

IN THE HIGH COURT OF JUDICATURE AT PATNA

Death Reference No.2 of 2015

(Arising out of PS.Case No. -62 Year- 2013 Thana
-Sajaur (Shahkund) District- -Bhagalpur)

=====

The State of Bihar

.... Petitioner

Versus

Prakash Yadav

.... Respondent

With

=====

Criminal Appeal (DB) No. 180 of 2015

Arising out of PS.Case No. -62 Year- 2013 Thana -Sajaur
(Shahkund) District- -Bhagalpur

=====

Prakash Yadav S/o Sri Jarmani Yadav, Resident of Village
Makandpur, P.S. Shahkund, District Bhagalpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the appellant Prakash Yadav : Mr. Kanhaiya Prasad Singh, Sr. Advocate.
Mr. Indeshwari Prasad Mandal, Advocate.
Mrs. Jyutsna Kumari, Advocate.

For the Respondent State : Mr. Ashwani Kumar Sinha, A.P.P.
Mr. S.C. Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA

and

**HONOURABLE MR. JUSTICE JITENDRA MOHAN
SHARMA**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE V.N. SINHA)

Date: 14-09-2015

Instant Death Reference, Cr. Appeal arise
out of judgment of conviction, order of sentence dated



28/30.01.2015, passed by 3rd Additional District & Sessions Judge, Bhagalpur in Sessions Trial No. 1155/13, 97/14, whereunder out of the three accused put on trial Accused No. 1 has been convicted for the offence under Section 302 of the Penal Code, awarded Capital punishment with further direction to pay fine of Rs. 25,000/-, in default of payment of fine to suffer imprisonment for two years.

2. Prosecution case, as set out in the fardbeyan of Naresh Yadav, resident of Village Dariapur Nagar, P.S. Sajaur Shahkund, District- Bhagalpur, recorded by Sub Inspector Anil Kumar Paswan, Officer-in-Charge, Shahkund Police Station on 09.04.2013 at 21:45 hours in Shahkund Primary Health Centre is that he is 60 years old and son of Mito Yadav, resident of Dariapur (Nagar) Police Station- Sajaur Shahkund, District- Bhagalpur, is recording his statement on the same day around 9:45 P.M. in Primary Health Centre, Shahkund before Officer-in-Charge, Shahkund Police Station that on the same day, around 3:00 P.M., he was at his residence, his son-in-law Prakash Yadav came to his house in Bolero vehicle with his two cousin Lallu Yadav, Ganauri Yadav, took his maternal granddaughter Shabnam Kumari for



providing her treatment by Ojha (Jhar Fook). Around 8:30 P.M. on the same day informant received information that Shabnam Kumari has been strangulated by his father and the two cousins, her dead body is kept in Primary Health Centre, Shahkund for providing treatment. The accused persons fled away after keeping the dead body in hospital. In the fardbeyan informant also stated that in previous January his maternal granddaughter Shabnam Kumari married out of her own free will after running away from home for which a case was also lodged in Shahkund Police Station. During pendency of the case Shabnam Kumari was produced in court and the court released her in favour of her parents. Mother of Shabnam Kumari, however, kept Shabnam Kumari at the house of the informant and she was residing at his house. The informant looked after her well being, education. Her father wanted to marry Shabnam Kumari elsewhere, but she was not agreeable, insisted to continue her earlier marriage which was not acceptable to her father Prakash Yadav and he along with Lallu Yadav, Ganauri Yadav came to the house of the informant, took her away on the pretext of subjecting her to treatment by Ojha (Jhar-fook) and strangulated her to death. Naresh Yadav having read



the statement which was also read over to him, found the same correct, put his signature on the fardbeyan in presence of his son Lalu Kumar Yadav who is also a signatory over the fardbeyan. Before recording the fardbeyan the scribe of the fardbeyan conducted inquest proceeding over the dead body of Shabnam Kumari and thereafter recorded the fardbeyan of the informant. After recording the fardbeyan the scribe of the fardbeyan returned to the Police Station in the same night at 10:30 P.M. and registered the First Information Report of the instant case. The Inquest Report of Shabnam Kumari is not on record but from the case diary where the Inquest Report has been incorporated it appears that the inquest over the dead body of Shabnam Kumari was conducted at 21:15 P.M. After recording the fardbeyan the dead body was dispatched for post mortem to Jawaharlal Nehru Medical College Hospital, Bhagalpur through Chowkidar Ashok Paswan, Haldhar Paswan. The Post Mortem Report of Shabnam Kumari indicates that the cause of death is asphyxia, shock due to throttling. On dissection of the body of Shabnam Kumari the Autopsy Surgeon also found that her underlying tissues were deeply bruised and infiltrated with blood and blood clots. There was fracture



of thyroid cartilage with bruising of adjacent soft tissues. Larynx and trachea was deeply congested. The Autopsy Surgeon also opined that the injuries found on the person of Shabnam Kumari were ante mortem, grievous and dangerous to life in ordinary course of nature caused by pressure over her neck by some hard, blunt object such as fingers and palm.

3. In the light of the fardbeyan, further statement of the informant and the police statement of his son, others as also the contents of inquest, post mortem report Investigating Officer of the case submitted charge-sheet dated 30.06.2013.

4. In the light of the charge-sheet cognizance was taken, after supply of police papers to the accused persons, the case was committed to the court of Sessions. Sessions court framed charge against accused Prakash Yadav under order dated 09.01.2014 and against the two other accused persons, namely, Lalu Yadav, Ganauri Yadav under order dated 11.03.2014 to which the three accused persons pleaded not guilty, claimed to be tried.

5. In support of the prosecution case, prosecution party examined seven witnesses. P.W. 1 Basanti Devi is the wife of the informant Naresh Yadav,



maternal grandmother of the deceased Shabnam Kumari. P.W. 2 Lalu Kumar Yadav is the son of the informant, maternal uncle of the deceased. He is also attesting witness of the fardbeyan. P.W. 3 Bali Yadav is also the son of the informant, maternal uncle of the deceased. P.W. 4 Naresh Yadav is the informant, maternal grandfather of the deceased, father-in-law of the accused. P.W. 5 Dr. Atul Kumar Mallick is the Assistant Professor in the Forensic Medicine Department of Jawaharlal Nehru Medical College, Bhagalpur, conducted autopsy on the dead body of Shabnam Kumari on 10.04.2013. P.W. 6 Anil Kumar Paswan at the relevant time was the Officer-in-Charge of Shahkund Police Station, scribe of the fardbeyan. P.W. 7 Niraj Tiwary at the relevant time served as Sub Inspector in the Shahkund Sajaur Police Station, is the Investigating Officer of the case.

