STATE OF PUNJAB
v.
DALBIR SINGH
(Criminal Appeal No. 117 of 2006)

FEBRUARY 01, 2012

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Arms Act, 1959 - s.27(3) - Vires of - Mandatory death penalty as imposed u/s.27(3) - If justified - Held: Mandatory death penalty has been found to be constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution - In s.27(3), the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of s.7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of s.7 shall be punishable with death - The word 'use' has not been defined in the Act - Therefore, the word 'use' has to be viewed in its common meaning - In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty - Both the words 'use' and 'result' are very wide - Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test - The concepts of 'due process' and the concept of a just, fair and reasonable law has been read by this Court into the guarantee u/Articles 14 and 21 of the Constitution - s.27(3) is thus violative of Articles 14 and 21 of the Constitution - Principles of Eighth Amendment of the U.S. Constitution (which provides for guarantee against cruel and harsh punishment) have also been incorporated in our laws - Direct mandate of the Constitution under Article 13 is that the State shall not make any law which takes away or abridges *the right conferred by Part III of the Constitution and any law* A *made in contravention of the same is, to the extent of contravention, void - s.27(3) is in clear contravention of Part III rights - It also deprives the judiciary from discharging its Constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure - s.27(3) is* B *against the fundamental tenets of our Constitutional law as developed by this Court - It is ultra vires the Constitution and is void - Constitution of India, 1950 - Articles 13, 14 and 21.*

Penal Code, 1860 - ss. 302 and 307 - Acquittal of C *accused on ground of benefit of doubt - Justification - Accused CRPF constable, who had been warned by his officer for non-performance of duty, opened fire from a self-loading rifle (SLR) whereupon the officer was hit on the back and another officer sustained multiple bullet injuries causing his death - Conviction of accused-respondent by trial court inter alia u/* D *ss. 302 and 307 IPC - High Court found irreconcilable inconsistencies in the prosecution case relating to a) deposition of witnesses and b) number of cartridges fired and recovered, and acquitted respondent by giving him benefit of doubt - On appeal, held: In the facts and circumstances of the* E *case, it cannot be said that the order of the High Court was either perverse or not based on proper appreciation of evidence - No interference called for u/Article 136 of the Constitution.*

F

The prosecution case was that respondent, a CRPF constable, who had been warned by the Deputy Commandant Quarter Master for his refusal to carry out fatigue duty as assigned to him, opened fire towards the Deputy Commandant's office from a Self Loading Rifle (SLR) whereupon the Deputy Commandant was hit in his G **back while the Battalion Havaldar Major (B.H.M.), who was also inside the office at the relevant time, sustained multiple bullet injuries in his shoulders which ultimately caused his death. The trial court convicted the respondent under Section 302 IPC, sentencing him to** H

A rigorous imprisonment for life and fine of Rs.2,000/-, under Section 307 IPC, sentencing him to rigorous imprisonment for 5 years and fine of Rs.2,000/-, and under Section 27 of the Arms Act, sentencing him to rigorous imprisonment for 3 years and fine of Rs.1,000/-. The
B substantive sentences were ordered to run concurrently. The High Court, however, reversed the order of conviction on the ground that there were irreconcilable inconsistency in the prosecution case.

C The High Court found that while PW.9 the alleged eye witness had deposed that respondent was apprehended at the spot, disarmed handed over to the Court, however, according to the Investigating Officer (IO) PW.12, the respondent was handed over to him outside the CRPF headquarters three days after the incident and then on
D his disclosure statement the SLR was recovered. The High Court further found that even though the prosecution allegation was that 20 cartridges were fired, only 7 empties were recovered and none of the bullets were recovered. The High Court gave benefit of doubt to
E the respondent and acquitted him, and therefore the instant appeal.

However, since the accused-respondent had been charged under Section 27(3) of the Arms Act, 1959 as well
F and since the vires of Section 27(3) of the said Act had been questioned, the instant appeal was heard both on merits of the High Court order and also on the question of vires of Section 27(3) of the Arms Act, 1959.

Dismissing the appeal, the Court

G

HELD:

<u>On merits</u>

1. There is no reason to interfere with the order of
H acquittal given by the High Court under Article 136 of the

Constitution. It cannot be said that the order of the High A
Court is either perverse or not based on proper appreciation of evidence. Therefore, on the merits of the order of acquittal granted by the High Court there is no reason to interfere. [Para 8] [621-F]

B

Vires of Section 27(3) of the Arms Act, 1959

2.1. A perusal of Section 27, sub-section (3) of the Arms Act, 1959, the vires of which has been challenged, shows that if by mere use of any prohibited arms or prohibited ammunitions or if any act is done by any C
person in contravention of Section 7, he shall be punishable with death. Section 7 of the said Act prohibits acquisition or possession, or manufacture or sale of prohibited arms or prohibited ammunitions. [Paras 14, 15]
[624-E-F] D

2.2. Section 7 imposes a prohibition on certain acts in respect of prohibited arms and ammunitions but Section 7 does not spell out the penalty. The penalty for contravention of Section 7 is provided under Section E
27(3) of the Act. [Para 18] [626-C]

2.3. Section 27 is divided into three sub-sections. Sub-section 1 prescribes that if any person who uses any arms or ammunition in contravention of section 5 he shall be punishable with imprisonment for a term which shall F
not be not less than three years but which may extend to seven years and he shall also be liable to fine. Section 5 prohibits manufacture, sale of arms and ammunition. Sub-section (2) of Section 27 provides for higher punishment, inter alia, on the ground that whoever uses G
any prohibited arms or prohibited ammunition in contravention of Section 7, he shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and he shall also be liable to fine. [Para 19] [626-D-F] H

2.4. Between Section 5 and Section 7 of the Act a distinction has been made since manufacture and sale of arms and ammunition is dealt with in Section 5 but Section 7 deals with prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms and ammunition. Therefore, there is a reasonable classification between Section 5 and Section 7 of the Act. Consequently, there is valid classification between Sections 27(1) and 27(2) on the severity of the punishment. [Para 20] [626-G-H; 627-A]

2.5. But so far as sub-section (3) of Section 27 is concerned, the same stands apart in as much as it imposes a mandatory death penalty. The difference between sub-section (2) and sub-section (3) of Section 27 is that under sub-section (2) of Section 27 if a person uses any prohibited arms or ammunition in contravention of Section 7, he shall be punished with imprisonment for a term of less than seven years which may extend to imprisonment for life and also with fine. But if the said use or act prohibited under Section 7 results in the death of any other person he shall be punishable with death penalty. Therefore, Section 27(3) is very wide in the sense anything done in contravention of Section 7 of the Act and with the use of a prohibited arms and ammunition resulting in death will attract mandatory death penalty. Even if any act done in contravention of Section 7, namely, acquisition or possession, or manufacture or sale, of prohibited arms results in death of any person, the person in contravention of Section 7 shall be punished with death. This is thus a very drastic provision for many reasons. Apart from the fact that this imposes a mandatory death penalty the Section is so widely worded to the extent that if as a result of any accidental or unintentional use or any accident arising out of any act in contravention of Section 7, death results, the only punishment, which has to be mandatorily imposed on

the person in contravention is, death. Notably, the language used is 'results' which is wider than the expression 'causes'. The word 'results' means the outcome and is wider than the expression 'causes'. Therefore, very wide expression has been used in Section 27(3) of the Act and without any guideline leading to mandatory punishment of death penalty. [Paras 21, 22] [627-B-G]

3. In Section 302 of IPC death penalty is not mandatory but it is optional. Apart from that the word 'murder' has been very elaborately defined in Section 300 of IPC with various exceptions and explanations. But in the case of Section 27(3) law is totally devoid of any guidelines and no exceptions have been carved out. [Paras 24 and 25] [628-B; 629-D]

