COMPENDIUM OF CASE LAWS ON

CAPITAL SENTENCE AND REMISSION



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1. This extract is taken from *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169 : 1972 SCC OnLine SC 459 at page 32

22. In the whole Code there is only one section (Section 303) where death is prescribed as the only punishment for murder by a person under sentence for imprisonment for life. There are several other sections in which death sentence could be imposed, but that sentence is not mandatory. Under two sections, namely Section 302—murder, and Section 121—waging war against the Government of India, alternative punishments of death or imprisonment for life are leviable. These are the two sections where the maximum punishment is death and the minimum is imprisonment for life. There are two other sections in the Penal Code, 1860 where the minimum punishment is prescribed—one is Section 397 which provides that if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years and (2) Section 398 which provides that at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years. As regards the rest of the offences, even those cases where the maximum punishment is the death penalty, a wide discretion to punish is given to the Judge. The reasons are explained by Ratanlal on the page referred to above:

> "Circumstances which are properly and expressly recognized by the law as aggravations calling for increased severity of punishment are principally such as consist in the manner in which the offence is perpetrated; whether it be by forcible or fraudulent means, or by aid of accomplices or in the malicious motive by which the offender was actuated, or the consequences to the public or to individual sufferers, or the special necessity which exists in particular cases for counter-acting the temptation to offend, arising from the degree of expected gratification, or the facility of perpetration peculiar to the case. These considerations naturally include a number of particulars, as of time, place, persons and things, varying according to the nature of the case. Circumstances which are to be considered in alleviation of punishment are: (1) the minority of the offender; (2) the old age of the offender; the condition of the offender, e.g., wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent. [Ed. foot note.—Irresistible impulse has also been accepted. (1971) 3 SCC 931 (2) : 1972 SCC (Cri) 179 (2), 182] Bentham mentions the following circumstances in mitigation of punishment which should be inflicted: (1) absence of bad intention; (2) provocation; (3) self-preservation; (4) preservation of some near friends; (5)

transgression of the limit of self-defence; (6) submission to the menaces; (7) submission to authority; (8) drunkenness; (9) childhood."

24. The policy of the law in giving a very wide discretion in the matter of punishment to the Judge has its origin in the impossibility of laying down standards. Take, for example, the offence of Criminal Breach of Trust punishable under Section 409 of the Penal Code, 1860. The maximum punishment prescribed for the offence is imprisonment for life. The minimum could be as low as one day's imprisonment and fine. It is obvious that if any standards were to be laid down with regard to several kinds of breaches of trust by the persons referred in that section, that would be an impossible task. All that could be reasonably done by the Legislature is to tell the Judges that between the maximum and minimum prescribed for an offence, they should, on balancing the aggravating and mitigating circumstances as disclosed in the case, judicially decide what would be the appropriate sentence. Take the other case of the offence of causing hurt. Broadly, that offence is divided into two categories—simple hurt and grievous hurt. Simple hurt is again sub-divided—simple hurt caused by a lethal weapon is made punishable by a higher maximum sentence—Section 324. Where grievous hurt is caused by a lethal weapon, it is punishable under Section 326 and is a more aggravating form of causing grievous hurt than the one punishable under Section 325. Under Section 326 the maximum punishment is imprisonment for life and the minimum can be one day's imprisonment and fine. Where a person by a lethal weapon causes a slight fracture of one of the un-important bones of the human body, he would be as much punishable under Section 326 of the Penal Code, 1860 as a person who with a knife scoops out the eyes of his victim. It will be absurd to say that both of them, because they are liable under the same section should be given the same punishment. Hence too, any attempt to lay down standards why in one case there should be more punishment and in the other less punishment would be an impossible task. What is thus true with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under Section 302 of the Penal Code, 1860. Two alternate sentences are provided one of which could be described as the maximum and the other minimum. The choice is between these two punishments and as in other cases the discretion is left to the Judge to decide upon the punishment in the same manner as it does in the case of other offences, namely, balancing the aggravating and mitigating circumstances. The framers of the Code attempted to confine the offence of murder within as narrow limits as it was possible for them to do in the circumstances. All culpable homicides were not made punishable under Section 302 of the Penal Code, 1860. Culpable homicides were divided broadly into two classes: (1) culpable homicide amounting to murder and (2) culpable homicide not amounting to murder. Culpable homicide which fell in the one or the other of the four strictly limited categories described in Section 300 of the Penal Code, 1860 amounted to murder unless it fell in one of the five exceptions mentioned

in that section, in which case the offence of murder was reduced to culpable homicide not amounting to murder. Any further refinement in the definition of murder was not practicable and, therefore, not attempted. The recent experience of the Royal Commission referred to above only emphasizes the extreme difficulty. The Commission frankly admitted that it was not possible to prescribe the lesser punishment of imprisonment for life by redefinition of murder or by dividing murder into degrees. It conceded that no formula was possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. That conclusion forced the Commission to the view that discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished. See para 595 of the Commission's Report.

25. American experience is not different. In some of the States murder and rape were punishable with death. But that was not the only punishment. The Law gave the Jury discretion in capital sentencing, and the question arose recently before the Supreme Court of America in *McGautha* v. *California*, [28 L Ed 2d 711 : 402 US 183 (1971)] whether in the absence of any standards for deciding when the accused should be sentenced to death or to life imprisonment the provision of law which gives the discretion to the Jury was constitutional. Mr Justice Harlan delivered the opinion of five Judges and Mr Justice Black substantially agreed with that opinion in a separate judgment. The majority held that "the infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury would need". The majority agreed with the view of the Royal Commission already referred to and observed "those who have come to grips with the hard task of actually attempting to draft means of channelling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability". The model Judicial Code which was presented to the court as an attempt towards standardisation was strongly criticised by the majority who pointed out that the Draftmen of the Model Judicial Code had expressly agreed with the conclusion of the Royal Commission that the factors which determined whether the sentence of death is the appropriate penalty in particular cases are too complex to be expressed within the limits of a simple formula. Some of the circumstances of aggravation and mitigation were mentioned in the Appendix to the Code. But it was pointed out that the Draftsmen of the Code did not restrict themselves to the items referred to in the Appendix but expressly stated that besides the above circumstances the court was bound to take into consideration "any other facts that the court deems relevant". This only meant that any exhaustive enumeration of aggravating or mitigating circumstances is impossible—the admission of which emphasizes

the view that standardisation is impossible. Finally the majority observed at p. 726: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution".

26. In India this onerous duty is cast upon Judges and for more than a century the judges are carrying out this duty under the Penal Code, 1860. The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion in the matter of sentence is, as already pointed out, liable to be corrected by superior courts. Laying down of standards to the limited extent possible as was done in the Model Judicial Code would not serve the purpose. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguards for the accused.

29. However, it is necessary to emphasize that the court is principally concerned with the facts and circumstances, whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the CrPC. The trial does not come to an end until all the relevant facts are proved and the Counsel on both sides have an opportunity to address the court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2) of the CrPC purport to provide for. These provisions are part of the procedure established by law and, unless it is shown that they are invalid for any other reasons, they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid, and, hence, the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21.

2. This extract is taken from *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : 1980 SCC OnLine SC 188 at page 719

99. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows:

> "In our view, capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:
>
> (*a*) Basically, every human being dreads death.
>
> (*b*) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.
>
> (*c*) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and legislatures and Members of the Bar and police officers — are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.
>
> (*d*) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.
>
> (*e*) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.
>
> (*f*) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

Views of the British Royal Commission

100. The British Royal Commission, after making an exhaustive study of the issue of capital punishment and its deterrent value, in their Report (1949-53), concluded:

> "The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible."

103. Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his view on this point as under:

> "Punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not."

That retribution is still socially acceptable function of punishment, was also the view expressed by Stewart, J., in *Furman* v. *Georgia* [33 L Ed 2d 346 : 408 US 238 (1972)] , at p. 389, as follows:

> "... I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct, in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law."

105. Retribution and deterrence are not two divergent ends of capital punishment. They are convergent goals which ultimately merge into one. How these ends of punishment coalesce into one was described by the **Law Commission of India**, thus:

> "The retributive object of capital punishment has been the subject-matter of sharp attack at the hands of the Abolitionists. We appreciate that many persons would regard the instinct of revenge as barbarous. How far it should form part of the penal philosophy in modern times will always remain a matter of controversy. No useful purpose will be served by a discussion as to whether the instinct of retribution is or is not commendable. The fact remains, however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct — the feeling prevails in the public is a fact of which notice is to be taken. The law does not encourage it, or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence. [Para 265 (18), 35th Report] "

148. The Law Commission in its 35th Report (Vol. I), made the following comments on this provision:

> "... **a considerable body of opinion is in favour of a provision requiring the court to state its reasons for imposing the punishment either of death or of imprisonment for life**. Further, this would be good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt.... It would increase the confidence of the people, in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death) or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment of life)."

In deference to this recommendation, Section 66 of the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955) deleted old sub-section (5) of Section 357 with effect from January 1, 1956, and thereafter, for such capital offences, it was left to the court, on the facts of each case, to pass, in its discretion, for reasons to be recorded, the sentence of death or the lesser sentence. This led to some difference of opinion whether, even after the amendment of 1955, in case of murder the normal punishment was death or imprisonment for life: (*See A.I.R. Commentaries on the Code of Criminal Procedure*, Vol. 3., p. 565, by D.V. Chitaley and S. Appu Rao). Overruling its earlier decision, the Bombay High Court in the *State* v. *Vali Mohammad* [AIR 1969 Bom 294, 299 : 71 Bom LR 1 : 1969 Cri LJ 1101] , held that death is not a normal penalty for murder. As against this, the Division Bench of the Madras High Court in *Re Veluchani Thevar* [AIR 1965 Mad 48, 49 : (1965) 2 MLJ 28] , held that death was the normal punishment where there were no extenuating circumstances. The third set of cases held that both the sentences were normal but the discretion as regards sentence was to be exercised in the light of facts and circumstances of the case.

151. Section 354(3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which **both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception**. The Joint Committee of Parliament in its Report, stated the object and reason of making this change, as follows:

> "A sentence of death is the extreme penalty of law and it is but fair that when a court awards that sentence in a case where the alternative sentence

of imprisonment for life is also available, it should give special reasons in support of the sentence."

Accordingly, sub-section (3) of Section 354 of the current Code provides:

"When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

152. In the context, we may also **notice Section 235(2) of the Code of 1973**, because it makes not only explicit, what according to the decision in *Jagmohan case* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] was implicit in the scheme of the code, but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:

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

The Law Commission in its 48th Report had pointed out this deficiency in the sentencing procedure:

"45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. **One such deficiency is the lack of comprehensive information as to characteristics and background of the offender**.

The aims of sentencing: Themselves obscure — become all the more in the absence of information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard. We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process."

By enacting Section 235(2) of the new Code, Parliament has accepted that recommendation of the Law Commission. Although sub-section (2) of Section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. "Of course", as was pointed out by this Court in *Santa Singh* v. *State of Punjab* [(1976) 4 SCC 190 : 1976 SCC (Cri) 545 : AIR 1976 SC 2386] ,

"care would have to be taken by the court to see that this hearing on the question of sentence is not turned into an instrument for unduly protracting

the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings."

154. Sections 432 and 433 of the Code of 1973 continue Sections 401 and 402 of the Code of 1898, with necessary modifications which bring them in tune with Articles 72 and 161 of the Constitution. Section 432 invests the "appropriate Government" [as defined in sub-section (7) of that section] with power to suspend or remit sentences. Section 433 confers on the appropriate Government power to commute sentence, without the consent of the person sentenced. Under clause (*a*) of the section, the appropriate Government may commute a sentence of death, for any other punishment provided by the Penal Code, 1860.

155. With effect from December 18, 1978, the Code of Criminal Procedure (Amendment) Act, 1978, inserted new Section 433-A, which runs as under:

> "433-A. *Restriction on powers of remission or commutation in certain cases.*— Notwithstanding anything contained in Section 432, **where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."**

157. We may next notice other provisions of the extant Code (corresponding to Sections 374, 375, 376 and 377 of the repealed Code) bearing on capital punishment. Section 366(1) of the Code requires the court passing a sentence of death to submit the proceedings to the High Court, and further mandates that such a sentence shall not be executed unless it is confirmed by the High Court. On such a reference for confirmation of death sentence, the High Court is required to proceed in accordance with Sections 367 and 368. Section 367 gives power to the High Court to direct further inquiry to be made or additional evidence to be taken. Section 368 empowers the High Court to confirm the sentence of death or pass any other sentence warranted by law; or to annul or alter the conviction or order a new trial or acquit the accused. Section 369 enjoins that in every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such court consists of two or more Judges, be made, passed and signed by at least two of them. Section 370 provides that where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be referred to a third Judge.

160. In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and **efficacy of the**

propositions laid down by this Court in *Jagmohan case* [(1978) 1 SCC 248 : (1978) 2 SCR 621] . These propositions may be summed up as under:

"(*i*) The general legislative policy that underlines the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(*ii*)-(*a*) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (referred to *McGoutha* v. *California* [(1971) 402 US 183])

(*b*) 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.

(*iii*) The view taken by the plurality in *Furman* v. *Georgia* [33 L Ed 2d 346 : 408 US 238 (1972)] decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and unguided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(*iv*)(*a*) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(*b*) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different. Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an

unguided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(*v*)(*a*) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the court at the preconviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided. Where counsel addresses the court with regard to the character and standing of the accused, they are duly considered by the court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(*b*) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302 Penal Code, "the court is *principally* concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the CrPC. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), CrPC purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21". (SCC p. 36), (emphasis added)"

162. In this view we are in accord with the dictum of this Court in ***Balwant Singh* v. *State of Punjab*** **[(1976) 1 SCC 425** : 1976 SCC (Cri) 43 : AIR 1976 SC 230 : (1976) 2 SCR 684] , wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J.) speaking for the court, summed up the scope and **implications of Section 354 (3),** thus: (SCC p. 427, para 4)

"Under this provision the court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case."

While applying proposition (*iv*)(*a*), therefore, the court has to bear in mind this fundamental principle of policy embodied in Section 354 (3).

163. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (*v*). In portion (*a*) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (*b*), it is emphasised that while making choice of the sentence under Section 302 of the Penal Code, the court is *principally* concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. ***The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code*, the court should not confine its consideration "principally" or *merely* to the circumstances connected with the particular *crime, but also* give due consideration to the circumstances of the *criminal.***

164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (*iv*)(*a*) and (*v*)(*b*) in *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] shall have to be recast and may be stated as below:

> "(*a*) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (*b*) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

167. Now, remains the question whether this Court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders.

171. Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, "crimes are only to be measured by the injury done to society". But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done (or risked) by the act and degree of actor's culpability". But how is the degree of that culpability to be measured. Can any thermometer be devised to measure its degree? This is a very baffling, difficult and intricate problem.

172. Secondly, criminal cases do not fall into set behavioristic patterns. Even within a single-category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. "Simply in terms of blameworthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated." [Messinger and Bittner's Criminology Year-Book (ibid.), Albert W. Alschuler article at p. 421] This is particularly true of murder. "There is probably no offence", observed Sir Ernest Cowers, Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder". The futility of attempting to lay down exhaustive standards was demonstrated by this court in *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] by citing the instance of the Model Penal Code which was presented to the American Supreme Court in *McGoutha* [(1971) 402 US 183] .

173. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty.

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

176. What the learned Chief Justice, who is amongst us in this case, has said recently in *Gurbaksh Singh Sibbia* v. *State of Punjab* [(1980) 2 SCC 565] in the context of laying down standards in the discretionary area of anticipatory bail, comes in as a timely reminder. **In principle, these observations aptly apply to the desirability and feasibility of laying down standards in the area of sentencing discretion**, also. Let us therefore, hark to the same: (SCC pp. 580-81, paras 14 and 15)

> "Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn L.C. said in *Hyman* v. *Rose* [1912 AC 623] :
>
> I desire in the first instance to point out that the discretion given by the section is very wide.... Now it seems to me that when the Act is so expressed to provide a wide discretion,... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which Judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so

wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a "code for the grant of anticipatory bail", which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence.

3. This extract is taken from *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681 : 1983 SCC OnLine SC 160 at page 487

31. Having dealt with the appeals on merits from the standpoint of proof of guilt and validity or otherwise of the order of conviction, we now come face to face with the problem indicated when the curtain was lifted, namely, the application of the rarest-of-rare-cases rule to the facts of individual cases in the context of the relevant guidelines. Some reflections on the question of death penalty may appropriately be made before we tackle the said question in the perspective of the present group of appeals.

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

I. Manner of commission of murder

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

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

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

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

II. Motive for commission of murder

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

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

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

IV . Magnitude of Crime

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

V. *Personality of victim of murder*

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

38. In this background the guidelines indicated in *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following

propositions emerge from *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :

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

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

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

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

4. This extract is taken from *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113 : 2008 SCC OnLine SC 1116 at page 790

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

54. Coming now to the facts of the case it is undeniable that the appellant killed Shakereh in a planned and cold-blooded manner but at least this much can be said in his favour that he devised the plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most. Further, though the way of killing appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim. Thirdly, as noted by Sinha, J. the appellant confessed his guilt at least partially before the High Court.

55. We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court. The hangman's noose is thus taken off the appellant's neck.

56. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this

standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment *when awarded as a substitute for death penalty* would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh* v. *State of Punjab* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] . In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

> "*14*. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case* [*Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646 : 1979 SCC (Cri) 749] . Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, *at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large*. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."
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> (emphasis added)

We think that it is time that the course suggested in *Dalbir Singh* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] should receive a formal recognition by the Court.

57. As a matter of fact there are sufficient precedents for the Court to take such a course. In a number of cases this Court has substituted death penalty by life imprisonment or in some cases for a term of twenty years with the further direction that the convict would not be released for the rest of his life or until the twenty-year term was actually served out. In this case [**Ed.**: *Swamy Shraddananda (1)* v. *State of Karnataka*, (2007) 12 SCC 288] too Sinha, J. passed exactly the same order. After declining to confirm the death sentence given to the appellant he proceeded to give the following direction : (SCC p. 322, para 98).

> "*98*. However, while saying so, we (sic) direct that in a case of this nature 'life sentence' *must be meant to be 'life sentence'*. Such a direction can be given, as would appear from some precedents."
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> (emphasis supplied)

Sinha, J. then mentioned the following five cases in which this Court had passed similar orders.

58. In *Subash Chander* v. *Krishan Lal* [(2001) 4 SCC 458 : 2001 SCC (Cri) 735] five accused persons, including Krishan Lal were put on trial for committing multiple murders. The trial court acquitted one of the accused but convicted the rest of them and sentenced each of them to death. In the death reference/appeals preferred by the convicted accused, the High Court confirmed the conviction of all the four accused but commuted their death sentence to life imprisonment. One Subash Chander (PW 2) came to this Court in appeal. On a consideration of the material facts this Court felt that the High Court was not justified in commuting the sentence of death of at least one accused, Krishan Lal. But then the counsel appearing on his behalf implored that instead of death penalty this Court might order for imprisonment of Krishan Lal for the remaining period of his life. This Court took note of the counsel's submission as follows: (SCC p. 467, para 19)

> "*19*. Faced with the situation Mr U.R. Lalit, Senior Counsel appearing for the aforesaid respondents submitted that instead of depriving Krishan Lal (A-1) of his life, the Court can pass appropriate order to deprive the aforesaid accused person of his liberty throughout his life. *Upon instructions, the learned Senior Counsel submitted that the said Krishan Lal, if sentenced to life imprisonment would never claim his premature release or commutation of his sentence on any ground*. We record such a submission made on behalf of the said accused, upon instructions."
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> (emphasis added)

This Court accepted the plea made by the counsel and passed the following order: (SCC p. 468, para 23)

> "*23*. However, in the peculiar circumstances of the case, apprehending imminent danger to the life of Subash Chander and his family in future, taking on record the statement made on behalf of Krishan Lal (A-1), we are inclined to hold that *for him the imprisonment for life shall be the imprisonment in prison for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the rules made for the purposes of grant of commutation and remissions.*"
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> (emphasis added)

59. In *Subash Chander* [(2001) 4 SCC 458 : 2001 SCC (Cri) 735] this Court referred to an earlier judgment **in *State of M.P.* v. *Ratan Singh* [(1976) 3 SCC 470** : 1976 SCC (Cri) 428] in which it was held that a sentence of imprisonment for life means a sentence for the entire life of the prisoner *unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure*. The Court also referred to the earlier decisions in *Sohan Lal* v. *Asha Ram* [(1981) 1 SCC 106] (this is a mistake since *Sohan Lal* [(1981) 1 SCC 106] is a completely different case; apparently the reference was to *Maru Ram* v. *Union of India* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] on p. 107 of the

same Report), *Bhagirath* v. *Delhi Admn.* [(1985) 2 SCC 580 : 1985 SCC (Cri) 280] and *Zahid Hussein* v. *State of W.B.* [(2001) 3 SCC 750 : 2001 SCC (Cri) 631]

60. In *Shri Bhagwan* v. *State of Rajasthan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] , the appellant, who was 20 years old at the time of commission of the offence, had come to this Court, condemned to death by the trial court and the High Court. According to the prosecution, he had killed five members of a family by mercilessly battering them to death. The manner of killing was brutal and the circumstances of the crime exhibited crass ingratitude on the appellant's part. The motive was theft of gold ornaments and other articles belonging to the victim family. In this case, K.G. Balakrishnan, J. (as the Hon'ble the Chief Justice was at that time) who wrote the judgment for the Court commuted the death sentence awarded to the appellant to imprisonment for life subject to the direction that he would not be released from the prison until he had served out at least 20 years of imprisonment including the period already undergone by him. In this case there is also a very useful discussion with regard to the provisions of commutation and remission in the Code of Criminal Procedure and the Prison Rules to which we shall advert later on in this judgment.

61. In *Prakash Dhawal Khairnar (Patil)* v. *State of Maharashtra* [(2002) 2 SCC 35 : 2002 SCC (Cri) 281] the condemned appellant had committed the murder of his own brother, their mother and four members of his brother's family because the deceased brother was not partitioning the property which the appellant claimed to be joint family property. In the totality of circumstances this Court set aside the death sentence awarded to the appellant but directed that for the murders committed by him, he would suffer imprisonment for life and further that he would not be released from prison until he had served out at least 20 years of imprisonment including the period already undergone by him. For giving such a direction, the Court referred to the decisions in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] and *Dalbir Singh* v. *State of Punjab* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] .

62. In *Ram Anup Singh* v. *State of Bihar* [(2002) 6 SCC 686 : 2002 SCC (Cri) 1466] there were a father and his two sons before this Court. They had killed the father's brother, the brother's wife, his daughter and his son-in-law. On conviction for the murders the father was sentenced to life imprisonment but the two sons were given the death penalty. This Court once again interfered and set aside the death sentence awarded by the trial court and confirmed by the High Court to the two sons and instead sentenced them to suffer rigorous imprisonment for life with the condition that they would not be released before completing an actual term of 20 years including the period of imprisonment already undergone by them. Reference was made to the decisions in *Shri*

Bhagwan [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] , *Dalbir Singh* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] and *Prakash Dhawal Khairnar (Patil)* [(2002) 2 SCC 35 : 2002 SCC (Cri) 281] .

63. The fifth decision mentioned by Sinha, J. was in *Mohd. Munna* v. *Union of India* [(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] . In this case it was basically held that in the absence of an order of remission formally passed by the appropriate Government, there was no provision in the Penal Code or in the Code of Criminal Procedure under which a sentence of life imprisonment could be treated as for a term of 14 years or 20 years and further that a convict undergoing imprisonment for life could not claim remission as a matter of right.

67. On a perusal of the seven decisions discussed above and the decisions referred to therein it would appear that this Court modified **the death sentence to imprisonment for life or in some cases imprisonment for a term of twenty years with the further direction that the convict must not be released from prison for the rest of his life or before actually serving out the term of twenty years, as the case may be, mainly on two premises; one, an imprisonment for life, in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner and two, a convict undergoing life imprisonment has no right to claim remission.** In support of the second premise reliance is placed on the line of decisions beginning from *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] and coming down to *Mohd. Munna* v. *Union of India* [(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] .

69. In this connection an interesting development was brought to our notice. We were informed that Subhashsingh Shobhnathsingh Thakur whose death sentence was modified by this Court to imprisonment for life—*till rest of life* by its judgment dated 5-11-2001 in *Jayawant Dattatraya Suryarao* v. *State of Maharashtra* [(2001) 10 SCC 109 : 2002 SCC (Cri) 897] , has filed a writ petition under Article 32 of the Constitution before this Court [Writ Petition (Criminal) No. 36 of 2008: *Subhashsingh Shobhnathsingh Thakur* v. *State of Maharashtra*] challenging, on substantially the same grounds, the order of the Court, insofar as it directed for the non-application of the statutory provisions of remission to his case.

COUNTER ARGUMENT

70. Our attention was also invited to a decision of this Court in *State (Govt. of NCT of Delhi)* v. *Prem Raj* [(2003) 7 SCC 121 : 2003 SCC (Cri) 1586] . In this case, Prem Raj, the accused-respondent before the Court was convicted by the trial court under Section 7 read with Sections 13(1)(*d*) and 13(2) of the

Prevention of Corruption Act and was sentenced to undergo rigorous imprisonment for two years and a fine of Rs 500 under Section 7. He was additionally sentenced to undergo imprisonment for 3½ years and a fine of Rs 1000 under Section 13(2) of the Act, subject to the direction that the two sentences would run concurrently. In appeal, on a plea made on the question of sentence, a learned Single Judge of the High Court enhanced the amount of fine to Rs 15,000 in lieu of the sentences of imprisonment and directed that on deposit of the amount of fine the State Government, being the "appropriate Government" would formalise the matter by passing an appropriate order under Section 433(*c*) of the Code of Criminal Procedure. This Court, on appeal by the State, held that the question of remission lay within the domain of the appropriate Government and it was not open to the High Court to give a direction of that kind.

71. In *Prem Raj* [(2003) 7 SCC 121 : 2003 SCC (Cri) 1586] the Court referred to two earlier decisions in *Delhi Admn.* v. *Manohar Lal* [(2002) 7 SCC 222 : 2002 SCC (Cri) 1670] and *State of Punjab* v. *Kesar Singh* [(1996) 5 SCC 495 : 1996 SCC (Cri) 1034] and in para 13 of the decision observed as follows: (*Prem Raj case* [(2003) 7 SCC 121 : 2003 SCC (Cri) 1586] , SCC pp. 127-28)

> "*13.* An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Admn.* v. *Manohar Lal* [(2002) 7 SCC 222 : 2002 SCC (Cri) 1670] . The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In *State of Punjab* v. *Kesar Singh* [(1996) 5 SCC 495 : 1996 SCC (Cri) 1034] , this Court observed as follows [though it was in the context of Section 433(*b*)]: (SCC pp. 495-96, para 3)
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> > '*3.* ... The mandate of Section 433 CrPC enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts. ... That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside.' "

Relying upon the aforesaid two decisions this Court set aside the order of the Court but left it open to the accused to move the appropriate Government for such relief as may be available in law. It was further clarified that it would be at the sole discretion of the Government to exercise the power conferred on it in accordance with law.

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73. In our view, the submission is wholly misconceived and untenable and the decision in *Prem Raj* [(2003) 7 SCC 121 : 2003 SCC (Cri) 1586] has no application to the issue under consideration.

74. At this stage, it will be useful to take a very brief look at the provisions with regard to sentencing and computation, remission, etc. of sentences. Section 45 of the Penal Code defines "life" to mean the life of the human being, unless the contrary appears from the context. Section 53 enumerates punishments, the first of which is death and the second, imprisonment for life. Sections 54 and 55 give to the appropriate Government the power of commutation of the sentence of death and the sentence of imprisonment for life respectively. Section 55-A defines "appropriate Government". Section 57 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

75. It is now conclusively settled by a catena of decisions that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life. [See the decisions of this Court in *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] (Constitution Bench), *Dalbir Singh* v. *State of Punjab* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] , *Maru Ram* v. *Union of India* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] (Constitution Bench), *Naib Singh* v. *State of Punjab* [(1983) 2 SCC 454 : 1983 SCC (Cri) 536] , *Ashok Kumar* v. *Union of India* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845] , *Laxman Naskar* v. *State of W.B.* [(2000) 7 SCC 626 : 2000 SCC (Cri) 1431] , *Zahid Hussein* v. *State of W.B.* [(2001) 3 SCC 750 : 2001 SCC (Cri) 631] , *Kamalanantha* v. *State of T.N.* [(2005) 5 SCC 194 : 2005 SCC (Cri) 1121] , *Mohd. Munna* v. *Union of India* [(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] and *C.A. Pious* v. *State of Kerala* [(2007) 8 SCC 312 : (2007) 3 SCC (Cri) 544] .]

76. It is equally well settled that Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. (See *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440] and *Ashok Kumar* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845] .) The object and purpose of Section 57 will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code.

90. Earlier in this judgment it was noted that in the decision in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] there is a useful discussion on the legality of remission in the case of life convicts. The judgment in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] , in SCC para 22, refers to and quotes from the earlier decision in *State of M.P.* v. *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] which in turn quotes a passage from the Constitution Bench decision in *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440] . It will be profitable to reproduce here the extract from *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] : (SCC pp. 473-74, para 4)

> "*4.* As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer res integra and stands concluded by a decision of this Court in *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] , where the Court, following a decision of the Privy Counsel in *Pandit Kishori Lal* v. *King Emperor* [(1944-45) 72 IA 1 : AIR 1945 PC 64] observed as follows: (AIR pp. 602-03, paras 4-5)
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> > '*4.* ... Under that section a person transported for life or any other terms before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.
> >
> > *5.* If so the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Penal Code, Code of Criminal Procedure or the Prisons Act. ... A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.'
>
> The Court further observed thus: (AIR pp. 603-04, paras 7-8)
>
> > '*7.* ... *But the Prisons Act does not confer on any authority a power to commute or remit sentences; it* provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act. ... Under the said rules the order of an appropriate Government under Section 401, Criminal Procedure Code, are a prerequisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

8. … The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.'

It is, therefore, manifest from the decision of this Court that the Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Penal Code. In other words, this Court has clearly held that a sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period the prisoner's death and remissions given under the Rules could not be regarded as a substitute for a sentence of transportation for life."