6. Counsel for the appellant submitted that out of the 8 prosecution witnesses P.Ws. 1, 2 and 3, maternal grandmother, maternal uncle of the deceased Shabnam Kumari as also her maternal grandfather P.W 4 Naresh Yadav having become hostile while deposing in court, there is hardly any evidence on record on the basis of which the conviction recorded under impugned



judgment can be maintained and Reference made by the trial judge answered in affirmative. It is submitted on behalf of the appellant that there being no positive evidence on record to connect the appellant, two of his cousin brothers, the trial court itself acquitted the two cousin brothers of the appellant, placing reliance on the same appraisal of evidence made by the trial court, the appellant should also be acquitted. In this connection, he pointed out that as per the First Information Report it was the appellant, his two cousins Accused Nos. 2, 3 had come to the house of Naresh Yadav, father-in-law of the appellant on 09.04.2013 in the afternoon around 2:00 P.M., took Shabnam Kumari for providing treatment by Ojha (Jhar Fook) as she insisted to continue her marriage performed out of her own sweet will without the consent of her parents, in the same evening, informant learnt that his granddaughter Shabnam Kumari has been strangulated by the three, her dead body, however, has been brought to Shahkund Primary Health Centre for treatment, he came to the Primary Health Centre along with the police officials, who informed him about her death and lodged the fardbeyan (Exhibit-3) in the same evening in Shahkund Hospital at 21:45 hours but in



court informant has given a go-bye to the aforesaid version as in Paragraphs 2, 3 of his evidence he has categorically denied the contents of the fardbeyan and even went on to depose in Paragraph 9 that the scribe police officer obtained his signature on a plain paper on the pretext that the same may be used for preparing Panchnama. In the light of the aforesaid deposition of the informant, the conviction of appellant Prakash Yadav, son-in-law of the informant, is also fit to be set aside by this Court. In this connection, he also pointed out that motive for the occurrence that Shabnam Kumari was insisting to continue with the marriage which she performed out of her own free will without the consent of the parents has not been established as from the evidence of Investigating Officer (P.W. 7) Paragraphs 7 to 10 it is evident that no investigation in connection with that case was ever conducted by him.

7. Counsel for the State has opposed the submission and submitted that true it is that the informant Naresh Yadav has given a go-bye to the prosecution case stated by him in the fardbeyan in Paragraph 3 of his evidence but his deposition in Paragraph 2 and further clarification made by him after



being subjected to cross-examination by the prosecution in Paragraphs 5 to 9 is sufficient to maintain the conviction of the appellant. It is submitted by the State counsel that in Paragraph 2 of his deposition Naresh Yadav stated that on the date of occurrence Prakash Yadav came to his house alone, informed P.W. 4 that Shabnam Kumari is required to be subjected to treatment by Ojha (Jhar Fook). P.W. 4 further stated in the same paragraph that he agreed with the suggestion made by Prakash Yadav, allowed him to take Shabnam Kumari. In the same paragraph P.W. 4 further stated that after being subjected to treatment by Ojha Shabnam Kumari was never brought to his house, on the same day between 8:00-9:00 P.M. the Sub Inspector came to his house (P.W. 4) and informed him that his maternal granddaughter has died. P.W. 4 along with the Sub Inspector came to Shahkund Hospital, saw her dead body. It is further submitted that aforesaid evidence in Paragraph 2 read with further evidence of P.W. 4 after being subjected to cross-examination by the prosecution in Paragraphs 7, 8, where he has admitted that after he reached the hospital along with police officer he saw his son-in-law present in the hospital who informed P.W. 4 that Shabnam died



during treatment, read with the medical evidence of autopsy surgeon (P.W. 5) that Shabnam Kumari was strangulated as she died because of asphyxia, shock due to throttling, on dissection fracture of thyroid cartilage was found, clearly establish that she was done to death after she was taken away by the appellant from the house of P.W. 4 and thereafter her dead body was brought to Shahkund Primary Health Centre by the appellant father on the pretext of treatment.

8. In view of the rival submissions made by the counsel for the parties, we have examined the fardbeyan of the informant (Exhibit-3), Post Mortem Report of Shabnam Kumari (Exhibit-2). In the light of the evidence of the informant (P.W. 4) Paragraph 2 read with the fardbeyan (Exhibit-3) it appears that it was appellant Prakash Yadav who came to the house of his father-in-law (P.W.-4) on 09.04.2013 at 3:00 P.M., took Shabnam Kumari on the pretext that she required treatment by Ojha (Jhar Fook). On the same day between 8:00-9:00 P.M. informant (P.W.4) was informed by the Sub Inspector (P.W. 6) that his maternal granddaughter is dead, her dead body is in Shahkund Primary Health Centre, P.W. 4 came to the hospital along with P.W. 6 where his son-in-



law appellant was also available and it was the son-in-law who informed P.W. 4 that he brought Shabnam Kumari to the hospital for treatment but she died. From the Post Mortem Report (Exhibit-2) and the evidence of doctor (P.W. 5) it is established that Shabnam Kumari died homicidal death caused by asphyxia, shock due to throttling. Her Post Mortem Report further indicate that on dissection there was fracture of thyroid cartilage. In the light of the aforesaid evidence, while recording the statement of the appellant under Section 313 Cr.P.C., the court below asked him to explain that the possession of his daughter was given to him, his wife by the court but his wife kept the daughter under the guardianship of her father (P.W. 4) to which appellant replied in affirmative. In reply to Question No. 5 that appellant has to say something more in his defence, appellant admitted that on 09.04.2013 he had come to Shahkund hospital to see his daughter Shabnam Kumari. In the hospital there was exchange of hot words between him and the police officer, whereafter the present case was lodged by his father-in-law on account of pressure mounted by the police officer. From the answer given by the appellant to Question No. 3 it is evident that custody of Shabnam Kumari was handed



over to the appellant, his wife by the court, thereafter appellant asked his wife to keep Shabnam Kumari at her father's house and under his guardianship (P.W. 4), from whose custody, as per evidence of P.W. 4 in Paragraph 2, Shabnam Kumari was brought by the appellant for providing treatment by Ojha (Jhar Fook) and thereafter she was brought to the hospital by the appellant, as has been deposed by P.W. 4 in Paragraph 7. As such, we are satisfied that Shabnam Kumari was strangled sometime after she was taken away by appellant from the house of his father-in-law in the afternoon of 09.04.2013 and thereafter her dead body brought to the hospital. In this connection, we may notice sub-section (2) of Section 154 of the Evidence Act, which has been inserted by Criminal Law Amendment Act, 2005 with effect from 16.04.2006, which permit the prosecution to rely on such part of the evidence of the hostile witness by which the prosecution case is supported. Placing reliance on the said provision, we rely on the evidence of P.W. 4 in Paragraphs 2, 7 and maintain the conviction of the appellant. Though we maintain the conviction of the appellant, we are satisfied that the instant case is not a case which can be categorized as rarest of rare case and



that the appellant deserves grant of Capital punishment, accordingly, answer the reference made under Section 366 Cr.P.C. in negative, set aside the Capital sentence imposed on the appellant, award the appellant Rigorous Imprisonment for life with further direction to pay fine of Rs. 25,000/-, in default of payment of fine, to suffer further imprisonment for six months. The appellant shall, however, be entitled for grant of remission under Section 432 Cr.P.C. after completing 14 years of jail custody including pre-trial period.

9. Now we proceed to give reasons as to why we have directed that the case of the appellant be considered for grant of remission after he completes 14 years of actual jail custody including pre-trial period as is required under Section 433A Cr.P.C. In this connection, we observe that prior to coming into force of Amending Act 26 of 1955 imposition of death sentence to a convict of capital offence was the rule as under sub-section (5) of Section 367 Cr.P.C, 1898 it was the duty of the Court not imposing death sentence on a convict of capital offence to record reasons as to why the convict has not been awarded death penalty. After removal of sub-section (5) of Section 367 Cr.P.C., 1898 the Court is not required to

indicate such reasons.