4. The Parliament while making law has to function under the specific mandates of the Constitution. Apart from the restrictions imposed on distribution of legislative powers under Part XI of the Constitution by Article 245 onwards, the direct mandate of the Constitution under Article 13 is that the State shall not make any law which takes away or abridges the right conferred by Part III of the Constitution and any law made in contravention of the same is, to the extent of contravention, void. Article 13(2) clearly prohibits the making of any law by the State which takes away or abridges rights, conferred by Part III of the Constitution. In the event of such a law being made the same shall be void to the extent of contravention. Only the judiciary can give the declaration that a law being in contravention of the mandate of Part-III of the Constitution is void. Therefore, power of judicial review is inherent in our Constitution. Article 13 of the Constitution is, therefore, a unique feature in our Constitution. [Paras 26, 27 and 28] [629-E-F; 630-E-F]

5.1. Mandatory death penalty has been found to be

A constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution. In our Constitution the concept of 'due process' was incorporated in view of the judgment of this Court in
B *Maneka Gandhi*. The principles of Eighth Amendment of the U.S. Constitution (which provides for guarantee against cruel and harsh punishment) have also been incorporated in our laws. This has been acknowledged by the Constitution Bench of this Court in Sunil Batra.
C Almost on identical principles mandatory death penalty provided under Section 303 IPC has been held ultra vires by the Constitution Bench of this Court in Mithu. Apart from that it appears that in Section 27(3) of the Act the provision of mandatory death penalty is more
D unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The word 'use' has not been
E defined in the Act. Therefore, the word 'use' has to be viewed in its common meaning. In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the
F words 'use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test. A law which is not consistent with notions of fairness while it imposes an irreversible penalty like death penalty is repugnant to the concept of
G right and reason. [Paras 87, 88, 89, 90] [656-G-H; 657-A;, D-H; 658-A]

5.2. The principle of 'due process' is an emanation from the Magna Carta doctrine. This was accepted in
H American jurisprudence. All these concepts of 'due

process' and the concept of a just, fair and reasonable A
law has been read by this Court into the guarantee under Articles 14 and 21 of the Constitution. Therefore, the provision of Section 27(3) of the Act is violative of Article 14 and 21 of the Constitution. [Paras 92, 94] [658-C, F]

B

5.3. Apart from that the said Section 27 (3) is a post Constitutional law and has to obey the injunction of Article 13 which is clear and explicit. In view of the mandate of Article 13 of the Constitution which is an Article within Part-III of our Constitution, Section 27(3) having been enacted in clear contravention of Part-III C
rights, Section 27(3) of the Act is repugnant to Articles 14 and 21 and is void. [Paras 95, 96] [658-G; 659-B]

5.4. Section 27(3) of the Act also deprives the judiciary from discharging its Constitutional duties of D
judicial review whereby it has the power of using discretion in the sentencing procedure. This power has been acknowledged in Section 302 IPC and in Bachan Singh case it has been held that the sentencing power has to be exercised in accordance with the statutory E
sentencing structure under Section 235(2) and also under Section 354(3) of the Code of Criminal Procedure. [Paras 97, 98] [659-C, D]

5.5. Section 27(3) of the said Act while purporting to impose mandatory death penalty seeks to nullify those F
salutary provisions in the Code. This is contrary to the law laid down in Bachan Singh. [Para 99] [659-E]

5.6. In fact the challenge to the constitutional validity of death penalty under Section 302 IPC has been G
negatived in Bachan Singh in view of the sentencing structure in Sections 235(2) and 354 (3) of the Criminal Procedure Code. By imposing mandatory death penalty, Section 27(3) of the Act runs contrary to those statutory safeguards which give judiciary the discretion in the H

matter imposing death penalty. Section 27(3) of the Act is thus ultra vires the concept of judicial review which is one of the basic features of our Constitution. [Para 100] [659-F, G]

5.7. The ratio in both Bachan Singh and Mithu has been universally acknowledged in several jurisdictions across the world and has been accepted as correct articulation of Article 21 guarantee. Therefore, the ratio in Mithu and Bachan Singh represents the concept of Jus cogens meaning thereby the peremptory non derogable norm in international law for protection of life and liberty. That is why it has been provided by the 44th Amendment Act of 1978 of the Constitution, that Article 21 cannot be suspended even during proclamation of emergency under Article 359(vide Article 359(1)(a) of the Constitution. Therefore Section 27(3) of the Arms Act is against the fundamental tenets of our Constitutional law as developed by this Court. Section 27(3) of Arms Act, 1959 is ultra vires the Constitution and is void. [Paras 100, 101, 102, 103 and 104] [659-H; 660-A-D]

Mithu vs. State of Punjab (1983) 2 SCC 277: 1983 (2) SCR 690; *Maneka Gandhi vs. Union of India* (1978) 1 SCC 248 : 1978 (2) SCR 621; *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 and *Sunil Batra vs. Delhi Administration and Others* (1978) 4 SCC 494 : 1979 (1) SCR 392 - relied on.

Subhash Ramkumar Bind Alias Vakil and another vs. State of Maharashtra (2003) 1 SCC 506 : 2002 (4) Suppl. SCR 65; *Surendra Singh Rautela vs. State of Bihar* (now State of Jharkhand) (2002) 1 SCC 266 : 2001 (5) Suppl. SCR 340; *State of Punjab vs. Swaran Singh Murder* Reference No. 5 of 2000 decided by Full Bench of Punjab & Haryana High Court on 26.5.2009; *Santokh Singh vs. State of Punjab,* 2000(3) Recent Criminal Reports 637 - referred to.

James Tyrone Woodson and Luby Waxton vs. State of North Carolina, **428 US 280 = 49 L Ed 2d 944;** *Stanislaus Roberts vs. State of Louisiana,* **428 US 325 = 49 L Ed 2d 974;** *Harry Roberts vs. State of Louisiana,* **431 US 633 = 52 L Ed 2d 637;** *George Summer vs. Raymond Wallace Shuman,* **483 US 66 = 97 L Ed 2d 56;** *Reyes vs. The Queen,* **(2002) 2 AC 235 = (2002) UKPC 11;** *Regina v. Hughes,* **(2002) 2 AC 259 = (2002) UKPC 12;** *Fox v. The Queen* **(2002 (2) AC 284);** *Bowe & Anr. vs. The Queen* **-(2006) 1 WLR 1623;** *Bernard Coard and Others vs. The Attorney General* **(Criminal Appeal No. 10/2006- unreported judgment of privy council);** *Francis Kafantayeni and Others vs. Attorney General* **[High Court of Malawi- Constitutional Case No.12 of 2005 [2007] M.W.H.C.1];** *Attorney General vs. Susan Kigula* **and 417 others (Supreme Court of Uganda-Constitution Appeal No.03/2006);** *Godfrey Ngotho Mutiso vs. Republic* **(Kenyan Court of Appeal- Criminal Appeal No.17/2008);** *Ong Ah Chuan vs. Public Prosecutor and Another,* **(1981) A.C. 648;** *Munn vs. Illinois,* **24 L Ed. 77 : 94 US 113, 142 (1876) and** *Planned Parenthood of Southeastern Pennsylvania vs. Casey,* **120 L ED 2d 674 - referred to.**

Case Law Reference:

1983 (2) SCR 690	**relied on**	**Para 30**
2002 (4) Suppl. SCR 65	**referred to**	**Para 34**
2001 (5) Suppl. SCR 340	**referred to**	**Para 35**
2000(3) Recent Criminal Reports 637	**referred to**	**Para 38**
1978 (2) SCR 621	**relied on**	**Para 46**
(1980) 2 SCC 684	**relied on**	**Para 46**
1979 (1) SCR 392	**relied on**	**Para 47**
428 US 280 = 49 L Ed 2d 944	**referred to**	**Para 49**

428 US 325 = 49 L Ed 2d 974	**referred to**	**Para 51**
431 US 633 = 52 L Ed 2d 637	**referred to**	**Para 53**
483 US 66 = 97 L Ed 2d 56	**referred to**	**Para 55**
(2002) 2 AC 235 = (2002) UKPC 11	**referred to**	**Para 58**
(2002) 2 AC 259 = (2002) UKPC 12	**referred to**	**Para 62**
(2002 (2) AC 284)	**referred to**	**Para 64**
(2006) 1 WLR 1623	**referred to**	**Para 66**
[2007] M.W.H.C.1- High Court of Malawi)	**referred to**	**Para 75**
(1981) A.C. 648	**referred to**	**Para 83**
24 L Ed. 77: 94 US 113, 142 (1876)	**referred to**	**Para 92**
120 L ED 2d 674	**referred to**	**Para 93**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 117 of 2006.