(emphasis supplied)

Further, in para 23, the judgment in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] observed as follows: (SCC pp. 306-07)

"*23.* In *Maru Ram* v. *Union of India* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] a Constitution Bench of this Court reiterated the aforesaid position and observed that the inevitable conclusion is that since in Section 433-A we deal only with life sentences, *remissions lead nowhere and cannot entitle a prisoner to release*. Further, in *Laxman Naskar* v. *State of W.B.* [(2000) 7 SCC 626 : 2000 SCC (Cri) 1431] , after referring to the decision of *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] , the Court reiterated that sentence for 'imprisonment for life' ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term if served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose."

(emphasis supplied)

91. The legal position as enunciated in *Pandit Kishori Lal* [(1944-45) 72 IA 1 : AIR 1945 PC 64] , *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440] , *Maru Ram* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] , *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] and *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

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

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

5. This extract is taken from *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150 : 2009 SCC OnLine SC 1138 at page 519

Questions involved

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

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

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

Law on death penalty

43. A Constitution Bench of this Court in *Bachan Singh* v. *State of Punjab* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] repelled the challenge of constitutionality to death penalty by laying down the framework law on this point. *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] serves as a watershed moment in the history of death penalty jurisprudence in India as it severed Indian judiciary's normative ambivalence on the subject. It was pronounced after the new legislative policy [in form of Section 354(3) of the Code of Criminal Procedure, 1973] came into force. The impact of this legislative change was variously interpreted by this Court, and this disparity in interpretation triggered *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] . One such case, which had laid down an interpretation of Section 354(3) was *Rajendra Prasad* v. *State of U.P.* [(1979) 3 SCC 646 : 1979 SCC (Cri) 749]

45. There are three broad values emerging from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] .

1. Individualised sentencing

46. For an effective compliance of sentencing procedure under Section 354(3) and Section 235(2) CrPC, sufficient discretion is a precondition. Strict channelling of discretion would also go against the founding principles of sentencing as it will prevent the sentencing court to identify and weigh various factors relating to the crime and the criminal such as culpability, impact on the society, gravity of offence, motive behind the crime, etc. *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] also holds the same view.

47. It was held in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] that: (SCC p. 741, paras 173-74)

"*173*. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty.

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

50. Mandatory death punishment (prescribed under Section 303 of the Penal Code) was stuck down as unconstitutional by this Court in *Mithu* v. *State of Punjab* [(1983) 2 SCC 277 : 1983 SCC (Cri) 405 : AIR 1983 SC 473] . This Court observed: (SCC p. 286, para 7)

"*7*. … If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. The ratio of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , therefore, is that, death sentence is constitutional if it is prescribed as an alternative sentence for the offence of murder *and* if the normal sentence prescribed by law for murder is imprisonment for life."

(emphasis in original)

.

2. Threshold of rarest of rare

2(A) Sentencing procedure

53. The analytical tangle relating to sentencing procedure deserves some attention here. Sentencing procedure deserves an articulate and judicial administration. In this regard, all courts are equally responsible. Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty. The selection of penalty must not require a judge to reflect on his/her personal perception of crime.

54. In *Swamy Shraddananda (2)* v. *State of Karnataka* [(2008) 13 SCC 767 : (2008) 10 Scale 669] (SCC p. 790, para 51), the Court notes that the awarding of sentence of death "depends a good deal on the personal

predilection of the Judges constituting the Bench". This is a serious admission on the part of this Court. Insofar as this aspect is considered, there is inconsistency in how *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] has been implemented, **as *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] mandated principled sentencing and not judge-centric sentencing**. There are two sides of the debate. It is accepted that the *rarest of the rare* case is to be determined in the facts and circumstance of a given case and there is no hard-and-fast rule for that purpose. There are no strict guidelines. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of the *rarest of rare* dictum. Therefore, it is to be read with Articles 21 and 14.

Pre-sentence hearing and "special reasons"

55. Under Sections 235(2) and 354(3) of the Criminal Procedure Code, there is a mandate as to a full-fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance with both the provisions. A scrupulous compliance with both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage. Please see *Santa Singh* v. *State of Punjab* [AIR 1956 SC 256] , *Malkiat Singh* v. *State of Punjab* [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] , *Allauddin Mian* v. *State of Bihar* [(1989) 3 SCC 5 : 1989 SCC (Cri) 490 : AIR 1989 SC 1456] , *Muniappan* v. *State of T.N.* [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , *Jumman Khan* v. *State of U.P.* [(1991) 1 SCC 752 : 1991 SCC (Cri) 283] and *Anshad* v. *State of Karnataka* [(1994) 4 SCC 381 : 1994 SCC (Cri) 1204] on this.

Nature of information to be collated at pre-sentence hearing

56. At this stage, *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in **the 48th Report of the Law Commission**.

57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this context, Guideline 4 in the list of mitigating circumstances as borne out by *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] is relevant. The Court held: (SCC p. 750, para 206)

> "*206*. (*4*) The probability that the accused can be reformed and rehabilitated.
>
> The State shall by evidence prove that the accused does not satisfy Conditions (*3*) and (*4*) above."

In fine, *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

2(B) Nature of content of the rarest of rare dictum

58. The *rarest of rare* dictum breathes life in "special reasons" under Section 354(3). In this context, *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] laid down a fundamental threshold in the following terms: (SCC p. 751, para 209)

> "*209*. … A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That *ought not to be done* save in the *rarest of rare* cases when the alternative option is unquestionably foreclosed."
>
> (emphasis supplied)

An analytical reading of this formulation would reveal it to be an authoritative negative precept. The "*rarest of rare* cases" is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in the form of "when the alternative option is unquestionably foreclosed".

59. Thus, in essence, the *rarest of rare* dictum imposes a wide-ranging embargo on award of death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification enumerated below:

1. that the case belongs to the *rarest of rare* category,

2. and the alternative option of life imprisonment will just not suffice in the facts of the case.

60. The *rarest of rare* dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the *rarest of rare* dictum places an extraordinary burden on the court, in case it selects death

punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the *rarest of rare* dictum.

61. The background analysis leading to the conclusion that the case belongs to the *rarest of rare* category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the *rarest of rare* aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted: (*Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , SCC p. 738, para 161)

> "*161*. … The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case *relating to the crime as well as the criminal*."
>
> (emphasis supplied)

Declared per Incuriam

62. Curiously, **in *Ravji* v. *State of Rajasthan*** [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] this Court held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, stating: (SCC p. 187, para 24)

> "*24*. … The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'."

63. We are not oblivious that *Ravji case* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has been followed in at least six decisions of this Court in which death punishment has been awarded in last nine years, but, in our opinion, it was rendered per incuriam. *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] specifically noted the following on this point: (SCC p. 739, para 163)

> "*163*. … The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under

Section 302 of the Penal Code, the court should not confine its consideration 'principally' or *merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.*"

(emphasis partly in original and partly supplied)

Shivaji v. *State of Maharashtra* [(2008) 15 SCC 269 : AIR 2009 SC 56] , *Mohan Anna Chavan* v. *State of Maharashtra* [(2008) 7 SCC 561 : (2008) 3 SCC (Cri) 193] , *Bantu* v. *State of U.P.* [(2008) 11 SCC 113 : (2009) 1 SCC (Cri) 353 : (2008) 10 Scale 336] , *Surja Ram* v. *State of Rajasthan* [(1996) 6 SCC 271 : 1996 SCC (Cri) 1314] , *Dayanidhi Bisoi* v. *State of Orissa* [(2003) 9 SCC 310 : 2003 SCC (Cri) 1798] and *State of U.P.* v. *Sattan* [(2009) 4 SCC 736 : (2009) 3 Scale 394] are the decisions where *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has been followed. It does not appear that this Court has considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent.

2(C) Alternative option is foreclosed

64. Another aspect of the *rarest of rare* doctrine which needs serious consideration is interpretation of latter part of the dictum (SCC p. 751, para 209) — "[t]hat ought not to be done save in the *rarest of rare* cases when the *alternative option is unquestionably foreclosed* (emphasis supplied)". *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

65. Death punishment, as will be discussed in detail a little later, qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability. Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution—all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end to anything to do with the life. This is the big difference between the two punishments. Before imposing death penalty, therefore, it is imperative to consider the same.

66. The *rarest of rare* dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life

imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be *completely futile*, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the *rarest of rare* doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] sets the bar very high by introduction of the *rarest of rare* doctrine.

67. In *Panchhi* v. *State of U.P.* [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] this Court also elucidates on "when the alternative option is foreclosed" benchmark in the following terms: (SCC p. 182, para 16)

> *16*. When the Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in *Bachan Singh* v. *State of Punjab* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] this Court took particular care to say that death sentence shall not normally be awarded for the offence of murder and that it must be confined to the *rarest of rare* cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid freaks wherein the lesser sentence would be, by any account, wholly inadequate. In *Machhi Singh* v. *State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] a three-Judge Bench of this Court while following the ratio in *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] laid down certain guidelines among which the following is relevant in the present case: (*Machhi Singh case* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , SCC p. 489, para 38)
>
> > '(*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.' "
> >
> > (emphasis supplied)

68. In *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] it was stated: (SCC p. 750, paras 206-07)

> "*206*. Dr. Chitale has suggested these mitigating factors:
>
> '*Mitigating circumstances*.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(*1*) That the offence was committed under the influence of extreme mental or emotional disturbance.

(*2*) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(*3*) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(*4*) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (*3*) and (*4*) above.

(*5*) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(*6*) That the accused acted under the duress or domination of another person.

(*7*) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

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

2(D) Role and responsibility of courts

69.*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] while enunciating the *rarest of rare* doctrine, did not deal with the role and responsibility of sentencing court and the appellate court separately. For that matter, this Court did not specify any review standards for the High Court and the Supreme Court. In that event, all courts, be it the trial court, the High Court or this Court, are duty-bound to ensure that the ratio laid down therein is scrupulously followed. Same standard of rigour and fairness are to be followed by the courts. If anything, inverse pyramid of responsibility is applicable in death penalty cases.

70. In *State of Maharashtra* v. *Sindhi* [(1975) 1 SCC 647 : 1975 SCC (Cri) 283] this Court reiterated, with emphasis, that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge.

2(E) Sentencing justifications in heinous crimes

71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.

72. We must also point out, in this context, that there is no consensus in the Court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigour and fairness are given primacy over sentiments and emotions.

73. In *Panchhi* [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] the Court downplayed the heinous nature of crime and relied on mitigating circumstances in the final opinion. The Court held: (SCC p. 183, para 20)

> "*20*. We have extracted the above reasons of the two courts only to point out that it is the savagery or brutal manner in which the killers perpetrated the acts on the victims including one little child which had persuaded the two courts to choose death sentence for the four persons. No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the '*rarest of rare* cases' as indicated in *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] . In a way, every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."
>
> (emphasis supplied)

74. In *Vashram Narshibhai Rajpara* v. *State of Gujarat* [(2002) 9 SCC 168 : 2003 SCC (Cri) 1112] this Court relied on the dictum of *Panchhi* [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] and further explained the approach: (*Vashram case* [(2002) 9 SCC 168 : 2003 SCC (Cri) 1112] , SCC p. 176, para 9)

"*9.* … As to what category a particular case would fall depends, invariably on varying facts of each case and no absolute rule for invariable application or yardstick as a ready reckoner can be formulated. In *Panchhi* v. *State of U.P.* [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] it has been observed that the brutality of the manner in which the murder was perpetrated may not be the sole ground for judging whether the case is one of the '*rarest of rare* cases', as indicated in *Bachan Singh* v. *State of Punjab* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and that every murder being per se brutal, the distinguishing factors should really be the mitigating or aggravating features surrounding the murder. The intensity of bitterness, which prevailed, and the escalation of simmering thoughts into a thirst for revenge or retaliation were held to be also a relevant factor."

(emphasis supplied)

75. This Court also gave primacy to mitigating circumstances in the final analysis: (*Vashram case* [(2002) 9 SCC 168 : 2003 SCC (Cri) 1112] , SCC p. 177, para 10)

"*10.* Considering the facts of the case presented before us, it is on evidence that despite his economic condition and earnest attempt to purchase a house for the family after raising loans, the wife and daughters were stated to be not pleased and were engaging in quarrels constantly with the appellant. Though they were all living together the continuous harassment and constant nagging could have very well affected his mental balance and such sustained provocation could have reached a boiling point resulting in the dastardly act. As noticed even by the High Court the appellant though hailing from a poor family had no criminal background and it could not be reasonably postulated that he will not get rehabilitated or that he would be a menace to the society. The boy of tender age would also once for all be deprived of the parental protection. Keeping in view all these aspects, in our view, it could not be said that the imposition of life imprisonment would not adequately meet the requirements of the case or that only an imposition of the extreme punishment alone would do real or effective justice. Consequently, we direct the modification of the sentence of death into one of rigorous imprisonment for life, by partly allowing the appeal to that extent. In other respects the appeal shall stand dismissed. The appellant shall undergo the remaining period of sentence as above."

76. In *Om Prakash* v. *State of Haryana* [(1999) 3 SCC 19 : 1999 SCC (Cri) 334] K.T. Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] dictum of balancing the "mitigating and aggravating circumstances". The Court was of the view that the sentencing court is bound by *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and not in specific terms to the incoherent and fluid responses of society: (*Om Prakash case* [(1999) 3 SCC 19 : 1999 SCC (Cri) 334] , SCC p. 24, para 7)

7. It is true that court must respond to the cry of the society and to settle what would be a deterrent punishment for an abominable crime. It is equally true that a large number of criminals go unpunished thereby increasing criminals in the society and law losing its deterrent effect. It is also a truism as observed in *State of M.P.* v. *Shyamsunder Trivedi* [(1995) 4 SCC 262 : 1995 SCC (Cri) 715] (SCC at p. 273) that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice delivery system a suspect; in the ultimate analysis, the society suffers and a criminal gets encouraged. Sometimes it is stated that only rights of the criminals are kept in mind, the victims are forgotten. Despite this it should be kept in mind that while imposing the *rarest of rare* punishment i.e. death penalty, the court must balance the mitigating and aggravating circumstances of the crime and it would depend upon particular and peculiar facts and circumstances of each case."

(emphasis supplied)

77. In *Dharmendrasinh* v. *State of Gujarat* [(2002) 4 SCC 679 : 2002 SCC (Cri) 859] (SCC p. 696, para 22) the Court acknowledged that the crime committed was "no doubt heinous and unpardonable" and that two innocent children lost their lives for no fault of theirs, but the Court chose to give force to mitigating circumstances in the following terms: (SCC p. 696, para 21)

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

78. The Court also stated the law in the following terms: (*Dharmendrasinh case* [(2002) 4 SCC 679 : 2002 SCC (Cri) 859] , SCC pp. 695-96, para 20)

"*20.* Every murder is a heinous crime. Apart from personal implications, it is also a crime against the society but in every case of murder death penalty is not to be awarded. Under the present legal position, imprisonment for life is the normal rule for punishing crime of murder and sentence of death, as held in different cases referred to above, would be awarded only in the *rarest of rare* cases. A number of factors are to be taken into account, namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying any kind of lust, greed or in pursuance of anti-social activity or by way of organised crime, drug trafficking or the like. Chances of inflicting the society with a similar criminal act that is to say vulnerability of the members of the society at the

hands of the accused in future and ultimately as held in several cases, mitigating and aggravating circumstances of each case have to be considered and a balance has to be struck. The learned State counsel as indicated earlier has already indicated the aggravating circumstances by reason of which it has been vehemently urged that sentence of death deserves to be confirmed."

