Bench saved the death penalty from being chopped out of the statute book by ordering that death penalty should be strictly restricted to the tiniest category of the rarest of

A the rare cases in which the lesser alternative is unquestionably foreclosed."

On a deeper reading of *Bachan Singh* (supra) it becomes clear that the court was operating under two fundamental constraints while dealing with the constitutionality challenge:

B

Firstly, death penalty is mentioned in the Constitution (for instance under Article 161 and Article 72(1)(c). Constitutional recognition was taken to be a primary signal for the legitimacy for section 302.

C

Secondly, owing to separation of power doctrine, the court took a deferential view towards section 354(3) which was brought in to discipline the courts on death penalty by making life imprisonment the rule and death penalty exception.

D Laboring under the aforementioned constraints, the death penalty was held constitutional. This affirmative response to constitutionality of death penalty presented another complicated challenge which related to administration of death penalty or in other words, sentencing of capital punishment. This has been E universally considered as a vexed question of law and practice and has not been satisfactorily dealt with in any jurisdiction so far.

It is interesting to note here that this Court opined in *State* F *of Punjab v. Prem Sagar and Ors.* [JT 2008 (7) SC 66], as late as 2008, that there is no sentencing policy in India. But *Bachan Singh* (supra) treated death penalty as an exceptional penalty, different from any other punishment, and did lay down a policy prescription on sentencing, way back in 1980.

G We have also noticed that in numerous decisions of this court, constitutional guarantees have been invoked at some stage of capital sentencing. Similarly, *rarest of rare* dictum takes its colour from constitutional guarantees.

H

1. "JUSTICE" IN CAPITAL SENTENCING

25. *Justice* must be the first virtue of the law of sentencing. A sentencing court must consider itself to be a "forum of principle". The central idea of such a forum is its continuing commitment to inhere a doctrinal approach around a core normative idea. "Principled reasoning" flowing from judicial precedent or legislation is the premise from which the courts derive the power. The movement to preserve substantial judicial discretion to individualize sentences within a range of punishments also has its basis in the court's ability to give principled reasoning.

The claim of sentencing to being a principled exercise is very important to the independent and unpartisan image of judiciary. *R. v. Willaert* (1953), 105 C.C.C. 172 (Ont.C.A.) way back in 1953, envisaged the role of judge in sentencing as "an art—a very difficult art—essentially practical, and directly related to the needs of society." We have now come from that description of court to court as "forum of principle". This role is consistent with the constitutional mandate of due process and equal protection.

(See Ronald Dworkin, The Forum of Principle 56 NYU L. Rev. 469 (1981) for more on "forum of principle"; for more on justice and sentencing see Von Hirsch and Andrew Ashworth, The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning Proportionate Sentencing: Exploring The Principles, Oxford University Press, 2005)

There is a fundamental relationship between the legitimacy of sentence belonging to a particular potency and the reasons accorded by the court to justify the same. This flows from the inherent nature of punishment which can be understood as a coercive force invoked by the state for a legitimate purpose. It was Bentham who said that "all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some

A greater evil." (See Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, in A Fragment of Government with An Introduction to the Principles of Morals and Legislation 281 (1948).)

B The reasons which are accorded by the court to justify the punishment should be able to address the questions relating to fair distribution of punishment amongst similarly situated convicts. This may be called the problem of distributive justice in capital sentence. In this context, the inquiry under Article 14 becomes significant. Fairness in this context has two aspects:

C

First refers to fair distribution amongst like offenders

And the second relates to the appropriate criteria for the punishment.

D The sentencing process, based on precedents around *Bachan Singh* (supra), should help us to determine specific, deserved sentences in particular cases. The reason as to why questions of justice play such an important part in the distribution of capital punishment, lies in the special nature of E capital punishment itself. Distributive justice is a relative notion: one can never determine whether one has received one's fair share except by comparison with that which has been allocated to others. Both questions are intertwined when we speak of Capital Sentence.