From the Judgment & Order dated 27.07.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 250-DB of 1996.

Gourab Banerji, ASG (for Ld. Attorney General for India), S.A. Haseeb, Sahil Tagotra, B.K. Prasad Gautam Jha, Ajay Pal, Jagjit Singh Chhabra, Siddhartha Dave, Senthil Jagadeesan, Jentiben A.O., Harinder Mohan Singh for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. This appeal at the instance of the State has been preferred from the judgment of the Division Bench of A the High Court of Punjab and Haryana at Chandigarh, dated July 27, 2005 in Criminal Appeal No. 250/1996 whereby High Court gave the appellant the benefit of doubt and acquitted him of the charges framed against him.

B

2. Briefly, the facts of the case are that the respondent Dalbir Singh, a constable in 36th Battalion Central Reserve Police Force, at the relevant time was posted at Fatehabad, District Amritsar, Punjab. On April 11th, 1993, Harish Chander, the Battalion Havaldar Major (hereinafter 'B.H.M.') in 'Company D' of the Battalion, reported to Hari Singh, the Deputy C Commandant Quarter Master (hereinafter 'Deputy Commandant'), that the accused had refused to carry out the fatigue duty assigned to him. On such report being made, the Deputy Commandant directed the B.H.M. and Sub Inspector Kewal Singh to produce the accused before him. As per these D directions, the accused was produced before the Deputy Commandant at 11:15 a.m. Upon being warned verbally about his non compliance of the orders for fatigue duty, the accused requested the warning to be issued in writing. Upon such a response, the Deputy Commandant ordered the B.H.M. and the E Sub Inspector to have the accused present before him the next morning.

3. However, immediately after these talks, the Deputy Commandant's office saw firing from a Self Loading Rifle F (SLR), even as the Deputy Commandant himself and the B.H.M. were inside it. As the Deputy Commandant positioned himself underneath a table, he allegedly noted that it was the accused who was firing from a rifle from a tent pitched outside. He was allegedly hit in his back. The B.H.M. sustained multiple bullet G injuries in his shoulders.

4. This entire incident was allegedly witnessed by Constable Dalip Kumar Mishra and Sub Inspector Kewal Singh. Eventually, when the firing had stopped and the accused was trying to reload his gun, he was overpowered and disarmed by H

Constable Mishra. The Deputy Commandant directed the Sub Inspector Kewal Singh to hand over the accused to the police, while he himself and B.H.M. Harish Chander were rushed to Sri Guru Nanak Hospital. Unfortunately, B.H.M. Harish Chander died en route and his body was identified in the hospital. The Deputy Commandant recorded his statement (Ex. PH) and an F.I.R. (Ex. PH/2) was registered at the hospital by Sub Inspector Jaswant Singh.

5. During investigation, the Investigating Officer, in the presence of SI Kewal Singh and Constable Mishra, found 20 empty bullet-cartridges (Ex.P4-P23) at the Battalion Headquarters at Khawaspur. These were taken into possession after putting them in a sealed parcel through recovery memo (Ex.PK). The empty cartridges were sent to the Forensic Science Laboratory on 15.4.1993 and the SLR was forwarded on 23.4.1993.

6. After investigation a challan was put in the Court of the Ilaqua Magistrate who found that the case was exclusively triable by the Court of Session, committed the same to Court of Session. The accused was charged under Section 302 and 307 of IPC and under Section 27 of the Arms Act. The accused pleaded not guilty and the Prosecution was called upon to examine its witnesses including DCQM Hari Singh (PW.6), SI Kewal Singh (PW.7), Constable Mishra (PW.9) and Sub Inspector Jaswant Singh. The accused, upon examination, denied all circumstances and asserted that he was innocent and had been falsely implicated. The Trial Court consequently convicted the accused under Section 302 of IPC, sentencing him to rigorous imprisonment for life and fine of Rs.2,000/-, under Section 307 of IPC, sentencing him to rigorous imprisonment for 5 years and fine of Rs.2,000/-, and under Section 27 of Arms Act, sentencing him to rigorous imprisonment for 3 years and fine of Rs.1,000/-. The substantive sentences were ordered to run concurrently.

7. In the impugned judgment the High Court while reversing

the order of conviction found that there is some irreconcilable inconsistency in the prosecution case. The High Court found that PW.9 the alleged eye witness deposed that the respondent was apprehended at the spot by him and he was disarmed by him and the SLR which was being used by the accused was taken in his possession and the accused was handed over to the Court. But according to the Investigating Officer (IO) PW.12, he went to the place of occurrence on the date of occurrence i.e. on 11.4.93, but neither the accused nor the SLR allegedly used by the accused were handed over to him. The further evidence of the IO is that on 14.4.93, the accused was handed over to him outside the CRPF headquarters. Then on his disclosure statement the SLR was recovered. In view of such irreconcilable discrepancy in the evidence of the prosecution, the High Court came to the finding that the prosecution was trying to suppress a vital part of the case and the incident did not take place in the manner presented by the prosecution. The High Court further found that even though the prosecution allegation is that 20 cartridges were fired, only 7 empties were recovered and none of the bullets were recovered. The High Court found that the same is very surprising when the prosecution version is that 20 bullets were actually fired in a room towards the side where there are no windows. It is, therefore, impossible that none of the bullets had been recovered. In view of the aforesaid finding of the High Court the accused was given the benefit of doubt.

8. We are of the opinion that there is no reason to interfere with the order of acquittal given by the High Court sitting in our jurisdiction under Article 136 of the Constitution. We do not think that the order of the High Court is either perverse or not based on proper appreciation of evidence. Therefore, on the merits of the order of acquittal granted by the High Court we find no reason to interfere. But since in this case the accused was charged under Section 27(3) of the Arms Act (hereinafter, 'the Act') and since the vires of Section 27(3) of the said Act has been questioned, we proceed to examine the said issue in detail.

9. In this matter leave was granted on 16.1.2006. On 31.8.2010, a Division Bench of this Court issued notice to the Attorney General as vires of Section 27(3) of the Act was challenged in the said proceeding.

10. Pursuant to such notice Mr. Gourab Banerjee, the learned ASG initially submitted before this Court on 15th March, 2011 and again on 21st July, 2011 that a proposal to amend Section 27(3) of the Act is under consideration of the Government of India and as such matter was adjourned. Thereafter the matter was heard on 1st December, 2011 and on subsequent dates both on merits of the High Court order and also on the question of vires of Section 27(3) of the Act.

11. Since the Court is to examine the constitutional validity of Section 27, sub-section (3) of the Act, for a proper appreciation of the questions involved, Section 27 of the Act is set out below:-

> **"27.Punishment for using arms, etc.-**
>
> (1) Whoever uses any arms or ammunition in contravention of section 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.
>
> (2) Whoever uses any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.
>
> (3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death."

12. The present form of Section 27 including Section 27(3)

has come by way of amendment, namely, by Amending Act 42 of 1988, the previous Section 27 was substituted. The Arms Act was enacted in 1959. At the time when it was enacted, Section 27 was in the following form:-

> "27. Punishment for possessing arms, etc., with intent to use them for unlawful purpose -
>
> Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried into effect or not, be punishable with imprisonment for a term which may extend to seven years, or with fine or with both."