10. In **Jagmohan Singh v. State of U.P. AIR 1973 SC 947** imposition of death sentence was assailed before a Constitution Bench of the Supreme Court as violative of Articles 19, 21, 14 of the Constitution on the ground that imposition of capital punishment is not only excessive but harshest penalty which the State can impose but also on the ground that it is irreversible and no law can deprive a convict of his right to life as after imposition of death sentence he is prevented from enjoying fundamental rights and that Legislature has given the Courts unguided discretion to impose capital punishment as there is no policy framed for imposing such punishment. Reliance in support of such submission was placed on the judgment of the U.S. Supreme Court in the case of **Furman Vs. State of Georgia** in which two of the nine judges constituting the Bench rejected imposition of capital punishment on a convict on the ground that it violated the 8th Amendment of U.S. Constitution which forbade cruel and unusual punishments and that imposition of death punishment violated human dignity and was not necessary in modern life. The other three Judges forming the





majority, however, did not take the view that 8th Amendment prohibited capital punishment for all crimes and in all circumstances though held that in the facts of the case capital punishment was not required to be imposed on the convict and directed imposition of life sentence. Supreme Court distinguished the aforesaid judgment of U.S. Supreme Court and observed that in the Constitution of India there is no provision like the 8th Amendment of U.S. Constitution nor the Courts in India are 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 and further observed that what is cruel and unusual may in conceivable circumstances be recorded as unreasonable but while dealing with punishments for crimes as prescribed by law it may not be so as capital punishment is awarded in India from ancient time right up to the present day though in number of offences for which it can be imposed has continuously dwindled. Supreme Court further observed that framers of the Constitution were well aware of the existence of capital punishment and provided for grant of pardon, reprieve, remission, commutation of sentence of any convict for



any offence. It also referred to Article 21 which provides that no person shall be deprived of his life except according to procedure established by law and observed that the implication is very clear as deprivation of life is constitutionally permissible if that is done according to procedure established by law and held that imposition of capital sentence cannot be recorded per se as unreasonable and not in public interest. In Paragraph 26 of the judgment Supreme Court rejected the contention that Judges have been given uncontrolled and unguided discretion to impose capital punishment or imprisonment for life and held that wide judicial discretion allowed to a Judge while imposing sentence is to enable the Judge to balance the aggravating and mitigating circumstances of the crime as proved by evidence led during the trial. After delivery of judgment in the case of Jagmohan Singh on 03.10.1972 Code of Criminal Procedure, 1898 was repealed with effect from 01.04.1974 by Code of Criminal Procedure, 1973 which require the trial court under sub-section (3) of Section 354 to state reasons for the sentence awarded and special reasons in the case of capital sentence. It is, therefore, evident that after coming into force of the

present Code imprisonment for life became a rule while capital sentence became an exception as special reasons was required to be recorded for imposing death sentence.

11. Justice Krishna Iyer speaking for the majority in **Rajendra Prasad Vs. State of Uttar Pradesh AIR 1978 SC 916** observed that retributive theory has lost its relevance in the current ethos of human rights and that there is a divinity in every man and none is beyond redemption but death penalty still on our Code is the last step in a narrow category where within a reasonable spell the convict is not likely to be cured and tends to murder others even within the prison and immediately on release if left alive. The patience of society must be tampered by the prudence of social security and that is the limited justification for deprivation of fundamental rights by extinguishment of the whole human being. The extreme penalty can be invoked only in extreme situation but further observed in Paragraph 105 that it is illegal to award capital sentence without considering the correctional possibility of the convict inside prison and reversed the view taken in the case of **Ediga Annamma AIR 1974 SC 799**



regarding the application of sub-section (3) of Section 354 and held that after enactment of sub-section (3) of Section 354 murder most foul is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion for imposing the punishment as the focus is now completely shifted from the crime to the criminal, special reasons necessary for imposing death penalty, must relate not to the crime but to the criminal. Having considered the evidence on record it was also observed that it is not legally permissible for the Court hearing the appeal to define the expression 'special reasons' by a process of judicial interpretation which virtually has the effect of abolishing the death sentence and then commuted the sentence of the three convicts.

12. In **Bachan Singh v. State of Punjab** **AIR 1980 SC 898** Constitution Bench of the Supreme Court considered the correctness of the observations made by the majority judgment in Rajendra Prasad in the light of earlier Constitution Bench judgment in Jagmohan Singh and the provisions of sub-section (2) of Section 235 and sub-section (3) of Section 354 Cr.P.C., 1973 and held that it is quite clear that while making



the choice of punishment or for ascertaining the existence or absence of special reasons the Court must pay due regard both to the crime and the criminal. The relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case as was held in Jagmohan Singh. More often than not these two aspects are so intertwined that it is difficult to give a separate treatment to each of them because “style is the man”. In many cases the extremely cruel or beastly manner of the crime is itself a demonstrative index of the depraved character of the perpetrator. It was held that it is not desirable to consider the circumstances of the crime and criminal in two separate water-tight compartments and required the Court to draw a balance-sheet of both aggravating and mitigating circumstances and to impose capital sentence in only rarest of rare cases and thereby the law laid down in Rajendra Prasad was overruled requiring the Courts to consider both aggravating and mitigating circumstances while imposing sentence on the convict. Following propositions emerges from Bachan Singh :

- i. capital punishment need not be inflicted

except in gravest cases of extreme culpability.

ii. before opting for capital punishment the circumstances of the offender required 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, capital punishment be imposed only when imprisonment for life appears to be altogether inadequate having regard to the circumstances of the crime and provided and only provided the option to impose sentence of imprisonment for life cannot be consciously 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 and in doing so the mitigating circumstances has to be accorded full weight and a just balance has to be struck between the two.

In Bachan Singh Supreme Court with reference to the judgment of the U.S. Supreme Court in the case of Furman v. Georgia and Indian Penal Code Amendment Bill noted in Paragraphs 200, 204 possible aggravating, mitigating circumstances respectively but





made it clear that the circumstances noted is not exhaustive and is only illustrative and required the Court to draw the balance-sheet and to impose punishment as per its finding made on the basis of both the aggravating and mitigating circumstances arising in the case from the evidence.

Bhagwati J. recorded his dissenting judgment in Bachan Singh holding Section 302 of the Penal Code insofar as it provides imposition of capital sentence as an alternative to life sentence is ultravires and void being violative of Articles 14, 21 of the Constitution since it does not provide any legislative guidance as to when life should be permitted to be extinguished by imposition of death sentence. Aforesaid dissent has been described by Asok K. Ganguly J. in his book "Landmark Judgments that Changed India" as glowing dissent perhaps because in **Maneka Gandhi Vs. Union of India AIR 1978 SC 597** the Court had evolved substantive due process doctrine interpreting Articles 14, 19, 21 of the Constitution which required the law to be just reasonable and fair in procedure otherwise it would violate the fundamental rights enshrined in the aforesaid articles of the Constitution and further for the



reason that Bhagwati J. could anticipate that the doctrine of rarest of rare case formulated by the majority would vary from Judge to Judge depending upon the value system, responses and social philosophy of the Judges constituting the Bench and feared that there would be chaotic, arbitrariness in imposition of death sentence.