(emphasis supplied)

79. Whether primacy should be accorded to aggravating circumstances or mitigating circumstances is not the question. Court is duty-bound by virtue of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] to equally consider both and then to arrive at a conclusion as to respective weights to be accorded. We are also bound by the spirit of Article 14 and Article 21 which forces us to adopt a principled approach to sentencing. This overarching policy flowing from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] applies to heinous crimes as much as it applies to relatively less brutal murders. The Court in this regard held: (SCC p. 751, para 209)

"*209.* ... Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency—a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception."

2(F) Public opinion in capital sentencing

80. It is also to be pointed out that public opinion is difficult to fit in the *rarest of rare* matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] .

81. The *rarest of rare* policy and legislative policy on death punishment may not be essentially tuned to public opinion. Even if we presume that the general populace favours a liberal death punishment policy, although there is no evidence to this effect, we cannot take note of it. We are governed by the dictum

of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] according to which life imprisonment is the rule and death punishment is an exception.

82. We are also governed by the Constitution of India. Articles 14 and 21 are constitutional safeguards and define the framework for State in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the State in its dealings with people in various capacities, including as a convict. The position is, if the State is precariously placed to administer a policy within the confines of Articles 21 and 14, it should be applied most sparingly. This view flows from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and in this light, we are afraid that the Constitution does not permit us to take a re-look on the capital punishment policy and meet the society's cry for justice through this instrument.

6. This extract is taken from *Union of India v. V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695 : 2015 SCC OnLine SC 1267 at page 51

8. Keeping the above factors in mind, precisely the nature of questions culminates as follows:

8.1. (*i*) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission?

8.2. (*ii*) Whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond grant of remission?

8.3. (*iii*) Whether the power under Sections 432 and 433 of the Criminal Procedure Code by the appropriate Government would be available even after the constitutional power under Articles 72 and 161 by the President and the Governor is exercised as well as the power exercised by this Court under Article 32?

8.4. (*iv*) Whether the State or the Central Government have the primacy under Section 432(7) of the Criminal Procedure Code?

8.5. (*v*) Whether there can be two appropriate Governments under Section 432(7)?

8.6. (*vi*) Whether power under Section 432(1) can be exercised *suo motu* without following the procedure prescribed under Section 432(2)?

8.7. (*vii*) Whether the expression "consultation" stipulated in Section 435(1) really means "concurrence"?

Questions (i) and (ii) [**Ed.** : Repeated here from paras 8.1 and 8.2, above.] **:**

(i) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission?

(ii) Whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond grant of remission?

50. Having thus noted the relevant provisions in the Constitution, the Penal Code, the Criminal Procedure Code and the DSPE Act, we wish to deal with the questions referred for our consideration in seriatim. The first question framed for the consideration of the Constitution Bench reads as under : (*V. Sriharan*

case [*Union of India* v. *V. Sriharan*, (2014) 11 SCC 1 : (2014) 3 SCC (Cri) 1] , SCC p. 19, para 52)

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

51. This question contains two parts. The first part poses a question as to whether life imprisonment as a punishment provided for under Section 53 of the Penal Code and as defined under Section 45 of the said Code means imprisonment for the rest of one's life or a convict has a right to claim remission. The second part is based on the ruling of *Swamy Shraddananda (2)* v. *State of Karnataka* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] .

58. It is quite apparent that this Court by stating as above has affirmed the legal position that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Criminal Procedure Code by the appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz. the President or the Governor of the State, respectively.

61. Having noted the abovereferred to two Constitution Bench decisions in *Godse* [*Gopal Vinayak Godse* v. *State of Maharashtra*, AIR 1961 SC 600 : (1961) 1 Cri LJ 736 : (1961) 3 SCR 440] and *Maru Ram* [*Maru Ram* v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196] which were consistently followed in the subsequent decisions in *Sambha Ji Krishan Ji* [*Sambha Ji Krishan Ji* v. *State of Maharashtra*, (1974) 1 SCC 196 : 1974 SCC (Cri) 102 : AIR 1974 SC 147] , *Ratan Singh* [*State of M.P.* v. *Ratan Singh*, (1976) 3 SCC 470 : 1976 SCC (Cri) 428] , *Ranjit Singh* [*Ranjit Singh* v. *UT of Chandigarh*, (1984) 1 SCC 31 : 1984 SCC (Cri) 27] , *Ashok Kumar* [*Ashok Kumar* v. *Union of India*, (1991) 3 SCC 498 : 1991 SCC (Cri) 845] and *Subash Chander* [*Subash Chander* v. *Krishan Lal*, (2001) 4 SCC 458 : 2001 SCC (Cri) 735] . The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under

Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Criminal Procedure Code.

71. Having thus noted the need for carrying out a special term of imprisonment to be imposed, based on sound legal principles, this Court also considered some of the decisions of this Court wherein the mandate of Section 433 of the Criminal Procedure Code was considered at length wherein it was held that exercise of power under Section 433 was an executive discretion and the High Court in its review jurisdiction had no power to commute the sentence imposed where a minimum sentence was provided. It was a converse situation which this Court held has no application and the submissions were rejected as wholly misconceived. Thereafter, a detailed reference was made to Sections 45, 53, 54, 55, 55-A, 57 and other related provisions in the Penal Code, 1860 to understand the sentencing procedure prevalent in the Code and after making reference to the provisions relating to grant of remission in Sections 432, 433, 433-A, 434 and 435 of the Criminal Procedure Code concluded as under in paras 91 and 92 : (*Swamy Shraddananda (2) case* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , SCC pp. 804-05)

> "*91.* The legal position as enunciated in *Kishori Lal* [*Kishori Lal* v. *King Emperor*, 1914 SCC OnLine PC 81 : (1944-45) 72 IA 1 : (1945) 58 LW 251] , *Gopal Vinayak Godse* [*Gopal Vinayak Godse* v. *State of Maharashtra*, AIR 1961 SC 600 : (1961) 1 Cri LJ 736 : (1961) 3 SCR 440] , *Maru Ram* [*Maru Ram* v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196] , *Ratan Singh* [*State of M.P.* v. *Ratan Singh*, (1976) 3 SCC 470 : 1976 SCC (Cri) 428] and *Shri Bhagwan* [*Shri Bhagwan* v. *State of Rajasthan*, (2001) 6 SCC 296 : 2001 SCC (Cri) 1095] *and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.*
>
> *92.* The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh [**Ed.** : Kalifulla, J. delivered the leading opinion of the Court on behalf of Dattu, C.J., himself and Ghose, J., while Lalit, J., for Sapre, J. and himself, delivered an opinion concurring therewith on all issues except on validity of the special category sentence.] *or it may be highly disproportionately inadequate* [**Ed.** : The matter between two asterisks has been emphasised in original.] . When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. *But at the same time, having*

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

(emphasis supplied)

96. Before doing so, we also wish to note each one of the **12 crimes for which, the penalty of death and life is prescribed:**

96.1. Under Section 120-B, when prescribing the penalty for criminal conspiracy in respect of offence for which death penalty or life imprisonment is provided for in the Penal Code, every one of the accused who was a party to such criminal conspiracy in the commission of the offence is to be treated as having abetted the crime and thereby liable to be punished and imposed with the same punishment as was to be imposed on the actual offender.

96.2. Under Section 121 the provision for capital punishment is for the offence of waging or attempting to wage a war or abetting the waging of war against the Government of India. In other words, in the event of such offence found proved, such a convict can be held to have indulged in a crime against the whole of the NATION meaning thereby against every other Indian citizen and the whole territory of this country.

96.3. Under Section 132, the punishment of death is provided for an offender who abets the committing ofMUTINY by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India and in the event of such MUTINY been committed as a sequel to such abetment. MUTINY in its ordinary dictionary meaning is an open revolt against constitutional authority, especially by soldiers or sailors against their officers. It can be, therefore, clearly visualised that in the event of such MUTINY taking place by the Army personnel what would be plight of this country and the safety and interest of more than 1200 million people living in this country.

96.4. Under the latter part of Section 194 whoever tenders or fabricates false evidence clearly intending thereby that such act would cause any

innocent person be convicted of capital punishment and any such innocent person is convicted of and executed of such capital punishment, the person who tendered such fake and fabricated evidence be punished with punishment of death.

96.5. Under the Second Part of Section 195-A if any person threatens any other person to give false evidence and as a consequence of such act any other person is though innocent, but convicted and sentenced to death in consequence of such false evidence, the person at whose threat the false evidence came to be tendered is held to be liable to be meted out with the same punishment of death.

96.6. Under Section 302, whoever commits murder of another person is liable to be punished with death or life imprisonment.

96.7. Under Section 305, whoever abets the commission of suicide of a person under 18 years of age i.e. a minor or juvenile, any insane person, any idiot or any person in a state of intoxication is liable to be punished with death or life imprisonment. It is relevant to note that the categories of persons whose suicide is abetted by the offender would be persons who in the description of law are supposedly unaware of committing such act which they actually perform but for the abetment of the offender.

96.8. Under the Second Part of Section 307, if attempt to murder is found proved against an offender who has already been convicted and sentenced to undergo life imprisonment, then he is also liable to be inflicted with the sentence of death.

96.9. Under Section 376-A whoever committed the offence of rape and in the course of commission of such offence, also responsible for committing the death of the victim or such injury caused by the offence is such that the victim is in a persistent vegetative state, then the minimum punishment provided for is 20 years or life imprisonment or death.

96.10. Under Section 376-E whoever who was once convicted for the offence under Sections 376, 376-A or 376-D is subsequently convicted of an offence under any of the said sections would be punishable for life imprisonment meaning thereby imprisonment for the remainder of his lifespan or with death. Under Section 376-D for the offence of gang rape, the punishment provided for is imprisonment for a minimum period of 20 years and can extend up to life imprisonment meaning thereby the remainder of that person's life.

96.11. Under Section 364-A kidnapping for ransom, etc. in order to compel the Government or any foreign State or international, intergovernmental

organisation or another person to do or abstain from doing any act to pay a ransom shall be punishable with death or life imprisonment.

96.12. Under Section 396, if any one of five or more persons conjointly committed dacoity, every one of those persons are liable to be punished with death or life imprisonment.

106. Viewed in that respect, we state that the ratio laid down in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] that a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in *Sangeet* v. *State of Haryana* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] that the deprival of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.

107. With that we come to the next important question, namely:

Question (iii) [**Ed.** : See also para 8.3, above.] **: *Whether the appropriate Government is permitted to grant remission under Sections 432/433 of the Criminal Procedure Code after the pardon power is exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its constitutional power under Article 32?***

108. For the above discussion the relevant provisions of the Criminal Procedure Code, 1973 are extracted as under:

"**432. *Power to suspend or remit sentences*.**—(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—

(*a*) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(*b*) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a criminal court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression 'appropriate Government' means—

(*a*) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the Executive Power of the Union extends, the Central Government;

(*b*) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. ***Power to commute sentence***.—The appropriate Government may, without the consent of the person sentenced, commute—

(*a*) a sentence of death, for any other punishment provided by the Penal Code, 1860;

(*b*) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(*c*) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(*d*) a sentence of simple imprisonment, or fine."

111. To quote a few, reference can be had to the decisions reported as *State of Punjab* v. *Kesar Singh* [*State of Punjab* v. *Kesar Singh*, (1996) 5 SCC 495 : 1996 SCC (Cri) 1034] , *Delhi Admn.* v. *Manohar Lal* [*Delhi Admn.* v. *Manohar Lal*, (2002) 7 SCC 222 : 2002 SCC (Cri) 1670] which were followed in *State (Govt. of NCT of Delhi)* v. *Prem Raj* [*State (Govt. of NCT of Delhi)* v. *Prem Raj*, (2003) 7 SCC 121 : 2003 SCC (Cri) 1586] . Para 13 of the last of the decisions can be quoted for its lucid expression on this issue which reads as under : (*Prem Raj case* [*State (Govt. of NCT of Delhi)* v. *Prem Raj*, (2003) 7 SCC 121 : 2003 SCC (Cri) 1586] , SCC pp. 127-28)

> "*13*. An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Admn.* v. *Manohar Lal* [*Delhi Admn.* v. *Manohar Lal*, (2002) 7 SCC 222 : 2002 SCC (Cri) 1670] . The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In *State of Punjab* v. *Kesar Singh* [*State of Punjab* v. *Kesar Singh*, (1996) 5 SCC 495 : 1996 SCC (Cri) 1034] this Court observed as follows [though it was in the context of Section 433(*b*)] : (SCC pp. 495-96, para 3)
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> > '*3*. ... The mandate of Section 433 of the Criminal Procedure Code enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts. ... *That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself*. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside.'"
>
> (emphasis supplied)

112. The first part of the said question pertains to the power of the appropriate Government to grant remission after the parallel power is exercised under Articles 72 and 161 of the Constitution by the President and the Governor of the State respectively. In this context, a reference to Articles 72 and 161 of the Constitution on the one hand and Sections 432 and 433 of the Criminal Procedure Code on the other needs to be noted.

112.1. When we refer to Article 72, necessarily a reference will have to be made to Articles 53 and 74 as well. Under Article 53 of the Constitution the Executive Power of the Union vests in the President and such power should be exercised by him either directly or through officers subordinate to him in

accordance with the Constitution. Under Article 74, the exercise of the functions of the President should always be based on the aid and advice of the Council of Ministers headed by the Prime Minister. Under the proviso to the said Article, the President can at best seek for reconsideration of any such advice and should act based on such reconsidered advice. Article 74(2) in fact, has insulated any such advice being enquired into by any court. Identical provisions are contained in Articles 154, 161 and 163 of the Constitution relating to the Governor of the State. Reading the above provisions, it is clear that the President of the Union and the Governor of the State while functioning as the Executive Head of the respective bodies, only have to act based on the advice of the Council of Ministers of the Union or the State.

112.2. While so, when we look into the statutory prescription contained in Sections 432 and 433 of the Criminal Procedure Code, though the exercise of the power under both the provisions vests with the appropriate Government either State or the Centre, it can only be exercised by the Executive Authorities headed by the President or the Governor as the case may be. In the first blush though it may appear that exercise of such power under Sections 432 and 433 CrPC is nothing but the one exercisable by the same authority as the Executive Head, it must be noted that the real position is different.

112.3. For instance, when we refer to Section 432 CrPC, the power is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further, under sub-section (2) of Section 432, it is stipulated that exercise of power of suspension or remission may require the opinion of the Presiding Judge of the court before or by which the conviction was held or confirmed. There is also provision for imposing conditions while deciding to suspend or remit any sentence or punishment. There are other stipulations contained in Section 432. Likewise, when we refer to Section 433 CrPC it is provided therein that the appropriate Government may without the consent of the persons sentenced commute any of the sentences to any other sentence which ranges from death sentence to fine.

112.4. One significant feature in the constitutional power which is apparent is that the President is empowered under Article 72 of the Constitution to grant pardons, reprieves, respites or remission, suspend or commute the sentence. Similar such power is also vested with the Governor of the State. Whereas under Sections 432 and 433 of the Criminal Procedure Code the power is restricted to suspension, remission and commutation. It can also be noted that there is no specific provision prohibiting the execution of the power under Sections 432 and 433 of the Criminal Procedure Code when once similar such power was exercised by the constitutional authorities under Articles 72 and 161 of the Constitution. There is also no such implied prohibition to that effect.