13. The Statements of Objects and Reasons of Act 42 of 1988 (the Amending Act) are as follows:-

> "**Act 42 of 1988.** - The Arms Act, 1959 had been amended to provide for enhanced punishments in respect of offences under that Act in the context of escalating terrorist and anti-national activities. However, it was reported that terrorist and anti-national elements, particularly in Punjab had in the recent past acquired automatic firearms, machine guns of various types, rockets and rocket launchers. Although the definitions of the expressions "arms", "ammunitions", "prohibited arms" and "prohibited ammunition" included in the Act are adequate to cover the aforesaid lethal weapons in the matter of punishments for offences relating to arms, the Act did not make any distinction between offences involving ordinary arms and the more lethal prohibited arms and prohibited ammunition. Further while the Act provided for punishment of persons in possession of arms and ammunition with intent to use them for any unlawful purpose, it did not provide for any penalties for the actual use of illegal arms. To overcome these deficiencies, it was proposed to

A amend the Act by providing for deterrent punishment for offences relating to prohibited arms and ammunition and for the illegal use of firearms and ammunition so as to effectively meet the challenges from the terrorist and anti-national elements. Accordingly, the Arms (Amendment) B Ordinance, 1988 was promulgated by the President on the 27th May, 1988. The Ordinance amended the Act to provide for the followings among other things namely:-

C (i) The definitions of "ammunition" and "prohibited ammunition" have been amended to include missiles so as to put the matter beyond any doubt;

(ii) Deterrent punishments have been provided for offences involving prohibited arms and prohibited ammunition;

D (iii) Punishments have also been provided for the use of illegal arms and ammunition and death penalty has been provided if such use causes death."

14. A perusal of Section 27, sub-section (3), the vires of which has been challenged, shows that if by mere use of any E prohibited arms or prohibited ammunitions or if any act is done by any person in contravention of Section 7, he shall be punishable with death.

15. Section 7 of the said Act prohibits acquisition or F possession, or manufacture or sale of prohibited arms or prohibited ammunitions. The said Section 7 is set out below:-

"7. Prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition.-

G

No person shall--

(a) acquire, have in his possession or carry; or

H (b) use, manufacture, sell, transfer, convert, repair, test or prove; or A

(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof;

any prohibited arms or prohibited ammunition unless he B
has been specially authorised by the Central Government in this behalf."

16. In the definition clause prohibited ammunitions and prohibited arms have been defined respectively under Section C
2, sub-Sections (h) and (i) respectively of the said Act. Those definitions are set out below:-

"(h) "Prohibited ammunition" means any ammunition, containing, or designed or adapted to contain, any noxious D
liquid, gas or other such thing, and includes rockets, bombs, grenades, shells, missiles articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition;" E

"(i) "prohibited arms" means--

(i) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the F
trigger or the magazine containing the missiles is empty, or

(ii) weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing, G

and includes artillery, anti-aircraft and anti-tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms;" H

17. The word 'acquire', 'possession' or 'carry' has not been defined under the said Act nor the word 'used', 'manufacture', 'sale', 'convert', 'repair', 'test' or 'prove' have been defined in the Act. The word 'transfer' has only been defined in Section 2(k) to mean as follows:-

> "(k) "transfer" with its grammatical variations and cognate expressions, includes letting on hire, lending, giving and parting with possession."

18. Section 7 imposes a prohibition on certain acts in respect of prohibited arms and ammunitions but Section 7 does not spell out the penalty. The penalty for contravention of Section 7 is provided under Section 27(3) of the Act as mentioned above.

19. If we look at Section 27, which has been set out above, it is divided into three sub-sections. Sub-section 1 prescribes that if any person who uses any arms or ammunition in contravention of section 5 he shall be punishable with imprisonment for a term which shall not be not less than three years but which may extend to seven years and he shall also be liable to fine. Section 5 prohibits manufacture, sale of arms and ammunition. Sub-section (2) of Section 27 provides for higher punishment, inter alia, on the ground that whoever uses any prohibited arms or prohibited ammunition in contravention of Section 7, he shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and he shall also be liable to fine.

20. Section 7 prohibits acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition. Therefore, between Section 5 and Section 7 of the Act a distinction has been made since manufacture and sale of arms and ammunition is dealt with in Section 5 but Section 7 deals with prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms and ammunition. Therefore, there is a reasonable classification between Section

5 and Section 7 of the Act. Consequently, there is valid classification between Sections 27(1) and 27(2) on the severity of the punishment.

21. But so far as sub-section (3) of Section 27 is concerned, the same stands apart in as much as it imposes a mandatory death penalty. The difference between sub-section (2) and sub-section (3) of Section 27 is that under sub-section (2) of Section 27 if a person uses any prohibited arms or ammunition in contravention of Section 7, he shall be punished with imprisonment for a term of less than seven years which may extend to imprisonment for life and also with fine. But if the said use or act prohibited under Section 7 results in the death of any other person he shall be punishable with death penalty. Therefore, Section 27(3) is very wide in the sense anything done in contravention of Section 7 of the Act and with the use of a prohibited arms and ammunition resulting in death will attract mandatory death penalty. Even if any act done in contravention of Section 7, namely, acquisition or possession, or manufacture or sale, of prohibited arms results in death of any person, the person in contravention of Section 7 shall be punished with death. This is thus a very drastic provision for many reasons. Apart from the fact that this imposes a mandatory death penalty the Section is so widely worded to the extent that if as a result of any accidental or unintentional use or any accident arising out of any act in contravention of Section 7, death results, the only punishment, which has to be mandatorily imposed on the person in contravention is, death. It may be also noted in this connection that language used is 'results' which is wider than the expression 'causes'. The word 'results' means the outcome and is wider than the expression 'causes'.

22. Therefore, very wide expression has been used in Section 27(3) of the Act and without any guideline leading to mandatory punishment of death penalty.

23. In this connection we may compare Section 302 of the

IPC with Section 27(3) of the Act. Section 302 is as follows:

> "**302. Punishment for murder.**- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

24. In Section 302 of IPC death penalty is not mandatory but it is optional. Apart from that the word 'murder' has been very elaborately defined in Section 300 of IPC with various exceptions and explanations. Section 300 of IPC is set out below:

> "**300. Murder.**-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
>
> Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-
>
> Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
>
> Exception 1.-**When culpable homicide is not murder.**- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:- A

First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.-That the provocation is not given by anything B done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence. C

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

25. But in the case of Section 27(3) law is totally devoid D of any guidelines and no exceptions have been carved out. It is common ground that the said amendment of Section 27 was brought about in 1988 which was much after the Constitution of India has come into operation.

E

26. The Parliament while making law has to function under the specific mandates of the Constitution. Apart from the restrictions imposed on distribution of legislative powers under Part XI of the Constitution by Article 245 onwards, the direct mandate of the Constitution under Article 13 is that the State F shall not make any law which takes away or abridges the right conferred by Part III of the Constitution and any law made in contravention of the same is, to the extent of contravention, void. Article 13 is set out hereinbelow:

"**13. Laws inconsistent with or in derogation of the** G **fundamental rights:** (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. H

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

27. It is obvious from the aforesaid that Article 13(2) clearly prohibits the making of any law by the State which takes away or abridges rights, conferred by Part III of the Constitution. In the event of such a law being made the same shall be void to the extent of contravention.

28. It is obvious that only the judiciary can give the declaration that a law being in contravention of the mandate of Part-III of the Constitution is void. Therefore, power of judicial review is inherent in our Constitution. Article 13 of the Constitution is, therefore, a unique feature in our Constitution.

29. Mr. Banerjee, the learned A.S.G appearing on behalf of Union of India submitted that after notice was issued in this matter to the Attorney General, the matter was examined by the Government of India and a tentative decision to amend Section 27(3) of the Act retrospectively with effect from 27th May, 1988

was under the contemplation of the Government. Pursuant to A such exercise, the Union Home Minister gave notice to the Secretary General of the Lok Sabha on 17th November, 2011 of its intention to move for leave to introduce the said Bill in the Lok Sabha and the Bill was introduced in the Lok Sabha in the following form. The form in which it is sought to be introduced B in the Lok Sabha is as follows:

"Be it enacted by Parliament in the Sixty-second year of the Republic of India as follows:-

	1. (1) This Act may be called the Arms (Amendment) Act, 2011	Short title and commencement
	(2) It shall be deemed to have come into force on the 27th day of May, 1988	
54 of 1959	2. In the Arms Act, 1959 in Section 27, in sub-section (3), for the words "shall be punishable with death" The words "shall be punishable with death or imprisonment for life and shall also be liable to fine", shall be substituted.	