F

Scholars have described the problem of disparate sentencing variously. Characterizing a situation before sentencing reforms swept American jurisdiction, when judges were using personal judgments to decide the questions of G sentencing, Marvin Frankel referred the practice as "wasteland in the law" and the general situation as one of "lawlessness." (See Marvin E. Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1 (1972))

H

2. EQUAL PROTECTION CLAUSE

26. A survey of the application of *Rarest of rare* doctrine in various courts will reveal that various courts have given their own meaning to the doctrine. This variation in the interpretation of *Rarest of rare* analysis may amount to be constitutionally infirm because of apparent arbitrariness on the count of content of the doctrine.

The moot question is whether, after more than quarter of a century since *Bachan Singh* (supra) recognized death penalty as a constitutionally permissible penalty, we can distill a meaningful basis from our precedent on death penalty, for distinguishing the few cases in which the capital sentence is imposed from the many cases in which it is not? A similar question was put by Justice Stewart in *Furman* (supra). He noted death sentences are cruel and unusual in the same way as being "struck by lightning is cruel and unusual". Moreover, the petitioners sentenced to death were seen as "capriciously selected random handful" and the question posed was whether the eighth amendment could tolerate death sentences "so wantonly and so freakishly imposed." Today, it could be safely said in the context of Indian experience on death penalty that no standards can be culled out from the judge made law which governs the selection of penalty apart from broad overall guideline of *Rarest of rare* under *Bachan Singh* (supra).

Frequent findings as to arbitrariness in sentencing under section 302 may violate the idea of equal protection clause implicit under Article 14 and may also fall foul of the due process requirement under Article 21. It is to be noted that we are not focusing on whether wide discretion to choose between life imprisonment and death punishment under section 302 is constitutionally permissible or not. The subject-matter of inquiry is how discretion under section 302 may result in arbitrariness in actual sentencing. Section 302 as held by *Bachan Singh* (supra) is not an example of law which is arbitrary on its face but is an instance where law may have been arbitrarily

A administered.

In *Swamy Shraddananda* (supra), this court noted arbitrariness-in-fact prevalent in the capital sentencing process with extraordinary candour:

B "Coupled with the deficiency of the Criminal Justice System is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* laid down the principle of the *Rarest of rare* cases. *Machhi Singh,* for practical application crystallised the principle into C five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the *Rarest of rare* cases principle nor the Machhi Singh categories were followed uniformly and D consistently. In *Aloke Nath Dutta v. State of West Bengal* Sinha J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict (see paragraphs 154 to 182, pp.504-510 SCALE). He finally E observed that `courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar' and further `it is evident that different benches had taken different view in the matter'. Katju J. in his order passed in this appeal said that he did not agree F with the decision in *Aloke Nath Dutt* in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju J. may be right that there can not be an absolute rule excluding death sentence in all cases of circumstantial evidence (though in Aloke Nath G Dutta it is said `normally' and not as an absolute rule). But there is no denying the illustrations cited by Sinha J. which are a matter of fact.

32. The same point is made in far greater detail in a report called, "Lethal Lottery, The Death Penalty in India" H compiled jointly by Amnesty International India and

Peoples Union For Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see chapter 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

33. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.

34. 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 lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied.

35. These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant.

Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage. We share the court's unease and sense of disquiet in Swamy Shraddananda case and agree that a capital sentencing

A system which results in differential treatment of similarly situated capital convicts effectively classify similar convict differently with respect to their right to life under Article 21. Therefore, an equal protection analysis of this problem is appropriate.

B In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect sentencing system. In a capital sentencing C system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary."

We have to be, thus, mindful that the true import of *Rarest* D *of rare* doctrine speaks of an extraordinary and exceptional case.

When the court is faced with a capital sentencing case, a comparative analysis of the case before it with other E purportedly similar cases would be in the fitness of the scheme of the Constitution. Comparison will presuppose an identification of a pool of equivalently circumstanced capital defendants. The gravity, nature and motive relating to crime will play a role play a role in this analysis.