113. In this context, the learned Solicitor General submitted that while the power under Articles 72 and 161 of the Constitution can be exercised more than once, the same is not the position with Sections 432 and 433 of the Criminal Procedure Code. The learned Solicitor General contended that since the exercise of power under Articles 72 and 161 is with the aid of the Council of Ministers, it must be held that Sections 432 and 433 of the Criminal Procedure Code are only enabling provisions for exercise of power under Articles 72 and 161 of the Constitution. In support of the said submission, the learned Solicitor General, sought to rely upon the passage in *Maru Ram* [*Maru Ram* v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196] to the effect that : (SCC p. 145, para 58)

> "*58.* … Since Sections 432 and 433(*a*) are a statutory expression and modus operandi of the constitutional power…."

Though the submission looks attractive, we are not convinced. We find that the said set of expression cannot be strictly stated to be the conclusion of the Court. In fact, if we read the entire sentence, we find that it was part of the submission made which the Court declined. On the other hand, in the ultimate analysis, the majority view was summarised wherein it was held at SCR p. 1248 as under : (*Maru Ram case* [*Maru Ram* v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196] , SCC p. 154, para 72)

> "*72.* (*4*) We hold that Sections 432 and 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like."

114. Therefore, it must be held that there is every scope and ambit for the appropriate Government to consider and grant remission under Sections 432 and 433 of the Criminal Procedure Code even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Sections 432 and 433 is to be exercised by the appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. We answer the said question on the above terms.

115. The next questions for consideration are [**Ed.** : See also paras 8.4 and 8.5, above.] :

> **Question (iv) :** ***(a) Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?***

(b) Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

Question (v) : ***Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?***

This extract is taken from *Union of India v. V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695 : 2015 SCC OnLine SC 1267 at page 118

141. Therefore, the answer to the question should be to the effect that where the case falls under the first test noted herein, it will be governed by Section 432(7)(*a*) of the Criminal Procedure Code in which event, the power will be exclusive to the Union. In cases which fall under the situation as was dealt with by this Court in *G.V. Ramanaiah* [*G.V. Ramanaiah* v. *Supt. of Central Jail*, (1974) 3 SCC 531 : 1974 SCC (Cri) 6 : AIR 1974 SC 31] , there again the power would exclusively remain with the Centre. The cases falling under second situation like the one covered by Articles 248 to 252 of the Constitution, wherein, the competence to legislate laws was with the State, and thereby if the Executive Power of the State will be available, having regard to the mandate of these Articles which empowers the Union also to make laws and thereby if the Executive Power of the Union also gets extended, though the power is coextensive, it must be held that having regard to the special features set out in the Constitution in these situations, the Union will get the primacy to the exclusion of the State.

142. Therefore, we answer Questions 52.3, 52.4 and 52.5 to the above extent leaving it open for the parties concerned, namely, the Centre or the State to apply the test and find out who will be the "appropriate Government" for exercising the power under Sections 432 and 433 of the Criminal Procedure Code.

143. Next, we take up the question [**Ed.** : See also para 8.6, above.] :

Question (vi) : ***Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?***

144. Sections 432(1) and (2) read as under:

"**432.*Power to suspend or remit sentences***.—(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the

person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the Presiding Judge of the court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists."

145. Sub-section (1) of Section 432 CrPC empowers the appropriate Government either to suspend the execution of a sentence or remit the whole or any part of the punishment to which he has been sentenced. While passing such orders, it can impose any conditions or without any condition. In the event of imposing any condition such condition must be acceptable to the person convicted. Such order can be passed at any time. Sub-section (2) of Section 432 pertains to the opinion to be secured from the Presiding Judge of the court who convicted the person and imposed the sentence or the Court which ultimately confirmed such conviction. Whenever any application is made to the appropriate Government for suspension or remission of sentence, such opinion to be rendered must say whether the prayer made in the application should be granted or refused. It should also contain reasons along with the opinion, certified copy of the record of the trial or such other record which exists should also be forwarded.

150. Therefore, it can safely be held that the exercise of power under Section 432(1) should always be based on an application of the person concerned as provided under Section 432(2) and after duly following the procedure prescribed under Section 432(2). We, therefore, fully approve the declaration of law made by this Court in *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] in para 61 that the power of appropriate Government under Section 432(1) of the Criminal Procedure Code cannot be *suo motu* for the simple reason that this section is only an enabling provision. We also hold that such a procedure to be followed under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the High Court concerned and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the appropriate Government. We, therefore, answer the said question to the effect that the *suo motu* power of remission cannot be exercised under Section 432(1), that it can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the court concerned.

This extract is taken from *Union of India v. V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695 : 2015 SCC OnLine SC 1267 at page 137

Answers to the Questions Referred in seriatim

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

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

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

Question 52.2 : *Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case?*
Answer

179. The exercise of power under Sections 432 and 433 of the Criminal Procedure Code will be available to the appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this Court is concerned, it is held that the powers under Sections 432 and 433 are to be exercised by the appropriate Government

statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the appropriate Government.

Questions 52.3, 52.4 and 52.5:

52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?

52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

52.5 Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

Answer

180. The status of appropriate Government whether the Union Government or the State Government will depend upon the order of sentence passed by the criminal court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(*a*) of the Constitution. The principle stated in the decision in *G.V. Ramanaiah* [*G.V. Ramanaiah* v. *Supt. of Central Jail*, (1974) 3 SCC 531 : 1974 SCC (Cri) 6 : AIR 1974 SC 31] should be applied. In other words, cases which fall within the four corners of Section 432(7)(*a*) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of appropriate Government. Barring cases falling under Section 432(7)(*a*), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the State concerned, the State Government would be the appropriate Government.

Question 52.6 : ***Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?***

Answer

181. No *suo motu* power of remission is exercisable under Section 432(1) of the Criminal Procedure Code. It can only be initiated based on an application of the person convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the court concerned.

This extract is taken from *Union of India v. V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695 : 2015 SCC OnLine SC 1267 at page 138

Question 52.7 : *Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?*

Answer

182. Having regard to the principles culled out in paras 173.1. to 173.14., it is imperative that it is always safe and appropriate to hold that in those situations covered by clauses (*a*) to (*c*) of Section 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently, the process of "consultation" in reality be held as the requirement of "concurrence".

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7. This extract is taken from *Manoj v. State of M.P.* (2023) 2 SCC 353 : 2022 SCC OnLine SC 677 at page 452

On sentence by Appellant and State

210. The hearing of this case was adjourned for sentencing on a subsequent date, before which the learned counsel submitted material regarding the lives of the accused — both before the incident and post-conviction by the trial court, jail reports and other material called for by this Court were received from the State, and written submissions were filed by both sides.

211. In the course of arguments, the learned AAG maintained that there were no mitigating circumstances and the cruelty evident from the nature of the crime, warrants nothing less than the capital punishment, which according to her was correctly imposed, concurrently. It was submitted that it is in cases like the present one, where the "rarest of rare" doctrine needs to be invoked as a deterrent.

212. On the other hand the counsel for the accused laid emphasis on the fact that neither of the courts below had even considered the possibility of reform of the accused who were all of young age and barring Manoj (who had been involved in a petty offence in the past) the others did not have any criminal antecedents. The counsel also argued that an overall look at the circumstances, at best, could lead the Court to conclude that the extensive injuries inflicted upon the deceased were in all probability on account of the plans of the accused going awry, upon their encountering the victims'

resistance. It was submitted besides that the potential of each convict to be reformed — both having regard to their previous backgrounds, as well as conduct in jail during pendency of trial and confirmation, was not considered. This amounted to an infraction of the rule in *Bachan Singh* v. *State of Punjab* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] .

213. The counsel relied on numerous judgments relating to the importance of considering mitigating circumstances, the State's role in demonstrating the accused is beyond reformation, mitigating circumstances such as age and socio-economic background, pre-sentence hearing — its scope and the court's obligation, etc.

214. Capital punishment is prescribed in numerous IPC offences, including murder, kidnapping for ransom, rape and injury causing death or leaving a woman in a vegetative state, rape or gang rape of a child below 12 years' old, dacoity with murder, among other offences. In *Bachan Singh* v. *State of Punjab* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] (hereafter "*Bachan Singh*"), this Court had upheld the imposition of death penalty as an alternate punishment under Section 302IPC on the strength of the 35th Report of the Law Commission of India (1967), the judgment in *Jagmohan Singh* v. *State of U.P.* [*Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169] (which had also noted that the 35th Report advocated for retention) and in several subsequent cases decided by this Court, in which the death penalty was recognised to be a *deterrent*. It laid emphasis

on the then recently added Sections 253(2) and 354(3)CrPC which provide for bifurcated pre-sentence hearing and sentencing procedure on conviction of capital offences, to conclude that this form of punishment continued to have legislative backing and thereby, represented the will of the people.

215. It is undeniable that there have been shifts in how punishment in capital offences are dealt with. This is apparent when developments are looked at holistically, or at a macrolevel : the amendments to the CrPC by Parliament, the 35th and 262nd Law Commission Reports which stand over 30 years apart, and the precedents of this Court, across the decades. Initially, the law imposed a requirement of written reasons for *not* imposing death penalty, which was removed in 1955. In 1973, through further amendment to the CrPC and insertion of Section 354(3) — life imprisonment became the norm and imposition of death penalty required "special reasons"; and through Section 253(2) — sentencing required separate consideration from the question of conviction. In both phases i.e. post-1955 and post-1973, capital punishment was upheld to be constitutional by five-Judge Benches of this Court in *Jagmohan Singh* [*Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169] and *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , respectively.

216. The 262nd Law Commission Report on Death Penalty (2015) (hereafter "the 262nd Report"), is a result of this Court's references in primarily two cases. Firstly, in *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*,

(2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] (hereafter "*Santosh Bariyar*") where, after taking note of the UN General Assembly Resolution 62/149 [Adopted on 18-12-2007.] it was pointed out that credible research was required to shape an informed discussion and debate, on the contentious issue of death sentence. Secondly, the judgment in *Shankar Kisanrao Khade* v. *State of Maharashtra* [*Shankar Kisanrao Khade* v. *State of Maharashtra*, (2013) 5 SCC 546, paras 148-149 : (2013) 3 SCC (Cri) 402] tasked the Law Commission to resolve the issue of whether death penalty is a deterrent punishment, is retributive justice, or serves an incapacitative goal; and to study the difference in approach adopted by the judiciary (rarest of rare) and the executive (what was termed as *unknown*) while granting commutation. In attempting to fulfil this mandate, the Commission discerned an urgent need for re-examination of its own earlier recommendations on the death penalty (in its 35th Report, 1967), given the drastic change in social, economic, and cultural contexts of the country since the 35th Report, and arbitrariness which has remained a major concern in the adjudication of death penalty cases since *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] laid down the foundational principle of "rarest of rare".

217. Reflective of changed circumstances and evolving discourse, the Report marks a shift in the approach towards the death penalty in India, going so far as to recommend abolition in all offences, except those relating to terrorism. A large part of the Report focusses on courts' discretion and judicial reasoning when it comes to sentencing. It concludes that death penalty sentencing in

India has been based on an *arbitrary* application of the *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] principle, and has become Judge-centric, based on the personal predilection of Judges — a concern which was alluded to even by this Court in *Swamy Shraddananda (2)* v. *State of Karnataka* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] and analysed extensively again in *Santosh Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] , followed by *Sangeet* v. *State of Haryana* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] , *Mohd. Farooq Abdul Gafur* v. *State of Maharashtra* [*Mohd. Farooq Abdul Gafur* v. *State of Maharashtra*, (2010) 14 SCC 641 : (2011) 3 SCC (Cri) 867] , and more recently in *Chhannu Lal Verma* v. *State of Chhattisgarh* [*Chhannu Lal Verma* v. *State of Chhattisgarh*, (2019) 12 SCC 438 : (2019) 4 SCC (Cri) 402] (hereafter "*Chhannu Lal Verma*").

This extract is taken from Manoj v. State of M.P.
(2023) 2 SCC 353 : 2022 SCC OnLine SC 677 at page 454

The death penalty framework and how to apply it for "principled sentencing"

218. This Court in *Bachan Singh* **[*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 :** 1980 SCC (Cri) 580] while upholding the constitutionality of capital punishment, categorically ruled that the new CrPC of **1973 marked a shift as it bifurcated the criminal trial to include a pre-sentence hearing [under Section 235(2)], and further mandated the sentencing court to outline the "special reasons" [under Section 354(3)] or absence of them, by considering circumstances both of the crime and the criminal. The Court also noted that while broad guidelines or indicators may be given, they cannot be put into water-tight compartments that curb discretion of any Judge to do justice in a given individual case** : (SCC pp. 739 & 748, paras 163 & 201)

> "*163.* … Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences,

including one under Section 302 of the Penal Code, the court should not confine its consideration "principally" or *merely* to the circumstances connected with the particular *crime*, *but also* give due consideration to the circumstances of the *criminal*.

***

201. … As we read Sections 354(3) and 235(2) and other related provisions of the 1973 Code, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard *both* to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

(emphasis in original)

219. The Court also accepted a list of helpful factors of aggravating and mitigating circumstances. [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684, paras 202 and 206 : 1980 SCC (Cri) 580] However, cautioning the court from treating them to be exhaustive, the Court further clarified that they were merely *indicative* and that the mitigating circumstances had to be read in a "liberal and expansive" manner, accounting for the dignity of human life : (*Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , SCC p. 751, para 209)

> "*209*. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. 'We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society.' Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts,

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

220. In *Machhi Singh* [***Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470** : 1983 SCC (Cri) 681] , this Court extrapolated the principles from *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , and merit repetition : (*Machhi Singh case* [*Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] , SCC p. 489, paras 38-40)

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

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

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

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

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

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

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

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum

weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

221. In *Machhi Singh* [*Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470, paras 32-37 : 1983 SCC (Cri) 681] , this Court also attempted to categorise cases under broadly five heads (i.e. manner of commission of murder, motive, anti-social or socially abhorrent nature of the crime, magnitude of crime, and personality of victim), by strongly analysing the aggravating circumstances of the crime. A formalistic reliance on these categories however, has the potential of leading any court awry as it has the unintended effect of drawing attention away from the criminal, and focussing disproportionately on the crime — the dangers of this standardisation was also noted by this Court in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] and more recently in Sanjiv Khanna, J.'s dissenting opinion in *Manoharan* v. *State* [*Manoharan* v. *State*, (2019) 7 SCC 716 : (2019) 3 SCC (Cri) 337] .

222. This Court in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] had warned against categorising cases. [*Id*, SCC paras 169-175, 192-195.] Rejecting the contention that standards and

guidelines should be laid down, it was noted in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] that degree of culpability cannot be measured, and aggravating and mitigating circumstances could not be rigidly enumerated so as to exclude "*all free play of discretion*". Reiterating that criminal cases cannot be categorised as there were infinite, unpredictable and unforeseen variations, it was held that by such categorisation, the sentencing process would cease to be judicial, and such standardisation or sentencing discretion is beyond the court's function. Therefore, it would be befitting *if reliance were placed not solely on those five categories of crimes* (which lays undue emphasis on aggravating circumstances) enumerated in *Machhi Singh* [*Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] , and instead on the two-question test, and the four guiding principles of *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] that were succinctly culled out in *Machhi Singh* [*Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681].

223. The decades that followed, have witnessed a line of judgments in which this Court has continually taken judicial notice of the incongruence in application of the "rarest of rare" test enunciated in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , and therefore, tried to restrict imposition of the death penalty, *in an attempt to strengthen a principled* application of the same.