Aforesaid minority opinion of Bhagwati J. is also supported by Civil Liberties Union as the Union believes that death penalty violates fundamental right of the convict and State should not give to itself the right to kill another human being especially when it kills with premeditation and ceremony in the name of the law or in the name of its people. The Union also believes that death penalty is uncivilized, cruel, unfair, inequitable in practice, strive to prevent execution and seek abolition of capital punishment. The Union has the following three fundamental concerns :

i. Death penalty is generally applied in an unfair and unjust manner against the men who are economically weak, their Advocates lack in skill.

ii. The majority of the professionals believe that capital punishment does not deter violent crime and

help in crime control.

iii. Innocent people are too often convicted and sentenced to death which is evident from the number of acquittals rendered in those cases in which accused was initially convicted and sentenced to death.

A society that respects life cannot deliberately impose capital punishment. Civil Liberties Union is further of the view that capital punishment unlike any other criminal punishment is irreversible. Speaking to French Chamber of Deputies in 1830 after witnessing the excesses of the French Revolution Marquis de Lafayette said that he is for abolition of the capital punishment until he will be sure about the infallibility of human judgment although proponents of capital punishment would argue that its merits are worth the occasional execution of innocent people, most would hasten to add that there is little likelihood of the innocent being executed. In United States there have been on the average of more than four cases each year in which an entirely innocent person was convicted and imposed death sentence. In many of the aforesaid cases commutation, remission arrived just hours or even minutes before the scheduled execution. In 2012





Columbia Human Rights Law Review reported the story of Carlos DeLuna, a man executed in Texas in 1989 for murder which was “common knowledge” had been committed by another man. DeLuna’s story indicate that there are many factors which can go wrong in a case in which convict has been awarded capital sentence, namely, faulty identification by eye-witnesses, investigative, prosecutorial misconduct, destroyed evidence, accused represented by inexperienced, ineffective defence lawyer outmatched by an experienced prosecutor. DeLuna was convicted relying on the testimony of the eye-witnesses, who identified him at the crime scene which was dimly lit from behind the police car. In order to avoid repetition of what happened to DeLuna and to save other innocents from going to gallows, it is necessary to abolish death sentence, as has been done in about 121 countries of the world placing reliance over the case of DeLuna and other similar cases all over the globe as also on the observations of philosopher, novelist and others. It may be useful to quote the observations of following few philosophers herein.

Albert Camus, a Nobel Prize winning French

philosopher and writer. Camus observed the cruelty involved in capital punishment, which is as follows:

“But what then is capital punishment but the most premeditated of murders, to which no criminal’s deed, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death to his victim and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.”

Russian Writer, **Anton Chekhov**, also maintained, “The State is not God. It has not the right to take away what it cannot restore when it wants to.”

Russian Novelist **Fyodor Dostoevsky’s** *The Idiot* was an important work, here arguably Dostoevsky critiques popular belief system existing in society which does not accept alternative view. The story is about Prince Myshkin who has just come back to Russia from an extended stay at sanatorium. Upon his return he enters into high Russian society only to unsettle people with his uncommon pureness and sincerity, thus earning him the title, *the idiot*, attributed to his naivety leaving people to





take advantage of him. Eventually all of his goodness welcomes only bad, leading to the end in which he is set to return to the sanatorium from which he came. The dialogue between Prince Myshkin (who is the protagonist in the novel- The Idiot) and the bell boy when they speak on capital punishment, as the bell boy mentions the humaneness of France's guillotine that was a common belief during the times to which the prince responds he has witnessed... "Do you know," the prince seized on this warmly, 'everybody makes exactly the same point that you have, that's why the machine the guillotine was invented. But something occurred to me when I was there: what if that's actually worse? You may think that's silly, ludicrous even, but with a little imagination even an idea like that can flash into your mind. Just think: if there was torture, for instance, there'd be suffering and wounds, bodily agony, all of which would distract you from the mental suffering, you would only have the torment of your physical injuries right up to the point of death. After all, the greatest, the most intense pain lies not so much in injuries perhaps, so much as the fact that you know for certain that in an hour's time, then in ten minutes, then thirty seconds, then now, at this moment, the soul will take wing from the body and you will cease to be a man, and that this is certain to happen; the main



thing is that it's certain. You put your head under the blade and hear it sliding toward you, it's that quarter of a second which is the most terrible of all....."To kill for murder is an immeasurably greater evil than the actual crime itself. Judicial murder is immeasurably more horrible than one committed by a robber. Someone killed by a robber, knifed at night in forest or somewhere certainly keeps hoping for a rescue right up to the last second. There have been instances of people whose throats have been cut still hoping for rescue right up to the last second. There have been instances of people whose throats have been cut still hoping, or running away, or pleading for their lives. But all this final hope, which makes dying 10 times easier is taken away by that certain; the sentence is pronounced and the whole agony resides in the fact that there is no escape. There is no greater torture in the world than that. Fetch a soldier and stand him right in front of a cannon during a battle and fire at him, he will go on hoping; but read out a certain death sentence to that same soldier and he will go off his head or bust into tears. Who can say that human nature can bear such a thing like that without going mad? Why this disgusting pointless, unnecessary mockery? Perhaps there exists a

man who has had his sentence read out to him and been allowed to suffer before being told: “Be off, you have been pardoned.” That man could tell you perhaps. Christ himself spoke of such agony and terror. No, a man should not be treated so.”

Cesare Beccaria, Philosopher,

Economist (1738–1794) was one of the greatest minds of the Age of Enlightenment in the 18th century. His writings on criminology and economics were well ahead of their time. In his famous and influential essay published in 1764 "On Crimes and Punishments." He maintains his view on capital punishment:

“The murder that is depicted as a horrible crime is repeated in cold blood, remorselessly.”

Auberon Alexander Waugh (1939 – 2001) was an English journalist. He famously wrote on Capital Punishment and negated the deterrent argument by saying- “Judicial execution can never cancel or remove the atrocity it seeks to punish; it can only add a second atrocity to the original one”. “So long as one sees killing as wrong there is no need to waste time with the deterrent argument, since it would be nonsense to try to prevent a theoretical evil in the future by perpetrating an actual one in the present.” (*The Spectator* 17/6/78)

George Bernard Shaw, a Playwright,
Nobel Laureate :

“Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind”.

Having considered the opinion of the Nobel Laureates, Philosophers and writers, it is also required of us to notice a joint study report by **Amnesty International India and People’s Union for Civil Liberties (PUCL)** on the Supreme Court judgments on death penalty between 1950-2006 published in May, 2008 wherein the term ‘death penalty’ is described as **Lethal Lottery**, as according to the report awarding of death sentence depends on a number of extremely variable and often subjective factors ranging from the competence of legal representation in particular at the trial stage, to the personal views of the Judges who form the Bench. The report has also stated “The randomness of the lethal lottery that is the death penalty in India is perhaps not so random. It goes without saying that the less wealth and influence a person has, the more likely they are to be sentenced to death.” The same has been



expressed in Part II of this report about **access to effective legal representation** (Section 7.1) as well as about **pretrial investigations and collection of evidence** (Section 6.1.1.).

We would also like to refer the **Law Commission of India Report, 2015** in response to the reference made to it under two judgments of the Supreme Court after analyzing the legal and jurisprudential justification for capital punishment. The Commission having thoroughly analysed the issue rejected all the aspects of penological justifications, namely, deterrence, incapacitation, retribution, revenge and public demand as legally inadequate and strongly embraced two powerful arguments against capital punishment i.e. reformation and restorative justice.