F Next step would be to deal with the subjectivity involved in capital cases. The imprecision of the identification of aggravating and mitigating circumstances has to be minimized. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. The G comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances.

The aggravating and mitigating circumstances have to be H separately identified under a rigorous measure. *Bachan Singh*

(supra), when mandates principled precedent based sentencing, compels careful scrutiny of mitigating circumstances and aggravating circumstances and then factoring in a process by which aggravating and mitigating circumstances appearing from the pool of comparable cases can be compared.

The weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualized sentencing, but at the same time reasons for apportionment of weights shall be forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness objections in future.

A sentencing hearing, comparative review of cases and similarly aggravating and mitigating circumstances analysis can only be given a go by if the sentencing court opts for a life imprisonment.

3. THE "RAREST" OF "RARE CASES"

27. *Bachan Singh* (supra) laid down its fundamental threshold in the following terms:

> "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."*

To translate the principle in sentencing terms, firstly, it may be necessary to establish general pool of rare capital cases. Once this general pool is established, a smaller pool of rare cases may have to established to compare and arrive at a finding of *Rarest of rare* case.

4. ARTICLE 21

28. Right to life, in its barest of connotation would imply

A right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realize
B the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life
C is taken away all, other rights cease to exist. South African constitutional court in *S v. Makwanyane* [1994 (3) SA 868 (A)] captures the crux of right to life in following terms:

> "Prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or
D necessarily inconsistent with the circumstances in which they had been placed.
>
> A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with
E other prisoners, the right to exercise, to write and receive letters and the rights of personality referred to by Innes J are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to
F prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter 3 subject only to limitations imposed by the prison regime that are justifiable under section 33. Of these, none are more important than the
G section 11(2) right not to be subjected to "torture of any kind . . . nor to cruel, inhuman or degrading treatment or punishment".
>
> There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether.
H It is that difference with which we are concerned in the

present case."

This court has acknowledged Death Punishment to be the most extraordinary penalty in various decisions. In *Shankarlal Gyarasilal Dixit v. State of Maharashtra* [(1981) 2 SCC 35] the court held:

> "Unfaithful husbands, unchaste wives and unruly children are not for that reason to be sentenced to death if they commit murders unconnected with the state of their equation with their family and friends. The passing of the sentence of death must elicit the greatest concern and solicitude of the Judge because, that is one sentence which cannot be recalled."

Therefore, in the context of punishments, the protections emanating from Article 14 and Article 21 have to be applied in the strictest possible terms. At this juncture, it is best to point out that the ensuing discussion, although applicable in constitutionality context, is carried out in the context of sentencing of death punishment. In every capital sentence case, it must be borne in mind that the threshold of *rarest of rare* cases is informed by Article 14 and 21, owing to the inherent nature of death penalty. Post *Bachan Singh* (supra), capital sentencing has come into the folds of constitutional adjudication. This is by virtue of the safeguards entrenched in Article 14 and 21 of our constitution.

Article 21 imposes two kinds of limitations, which overlap in their reach, on punishments:

4(A). Due process requirement

29. With non-capital punishments, a more severe punishment for one offender than another is commonly accepted, even in similar circumstances. The infinite gradations of guilt and the limits of human capacity to judge cause us to overlook differential treatment of apparently similar convicts. As the relative severity of punishment increases, how ever, it

becomes more difficult to overlook sentencing disparities. Death is the most severe of all punishments.

The US Supreme Court has acknowledged that there is a profound and immeasurable gap between a death sentence and a life sentence. In *Woodson,* [428 U.S. at 305] the court held that there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (see also *Lockett,* [438 U.S. at 604]) In *Rummel v. Estelle,* [445 U.S. 263, 272 (1980)], the Court noted that challenges to the excessiveness of particular sentences have rarely been successful in non-capital cases.