224. This aspect was dealt with extensively in *Santosh Bariyar* **[*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498,** para 112 : (2009) 2 SCC (Cri) 1150] **where the Court articulated the test to be a *two-step process* to determine whether a case deserves the death sentence — firstly, that the case belongs to the "rarest of rare" category, and secondly, that the option of life imprisonment would simply not suffice**. **For the first step**, the aggravating and mitigating circumstances would have to be identified and considered equally**. For the second test**, the court had to consider whether the alternative of life imprisonment was unquestionably foreclosed as the sentencing aim of reformation was unachievable, for which the *State must provide material*.

225. About four years later, in *Sangeet* [***Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611]** , this Court lamented the continuing lack of attention given to circumstances of the criminal, reiterated that balancing of aggravating-mitigating circumstances and failure to apply the *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] sentencing framework uniformly, was leading to Judge-centric and inconsistent jurisprudence in death penalty matters.

226. In *Shankar Kisanrao Khade* **[*Shankar Kisanrao Khade* v. *State of Maharashtra*, (2013) 5 SCC 546, paras 148-149** : (2013) 3 SCC (Cri) 402**] this Court developed yet another framework of the "crime test", criminal test" and "rarest of rare test**" (which was held to be distinct from the "balance test" that was discouraged in *Santosh Bariyar* [*Santosh Kumar*

Satishbhushan Bariyar v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] and subsequently, in *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] as well) : (*Shankar Kisanrao Khade case* [*Shankar Kisanrao Khade* v. *State of Maharashtra*, (2013) 5 SCC 546, paras 148-149 : (2013) 3 SCC (Cri) 402] , SCC p. 576, para 52)

"*52.* … In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm

women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

227. Recently, while considering a review petition, this Court in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* **[*Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460** : (2019) 4 SCC (Cri) 420] held that *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] had intended the test to be "*probability*" and not improbability, possibility or impossibility of reformation and rehabilitation as a mandate of Section 354(4)CrPC. [*Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460, para 45 : (2019) 4 SCC (Cri) 420] The Court analysed numerous earlier precedents, noting that evidence by the State on this has been sparse and limited, but was essential for the courts to measure the probability of reform, rehabilitation and reintegration. The Court located this requirement in the right of the accused, who regardless of being ruthless, was entitled to a life of dignity, notwithstanding his crime. [*Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460, para 47 : (2019) 4 SCC (Cri) 420] While this process is not easy, it was noted that neither is the process of rehabilitation since it involves reintegration into society. When this is found to be not possible in certain cases, a longer duration of imprisonment was instead permissible.

Uneven application of this framework and (in) consistency in sentencing

228. An overall analysis of capital punishment cases decided by this Court will perhaps reflect that that there is in fact, no pattern. While there are real and valid concerns in the non-uniform application of the *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] framework, discretion in sentencing, in itself — is not worrisome, and the concern needs to be dispelled. While generally Judges may look to precedents for the comfort of numbers, that process only gives an indication of how similar instances have been dealt with and has a *limited* role when it comes to sentencing. The discretion afforded to the court in sentencing, is not for it to be Judge-centric or result in disparate rulings, but in fact to enable the court with the *flexibility* of considering the case-specific factors relating to the crime and criminal, without falling into predetermined patterns. Sentencing is not a mathematical equation and ought not be seen as one. This has been recognised in numerous cases starting from *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] itself.

229. In *Santosh Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] , analysing the equality principle, due process and proportionality requirement in capital sentencing, it was held that rather than applying strict classification of the type of offences that warrant death sentence, the court must focus on *equally* considering the aggravating and mitigating circumstances (in which commonality is to be drawn *across* case), and arrive at individualised

sentencing outcomes on a *case-to-case basis*. [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 172 : (2009) 2 SCC (Cri) 1150] It was noted : (*Santosh Bariyar case* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] , SCC p. 550, paras 132-33)

"*132*. ... The imprecision of the identification of aggravating and mitigating circumstances has to be minimised. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. *The comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances*. The aggravating and mitigating circumstances have to be separately identified under a rigorous measure.

133. *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] when mandates principled precedent-based sentencing, compels careful scrutiny of mitigating circumstances and aggravating circumstances and then factoring in a process by which aggravating and mitigating circumstances appearing from the pool of comparable cases can be compared. The weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualised sentencing, but at the same time reasons for apportionment of weights shall be forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness objections in

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

(emphasis supplied)

230. The strength of "precedent" and "consistency" is perhaps, therefore, *lowest* when it comes to matters of sentencing, as long as it is within the confines of legality and resulting in "principled sentencing". In other words, the judicial incongruence when it relates to sentencing, would in fact be a positive indicator, rather than a negative one, *provided it is still within the well-defined contours of "principled" sentencing*. For sentencing in capital offences, discretion to arrive at individualised sentences is encouraged, but must be constrained by the "rarest of rare" principle, wherein the court considers aggravating circumstances of the crime, and mitigating circumstances of the criminal (a "liberal and expansive" construction of the latter), which in turn must inform their consideration of whether the option of life imprisonment is unquestionably foreclosed owing to an impossibility [Held to be "probability" and not "impossibility" in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460 : (2019) 4 SCC (Cri) 420] to reform.

231. Deviation from this principle i.e. *unguided* discretion on the other hand, would quite obviously lead to bad law. For instance**, *Ravji* v. *State of Rajasthan* [*Ravji* v. *State of Rajasthan*, (1996) 2 SCC 175** : 1996 SCC (Cri) 225] (hereafter "*Ravji*"), in complete contravention of this Court's earlier Constitution Bench decision of *Bachan Singh* [*Bachan Singh* v. *State of Punjab*,

(1980) 2 SCC 684 : 1980 SCC (Cri) 580] (which focussed on both the crime, and criminal), held that "... *It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial*". A line of cases [*Surja Ram* v. *State of Rajasthan*, (1996) 6 SCC 271 : 1996 SCC (Cri) 1314; *Dayanidhi Bisoi* v. *State of Orissa*, (2003) 9 SCC 310 : 2003 SCC (Cri) 1798; *Mohan Anna Chavan* v. *State of Maharashtra*, (2008) 7 SCC 561 : (2008) 3 SCC (Cri) 193; *Bantu* v. *State of U.P.*, (2008) 11 SCC 113 : (2009) 1 SCC (Cri) 353; *Shivaji* v. *State of Maharashtra*, (2008) 15 SCC 269 : (2009) 3 SCC (Cri) 146; *State of U.P.* v. *Sattan*, (2009) 4 SCC 736 : (2009) 2 SCC (Cri) 572; etc.] , further relied on this (in this Court's considered opinion, incorrect) decision in *Ravji case* [*Ravji* v. *State of Rajasthan*, (1996) 2 SCC 175 : 1996 SCC (Cri) 225] , and concluded that the nature and gravity of the crime (i.e. its brutality or heinousness), were sufficient to impose capital punishment, without considering mitigating circumstances of the criminal. Subsequently, the decision in *Ravji* [*Ravji* v. *State of Rajasthan*, (1996) 2 SCC 175 : 1996 SCC (Cri) 225] was—quite correctly—declared to be *per incuriam* by another Bench of this Court in *Santosh Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] , for non-consideration of circumstances of the criminal. Other cases that have focussed on brutality of the crime, as negating or washing away the need to consider mitigating circumstances, similarly serve as bad precedent.

232. This Court in *Rajesh Kumar* v. *State* [***Rajesh Kumar* v. *State*, (2011) 13 SCC 706, para 74** : (2012) 2 SCC (Cri) 836] **again reiterated that *brutality in itself, was not enough to impose death sentence*** — the accused was convicted for murder of two children who offered no provocation or resistance to the brutal and inhuman fashion in which the accused committed the crime, however, it was held that due consideration to the mitigating circumstances of the criminal still had to be given. Evidence had to be placed on record by the State, demonstrating that he was beyond reform or rehabilitation, the absence of which was a mitigating circumstance in itself. The High Court had merely noted that he was a first-time offender and had a family to take care of — which this Court noted was a very narrow and myopic view on the mitigating circumstances.

233. Therefore, "individualised, principled sentencing" — based on *both* the crime and criminal, with consideration of whether reform or rehabilitation is achievable (held to be "*probable*" in *Rajendra Pralhadrao Wasnik* [***Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460** : (2019) 4 SCC (Cri) 420]), and consequently whether the option of life imprisonment is unquestionably foreclosed — should be the only factor of "commonality" that must be discernible from decisions relating to capital offences. With the creation of a new sentencing threshold in *Swamy Shraddananda (2)* [***Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 :** (2009) 3 SCC (Cri) 113] , and later affirmed by a Constitution Bench in *Union of India* v. *V. Sriharan* [***Union of India* v. *V. Sriharan*, (2016) 7 SCC 1** : (2016) 2

SCC (Cri) 695] , of life imprisonment without *statutory* remission (i.e. Articles 72 and 161 of the Constitution are still applicable), yet another option exists, before imposition of death sentence. However, serious concern has been raised against this concept, as it was upheld by a narrow majority, and is left to be considered at an appropriate time.

Theories of punishment

234. The 262nd Report speaks extensively to the penological justification of the death penalty. It finds that there is inconclusive evidence that this form of punishment has more of a deterrent effect, in comparison to life imprisonment. Dismissing the retributive theory of punishment on the ground that it suffers from lack of guidance on quantifying the punishment that would be appropriate to impose, it categorically states that:

> "**7.1.2.** Capital punishment fails to achieve any constitutionally valid penological goals.
>
> **7.1.3.** focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime."

235. While the 262nd Report recommends abolition of the death penalty on this ground, in addition to sentencing having become Judge-centric or arbitrary, it has not prompted parliamentary intervention. Whether the death penalty deserves a relook [as recommended by Kurian Joseph, J. (dissenting) in *Chhannu Lal Verma* [***Chhannu Lal Verma* v. *State of Chhattisgarh*, (2019) 12 SCC 438** : (2019) 4 SCC (Cri) 402]], in light of the 262nd Law Commission Report, evolving jurisprudence, public discourse and international standards of human rights, is outside the purview of this Court's jurisdiction given the Constitution Bench decision in *Bachan Singh* [*Bachan Singh* v. *State*

of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , and a question best left for the legislature to critically consider. In this backdrop, what this Court can do, is try and bolster the existing sentencing framework. This is possible only by giving true meaning to the existing guidelines (without falling into the trap of "categorising" crimes that *automatically* warrant death penalty). To do so, this Court finds it necessary to lay out certain practical guidelines (elaborated below) that can facilitate consideration of mitigating circumstances as recognised in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , and consequently ensure uniform application of this framework.

236. The 262nd Report recognised the paradigm shift, in policy and discourse, towards a reformative and rehabilitative response to crime, and the development of jurisprudence such that adjudging a case to be "rarest of rare" was not sufficient, and special emphasis had to be placed in considering whether the offender is amenable to reform. Implicit in this shift is the understanding that the criminal is not a product of only their own decisions, but also a product of the State and society's failing, which is what entitles the accused to a chance of reformation. Thus, making life imprisonment the norm, and death penalty the exception. In *Lehna* v. *State of Haryana* [***Lehna* v. *State of Haryana*, (2002) 3 SCC 76** : 2002 SCC (Cri) 526] while deciding whether the facts in that case were appropriate for death penalty, traced this shift in approach : (SCC pp. 83-84, para 14)

"*14*. … Section 302IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3). There is another provision in the Code which also uses the significant expression "special reason". It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short "the old Code"). Section 361 which is a new provision in the Code makes it mandatory for the court to record "special reasons" for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. *This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country*. Section 361 and Section

354(3) have both entered the statute book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. *It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded.* Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed."

(emphasis supplied)

237. Mitigating factors in general, rather than excuse or validate the crime committed, seek to explain the surrounding circumstances of the criminal to enable the Judge to decide between the death penalty or life imprisonment. An illustrative list of indicators first recognised in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684, para 206 : 1980 SCC (Cri) 580] itself : (SCC p. 750, para 206)

"***206. ... Mitigating circumstances.—***In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

These are hardly exhaustive; subsequently, this Court in several judgments has recognised, and considered commutation to life imprisonment, on grounds such as young age [*Mahesh Dhanaji Shinde* v. *State of Maharashtra*, (2014) 4 SCC 292 : (2014) 2 SCC (Cri) 321; *Gurvail Singh* v. *State of Punjab*, (2013) 2 SCC 713 : (2013) 2 SCC (Cri) 864] , socio-economic conditions [*Mulla* v. *State of U.P.*, (2010) 3 SCC 508 : (2010) 2 SCC (Cri) 1150; *Kamleshwar Paswan* v. *State (UT of Chandigarh)*, (2011) 11 SCC 564 : (2011) 3 SCC (Cri) 409; *Sunil Damodar Gaikwad* v. *State of Maharashtra*, (2014) 1 SCC 129 : (2013) 4 SCC (Cri) 83] ,

mental illness [*Shatrughan Chauhan* v. *Union of India*, (2014) 3 SCC 1 : (2014) 2 SCC (Cri) 1] , criminal antecedents [*Dilip Premnarayan Tiwari* v. *State of Maharashtra*, (2010) 1 SCC 775 : (2010) 1 SCC (Cri) 925] , as relevant indicators on the questions of sentence. Many of these factors reflect demonstrable ability or merely the *possibility* even, of the accused to reform [i.e. (3) and (4) of the *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] list], which make them important indicators when it comes to sentencing.

Pre-sentence hearing — Opportunity and obligation to provide material on the accused

238. This Court in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] held that the introduction of pre-sentencing hearing to the accused in 1973 through Section 235(2)CrPC altered the *Jagmohan Singh* [*Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169] principle that the court is *primarily* concerned with the circumstances connected with crime. Therefore, now due consideration has to be given to the circumstances of the *criminal* as well, when adjudicating whether the case falls within "rarest of rare" and if the option of life imprisonment as an alternative, is unquestionably foreclosed. In *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , this Court categorically stated that, "*[t]he probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society*", is a relevant circumstance, that must be given great weight in the determination of sentence.

239. The sentencing hearing contemplated under Section 235(2), is not confined merely to oral hearing but intended to afford a real opportunity to the prosecution as well as the accused, to place on record facts and material relating to various factors on the question of sentence and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. **[*Malkiat Singh* v. *State of Punjab*, (1991) 4 SCC 341** : 1991 SCC (Cri) 976]

240. In the absence of an individual's capacity to effectively bring forth mitigating factors, this Court in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] placed the burden of eliciting mitigating circumstances *on the court*, which has to consider them liberally and expansively, whereas the responsibility of providing material to show that the accused is beyond the scope of reform or rehabilitation, thereby unquestionably foreclosing the option of life imprisonment and making it a fit case for imposition of death penalty, is one which falls squarely *on the State*. This has been reiterated and further spelt out by this Court in *Santosh Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] , *Rajesh Kumar* [*Rajesh Kumar* v. *State*, (2011) 13 SCC 706, para 74 : (2012) 2 SCC (Cri) 836] , *Chhannu Lal Verma* [*Chhannu Lal Verma* v. *State of Chhattisgarh*, (2019) 12 SCC 438 : (2019) 4 SCC (Cri) 402] , and other decisions [*Muniappan* v. *State of T.N.*, (1981) 3 SCC 11 : 1981 SCC (Cri) 617; *Anil* v. *State of Maharashtra*, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266, etc.] .