C D E F

30. Leaned Addl. Solicitor General submitted that in the light of the aforesaid pronouncement by this Court in *Mithu vs. State of Punjab* - (1983) 2 SCC 277, the government is examining the question of making suitable amendments as indicated above to Section 27(3) of the Act. G

31. This Court, however, is not inclined to defer its decision. The Court, however, cannot refuse to examine the provision in view of a very fair stand taken by learned ASG.

32. The Judges of this Court have taken an oath to uphold H

and preserve the Constitution and it is well known that this Court has to protect the Constitution as a sentinel on the qui vive against any abridgement of its principles and percepts.

33. It may be noted that Section 27(3) as it stands as on date was considered by this Court in several judgments. Those judgments are noted hereinbelow.

34. It was considered in the case of *Subhash Ramkumar Bind Alias Vakil and another vs. State of Maharashtra* reported in (2003) 1 SCC 506. In that case the appellant Bind was charged under Section 302/34 and also under Section 27(3) of the Act and death sentence was awarded to Bind by the Sessions Court and the same was affirmed by the High Court. This Court while reducing the death sentence awarded by the High Court to one of life did not pronounce on the constitutional validity of Section 27(3) even though this Court referred to the statement of Objects and Reasons of the Amending Act which introduced Section 27(3). This Court found that the arms in question could not be brought within the definition of 'prohibited arms' as defined under Section 2(i) of the Act. This Court held that in order to bring the arms in question within the prohibited arms, the requirement of the statute was to issue a formal notification in the Official Gazette but as the State was relying on an administrative notification, this Court held that the same cannot be treated as a gazette notification and the conviction of Bind under Section 27(3) of the Act was set aside. This Court did not pronounce either way on the constitutional validity of Section 27(3). Therefore, the decision in Bind (supra) is not an authority on the constitutional validity of Section 27(3) of the Act.

35. Section 23 was again considered by this Court in the case of *Surendra Singh Rautela vs. State of Bihar (now State of Jharkhand)* - (2002) 1 SCC 266. The appellant Surendra Singh Rautela was initially convicted under Section 27(3) of the Arms Act and was given death penalty. Thereafter, the same sentence was set aside by the High Court on merits.

36. In *Surendra Singh* (supra), before this Court learned

senior counsel appearing on behalf of the State very fairly A
stated that he was not in a position to challenge the order of acquittal of the appellant under Section 27(3) on merits. Therefore, the question of constitutional validity of Section 27(3) was neither canvassed nor examined before this Court.

37. The question of constitutional validity of Section 27(3) B
of the Arms Act was referred to Full Bench of Punjab and Haryana High Court in the case of State of Punjab vs. Swaran Singh - Murder Reference No. 5 of 2000 decided on 26.5.2009.

38. The matter went before the Full Bench as the Division C
Bench of the High Court of Punjab and Haryana expressed doubt about the correctness of the decision rendered by the Division Bench in Santokh Singh vs. State of Punjab, 2000(3) Recent Criminal Reports 637.

39. The following questions were raised: D

(i) Whether the judgment of Division Bench is correct in law?

(ii) Whether section 27(3) of the Arms Act is unconstitutional being violative of Article 14 and 21 of the Constitution of India? E

40. The Court found that a 303 rifle has not been notified as a prohibited arm by the Central Government. The Court dealt with the provisions of Rule 3 and Schedule I to the said Rules categorising arms and ammunition for the purpose of Rule 3 F
under the said Act.

41. On such consideration, the Full Bench, on a careful reading of Rules 3 and 4 and two Schedules, came to a conclusion that in the absence of a notification by the Government declaring 303 rifle as a prohibited arm, the said G
weapon cannot be treated as the one prohibited under the Act and accordingly affirmed the view taken in the case of *Santokh Singh* (supra). However, the Full Bench did not answer the question No.2 in the light of the law declared in *Mithu* (supra). Therefore the constitutional validity of Section 27(3) has not H

A been decided by the Full Bench.

42. The question of constitutional validity of mandatory death sentence was examined by this court in *Mithu* (supra). In that case the constitutional validity of Section 303 of IPC came up for consideration. Provision of Section 303 of IPC is B set out below:

> "**303. Punishment for murder by life-convict.**- Whoever, being under sentence of imprisonment for life, commits murder shall be punished with death."

C 43. Chief Justice Y.V. Chandrachud giving the majority opinion held that the sentence of death, prescribed by Section 303 of IPC for the offence of murder committed by a person who is under a sentence of life imprisonment is a savage sentence and this Court held that the same is arbitrary and D oppressive being violative of Articles 21 and 14 of the Constitution. Relevant para 23 at page 296 of the report is set out below:

> "23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion E that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section F was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention. The Section also assumes that life convicts are a dangerous breed of humanity as a class. That assumption is not supported by G any scientific data. As observed by the Royal Commission in its Report on "Capital Punishment":
>
> > "There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is H not so. Most find themselves in prison because they

> have yielded to temptation under the pressure of a combination of circumstances unlikely to recur."

> In *Dilip Kumar Sharma v. State of M.P.*, this Court was not concerned with the question of the vires of Section 303, but Sarkaria, J., in his concurring judgment, described the vast sweep of that Section by saying that "the section is Draconian in severity, relentless and inexorable in operation" [SCC para 22, p. 567: SCC (Cri) p. 92]. We strike down Section 303 of the Penal Code as unconstitutional and declare it void. It is needless to add that all cases of murder will now fall under Section 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder."

44. In the said judgment, Chief Justice Y.V. Chandrachud, who was delivering the majority judgment observed that the court has to exercise its discretion in the matter of life and death. In the opinion of the learned Chief Justice any sentencing process by which the legislature deprives the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, and compels them to shut their eyes to mitigating circumstances is unconscionable. The relevant observations made in paragraphs 12 and 16 are set out below

> "12. The other class of cases in which, the offence of murder is committed by a life convict while he is on parole or on bail may now be taken up for consideration. A life convict who is released on parole or on bail may discover that taking undue advantage of his absence, a neighbour has established illicit intimacy with his wife. If he finds them in an amorous position and shoots the seducer on the spot, he may stand a fair chance of escaping from the charge of murder, since the provocation is both grave and sudden. But if, on seeing his wife in the act of adultery, he leaves the house, goes to a shop, procures a weapon and returns to kill her paramour, there would be evidence of what is

A called mens rea, the intention to kill. And since, he was not acting on the spur of the moment and went away to fetch a weapon with murder in his mind, he would be guilty of murder. It is a travesty of justice not only to sentence such a person to death but to tell him that he shall not be heard B why he should not be sentenced to death. And, in these circumstances, now does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death? In ordinary life, we will not say it about law, it is not C reasonable to add insult to injury. But, apart from that, a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity D of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'theft', 'breach of trust' or 'murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how E grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not F to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The G mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people H of India, are pledged to a different set of values. For us,

law ceases to have respect and relevance when it compels A
the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead.

B

16. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence C
of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. "The infinite variety of cases and facets to each D
would make general standards either meaningless 'boiler plate' or a statement of the obvious......." As observed by Palekar, J., who spoke for a Constitution Bench in *Jagmohan Singh v. State of U.P.:* [SCC para 26, p. 35: SCC (Cri) p. 184]

E

> "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 exercise of judicial discretion on F
> well-recognised principles is, in the final analysis, the safest possible safeguard for the accused."

45. In his concurring judgment Justice O. Chinnappa Reddy held as follows:

G

"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 of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. H

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 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 unconstitutional."

46. It is now well settled that in view of decision in *Maneka Gandhi vs. Union of India* - (1978) 1 SCC 248, *Bachan Singh Vs. State of Punjab* - (1980) 2 SCC 684 and *Mithu* (supra) 'due process of law' is part of our Constitutional jurisprudence.

47. The Constitution Bench in *Sunil Batra vs. Delhi Administration and Others* - (1978) 4 SCC 494, has also held that the guarantee against cruel and harsh punishment given in the Eighth Amendment of the U.S. Constitution is also part of our constitutional guarantee. Once the concept of 'due process of law' and the guarantee against harsh and cruel punishment (Eighth Amendment of the U.S. Constitution) are woven in our Constitutional guarantee, it is the duty of this Court to uphold the same whenever any statute even prima-facie seeks to invade the same. This also seems to be the mandate of Article 13(2) of the Constitution of India.