Fairness to any capitally sentenced convict, therefore, requires an assessment of the relative propriety of the sentence. Because of their irrevocability and severity, the Constitution requires greater reliability and fairness from sentencing courts for capital sentences than for non-capital sentences.

4(B). Proportionality Requirement

30. The Canadian Charter of Rights makes provision for the limitation of rights through a general clause. Section 1 of the Charter permits such reasonable limitations on Charter rights "as can be demonstrably justified in a free and democratic society". In *R. v. Oakes,* [1986] 1 S.C.R. 103 it was held that in order to effect a limitation, there has to exist a sufficient objective to warrant the limitation of the right in question. There should also be proportionality between the limitation and such objective. In a frequently-cited passage, Dickson, J. described the components of proportionality as follows:

> "There are, in my view, three important components of a *proportionality* test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected

to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question: *R v Big M Drug Mart Limited* (supra). A

Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right of freedom, and the objective which has been identified as of 'sufficient importance'." B

During the sentencing process, the sentencing court or the appellate court for that matter, has to reach to a finding of a rational and objective connection between capital punishment and the purpose for which it is prescribed. In sentencing terms, "special reasons" as envisaged under section 354(3) Code of Criminal Procedure have to satisfy the comparative utility which capital sentence would serve over life imprisonment in the particular case. The question whether the punishment granted impairs the right to life under Article 21 as little as possible. C D

R. v. Chaulk, [1990] 3 S.C.R. 1303] suggested that the means must impair the right "as little as is reasonably possible". The court held: E

"Where choices have to be made between "differing reasonable policy options", the courts will allow the Government the deference due to legislators, but "(will) not give them an unrestricted licence to disregard an individual's Charter rights. Where the Government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down"." F G

The fact that capital sentence is a live penalty in India; we should strive to tune the practice to the evolving standards of a maturing society. The normative thresholds attached thereto and evolving constitutional sensibilities shall continue to throw H

A fresh challenges. We have not fully resolved the dilemma arising from the fact that the Constitution prohibits excessive punishment borne out of undue process, but also permits, and contemplates that there will be capital punishment arising out of an exercise of extremely wide discretion. This dilemma is
B inherently difficult to resolve. And we should refrain from enforcing any artificial peace on this landscape.

While chosing for one option or the other, these constitutional principles must be borne in mind. The nature of capital sentencing is such that it is important that we ask the
C right questions. Tony Bottoms very aptly puts this general sentencing dilemma, which become much more acute in capital sentencing. He comments, that "justice" and punishment when applied to sentencing are "asymmetrical concepts, in the sense that it is reasonably easy to establish what is unjust or
D undeserved, but not what, precisely, is just or deserved." (See Anthony Bottoms, The Philosophy and Politics of Punishment and Sentencing, in The Politics of Sentencing Reform 20 (C.M.V. Clarkson & R. Morgan eds., 1995))

E Principle of prudence, enunciated by *Bachan Singh* (supra) is sound counsel on this count which shall stand us in good stead – whenever in the given circumstances, there is difference of opinion with respect to any sentencing prop/ rationale, or subjectivity involved in the determining factors, or
F lack of thoroughness in complying with the sentencing procedure, it would be advisable to fall in favour of the "rule" of life imprisonment rather than invoking the "exception" of death punishment.

G **SENTENCING IN THIS CASE – *BACHAN SINGH* TEST**

31. Let us now examine the relevant factors relating to sentencing in this case, keeping in mind the letter and spirit of the *Bachan Singh* (supra).

H Kumar Gaurav (PW-1) has given the details of the incident.

We have already noted his statement before the court primarily on the deposition of the said Approver, Kumar Gaurav, whereupon the prosecution relies to establish that the accused deserves the harshest punishment.