Professor Mohan Gopal, an eminent Jurist, in his interview to Sri V. Venkatesan published in Frontline Volume 32 No. 21 dated October 30, 2015 observed that the report ignored strong abolitionist public opinion of the masses eloquently expressed by Dr. Ambedkar in the Constituent Assembly debate on behalf of poor and the downtrodden, the most vulnerable to lose life on the gallows and supported abolition of death



sentence as the country by and large believes in the principle of non-violence which has been its ancient tradition. He further referred to the advances in Human Rights Law and the evolution of constitutional jurisprudence on fundamental rights and observed today it is impossible for the State to kill its prisoners without violating their human, constitutional rights, right to life, dignity and equality and there is no justification at all for imposition of cruel and unusual capital punishment as safeguards in law have failed in providing a constitutionally secure environment for administration of this irrevocable punishment. He further said that the Commission was not justified in making distinction between terror and non-terror offences.

13. A Three Judge Bench of the Supreme Court in **Machhi Singh Vs. State of Punjab A.I.R. 1983 Supreme Court 957** in Paragraphs 31 onwards proceeded to consider how to apply the rarest of rare case doctrine evolved in Bachan Singh to the facts of the two convicts of the said case namely, Machhi Singh and Jagir Singh who were awarded death sentence by the courts below. In Paragraph 32 the court observed that reverence for life principle may not be applied to the case



of a death row convict as the convict himself while committing murder did not had any respect for life of the victim, in the circumstances, reverence of life principle cannot be applied to the convict from saving him from going to the gallows. Death sentence may, however, be imposed only in rarest of rare cases in which collective conscience of the community is so shocked that it will accept the holders of judicial powers to inflict death penalty irrespective of their personal opinion, as regards desirability or otherwise of retaining death penalty and every case will have to be viewed from the point of view of motive, manner of commission of crime or the anti-social or abhorrent nature of crime, magnitude of crime, personality of victim etc. and further held in Paragraph 33 that in the aforesaid background the guidelines indicated in Bachan Singh will have to be culled out to the facts of each of the individual case wherever the question of imposing death sentence arises. In Paragraph 34 of the said judgment the Supreme Court noted the two questions which is required to be asked, answered while applying the guidelines laid down in Bachan Singh :

(a). Is there something uncommon about

the crime which renders sentence of imprisonment for life inadequate and calls for 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 ?

14. In **Aloke Nath Dutta Vs. State of West Bengal (2007) 12 SCC 230** Supreme Court in Paragraph 145 formulated the question whether the facts and evidence in the case satisfied the parameters for imposing death sentence and answered the question in negative in Paragraphs 179, 180 but prior thereto observed in Paragraph 178 that what would constitute a rarest of rare case must be determined in the fact situation obtaining in each case. Different criteria have been adopted by different Benches of the Supreme Court, although the offences are similar in nature. Because the case involved offences under the same provision, the same by itself may not be a ground to lay down any uniform criteria for awarding Capital punishment or lesser punishment as several factors therefor are required to be taken into consideration. No

sentencing policy in clear terms has been evolved either by the Legislature or by judicial pronouncement.

15. In **Swamy Shraddananda Vs. State of Karnataka (2007) 12 SCC 288** the two Judges of the Supreme Court differed as to whether the appellant be awarded Capital sentence or sentence of imprisonment for life and the matter was referred to a Bench of three Judges.

16. The three Judge Bench in **Swamy Shraddananda(2) Vs. State of Karnataka (2008) 13 SCC 767** commuted the death sentence to life imprisonment with direction that the appellant would not be released from prison till the end of his life. The provisions in regard to commutation, remission, suspension etc. are to be found both in the Constitution of India and in the Cr.P.C. and Supreme Court in the said judgment made it absolutely clear that this judgment is not concerned with the Constitutional provision that are in the nature of State's sovereign power. In the said judgment Supreme Court noted in Paragraph 56 that Shraddananda was taken in custody on 28.03.1994 and 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 prison in the first quarter of 2009 as he had already completed more than 14 years of incarceration. Such eventuality was not acceptable to the Supreme Court and the Supreme Court breaking the standardized norms and practice rendered the sentence of life imprisonment equal to imprisonment for whole life 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 and held that punishment of imprisonment for life awarded as substitute for death penalty is beyond remission 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 the Supreme Court but also by the High Courts being the superior courts in their respective States. A suggestion to that effect was made by the Supreme Court 30 years ago in **Dalbir Singh Vs. State of Punjab (1979) 3 SCC 745**. In Paragraph 14 of the judgment Supreme Court held as follows:

“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. 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."

Having incorporated the quotation Supreme Court observed that it is time that the course suggested in Dalbir Singh should receive a formal recognition by the Court. In Paragraph 58 Supreme Court considered the case of **Subash Chander Vs. Krishan Lal (2001) 4 SCC 458** in which five accused persons including Krishan Lal were put on trial for committing multiple murders. The Trial Court acquitted one of the accused but convicted rest of them and sentenced each to suffer Capital punishment. In the



death reference, appeals the High Court confirmed the conviction of four accused but commuted their death sentence to life imprisonment. Subash Chandar filed appeal in Supreme Court. On a consideration of the material facts Supreme Court felt that the High Court was not justified in commuting the sentence of death of at least one accused Krishan Lal. The counsel appearing on behalf of Krishan Lal implored that instead of death penalty Supreme Court might order for imprisonment of Krishan Lal for the remaining period of his life. Supreme Court noted the submission of counsel in Paragraph 19 which is quoted herein below:

“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.”

Supreme Court accepted the plea made by counsel for Krishan Lal and passed the following order in paragraph 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 remission.”

In Paragraph 60 Court considered **Sri Bhagwan Singh Vs. State of Rajasthan (2001) 6 SCC 296**. The appellant who was 20 years old at the time of commission of offence had come to Supreme Court after being condemned to death by the trial, High Court. According to the prosecution he had mercilessly killed five members of a family. The manner of killing was brutal and the circumstances of the crime exhibited crass ingratitude on his part. The motive was theft of



gold ornaments and other articles belonging to the victim's family. Supreme Court speaking through K.G. Balakrishnan, J. commuted the death sentences awarded to Sri Bhagwan the imprisonment for life subject to the direction 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. In Paragraph 61 Court considered the judgment of **Prakash Dhawal Khairnar (Patil) Vs. State of Maharashtra (2002) 2 SCC 35** who was also condemned to death after he committed murder of his own brother their mother and four members of his brother's family because the deceased had not agreed to partition the property which appellant claimed to be joint family property. In the totality of circumstances Supreme Court placing reliance on Sri Bhagwan, Dalbir Singh 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. In Paragraph 62 Supreme Court considered the judgment in the case of

Ram Anup Singh Vs. State of Bihar (2002) 6 SCC 686

in which father and his two sons had killed the father's brother, his wife daughter and son-in-law, on conviction for the murders the father was sentenced to life imprisonment but the two sons were given the Capital punishment. Supreme Court once again interfered placing reliance on Dalbir Singh and Prakash Dhawal Khairnar (Patil) and set aside the death sentence awarded 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 actual term of 20 years including the period of imprisonment already undergone by them. In Paragraph 63 Supreme Court considered the judgment in **Mohd. Munna Vs. Union of India (2005) 7 SCC 417** in which Supreme Court 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 Cr.P.C. under which a sentence of life imprisonment would 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. In Paragraph 65 Supreme Court considered the judgment in the case



of **Jayawant Dattatraya Suryarao Vs. State of Maharashtra (2001) 10 SCC 109** in which the Court considered a batch of five analogous cases. Three were appeals on behalf of the three convicted accused, another appeal by the State in regard to the accused who was acquitted by the trial court and another was death reference in regard to one of the appellants Subhashsingh Shobhnathsingh Thakur (A-6) who was given sentence of death on two counts, one under the provisions of Terrorist and Disruptive Activities (Prevention) Act (TADA) and other under Section 120-B of the Penal Code. According to the prosecution case the appellants along with number of other co-accused armed with highly sophisticated weapons raided J.J. Hospital, Mumbai where the victim a member of another underworld gang was admitted for treatment. In the hospital indiscriminate firing was resorted to killing not only their target but also two policemen who were on guard duty and injuring several others. The Court placing reliance on the judgment of **Subash Chander, Sri Bhagwan, Maru Ram Vs. Union of India (1981) 1 SCC 107, Bhagirath Vs. Delhi Admn. (1985) 2 SCC 580 and Zahid Hussein Vs. State of W.B. (2001) 3**