48. Mr. Banerjee, learned ASG has rendered considerable assistance to this Court by placing before the Court judgments from different jurisdiction on the question of mandatory capital punishment and also decisions where Court examined cases of cruel and unusually harsh punishment.

49. In this connection we may refer to the judgment of the U.S. Supreme Court in the case of *James Tyrone Woodson and Luby Waxton vs. State of North Carolina,* 428 US 280 = 49 L Ed 2d 944. In that case the petitioners were convicted of first degree murder in view of their participation in an armed

robbery of a food store. In the course of committing the crime A
a cashier was killed and a customer was severely wounded. The petitioners were found guilty of the charges and sentenced to death. The Supreme Court of North Carolina affirmed the same. But then certiorari was granted by the U.S. Supreme Court to examine the question whether imposition of death B
penalty in that case constituted a violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. The factual background of that case is that in 1974 North Carolina General Assembly codified a statute making death the mandatory sentence for all persons convicted of first degree murder. C
Stewart, J., speaking for the Court held that the said mandatory death sentence was unconstitutional and violated the Eighth Amendment. The learned Judge held:-

> "...A process that accords no significance to relevant facets of the character and record of the individual offender D
> or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human E
> beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> .... This Court has previously recognized that "for the F
> determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." .... G
> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. ...While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy H

rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v Dulles, 356 US, at 100, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. ... This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

50. However, strong dissent was expressed by Justice White, Chief Justice Burger and Justice Rehnquist. According to these learned Judges, North Carolina statute providing for mandatory death penalty upon proof of guilt in a case of first degree murder was constitutionally valid.

51. A similar conclusion was pronounced on the same day i.e. 2nd July, 1976 in Stanislaus Roberts vs. State of Louisiana, 428 US 325 = 49 L Ed 2d 974 in a case of death penalty for a crime of first degree murder under the laws of Louisiana. Justice John Paul Stevens giving the majority opinion observed at pages 981-982 of the report as follows:-

"...The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute. ... A large group of jurisdictions first responded to the unacceptable severity of the common-law rule of automatic death sentences for all murder convictions by narrowing the definition of capital homicide. Each of these

jurisdictions found that approach insufficient and A
subsequently substituted discretionary sentencing for
mandatory death sentences. See *Woodson v North
Carolina,* ante, at 290-292, 49 L Ed 2d 944, 96 S Ct
2978."

B

"The futility of attempting to solve the problems of
mandatory death penalty statutes by narrowing the scope
of the capital offense stems from our society's rejection of
the belief that "every offense in a like legal category calls
for an identical punishment without regard to the past life C
and habits of a particular offender". *Williams v. New York,*
337 US 241, 247, 93 L Ed 1337, 69 S Ct 1079 (1949).
See also *Pennsylvania v. Ashe,* 302 US 51, 55, 82 L Ed
43, 58 S Ct 59 (1937)."

"The constitutional vice of mandatory death sentence D
statutes - lack of focus on the circumstances of the
particular offense and the character and propensities of the
offender - is not resolved by Louisiana's limitation of first-
degree murder to various categories of killings. The
diversity of circumstances presented in cases falling within E
the single category of killings during the commission of a
specified felony, as well as the variety of possible offenders
involved in such crimes, underscores the rigidity of
Louisiana's enactment and its similarity to the North
Carolina statute. Even the other more narrowly drawn F
categories of first-degree murder in the Louisiana law
afford no meaningful opportunity for consideration of
mitigating factors presented by the circumstances the
particular crime or by the attributes of the individual
offender."

G

52. Here also Chief Justice Burger, White J., Balckmum,
J., and Rehnquist, J., dissented and upheld the constitutionality
of the Louisiana statute.

53. In *Harry Roberts vs. State of Louisiana,* 431 US 633 H

= 52 L Ed 2d 637, the case arose out of a Louisiana statute imposing mandatory death penalty for the first degree murder of a police officer. The Court opined:-

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.
>
> As we emphasized repeatedly in Roberts and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional."

54. Accordingly, death penalty was set aside by the majority and the matter was remitted for further proceeding. Here also Chief Justice Burger, Justice Blackmum, Justice White and Justice Rehnquist gave strong dissents, opining that the statute was constitutionally valid.

55. Again similar question came up before the U.S. Supreme Court in *George Summer vs. Raymond Wallace Shuman,* 483 US 66 = 97 L Ed 2d 56. This case came from

Nevada which mandated death penalty for murder committed by a person while serving a life sentence without the possibility of parole. The statutory provision considered in this case is somewhat akin to Section 303 of Indian Penal Code. Justice Blackmum delivering the majority opinion held that Nevada statute was unconstitutional being violative of Eighth and Fourteenth Amendments. The learned Judge held:-

> "......This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. See, e.g., *Tison v. Arizona*, 481 US 137, 95 L Ed 2d 127,107 S Ct 1676 (1987); Enmund Florida, 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368 (1982). Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident. An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even though it is a life-term inmate or an inmate serving a particular number of years who is involved.
>
> ......The circumstances surrounding any past offense may vary widely as well. Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label "life-term inmate" reveals little about the inmate's record or character. Even if the offense was first-degree murder, whether the defendant was the primary force in that incident, or a no triggerman like Shuman, may be relevant to both his criminal record and his character. Yet under the mandatory statute, all predicate life-term offenses are given the same weight - a weight that is deemed to outweigh any possible combination of mitigating circumstances."

56. The Court insisted on a guided discretion on the statute by holding:-

> "...state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to constitutional mandate of heightened reliability in death-penalty determinations through individualized sentencing procedures. Having reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today. We agree with the courts below that the statute under which respondent Shuman was sentenced to death did not comport with the Eighth and Fourteenth Amendments."

57. This judgment was also dissented by Justice White, Chief Justice Rehnquist and Justice Scalia.

58. In this connection if we look at some of the judgments delivered by the Privy Council we would find the same principle has been followed in *Reyes vs. The Queen,* (2002) 2 AC 235 = (2002) UKPC 11. In Reyes (supra) the appellant was convicted and sentenced to death under the laws of Belize he committed the murder by shooting. The Privy Council granted leave to the accused to raise two issues on constitutional points - (i) mandatory death penalty infringes both the protection against subjection to inhuman or degrading punishment or other treatment in violation of rights under Section 7 of the Constitution of Belize and also in violation of the right to life protected under Sections 3 and 4 of the said Constitution. The second issue was on the constitutionality of hanging. Section 4(1) and Section 7 of the Constitution of Belize are as follows:-

> "4(1). A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted."

> "7. No person shall be subjected to torture or to inhuman

or degrading punishment or other treatment."

59. In the case of *Reyes* (supra) the decision of this Court in Mithu (para 36 page 252 of the report) as also the decision of this Court in Bachan Singh (para 43, page 256 of the report) were considered. The Board observed:-

> "...The Board is however satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect..."

60. In paragraph 44 at page 257 of the report the Board made a very valid and very interesting distinction between mercy and justice, which is set out below:-

> "......Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility....... It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. .... The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process."

61. The Privy Council thus overruled the decision of the Court of Appeal of Belize.

62. In *Regina v. Hughes,* (2002) 2 AC 259 = (2002) UKPC 12, the defendant (accused) was convicted by the High Court of Saint Lucia for murder. The Criminal Code of Saint Lucia provided death sentence to be imposed on anybody who is convicted of murder and Hughes was sentenced to death. The Board found that under Section 178 of the Criminal Code, imposition of death sentence for murder was mandatory and the Court had no power to impose a lesser sentence. The Board held such inhuman and degrading sentencing procedure to be void. In this case also this Court's decision in *Mithu* (supra) and *Bachan Singh* (supra) were considered by the Privy Council. In paragraph 52, the Board held:-

> "......It follows that the decision as to the appropriate penalty to impose in the case of murder should be taken by the judge after hearing submissions and, where

appropriate, evidence on the matter. In reaching and A articulating such decisions, the judges will enunciate the relevant factors to be considered and the weight to be given to them, having regard to the situation in Saint Lucia. The burden thus laid on the shoulders of the judiciary is undoubtedly heavy but it is one that has been carried by B judges in other systems. Their Lordships are confident that the judges of Saint Lucia will discharge this new responsibility with all due care and skill."