Accused No. 1 however has a different story to tell. As per him he himself, Kumar Gaurav (PW-1) and Kartikraj (the deceased) had staged a fake kidnapping to extract money from Kartikraj's parents. It is evident from his deposition that all persons involved were in the night of the incident having a party at his flat situated in Amrapali Society. They were drunk. They had watched movies all night on the VCR. They made a phone call at the residence of the father of Kartikraj, demanding ransom. It was done only on the suggestion of Kumar Gaurav (PW-1), the Approver. It was he who had suggested that they could earn a good amount pretending to kidnap someone amongst them. Kartikraj was chosen since his father was from a wealthy family. It was Kartikraj himself who had dialed his father's number and handed over the phone to Kumar Gaurav (PW-1).

As per the appellant, they had continued the party even on the next day. Since all the liquor had been consumed he himself and the deceased had at about 4.00 p.m. gone out to purchase some more liquor. Thereafter he had left the place to finish his work and when he came back, he found Kartikraj lying in front of the toilet having sustained head injuries. We may notice his statements from the judgment of the learned Sessions Judge in the following terms:

> "Thereafter, as he had some work, he dropped Kartikraj to that flat and went to finish his work. Thereafter, when he came back to that flat, he saw Kartikraj lying in front of the toilet sustaining head injury. Approver – Kumar Gaurav and his two friends found frightened and worried. Thereafter, when he inquired with them as to what happened, Kumar Gaurav told him that after Kartikraj brought bottles of Rum, he drunk very fast and got drink

very heavily and while going to the toilet, feli down etc. Thereafter, when he suggested to take Kartikraj to a doctor, approver Kumar Gaurav said that since he made ransom call, nobody would believe them that Kartikraj fell unconscious accidentally after drinking heavily. Thereafter, approver Kumar Gaurav told him that in fact Kartikraj is dead and he has confirmed by checking his pulse. After hearing this, he got very scared and told Kumar Gaurav that they must inform police and now, the joke has gone too far. But, Kumar Gaurav told that he has thought about everything and asked him to dispose of the motorcycle of Kartikraj. Accordingly, he left the flat and under mental stress and fear, he wandered here and there and finally abandoned the motorcycle in wee hours of morning. Thereafter, he did not go back to the flat of Amrapali Society. On 9.8.2001 in the evening, he received phone call of Kumar Gaurav (P.W.1) asking him to come to Mumbai at Dadar immediately and threatened him that if he did not go as per his directions to Mumbai, he will inform his name to the police. Therefore, he followed whatever was being told by approver Kumar Gaurav. When he went to Pariera Housing Society flat at Naigaon, Mumbai, he saw Kumar Gaurav (P.W.1) and Accused Nos. 2 and 3 there. There he was told by Kumar Gaurav (P.W.1) that he himself and his associates have disposed of the dead body of Kartikraj and further told him that the father of Kartikraj is still ready to pay ransom and that he would be sending the amount to Mumbai and he (Kumar Gaurav P.W.1) will collect the amount. Thereafter when Kumar Gaurav (P.W.1) went to collect the amount of ransom, he was asked by Kumar Gaurav (P.W.1) to stand near Andheri Railway Station. Accordingly, when he was standing near Andheri Railway Station, police along with Kumar Gaurav (P.W.1) came there and accosted him. Thus, according to Accused No. 1 Santosh kumar Bariyar, death of Kartikraj is accidental and his dead body is disposed of by Kumar Gaurav (P.W.1) and his friends. But,

he does not know as to how the dead body of Kartikraj was disposed of." A

We may also notice the reasoning of the courts below in imposing death sentences on the appellant. The learned Sessions Judge as regards the appellant noted: B

"...It is Santoshkumar Bariyar's mastermind which was responsible for the ultimate act of brutal killing of Kartikraj and it is, [he] who directed the accused Nos. 2 and 3, so also, Kumar Gaurav (PW-1) to catch hold Kartikraj while strangulation and further it is, [he] who directed Accused C Nos. 2 and 3 and approver Kumar Gaurav (PW-1) to cut the dead body of Kartikraj. Not only this, but it is, [he] who acted nastly and inhumanly manner by twisting right leg of Kartikraj when one of the other accused could not cut in the right leg of Kartikraj. Therefore, I am of the opinion that D it will not be possible to reform and rehabilitate the accused No.1 by imposing [a] minimum sentence of imprisonment for life. Hence, I hold that this is a *rarest of rare* case."