SCC 750 confirmed the conviction of Subashsingh Shobhnathsingh Thakur (A-6) but modified the sentence from death penalty to imprisonment for life. In Paragraph 66 Supreme Court considered the judgment in the case of **Nazir Khan Vs. State of Delhi (2003) 8 SCC 461** in which the appellants were sentenced to death for committing offences punishable under Section 364-A read with Section 120-B I.P.C. They were also convicted under the provisions of Terrorist and Disruptive Activities (Prevention) Act (TADA) with different terms of imprisonment for those offences. The Court placing reliance on the judgment of **Ashok Kumar and Sat Pal Vs. State of Haryana (1992) 4 SCC 172** commuted the death sentence of the three appellants but having regard to the gravity of the offences and dastardly nature of their act directed for their incarceration for a period of 20 years with further direction that this accused-appellant would not be entitled for any remission from the term of 20 years. In Paragraph 67 Supreme Court observed that on a perusal of the aforesaid 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 20 years with further direction that the convict must not be released from the prison for the rest of his life or before actually serving out the term of 20 years as the case may be mainly on two premises: (1). Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code mean imprisonment for rest of the life of the prisoner and (2) A convict undergoing life imprisonment has no right to claim remission. In support of second premise reliance is placed on the line of decisions beginning from **Gopal Vinayak Godse Vs. State of Maharashtra AIR 1961 SC 600** and coming down to Mohd. Munna.

In Paragraph 68 Court noted the doubt raised about correctness of the second premise that a convict undergoing sentence of imprisonment for life has no right to claim remission as the same tantamounts to imposing punishment of imprisonment suspending the operation of the statutory provision of remission and restraining the appropriate Government from discharging its statutory duties. In Paragraph 70 Court noted the judgment in the case of **State (Govt. of NCT of Delhi) Vs. Prem Raj (2003) 7 SCC 121** who was



convicted for the different offences under the Prevention of Corruption Act and was sentenced to undergo R.I. for two years and a fine of Rs. 500/- under Section 7 of the Act. He was additionally sentenced to undergo imprisonment for 3½ years and a fine of Rs. 1,000/- under Section 13(2) of the Act. Both the sentences were directed to run concurrently. In appeal on a plea made on the question of sentence High Court enhanced the amount of fine to Rs. 15,000/- in lieu of the sentence of imprisonment and directed that on deposit of the amount of fine the State Government being the appropriate Government would formalize the matter by passing an appropriate order under Section 433(c) of the Code of Criminal Procedure. Supreme Court on appeal filed by the State held that the question of remission lay within the domain of the appropriate Government and it was not open to the High Court to give a direction of that kind. In Paragraph 71 Supreme Court considered the judgment in the case of Prem Raj in which the Court referred to the earlier decision in **Delhi Admn. Vs. Manohar Lal (2002) 7 SCC 222** and **State of Punjab Vs. Kesar Singh (1996) 5 SCC 495** and in Paragraph 13 of the decision in the case of Prem Raj observed as

follows:

“13. An identical question regarding exercise of power in terms of Section 433 of the Cr.P.C. was considered in **Delhi Admn. Vs. Manohar Lal**. The Bench speaking through 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 Vs. Kesar Singh** Supreme Court observed in Paragraph 3 as follows (in the context of Section 433(b)):

“3. The mandate of Section 433 Cr.P.C. 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 Cr.P.C. 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.”

In Paragraph 72 Supreme Court noted the submission that as the Court could not direct the appropriate Government for granting remission to a convicted prisoner, it was not open to the court to direct appropriate Government not to consider the case of a convict for grant of remission in sentence. Punishment for an offence is a judicial function but once the judgment was pronounced and punishment awarded the matter no longer remain in the hands of the Court. The execution of the punishment passed into the hands of the executive and under the scheme of the Statute the court had no control over the execution. In Paragraph 73 Supreme Court held the submission noted above in Paragraphs 71, 72 as wholly misconceived and untenable and further held that decision in Prem Raj has no application to the issue under consideration. In Paragraph 74 Supreme Court took note of Section 45 of the Penal Code which defines life to mean the life of human being unless the contrary appears from the





context. In the same paragraph Supreme Court further noted Section 53 of the penal Code which enumerates punishments, the first of which is death and the second imprisonment for life. In the same paragraph Supreme Court also referred to Sections 54, 55 of the Penal Code which empower the appropriate Government to commute the sentence of death and the sentence of imprisonment for life respectively. In the same paragraph Supreme Court also noted Sections 55A, 57 which defines appropriate government and provides the manner in which fraction of the term of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. In Paragraph 75 Supreme Court placing reliance on the Constitution Bench judgment in the case of **Gopal Vinayak Godse Vs. State of Maharashtra AIR 1961 SC 600, Maru Ram Vs. Union of India (1981) 1 SCC 107, Dalbir Singh Vs. State of Punjab (1979) 3 SCC 745, Naib Singh Vs. State of Punjab (1983) 2 SCC 454, Ashok Kumar Vs. Union of India (1991) 3 SCC 498, Laxman Naskar Vs. State of W.B. (2000) 7 SCC 626, Zahid Hussein Vs. State of W.B. (2001) 3 SCC 750, Kamalanantha Vs. State of T.N. (2005) 5 SCC 194, Mohd. Munna Vs. Union of India (2005) 7**

SCC 417 and C.A. Pious Vs. State of Kerala (2007) 8

SCC 312 held that it is now conclusively settled by a catena of decisions that punishment of imprisonment for life ended down by the Court means a sentence of imprisonment for the convict for the rest of his life. In Paragraph 76 Supreme Court placing reliance on the Constitution Bench Judgment in **Gopal Vinayak Godse and Ashok Kumar** further observed that 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 20 years as it is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. In the said paragraph Supreme Court also observed that the object and purpose of Section 57 of the Penal Code will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code. In Paragraph 77 Supreme Court considered the issue of commutation and remission etc. of sentences and observed that the provisions in regard to the commutation, remission, suspension etc. are to be found both in the Constitution and in the Statute. Articles 72, 161 of the Constitution empower the President and the