63. Therefore, the constitutionality of Section 178 of the C statute was not affirmed and instead matter was left to the discretion of the judges.

64. The question again came up before the Privy Council in the case of *Fox vs. The Queen* (2002 (2) AC 284).

D

65. In that case the defendant was convicted by the High Court of Saint Chrisopher and Nevis on two counts of murder and he was sentenced to death on each count pursuant to Section 2 of the Offences against the Person Act, 1873, which prescribed a mandatory death sentence for murder. His appeal E against conviction and sentence was dismissed by the Eastern Caribbean Court of Appeal (Saint Christopher and Nevis). Then the Judicial Committee of the Privy Council granted him special leave to appeal against both conviction and sentence. Ultimately appeal was dismissed against conviction, but on the question F of sentence the Privy Council held that Section 2 of the offences against the Person Act, 1873 was inconsistent with section 7 of the Constitution and accordingly sentence of death was quashed and the matter was remitted to the High Court to determine the appropriate sentence having regard to all the G circumstances of the case and in the light of the evidence relevant to the choice of sentences. In doing so the Privy Council applied its ratio in the case of *Reyes* (supra) and also the ratio in *Regina* (supra).

66. The Privy Council again had to consider the same H

A question in Bowe & Anr. vs. The Queen -(2006) 1 WLR 1623. In that case also both he appellants were convicted for murder and sentenced to death in terms of the Section 312 of the Penal Code of The Bahamas and their appeals against conviction did not succeed.

B 67. Section 312 of the Code was challenged to the extent that it provides that persons other than pregnant women charged for murder under Section 312 of the Code must be punished by death sentence.

C 68. In that case the Court of Appeal held by a majority that any challenge to the constitutionality of the Code providing for mandatory sentence must be made to the Supreme Court.

69. Allowing the appeal, the Privy Council held that the D Court of appeal erred in construing Article 28 of the Constitution as precluding it from entertaining a challenge to the constitutionality of a sentencing provision.

70. In paragraph 29 of the judgment, the Privy Council formulated the principles which are relevant for consideration E in a case of mandatory death sentence. The said principles are set out below:

(I) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant F should be proportionate to the gravity of the crime of which he has been convicted.

(II) The criminal culpability of those convicted of murder varies very widely.

G (III) Not all those convicted of murder deserve to die.

(IV) Principles (I), (II) and (III) are recognised in the law or practice of all, or almost all, states which impose the capital penalty for murder.

H

(V) Under an entrenched and codified Constitution on A the Westminster model, consistently with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive. B

71. The Privy Council answered the question in paragraphs 30, 31, 32, 34 and 35 of the judgment.

72. In para 43 the conclusion of the Board was as follows: C

"The Board will accordingly advise Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. So construed, it was continued under the 1973 Constitution. These appeals should be allowed, the death sentences D quashed and the cases remitted to the Supreme Court for consideration of the appropriate sentences. Should the Supreme court, on remission, consider sentence of death to be merited in either case, questions will arise on the lawfulness of implementing such a sentence, but they are E not questions for the Board on these appeals."

73. In the unreported judgment of the Privy Council in *Bernard Coard and Others vs. The Attorney General* (Criminal Appeal No. 10/2006) the same principle has been upheld. In that appeal from the Court of Appeal of Grenada, the Judicial F Committee of Privy Council consisted of Lord Bingham of Cornhill, Lord Hoffmann, Lord Phillips of Worth Matravers, Lord Carswell and Lord Brown of Eaton-under-Heywood. The facts were that in Grenada, a revolutionary outfit was split into two factions, one of which was led by the appellant Bernard Coard. G In a violent incident Maurice Bishop, the then Prime Minister of Grenada and others were executed by Coard's supporters. Over that incident, the appellants were mandatorily sentenced to death for murder. However the Governor General commuted the death sentence to life imprisonment, and a pardon was H

granted on the condition that the appellants be kept in custody with hard labour for the remainder of their lives. The appellant challenged the sentence.

74. The Board, while rejecting the other contention by the appellant, allowed the appeal on the ground that the mandatory death sentence was unconstitutional. The Board relied on its previous decision in *Regina* (supra). In paragraph 32 of the judgment, the Board inclined in favour of accepting the principle of determination of a sentence by the judiciary rather than accepting the statutory mandate of a death sentence. The judgment by Lord Hoffmann laid down the following principles:

> "32. Fifthly, and perhaps most important, is the highly unusual circumstance that, for obvious reasons, the question of appellants' fate is so politically charged that it is hardly reasonable to expect any Government of Grenada, even 23 years after the tragic events of October 1983, to take an objective view of the matter. In their Lordships opinion that makes it all the more important that the determination of the appropriate sentence for the appellants, taking into account such progress as they have made in prison, should be the subject of a judicial determination."

75. Similar principles were followed in the High Court of Malawi in the case of *Francis Kafantayeni and Others vs. Attorney General* (Constitutional Case No.12 of 2005 [2007] M.W.H.C.1). Facts therein were that the accused was convicted of murder and sentenced to mandatory death penalty. The challenge to the constitutionality of death penalty was on four grounds, all based on the Malawi Constitution. The first ground related to depravation of right to life under Section 16, the second related to inhuman and degrading treatment under Section 19, the third related to right to a fair trial under Section 42 (2) (f) and finally the fourth challenge was that it violated principles of separation of powers of State.

76. The Court, after analyzing the relevant provisions of the Constitution and the Penal Code, and the leading authority or *Reyes* (supra), struck down mandatory death penalty holding that such penalty was degrading and inhuman, and denied the right to a fair trial. The Court expressed its opinion in the following words:

> "We agree with counsel that the effect of the mandatory death sentence under section 210 of the Malawi Penal Code for the crime of murder is to deny the accused as a convicted person the right to have his or her sentence reviewed by a higher court than the court that imposed the sentence; and we hold that this is a violation of the right to a fair trial which in our judgment extends to sentencing."

77. In the concluding portion of the judgment, the court, by exercising a degree of caution, observed as follows:

> "Pursuant to Section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder. For the removal of doubt, we state that our declaration does not outlaw the death penalty for the offence of murder, but only the mandatory requirement of the death penalty for that offence. The effect of our decision is to bring judicial discretion into sentencing for the offence of murder, so that the offender shall be liable to be sentenced to death only as the maximum punishment."

78. The Supreme Court of Uganda, at Mengo, struck a similar note in the case of *Attorney General vs. Susan Kigula and 417 others* (Constitution Appeal No.03/2006). Out of the various issues urged before the Court, one of them was, that the laws of Uganda, which provide for mandatory death sentence were unconstitutional and that the carrying out of a death sentence after a long delay is a cruel, inhuman and degrading treatment. Equally degrading is the legal mode of carrying out a death sentence by hanging. The majority of the

judges by relying upon *Mithu* (supra) and *Reyes* (supra), *James Tyrone Woodson* (supra) held that imposition of mandatory death sentence for certain offences was unconstitutional. A most pertinent ruling has been given in the following words:

> "In our view if there is one situation where the framers of the Constitution expected an inquiry, it is the one involving a death penalty. The report of the Judge is considered so important that it forms a basis for advising the President on the exercise of the prerogative of mercy. Why should it not have informed the Judge in passing sentence in the first place."

79. Furthermore, the administration of justice was considered a function of the Judiciary under Article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing was what constitutes administration of justice. By providing mandatory death penalty Parliament removed the power to determine sentence from the Court's power and that, the Court is to be inconsistent with Article 126 of the Constitution.

The Court further held:

> "We do not agree with learned counsel for the Attorney General that because Parliament has the powers to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2 (2) of the Constitution."

It also held:

> "Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the

effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution. We also agree with Professor Sempebwa, for the respondents, that the power given to the court under article 22 (1) does not stop at confirmation of conviction. The Court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution."