E

The sentence was affirmed by the High Court stating:

"...Examined from all angles, we feel that PW 1 has established that the main architect of the conspiracy is A1. It was hatched by all the accused and carried out as per the directions of A1. A1 showed extreme depravity in F cutting the dead body and ensuring that it was disposed of. The lust for money continued till the accused were arrested..."

However while imposing the sentence of imprisonment for G life on Sanjeeb Kumar Roy (A 2) and Santosh Kumar Roy (A 3) the learned Sessions Judge noted:

"As far as the Accused Nos. 2 and 3 are concerned, it is evident from the proven facts that they accepted the plan of Accused No. 1 only for monetary gain. The plan was H

A possessed by accused No. 1 only. The Accused Nos. 2 and 3 as well as the approver Kumar Gaurav were motivated by accused No.1 Santosh Kumar Bariyar and therefore, they all hatched [a] criminal conspiracy. Hence it cannot be disputed that the Accused Nos. 2 and 3 B participated in the commission of [the] crime at the behest of Accused No. 1 Santosh Kumar Bariyar, which can be considered as a mitigating circumstance. Considering this mitigating circumstance and ages of Accused Nos. 2 and 3, in my view, it will be just and proper to give them an C opportunity to reform and rehabilitate by imposing minimum sentence of life imprisonment."

The High Court refused to interfere with the question of the sentence on the said accused in the following words:

D "...Though it is true that A2 and A3 have actively participated in the crime, the brain behind it is A 1. A2 and A3 have carried out dictates of A1. This is a mitigating circumstance. Hence, we are not inclined to enhance the sentence."

E

The doctrine of proportionality, which appears to be the premise whereupon the learned trial judge as also the High Court laid its foundation for awarding death penalty on the appellant herein, provides for justifiable reasoning for awarding F death penalty.

However while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand G falls within the rarest of the rare case.

The reasons assigned by the courts below, in our opinion, do not satisfy Bachan Singh Test. Section 354 (3) of the Code provides for an exception. General rule of doctrine of H proportionality, therefore, would not apply. We must read the

said provision in the light of Article 21 of the Constitution of India. A

Law laid down by *Bachan Singh* (supra) and *Machhi Singh* (supra) interpreting Section 354 (3) of the Code should be taken to be a part of our constitutional scheme. B

Although the Constitutional Bench judgment of the Supreme Court in *Bachan Singh* (supra) did not lay down any guidelines on determining which cases fall within the *'rarest of rare'* category, yet the mitigating circumstances listed in and endorsed by the judgment gives reform and rehabilitation great C importance, even requiring the state to prove that this would not be possible, as a precondition before the court awarded a death sentence. We cannot therefore determine punishment on grounds of proportionality alone. There is nothing before us that shows that the appellant cannot reform and be rehabilitated. D

In *Dhananjoy Chatterjee v. State of W.B.* [(1994) 4 SCC 220], this Court has taken notice of the fact that shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate making justice E suffer by weakening the system's credibility. Although the increasing number of cases which affect the society may hold some value for the sentencing court, but it cannot give a complete go-by to the legal principle laid down by this court in *Bachan Singh* (supra) that each case has to be considered on its own facts. F

Mr. Adsure has placed strong reliance on a decision of this Court in *Mohan and Others v. State of T.N.* [(1998) 5 SCC 336] to contend that the manner in which the murder was committed itself point out that all the accused deserved death penalty. In G our opinion the facts of that case are clearly distinguishable from the present one. That case involved the murder of a minor. It clearly is not applicable to the present case. Moreover, the court in that case too recognized that proper and due regard must be given to the mitigating circumstances in every case. H

A Further indisputably, the manner and method of disposal of the dead body of the deceased was abhorrent and goes a long way in making the present case a most foul and despicable case of murder. However, we are of the opinion, that the mere mode of disposal of a dead body may not by itself B be made the ground for inclusion of a case in the *"rarest of rare"* category for the purpose of imposition of the death sentence.