241. In *Santosh Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] , making observations on nature of information to be collected at the *pre-sentencing stage*, this Court further observed that : (SCC p. 527, para 56)

> "*56.* At this stage, *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] informs the content of the sentencing hearing. *The court must play a proactive role to record all relevant information*

at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. *But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender*. This issue was also raised in the 48th Report of the Law Commission."

(emphasis supplied)

242. The State's duty is heightened in importance even more so, in the Indian context where a majority of the accused have a poor or rudimentary level of legal representation. The importance of collecting socio-economic factors in the context of our criminal justice system was critically noted by the 262nd Report as follows:

"7.1.6. Numerous committee reports as well as judgments of the Supreme Court have recognised that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system

also operate disproportionately against the socially and economically marginalised who may lack the resources to effectively advocate their rights within an adversarial criminal justice system."

243. However, despite over four decades since *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] there has been little to no policy-driven change, towards formulating a scheme or system that elaborates how mitigating circumstances are to be collected, for the court's consideration. Scarce information about the accused at the time of sentencing, severely disadvantages the process of considering mitigating circumstances. It is clarified that mere mention of these circumstances by the counsel, serves no purpose — rather, they must be connected to the possibility of reformation and assist principled judicial reasoning [as required under Section 235(2)CrPC]. Constrained by this lack of assistance, this Court (as mentioned above) in *Rajesh Kumar* [*Rajesh Kumar* v. *State*, (2011) 13 SCC 706, para 74 : (2012) 2 SCC (Cri) 836] has even gone so far as to hold that the very fact that the State had not given any evidence to show that the convict was beyond reform and rehabilitation was a mitigating circumstance, in itself.

244. The lack of forthcoming information has led to attempts by the courts, to look backwards—sometimes many years after the crime has been committed—to evaluate on the one hand, circumstances that could not have been paused in time, and on the other those which can be captured, but for which there exists no frame of reference from the past, for comparison. This inconsistency in some courts calling for reports, while others fail to — further

contributes to our patchwork jurisprudence on capital sentencing, and in turn undermines the equality principle and due process protection that *Santosh Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, para 112 : (2009) 2 SCC (Cri) 1150] recognises as existing, in favour of death row convicts.

245. The move to call for a Probation Officer's Report **[*Birju* v. *State of M.P.*, (2014) 3 SCC 421 : (2014) 2 SCC (Cri) 78; *Anil* v. *State of Maharashtra*, (2014) 4 SCC 69 : (2014)** 2 SCC (Cri) 266; *State* v. *Bharat Singh*, 2014 SCC OnLine Del 1510] (as done by this Court even in this case), is in fact a desperate attempt by the courts at the appellate stage, to obtain information on the accused — at present. Good conduct of the accused at the post-conviction stage in prison (through a jail report), and psychiatric evaluation to evaluate possibility of reform (albeit at the appellate sentencing stage), were considered recently in *Chhannu Lal Verma* [*Chhannu Lal Verma* v. *State of Chhattisgarh*, (2019) 12 SCC 438 : (2019) 4 SCC (Cri) 402] as necessary indicators for considering mitigating circumstances : (SCC pp. 451-52, paras 15-16)

> "*15.* … Since the appellant has been in jail, we wanted to know whether there was any attempt on his part for reformation. The Superintendent of the jail has given a certificate that his conduct in jail has been good. Thus, there is a clear indication that despite having lost all hope, yet no frustration has set on the appellant. On the contrary, there was a conscious effort on his part to lead a good life for the remaining period. A convict is

sent to jail with the hope and expectation that he would make amends and get reformed. That there is such a positive change on a death row convict, in our view, should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed. As held by the Constitution Bench in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] *it was the duty of the State to prove by evidence that the convict cannot be reformed or rehabilitated. That information not having been furnished by the State at the relevant time, the information now furnished by the State becomes all the more relevant*. The standard set by the "rarest of rare" test in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] is a high standard. *The conduct of the convict in prison cannot be lost sight of. The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform.*

16. In the matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such a psychological/psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform. The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated."

(emphasis supplied)

246. However, this too, is too little, too late and only offers a peek into the circumstances of the accused *after* conviction. The unfortunate reality is that in the absence of well-documented mitigating circumstances at the trial level, the aggravating circumstances seem far more compelling, or overwhelming, rendering the sentencing court prone to imposing the death penalty, on the basis of an incomplete, and hence, incorrect application of the *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] test.

247. The goal of reformation is ideal, and what society must strive towards — there are many references to it peppered in this Court's jurisprudence across the decades — but what is lacking is a concrete framework that can measure and evaluate it. Unfortunately, this is mirrored by the failure to implement prison reforms of a meaningful kind, which has left the process of incarceration and prisons in general, to be a space of *limited potential* for systemic reformation. The goal of reformative punishment requires systems that actively enable reformation and rehabilitation, as a result of nuanced policy-making. As a small step to correct these skewed results and facilitate better evaluation of whether there is a possibility for the accused to be reformed (beyond vague references to conduct, family background, etc.), this Court deems it necessary to frame practical guidelines for the courts to adopt and implement, till the legislature and executive, formulate a coherent framework through legislation. These guidelines may also offer guidance or

ideas, that such a legislative framework could benefit from, to systematically collect and evaluate information on mitigating circumstances.

Practical guidelines to collect mitigating circumstances

248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] . Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

250. Next, the State, must in a *time-bound manner*, collect *additional* information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

(*a*) Age

(*b*) Early family background (siblings, protection of parents, any history of violence or neglect)

(*c*) Present family background (surviving family members, whether married, has children, etc.)

(*d*) Type and level of education

(*e*) Socio-economic background (including conditions of poverty or deprivation, if any)

(*f*) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

(*g*) Income and the kind of employment (whether none, or temporary or permanent, etc.);

(*h*) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent

of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — *a fresh report* (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will *further* evidence the reformative progress, and reveal post-conviction mental illness, if any.

252. It is pertinent to point out that this Court in *Anil* v. *State of Maharashtra* [*Anil* v. *State of Maharashtra*, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] has in fact directed criminal courts to call for additional material : (SCC p. 86, para 33)

> "*33.* … Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. *We, therefore, direct that the criminal courts, while dealing with the offences like Section 302IPC, after conviction, may, in appropriate cases, call for a report to*

determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case."

(emphasis supplied)

We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for conviction of offences that carry the possibility of death sentence.

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8. This extract is taken from *Laxman Naskar v. Union of India*, (2000) 2 SCC 595 : 2000 SCC (Cri) 509 : 2000 SCC OnLine SC 392 at page 598

6. From the counter filed by the State, we find that the Government has also framed guidelines for this purpose. To consider the prayer for premature release of the "life convicts", a police report was called for on the following points:

(*i*) Whether the offence is an individual act of crime without affecting the society at large.

(*ii*) Whether there is any chance of future recurrence of committing crime.

(*iii*) Whether the convict has lost his potentiality in committing crime.

(*iv*) Whether there is any fruitful purpose of confining this convict any more.

(*v*) Socio-economic condition of the convict's family.

9. This extract is taken from *Ram Chander v. State of Chhattisgarh*, (2022) 12 SCC 52 : 2022 SCC OnLine SC 500 at page 62

13. While a discretion vests with the Government to suspend or remit the sentence, the executive power cannot be exercised arbitrarily. The prerogative of the executive is subject to the rule of law and fairness in State action embodied in Article 14 of the Constitution. In *Mohinder Singh* [*State of Haryana* v. *Mohinder Singh*, (2000) 3 SCC 394 : 2000 SCC (Cri) 645] , this Court has held that the power of remission cannot be exercised arbitrarily. The decision to grant remission should be informed, fair and reasonable. The Court held thus : (SCC pp. 400-01, para 9)

> "*9.* The circular granting remission is authorised under the law. It prescribes limitations both as regards the prisoners who are eligible and those who have been excluded. Conditions for remission of sentence to the prisoners who are eligible are also prescribed by the circular. Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case. Power of remission, however, cannot be exercised arbitrarily. Decision to grant remission has to be well informed, reasonable and fair to all concerned."

In *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] , this Court reiterated the principle that the power of remission cannot be exercised arbitrarily by relying on the decision in *Mohinder* [*State of Haryana* v. *Mohinder Singh*, (2000) 3 SCC 394 : 2000 SCC (Cri) 645] .

14. While the court can review the decision of the Government to determine whether it was arbitrary, it cannot usurp the power of the Government and

grant remission itself. Where the exercise of power by the executive is found to be arbitrary, the authorities may be directed to consider the case of the convict afresh.

15. In *Laxman Naskar* v. *State of W.B.* [*Laxman Naskar* v. *State of W.B.*, (2000) 7 SCC 626 : 2000 SCC (Cri) 1431] , while the jail authorities were in favour of releasing the petitioner, the review committee constituted by the Government recommended the rejection of the claim for premature release on the grounds that : (*i*) the two witnesses who had deposed during the trial and people of the locality were apprehensive that the release of the petitioner will disrupt the peace in the locality; (*ii*) the petitioner was 43 years old and had the potential of committing a crime; and (*iii*) the crime had occurred in relation to a political feud which affected the society at large. The Court while placing reliance on *Laxman Naskar* v. *Union of India* [*Laxman Naskar* v. *Union of India*, (2000) 2 SCC 595 : 2000 SCC (Cri) 509] stipulated the factors that govern the grant of remission, namely : (*Laxman Naskar case* [*Laxman Naskar* v. *State of W.B.*, (2000) 7 SCC 626 : 2000 SCC (Cri) 1431] , SCC p. 598, para 6)

> "*6.* … (*i*) Whether the offence is an individual act of crime without affecting the society at large.
>
> (*ii*) Whether there is any chance of future recurrence of committing crime.
>
> (*iii*) Whether the convict has lost his potentiality in committing crime.
>
> (*iv*) Whether there is any fruitful purpose of confining this convict any more.
>
> (*v*) Socio-economic condition of the convict's family."

16. Based on the above factors, the Court found that the Government's decision to reject the claim of remission was based on reasons that were irrelevant or devoid of substance. The Court quashed the order of the Government and directed it to decide the matter afresh. The Court held thus :

(*Laxman Naskar case* [*Laxman Naskar* v. *State of W.B.*, (2000) 7 SCC 626 : 2000 SCC (Cri) 1431] , SCC pp. 631-32, paras 8-9)

"*8.* If we look at the reasons given by the Government, we are afraid that the same are palpably irrelevant or devoid of substance. Firstly, the views of the witnesses who had been examined in the case or the persons in the locality cannot determine whether the petitioner would be a danger if prematurely released because the persons in the locality and the witnesses may still live in the past and their memories are being relied upon without reference to the present and the report of the jail authorities to the effect that the petitioner has reformed himself to a large extent. Secondly, by reason of one's age one cannot say whether the convict has still potentiality of committing the crime or not, but it depends on his attitude to matters, which is not being taken note of by the Government. Lastly, the suggestion that the incident is not an individual act of crime but a sequel of the political feud affecting society at large, whether his political views have been changed or still carries the same so as to commit crime has not been examined by the Government.

9. On the basis of the grounds stated above the Government could not have rejected the claim made by the petitioner. In the circumstances, we quash the order made by the Government and remit the matter to it again to examine the case of the petitioner in the light of what has been stated by this Court earlier and our comments made in this order as to the grounds upon which the Government refused to act on the report of the jail authorities and also to take note of the change in the law by enacting the West Bengal Correctional Services Act 32 of 1992 and to decide the matter afresh within a period of three months from today. The writ petition is allowed accordingly. After issuing rule the same is made absolute."

B. *The value of the opinion of the Presiding Judge*

19. Sub-section (2) of Section 432CrPC provides that the appropriate Government may take the opinion of the Presiding Judge of the court before or by which the person making an application for remission has been convicted on whether the application should be allowed or rejected, together with the reasons for such opinion.

20. In *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] , the Court held that sub-sections (2) to (5) of Section 432 lay down procedural safeguards to check arbitrary remissions. The Court observed that the Government is required to approach the Presiding Judge of the court to opine on the application for remission. The Court observed thus : (SCC pp. 472-73, paras 61-62)

> "*61*. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432CrPC cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432CrPC cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting

remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable inasmuch as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

62. It must be remembered in this context that it was held in *State of Haryana* v. *Mohinder Singh* [*State of Haryana* v. *Mohinder Singh*, (2000) 3 SCC 394 : 2000 SCC (Cri) 645] that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432CrPC does provide this check on the possible misuse of power by the appropriate Government."

21. In *Sriharan* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] a Constitution Bench of this Court held that the procedure stipulated in Section 432(2) is mandatory. The Court did not specifically hold that the opinion of the Presiding Judge would be binding, but it held that the decision of the Government on remission should be guided by the opinion of the Presiding Officer of the court concerned. The Court had framed the following question : (SCC p. 118, para 143)

"*143.* … Question (*vi*) : Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?"

22. Answering the above question, the Court held as follows : (*Sriharan case* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] , SCC pp. 120-21, paras 148-50)

"*148*. Keeping the above principles in mind, when we analyse Section 432(1)CrPC, it must be held that the power to suspend or remit any sentence will have to be considered and ordered with much more care and caution, in particular the interest of the public at large. In this background, when we analyse Section 432(1)CrPC, we find that it only refers to the nature of power available to the appropriate Government as regards the suspension of sentence or remission to be granted at any length. Extent of power is one thing and the procedure to be followed for the exercise of the power is different thing. There is no indication in Section 432(1) that such power can be exercised based on any application. What is not prescribed in the statute cannot be imagined or inferred. Therefore, when there is no reference to any application being made by the offender, that cannot be taken to mean that such power can be exercised by the authority concerned on its own. More so, when a detailed procedure to be followed is clearly set out in Section 432(2). It is not as if by exercising such power under Section 432(1), the appropriate Government will be involving itself in any great welfare measures to the public or the society at large. It can never be held that such power being exercised suo motu any great development act would be the result. After all, such exercise of power of suspension or remission is only going to grant some relief to the offender who has been found to have committed either a heinous crime or at least a crime affecting the society at large. Therefore, when in the course of exercise of larger constitutional powers of similar kind under Articles 72 and 161 of the Constitution it has been opined by this Court to be exercised with great care and caution, the one exercisable under a statute, namely, under Section 432(1)CrPC which is lesser in degree should necessarily be held to be exercisable in tune with the adjunct provision contained in the same section. Viewed in that respect, we find that the procedure to be followed whenever any application for remission is moved, the safeguard provided under Section 432(2)CrPC should be the sine qua non for the ultimate power to be exercised under Section 432(1)CrPC.

149. By following the said procedure prescribed under Section 432(2), the action of the appropriate Government is bound to survive and stand the scrutiny of all concerned, including the judicial forum. It must be remembered, barring minor offences, in cases involving heinous crimes like, murder, kidnapping, rape, robbery, dacoity, etc. and such other offences of such magnitude, the verdict of the trial court is invariably dealt with and considered by the High Court and in many cases by the Supreme Court. Thus, having regard to the nature of opinion to be rendered by the Presiding Officer of the court concerned will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors which will enable the appropriate Government to take the right decision as to whether or not suspension or remission of sentence should be granted. It must also be borne in mind that while for the exercise of the constitutional power under Articles 72 and 161, the Executive Head will have the benefit of act and advice of the Council of Ministers, for the exercise of power under Section 432(1)CrPC, the appropriate Government will get the valuable opinion of the judicial forum, which will definitely throw much light on the issue relating to grant of suspension or remission.