Governors of the State respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence and made it clear that the judgment is not concerned at all with the constitutional provisions that are in the nature of the State's sovereign power as the judgment relates only to the provisions of commutation, remission etc. as contained in the Code of Criminal Procedure, Prisoner's Act and the rules framed by the different States. In Paragraph 78 Supreme Court referred to Sections 432, 433 Cr.P.C. which deal with power of the State to suspend or remit and commute sentences. In the same paragraph Court also referred to Section 433A which was inserted in Cr.P.C. by an amendment made in 1978 imposing restriction of powers of remission or commutation in certain cases. In Paragraph 79 Court referred to Section 434 Cr.P.C. which gives concurrent power to the Central Government in case of death sentence and Section 435 provides that in certain cases the State Government must act only after consultation with the Central Government. In Paragraph 80 Supreme Court observed that from perusal of Prison Acts and the rules it appears that for good



conduct and for doing certain duties etc. inside the jail the prisoners are given some test remission on a monthly, quarterly or annual basis. The test of remission so earned by a prisoner are added to the period of his actual imprisonment including the period undergone as an undertrial to make up the term of sentence awarded by the Court and in the said background raised the question as to how remission can be applied to the imprisonment for life and further observed that the way in which remission is allowed it can only apply to a fixed term and life imprisonment being for the rest of life is by nature indeterminate. In Paragraph 82 Supreme Court referred to **Karnataka Prison Rules, 1974 and Chapter XII of Karnataka Prison Manual** which deal with the remission system and then quoted Rule 214(c) of the same Rules which provides as follows:

“The sentence of all prisoners sentenced to imprisonment for life or to more 20 years’ imprisonment in the aggregate to imprisonment for life and imprisonment for exceeding in the aggregate 20 years, shall for these Rules be deemed to be sentence of imprisonment for 20 years.”

In Paragraph 83 Supreme Court further



noted the submission that cases of life convicts are first considered for remission by an Advisory Board constituted under Rule 814. The proposals for premature release of life convicts convicted after 18.12.1978 the date of introduction of Section 433A in Cr.P.C. are placed before the Advisory Board as provided under Government order dated 17.07.1989 on completion of 13 years and eight months of imprisonment including the undertrial period. The recommendations of the Board go to Inspector General of Prison together with all the records and are finally placed before the Government for considering the premature release of the prisoner on completion of 14 years of imprisonment. The State Government considers the recommendations of the Advisory Board and gives direction either for the release forthwith of the prisoner or that the prisoner would be released in the ordinary course on the expiry of the sentence less the period of remission earned. In case of a life convict if no order of premature release is passed there can be no release by the mere lapse of time since a life sentence is for the rest of life. In Paragraph 84 Supreme Court noted that specific orders are passed by the Government to



commute the sentence of life imprisonment to imprisonment for 20 years or less as per the provisions of Sections 54, 55 of the Penal Code and Section 433A Cr.P.C. and further observed that in case of life convict an assumption can be made if the convict is allowed all kinds of remission in the normal course the total period of remission allowed to the convict shall come to six years which is less than $1/3^{\text{rd}}$ of 20 years and the same is in consonance with Rule 214(c) of Karnataka Prison Manual as under the Rules sentence of imprisonment for life is deemed sentence of imprisonment for 20 years. From Paragraph 86 of the judgment it appears that Supreme Court also made enquiries on the issue of premature release of a life convict in the State of Bihar and came to learn that similar process as in vogue in Karnataka is also followed in Bihar and the remission matter of a life convict is first considered by the Bihar State Sentence Remission Board and then final order is passed by the State Government in the Department of Law on the basis of the recommendation received from the Board. In this connection Court also referred to Government instructions contained in letter dated 21.1.1984 incorporating the Government decision that



for grant of remission to a life convict and for his release from the prison, imprisonment for life will be deemed to be imprisonment for a term of 20 years. Para 1 of the said letter indicated that a life convict would not be entitled to the benefit of set off under Section 428 of the Code of Criminal Procedure, 1973, for the period of incarceration as an undertrial. Paragraph 1 of the letter was, however, deleted by letter dated 23.5.1985 following the decision of the Supreme Court in **Bhagirath Vs. Delhi Admn. (1985) 2 SCC 580**. In Paragraph 87 Supreme Court noted the contents of Para 2 of the letter as it originally stood providing that an accused who is given the punishment of imprisonment for life in a capital offence or whose death sentence is commuted to life sentence under Section 433 Cr.P.C. as well as an accused who was awarded life sentence after 18.12.1978 would be released from prison. (a). on completion of 14 years of imprisonment and (b). when the total period of the imprisonment and the days of remission added up to 20 years. Para 2 of the said letter was also deleted by the Government under Letter dated 29.06.2007 which provided that the decision to release a convict undergoing life imprisonment for a capital offence or



whose death sentence is commuted to life imprisonment would be considered by the State Government or by the State Sentence Remission Board constituted by the Government. In Paragraph 88 Supreme Court observed that both in Karnataka and Bihar remission is granted to life convicts by deemed conversion of life imprisonment into a fixed term of 20 years. The deemed conversion of life imprisonment went for fix term by an executive order issued by the State Government apparently flies in the face of long line of decisions of the Supreme Court as no provision of law sanction such a course and Supreme Court held that the life convicts are granted remission and release from prison on completing 14 years term without any sound legal basis and in most mechanical manner without any sociological and psychotropic appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. In the same paragraph Supreme Court also observed that remission is the rule and denial of remission is made only in the rarest of rare cases. In this connection in Paragraph 89 of the said judgment Supreme Court noted the observation made by the Constitution Bench of the

Supreme Court in Jagmohan Singh :

“..... In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether the sole alternative will be an adequate substitute for the death penalty.”

Five years after judgment in Jagmohan Singh Section 433A was inserted in Cr.P.C. imposing restriction on the power of remission or commutation in certain cases. After introduction of Section 433A Supreme Court in Bachan Singh observed that :

“It may be recalled that in Jagmohan Singh this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now Section 433A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432, 433 so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years.”

Thus, all that is changed by Section 433A is that before its insertion and imprisonment for life in





most cases worked out to a dozen years of imprisonment and after introduction it works out to 14 years of imprisonment, but the observation in Jagmohan Singh that this cannot be accepted as an adequate substitute for the death penalty still holds true.

In Paragraphs 92, 93 Court observed as follows:

“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 emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalization 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 besides being in accord with the modern trends in penology.”

17. In the case of **Sangeet and Anr. Vs. State of Haryana (2013) 2 SCC 452** appellants were awarded capital sentence which was confirmed by the



High Court. Supreme Court, however, converted the Capital Punishment into life sentence subject to faithful implementation of the provisions of the Code of Criminal Procedure, 1973. The accused persons were convicted for the offence of murder, attempt to murder, rioting armed with deadly weapon, house trespass in order to commit an offence punishable with death read with Section 149 of the Penal Code. Five of the accused persons were also convicted for the offence under Section 25(1-B) of the Arms Act. Except the appellant all other accused persons were sentenced to suffer rigorous imprisonment for life and payment of fine. Taking note of the fact that entire family was done to death by the accused persons in a brutal and merciless manner the trial judge and the High Court found the case in the category of rarest of rare case awarding death penalty to the appellant. In Sangeet Supreme Court considered the judgment of Jagmohan, Bachan Singh on the question of death penalty. In Bachan Singh Supreme Court framed the following two questions”

(i). Whether death Penalty provided for the offence under Section 302 of the Penal Code is unconstitutional?



(ii). If the answer to the above question is in negative whether the sentencing procedure provided under sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973 is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence in the alternative with imprisonment for life.

Question No. (i) was answered in negative by the Constitution Bench. While answering Question (ii) the Constitution Bench culled out the five propositions laid down in Jagmohan Singh and agreed with them except to the extent propositions (iv)(a) and (v)(b) in view of the change in legislative policy. In the judgment of Sangeet Supreme Court was concerned only with the aforesaid two propositions but for convenience reproduced all the propositions culled out from Jagmohan Singh.