80. In a still more recent decision in the case of *Godfrey Ngotho Mutiso vs. Republic* (Criminal Appeal No.17/2008), the Kenyan Court of Appeal pronounced its judgment in a criminal appeal arising from the judgment of the High Court of Kenya. The three-judge Bench delivering the verdict, considered the matter as an issue of singular historical moment in the country in dealing with the offence of murder and penalty of death.

81. The Court formulated the following proposition:

"In its judgment, the Court of Appeal clarified the various issues, particularly, the fact that the appellant did not challenge the conviction for the offence of murder nor the constitutionality of the death penalty itself. The Court then framed the issue for determination and listed out the various authorities relied upon by the counsel. The submissions made by the counsel for the appellants were summarized by the Court as follows:

"The imposition of the mandatory death penalty for particular offences is neither authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of sentence.

Mandatory death sentence is antithetical to fundamental human rights and there is no constitutional justification for it. A convicted person ought to be given an opportunity to show why the death sentence should not be passed against him.

The imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum. Making the sentence mandatory would therefore be an affront to the human rights of the accused.

Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively the word "shall" ought to be construed as "may".

There is a denial to (sic of) a fair hearing when no opportunity is given to an accused person to offer mitigating circumstances before sentence, which is the normal procedure in all other trials for non-capital offences. Sentencing was part of the trial and mitigation was an element of fair trial.

Sentencing is a matter of law and part of the administration of justice which is the preserve of the Judiciary. Parliament should therefore only prescribe the maximum sentence and leave the courts to administer justice by sentencing the offenders according to the gravity and circumstances of the case."

82. By formulating the aforesaid propositions, the Court held that Section 204 of the Penal Code which provided for mandatory death penalty was unconstitutional.

83. However, a discordant note was struck by the Privy Council in one of its old judgments in the case of *Ong Ah Chuan vs. Public Prosecutor and Another,* (1981) A.C. 648. The judgment was rendered by Lord Diplock, in a Bench consisting of Lord Diplock, Lord Keith of Kinkel, Lord Scarman and Lord Roskill. The Board heard the appeal from the Court of Criminal Appeal from Singapore, against a conviction for the offence of drug trafficking of heroine in Singapore. As the

amount of heroine was more than 15 grams in each case, a A
sentence of death was imposed on each of the defendants. Even though, before the Court of Appeal, the constitutionality of the provisions of the Drug Act was not challenged, leave was sought before the Board on those issues. Especially the constitutional issue was that the provision in Section 29 in B
Schedule II for mandatory death penalty for trafficking in controlled drugs, in excess of the prescribed quantities, was unconstitutional.

84. The Board permitted the questions to be raised. C
Ultimately, the Board came to the following findings:

"The social object of the Drugs Act is to prevent the growth of drug addition in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The D
social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates E
near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to determine in the light of information that is F
available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at G
transactions which involve 15 grams of heroin or more is so low as to be purely arbitrary.

The Court also held:

"Wherever a criminal law provides for a mandatory H sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated with equal punitive treatment for similar legal guilt." (Page 674 of the report)

85. In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. Their Lordships held that the quantity that attracts death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good hearted Samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law which the long established constitutional way of doing is the same in Singapore as in England. (674 of the report)

86. However the aforesaid opinion of Lord Diplock, was subsequently noticed by the Privy Council in *Bowe* (supra) at page 1644, wherein the decision in *Ong Ah Chuan* (supra) was explained inter alia, on the ground that the Constitution of Singapore does not have a comparable provision like the Eighth Amendment of the American Constitution relating to cruel and unusual punishment.

87. It is clear from the discussion hereinabove that mandatory death penalty has been found to be constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution.

88. It has already been noted hereinabove that in our

Constitution the concept of 'due process' was incorporated in view of the judgment of this Court in *Maneka Gandhi* (supra). The principles of Eighth Amendment have also been incorporated in our laws. This has been acknowledged by the Constitution Bench of this Court in *Sunil Batra* (supra). In para 52 at page 518 of the report, Justice Krishna Iyer speaking for the Bench held as follows:

> "52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."

89. Almost on identical principles mandatory death penalty provided under Section 303 of the Indian Penal Code has been held ultra vires by the Constitution Bench of this Court in *Mithu* (supra). Apart from that it appears that in Section 27(3) of the Act the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The word 'use' has not been defined in the Act. Therefore, the word 'use' has to be viewed in its common meaning. In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the words 'use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test.

90. A law which is not consistent with notions of fairness while it imposes an irreversible penalty like death penalty is

repugnant to the concept of right and reason.

91. In *Dr. Bonham* case - (1610) 8 Co Rep 114a : 77ER 646, Lord Coke explained this concept several centuries ago. The classical formulation by Lord Coke is:-

> "It appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

92. The principle of 'due process' is an emanation from the Magna Carta doctrine. This was accepted in American jurisprudence [See *Munn vs. Illinois,* 24 L Ed. 77 : 94 US 113, 142 (1876)].

93. Again this was acknowledged in *Planned Parenthood of Southeastern Pennsylvania vs. Casey,* 120 L ED 2d 674, wherein the American Supreme Court observed as follows:

> "The guarantees of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation'."

94. All these concepts of 'due process' and the concept of a just, fair and reasonable law has been read by this Court into the guarantee under Articles 14 and 21 of the Constitution. Therefore, the provision of Section 27(3) of the Act is violative of Article 14 and 21 of the Constitution.

95. Apart from that the said Section 27 (3) is a post Constitutional law and has to obey the injunction of Article 13 which is clear and explicit. Article 13(2) is as follows:

> "13(2) The State shall not make any law which takes away

or abridges the rights conferred by this Part and any law A
made in contravention of this clause shall, to the extent of
the contravention, be void."

96. In view of the aforesaid mandate of Article 13 of the
Constitution which is an Article within Part-III of our Constitution, B
Section 27(3) having been enacted in clear contravention of
Part-III rights, Section 27(3) of the Act is repugnant to Articles
14 and 21 and is void.

97. Section 27(3) of the Act also deprives the judiciary from
discharging its Constitutional duties of judicial review whereby C
it has the power of using discretion in the sentencing procedure.

98. This power has been acknowledged in Section 302
of the Indian Penal Code and in *Bachan Singh* (supra) case it
has been held that the sentencing power has to be exercised D
in accordance with the statutory sentencing structure under
Section 235(2) and also under Section 354(3) of the Code of
Criminal Procedure.

99. Section 27(3) of the said Act while purporting to
impose mandatory death penalty seeks to nullify those salutary E
provisions in the Code. This is contrary to the law laid down in
Bachan Singh (supra).

100. In fact the challenge to the constitutional validity of
death penalty under Section 302 of Indian Penal Code has F
been negatived in *Bachan Singh* (supra) in view of the
sentencing structure in Sections 235(2) and 354 (3) of the
Criminal Procedure Code. By imposing mandatory death
penalty, Section 27(3) of the Act runs contrary to those statutory
safeguards which give judiciary the discretion in the matter G
imposing death penalty. Section 27(3) of the Act is thus ultra
vires the concept of judicial review which is one of the basic
features of our Constitution.

101. It has also been discussed hereinabove that the ratio
in both *Bachan Singh* (supra) and *Mithu* (supra) has been H

universally acknowledged in several jurisdictions across the world and has been accepted as correct articulation of Article 21 guarantee. Therefore, the ratio in *Mithu* (supra) and *Bachan Singh* (supra) represents the concept of Jus cogens meaning thereby the peremptory non derogable norm in international law for protection of life and liberty.

102. That is why it has been provided by the 44th Amendment Act of 1978 of the Constitution, that Article 21 cannot be suspended even during proclamation of emergency under Article 359(vide Article 359(1)(a) of the Constitution.

103. This Court therefore holds that Section 27(3) of the Arms Act is against the fundamental tenets of our Constitutional law as developed by this Court.

104. This Court declares that Section 27(3) of Arms Act, 1959 is ultra vires the Constitution and is declared void. The appeal is thus dismissed on merits and the High Court judgment acquitting the respondent is affirmed.

B.B.B. Appeal dismissed.