It may have to be considered with several other factors. This Court has dealt with the issue in *Ravindra Trimbak* C *Chouthmal v. State of Maharashtra* [(1996) 4 SCC 148]. In this case of dowry death, the head of the deceased was severed and her body cut into nine pieces for disposal. This court however expressed doubts over the efficacy of the deterrent effect of capital punishment and commuted the death sentence D to one of RI for life imprisonment.

The issue of deterrence has also been discussed in the judgment of *Swamy Shraddananda – I* (supra), thus:

E "70. It is noteworthy to mention here the Law Commission in its Report of 1967 took the view that capital punishment acted as a deterrent to crime. *While it conceded that statistics did not prove these so-called deterrent effects.* It also said that figures did not disprove them either."

F [Emphasis supplied]

Most research on this issue shows that the relationship between deterrence and severity of punishment is complicated. It is not obvious how deterrence relates to severity and G certainty. Furthermore criminal policy must be evidence-led rather than based on intuitions, which research around the world has shown too often to be wrong. In the absence of any significant empirical attention to this question by Indian criminologists, we cannot assume that severity of punishment correlates to deterrence to an extent which justifies the H

restriction of the most fundamental human right through the imposition of the death penalty. The goal of crime reduction can be achieved by better police and prosecution service to the same or at least to a great extent than by the imposition of the death penalty.

In this respect, we may furthermore add here that in the most recent survey of research findings on the relation between the death penalty and homicide rates, conducted for the United Nations in 1988 and updated in 2002, it was stated:

> "... it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment."
>
> [See Roger Hood, *The Death Penalty: A World-wide Perspective,* Oxford, Clarendon Press, third edition, 2002, p. 230]
>
> [See also *Kennedy v. Lousiana* (128 S. Ct. 2641)]

MITIGATING CIRCUMSTANCES

32. Determination, as to what would be the rarest of rare cases, is a difficult task having regard to different legal principles involved in respect thereof. With the aforementioned backdrop, we may notice the circumstances which, in our opinion, should weigh with us for not imposing the extreme penalty.

The entire prosecution case hinges on the evidence of the approver. For the purpose of imposing death penalty, that factor may have to be kept in mind. We will assume that in *Swamy Shraddananda* (supra), this Court did not lay down a firm law that in a case involving circumstantial evidence, imposition of death penalty would not be permissible. But, even in relation thereto the question which would arise would be whether in arriving at a conclusion some surmises, some hypothesis would

A be necessary in regard to the manner in which the offence was committed as contra-distinguished from a case where the manner of occurrence had no role to play. Even where sentence of death is to be imposed on the basis of the circumstantial evidence, the circumstantial evidence must be such which leads B to an exceptional case. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of C sentencing evaluation of evidence would not be permissible, the courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view of evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser punishment. D A statement of approver in regard to the manner in which crime has been committed *vis-à-vis* the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine

E The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for F jobs.

Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on accused No. 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a G young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent H

thereto.

It must be noted that the discretion given to the court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. One of the principles which we think is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.

Section 354(3) of the Code of Criminal Procedure requires 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 thereof.

33. We do not think that the reasons assigned by the courts below disclose any special reason to uphold the death penalty. The discretion granted to the courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

34. We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the *'rarest of rare'* case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no

special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the *"rarest of rare"* category.

35. For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. Subject to the modification in the sentence of appellant (A1) mentioned hereinbefore, both the appeals of the appellant as also that of the State are dismissed.

G.N. Appeals dismissed.