150. Therefore, it can safely be held that the exercise of power under Section 432(1) should always be based on an application of the person concerned as provided under Section 432(2) and after duly following the procedure prescribed under Section 432(2). We, therefore, fully approve the declaration of law made by this Court in *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] in para 61 that the power of appropriate Government under Section 432(1) of the Criminal Procedure Code cannot be suo motu for the simple reason that this section is only an enabling provision. *We also hold that such a procedure to be followed under Section 432(2) is mandatory. The manner in which the opinion*

is to be rendered by the Presiding Officer can always be regulated and settled by the High Court concerned and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the appropriate Government. We, therefore, answer the said question to the effect that the suo motu power of remission cannot be exercised under Section 432(1), that it can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the court concerned."

(emphasis supplied)

23. There appears to be a difference of opinion between the High Courts on whether the opinion of the Presiding Judge is binding on the Government. The High Court of Judicature at Bombay [*Yovehel* v. *State of Maharashtra*, 2020 SCC OnLine Bom 1318] has held that the opinion of the Presiding Judge is binding. The High Court has placed reliance on *Sriharan* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] to arrive at the following conclusion : (*Yovehel case* [*Yovehel* v. *State of Maharashtra*, 2020 SCC OnLine Bom 1318] , SCC OnLine Bom paras 29-30)

"*29*. The Constitution Bench of the Supreme Court in *Union of India* v. *V. Sriharan* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] has answered referral questions pertaining to the provisions of Section 432(2)CrPC and held that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Judge of the court concerned and exercise of the powers under Section 432(1)CrPC must be in accordance with the procedure as enumerated under Section 432(2)CrPC. In view of the same, to our mind, seeking opinion of the Presiding Judge of the court or by which conviction was had or confirmed as to whether the application filed under Section 432(1)CrPC should be granted or refused, is not an empty formality. It is true that if we read Section 432(2)CrPC the

word "may" is used. If we consider the said exercise of calling opinion of the Presiding Judge of the court as merely relevant circumstance, the object of the said provision will be defeated. It is well settled that in construing the provisions of the statute, the court should be slow to adopt the construction which tends to make any part of the statute meaningless or ineffective. If we read sub-section (2) of Section 432CrPC as a whole, it appears that the requirement of seeking opinion of the Presiding Judge of the Court as to whether the application filed in terms of Section 432(1)CrPC should be granted or refused. In the language of sub-section (2) of Section 432CrPC it is also incumbent upon such Presiding Judge of the Court to state his opinion together with his reasons for such opinion.

30. … For this reason, in our considered opinion, the Presiding Judge of the court is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. He is an expert in the field and as such a greater weight to his opinion is required to be attached. It would be a fallacy to grant remission to the hardened criminal, who has committed the offence with extreme brutality, etc. by treating the opinion of the Presiding Judge of the Court as a relevant circumstance without having any binding effect. We are afraid that if the answer to the referral Question (*iii*) is recorded as "relevant circumstances" that would open floodgates to the authorities to treat it as "irrelevant circumstances" and grant benefit of remission to the unscrupulous prisoners."

24. On the other hand, the High Court of Patna [*Ravi Pratap Mishra* v. *State of Bihar*, 2017 SCC OnLine Pat 314] has held that the opinion of the Presiding Judge is not binding but is only a guiding factor. The High Court observed that the State Sentence Remission Board consists of high-level officials who can exercise their independent wisdom and are not bound by the opinion of the Presiding Judge. The High Court held thus : (*Ravi Pratap Mishra case* [*Ravi*

Pratap Mishra v. *State of Bihar*, 2017 SCC OnLine Pat 314] , SCC OnLine Pat para 7)

"7. Now we may come to the function of the Board. From what has been noted above, it appears that the Board felt bound by the opinion of the Judicial Officer, however irrelevant it may be. Is this stand of the Board correct? In our view, it is not. The Board consists of very high level officials. It consists of the Law Secretary, the Home Secretary, the Inspector General of Prison, the District and Sessions Judge, Patna amongst other officials. It is an independent statutory body which has to exercise its independent wisdom in accordance with law. It is not bound by the opinion of any other person. The opinions of the Jail Superintendent, the Superintendent of Police, the Probationary Officer, the trial Judge are guiding factors to enable the Board to come to an independent opinion. It is not bound by what is said in any one or all of the opinions. We will not try and illustrate this inasmuch as the Board having been constituted by senior responsible officers, they would exercise the power keeping in view the legislative policy as enacted in Section 432CrPC in respect of a convict of a heinous offence and who has served the sentence substantially. It is only such person who are to be considered for release. The object of the section is not to condemn such persons but to ensure that having spent a substantial period of their sentence, they be permitted to come back into society. It is only when there is serious apprehension about their future conduct, serious and inevitable apprehension about their future conduct upon their release which is bona fide born out from the records that the Board would be legitimately justified in refusing to release the convict otherwise it is not bound by the opinion of the authorities though, as noted above, they are guiding factors to be taken into account."

25. In *Sriharan* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] , the Court observed that the opinion of the Presiding Judge shines a light on the nature of the crime that has been committed, the record of the convict, their background and other relevant factors. Crucially, the Court observed that the opinion of the Presiding Judge would enable the Government to take the "*right*" decision as to whether or not the sentence should be remitted. Hence, it cannot be said that the opinion of the Presiding Judge is only a relevant factor, which does not have any determinative effect on the application for remission. The purpose of the procedural safeguard under Section 432(2)CrPC would stand defeated if the opinion of the Presiding Judge becomes just another factor that may be taken into consideration by the Government while deciding the application for remission. It is possible then that the procedure under Section 432(2) would become a mere formality.

10. This extract is taken from *In Re : Policy Strategy For Grant Of Bail* 2025 INSC 239

IN THE SUPREME COURT OF INDIA
ORIGINAL/APPELLATE
JURISDICTION

SUO MOTU WRIT PETITION (CRL.) NO. 4 OF 2021

IN RE : POLICY STRATEGY FOR GRANT OF BAIL

with

SPECIAL LEAVE PETITION (CRL.) NO. 529 OF 2021

JUDGMENT

ABHAY S. OKA ,J.

1) We are dealing with the power of the appropriate Government to remit the whole or a part of the sentence of the convicts. A detailed note on the subject has been submitted by Ms. Liz Mathew, learned senior counsel appointed as amicus curiae, duly assisted by learned counsel Shri Navneet R. We have heard the submissions of the learned amicus. As far as the remission of the sentence of the convicts is concerned, there are provisions under Section 432 of the Code of Criminal Procedure, 1973 (for short, 'the CrPC') and Section 473 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short, 'the BNSS'). Section 432 of the CrPC reads thus:

> "432. Power to suspend or remit sentences.—
>
> (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the

ied SignatureNotVerified Digitally signed by ASHISHKOHLE Date:2025.02.18 17:01:18 IST Reason:

person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record there of as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section maybe one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the Expression "appropriate Government" means,—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive

power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed. "

The corresponding provision under the BNSS is Section 473.ItissubstantiallysimilartoSection432oftheCrPC.Therefore, we are not reproducing it.

3) ThepowerunderSection432oftheCrPCis circumscribed by Section 433-A. It provides that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided or where a sentence of death imposed on a person has beencommutedunderSection433intooneofimprisonment for life, the appropriate Government cannot grant remission unless the convict has served at least fourteen years of actual imprisonment. There is an identical provision in Section 475 of the BNSS. This is an embargo on the power of the appropriate Government under Section 432 of the CrPC. We may note that the power of the President of India under Article 72 of the Constitution of India (for short, 'the Constitution') and the power of the Governor under Article 161 of the Constitution to grant pardon, commute the sentence, or remit the sentence remains unaffected by Section 433-A of the CrPC or Section 475 of the BNSS.

5) The first issue is whether the power to grant remission can be exercised without the convict or anyone on behalf of the convict applying to the appropriate Government for a grant of remission. The second issue is about the nature of conditions imposed while granting remission. The third

issue is whether there can be automatic revocation of remission granted to the convict if he commits a breach of the terms and conditions on which remission is granted. Lastly, another question is whether there is a requirement to record reasons while rejecting applications of the convicts for grant of permanent remission.

QUESTION : WHETHER APPROPRIATE GOVERNMENT CAN CONSIDER THE CASE OF A CONVICT FOR GRANT OF REMISSION WITHOUT AN APPLICATION MADE ON BEHALF OF THE CONVICT?

8) In the cases of ***Sangeet*** [1] and ***Mohinder Singh*** [2], this Court did not consider a scenario where a policy was framed by the appropriate Government for grant of premature release or grant of remission. This Court considered this factual contingency in the case of ***Rashidul Jafar v. State of Uttar Pradesh*** [3]. InParagraphs17and18, this Court held thus:

> **"17.** The implementation of the policy for premature release has to be carried out in an objective and transparent manner as otherwise it would impinge on the constitutional guarantees under Articles 14and 21. Many of these life convicts who have suffered long years of incarceration have few or no resources. Lack of literacy, education and social support structures impede their [3](2024)6SCC561 right to access legal remedies. Once the State has formulated its policy defining the terms for premature release, due consideration in terms of the policy must be given to all

eligible convicts. The constitutional guarantees against arbitrary treatment and of the right to secure life and personal liberty must not be foreclosed by an unfair process of considering applications for premature release in terms of the policy.

18. Significantly, the policy has been amended to remove the requirement of convicts submitting an application for premature release and instead places the responsibility on the officers of the State to consider eligible prisoners. The prison administration, legal services authorities at the district and State level and officers of the police department and the State must diligently ensure that cases of eligible prisoners are considered on the basis of policy parameters. We have gained a distinct impression, based on the cases which have come before the Court here and even earlier that there is a general apathy towards ensuring that the rights which have been made available to convicts who have served out their sentences in terms of the policy are realised. This results in the deprivation of liberty of those who are entitled to be released. They languish in overcrowded jails. Their poverty, illiteracy and disabilities occasioned by long years of incarceration are compounded by the absence of supportive social and legal structures. The promise of equality in our Constitution would not be fulfilled if liberty were to be conditional on an individual's resources,

> which unfortunately many of these cases provide hard evidence of. This situation must change and hence this Court has had to step in. We now proceed to formulate peremptory directions."
>
> (emphasis added)

When a State Government or a Union Territory has adopted a policy for the grant of permanent remission which incorporates conditions for eligibility, it becomes an obligation of the State Government or the Union Territory to consider cases of all eligible convicts for the grant of permanent remission as per the policy adopted. If such a policy exists, and if the State Government or the Government of Union Territory raises a contention that relief will be granted only to those who apply as per policy, it will amount to saying that even if convicts are eligible for consideration in terms of the policies, their cases will not be considered in terms of the policy. Such conduct on the part of the States will be discriminatory and arbitrary and amount to a violation of Article 14 of the Constitution. The power under Section 432(1) must be exercised in a fair and reasonable manner. Therefore, whenever there is a policy for consideration of cases for permanent remission, it becomes an obligation of the State to consider cases of every eligible convict under the policy.

9) At this stage, we may note here that the National Legal Services Authority (NALSA) has formulated a Standard Operating Procedure on legal assistance, operationalisation, and co-ordination in improving the process of premature release, parole, furlough of prisoners, 2022 (for short, 'the SOP'). The SOP has been formulated as per the directions issued by this Court in Special Leave Petition (Crl.) No. 4358- 59 of 2021 in the

case of ***Kadir v State of Uttar Pradesh***. The SOP contemplates prison superintendents of all the prisons preparing a list of all life convicts and other convicts who will be entitled to be considered for premature release in immediate four months as per the eligibility provided under the state policy. It is thus apparent that after the preparation of a list of all life convicts and other convicts who will be entitled to be considered for premature release, the said list must be regularly forwarded by the prison superintendents to the appropriate Government so that the case of premature release of such convicts is considered by the appropriate Government. Since we are on the SOP made by the NALSA, we may note here that the SOP provides for appointing an advocate for the purposes of challenging the order refusing to grant permanent remission. We request NALSA to consider in corporating in the SOP the requirement of bringing to the notice of the convict the fact that the convicts have the liberty to challenge the order of rejection of grant of premature release.

REQUIREMENT OF RECORDING REASONS

17) The power to grant premature release must be exercisedinafairandreasonablemanner.Itaffectstheconvict'sliberty guaranteed under Article 21 of the Constitution. Therefore, the requirement of recording reasons either for granting or rejecting the prayer for permanent remission will have to be read into the provisions of Section 432 of the CrPC and Section 473 of the BNSS. Principles of natural justice must be read into the provisions of Section 432 of the CrPC. In any case, in the case of ***Bilkis Yakub Rasool v. Union of India*** [5] in paragraph 222.8, this Court held that the reasons for grant or refusal of remission should be clearly delineated in the order. Therefore, the requirement to record reasons

exists. Brief reasons must be recorded, which are sufficient to enable the convict to underst and why his prayer for remission has been rejected. This enables him to challenge the order of rejection.

PRESIDING OFFICER'S DUTY

20) When the Presiding officer's opinion is sought as per Sub- Sections (2) of Section 432 of the CrPC and Section 473 of the BNNS, the Presiding Officer must submit his opinion at the earliest considering the fact that the issue of liberty of the convict is involved.

21) We, therefore, record the following conclusions:

a) Where there is a policy of the appropriate Government laying down guidelines for consideration of the grant of premature release under Section 432 of the CrPC or Section 473 of the BNSS, it is the obligation of the appropriate Government to consider cases of all convicts for grant of premature release as and when they become eligible for consideration in terms of the policy. In such a case, it is not necessary for the convict or his relatives to make a specific application for grant of permanent remission. When the jail manual or any other departmental instruction issued by the appropriate Government contains such policy guidelines, the aforesaid direction will apply;

b) We direct those States and Union Territories that do not have a policy dealing with the grant of remission in terms of Section 432 of the CrPC or Section 473 of the BNSS to formulate a policy within two months from today;

c) Appropriate Government has the power to incorporate suitable conditions in an order granting permanent remission. Consideration of various factors, which are mentioned in the paragraph 13 above by way of illustration, is necessary before finalizing the conditions. The conditions must aim at ensuring that the criminal tendencies, if any, of the convict remain in check and that the convict rehabilitates himself in the society. The conditions should not be so oppressive or stringent that the convict is not able to take advantage of the order granting permanent remission. The conditions cannot be vague and should be capable of being performed;

d) Order granting or refusing the relief of permanent remission must contain brief reasons. The order containing reasons should be immediately communicated to the convict through the office of the concerned prison. The copies thereof should be forwarded to the Secretaries of the concerned District Legal Services Authorities. It is the duty of the prison authorities to inform the convict that he has the right to challenge the order of rejection of the prayer for the grant of remission.

e) As held in the case of ***Mafabhai Motibhai Sagar*** [4], an order granting permanent remission can not be withdrawn or cancelled without giving an opportunity of being heard to the convict. An order of cancellation of permanent remission must contain brief reasons;

f) The District Legal Services Authorities shall endeavour to implement NALSA SOP in its true letter and spirit.

22) Further, the District Legal Services Authorities shall also monitor implementation of conclusion (a) as recorded

above. For this purpose, the District Legal Services Authorities shall maintain the relevant date of the convicts and as and when they become eligible to a consideration for grant of premature release, they shall do the needful in terms of conclusion (a). The State Legal Services Authorities shall endeavour to create a portal on which the data as aforesaid can be uploaded on real time basis.