“(i). The general legislative policy that underlines the structure of our criminal law principally contained in the 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 I.P.C. where the only 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 (McGoutha Vs. California).

(ii)(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 majority in Furman Vs. Georgia decided by the Supreme Court of U.S. 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 life violates the 8th Amendment is not



applicable in India. In India our Constitution does not have any provision like the 8th Amendment nor the Indian Courts are at liberty to apply the test of reasonableness with the freedom with which 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 the superior courts. The exercise of judicial discretion on well recognized 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 pre-conviction stage notwithstanding the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided where the 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 emphasized 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 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 Cr.P.C. 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 Section 309(2) Cr.P.C. 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 reason they must be regarded as valid. No reasons are offered to show that they are constitutional, invalid and hence death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21.

After culling out the propositions laid down in Jagmohan Singh Supreme Court in Sangeet observed in Paragraphs 18 to 20 that from perusal of propositions (iv)(a) and (v)(b) it will appear that the Court while exercising its discretion in a murder case is required to balance all the aggravating and mitigating circumstances of the crime under inquiry and for convenience called the same as Phase-I of an evolving



sentencing policy. In Paragraph 21 of Sangeet Supreme Court observed that in Banchan Singh Constitution Bench did not fully accept propositions (iv)(a) and (v)(b) as would appear from Paragraphs 161 to 166 of the judgment in Bachan Singh and further said that those two propositions need to be adjusted and attuned to the shift in the legislative policy and further observed that the sentence of death or imprisonment for life could be imposed after weighing the aggravating and mitigating circumstances of a particular case but in view of Section 354(3) Cr.P.C. punishment of imprisonment for life should normally be imposed and sentence of death could be imposed as exception as for awarding sentence of death special reasons need to be recorded. After introduction of Section 354(3) legislative policy virtually obviated the necessity of balancing the aggravating and mitigating circumstances of the crime for the award of punishment in respect of an offence of murder and thereby the Constitution Bench adjusted and attuned proposition (iv)(a) by deleting, balancing all the aggravating and mitigating circumstances of the crime and held in Banchan Singh (a) the normal rule is that the offence of murder shall be punished with the



sentence of life imprisonment and death sentence can be imposed only if there are special reasons recorded in writing for doing so. In Paragraph 23 of Sangeet Supreme Court observed that the Constitution Bench in Bachan Singh did not fully accept proposition (v)(b) that while making the choice of sentence the court should be principally concerned with the circumstances connected with the particular crime under inquiry (Paragraph 163). It laid down that not only the relevant circumstances of the crime should be considered but due consideration must also be given to the circumstances of the criminal consequently the Constitution Bench reformulated proposition (v)(b) of Jagmohan Singh to read as follows:

“(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code 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 death sentence.



In view of the above in paragraph 24 of Sangeet Supreme Court observed that in Bachan Singh Constitution Bench held that the sentence of death ought to be given only in the rarest of rare cases and it should be given only when the option of awarding the sentence of life imprisonment is unquestionably foreclosed. In paragraph 25 of Sangeet Supreme Court further observed that in Banchan Singh Constitution Bench of Supreme Court made two very significant departure from Jagmohan Singh. (i). in the award of punishment by deleting any reference to the aggravating and mitigating circumstances of the crime and (ii) in introducing the circumstances of the criminal. In Paragraph 26 of Sangeet Supreme Court observed that Bachan Singh effectively opened Phase-II of sentencing Policy by shifting the focus from the crime to both crime and the criminal and marked watershed in sentencing. In Paragraphs 29, 30 of Sangeet Supreme Court observed that despite legislative change and Banchan Singh discarding proposition (iv)(a) of Jagmohan Singh Supreme Court in Machhi Singh revived balancing of aggravating and mitigating circumstances through a balance sheet theory. In doing so it sought to compare



aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. In the same paragraph Supreme Court further observed that aggravating and mitigating circumstances pertained to crime and criminal respectively and can hardly be compared with one another. A balance-sheet cannot be drawn-up of two distinct and different constituents of an incident. Nevertheless the Balance-sheet theory held the field-post Machhi Singh. The application of sentencing policy through aggravating and mitigating circumstances was considered in Swamy Shraddananda (2) and it was concluded in Paragraph 48 of the report that there is lack of evenness in the sentencing process. The rarest of rare principle has not been followed uniformly or consistently and reference made to Alope Nath Dutta which in turn referred to several other decisions to bring home the point. In paragraph 33 of Sangeet Supreme Court observed that balancing of aggravating and mitigating circumstances approach needs a fresh look in view of the conclusions in Bachan Singh as Bachan Singh intended principled sentencing which of late has become judge-centric as highlighted in **Swamy Shraddananda (2), Santosh Kumar Satishbhushan**

Bariyar Vs. State of Maharashtra (2009) 6 SCC 498.

This aspect of the sentencing policy in Phase-II as introduced by Constitution Bench in Bachan Singh seems to have been lost in transition. In paragraphs 34 to 38 of Sangeet Supreme Court referred to the cases in which death sentence was confirmed without considering the circumstances of the criminal. In paragraphs 39 to 47 of Sangeet Supreme Court considered the case of **B.A. Umesh Vs. High Court of Karnataka (2011) 3 SCC 85, Sushil Murmu Vs. State of Jharkhand (2004) 2 SCC 338, Mohd. Chaman Vs. State (NCT of Delhi) (2001) 2 SCC 28, Dilip Premnarayan Tiwari Vs. State of Maharashtra (2010) 1 SCC 775, Sebastian Vs. State of Kerala (2010) 1 SCC 58** and observed in paragraph 48 that aforesaid cases demonstrate the Judge-centric approach to sentencing, adverted in Swamy Shraddananda (2) and endorsed in Bariyar and the existence of the uncertainty principle in awarding life imprisonment or the death penalty. In paragraph 49 of Sangeet Supreme Court observed that despite Bachan Singh the particular crime continues to play a more important role than the crime and criminal as is apparent from some of the cases





mentioned above. It was also observed that standardization and categorization of crimes was attempted in Machhi Singh for the practical application of the rarest of rare cases principle which was discussed in Swamy Shraddananda. It was pointed out in paragraph 33 of the report that the Constitution Bench in Jagmohan Singh and Bachan Singh had firmly declined to be drawn into making any standardization or categorization of cases for awarding death penalty. In fact in Bachan Singh the Constitution Bench gave over half a dozen reasons against the argument for standardization or categorization of cases. Swamy Shraddananda observed that Machhi Singh overlooked the fact that the Constitution Bench in Jagmohan Singh and Bachan Singh had resolutely refrained from such an attempt. Accordingly, it was held in Swamy Shraddananda that even though the five categories of crime (manner, motive for commission of murder, antisocial nature of crime, magnitude of crime and personality of victim of murder) delineated in Machhi Singh provide very useful guidelines, nonetheless they could not be taken as inflexible, absolute or immutable. In paragraph 50 of Sangeet it is observed that in Swamy



Shraddananda this Court went so far as to note in paragraph 48 of the report that in attempting to standardize and categorize the crimes, Machhi Singh considerably enlarged the scope for imposing death penalty which was greatly restricted by Bachan Singh. In paragraph 50 of Sangeet Supreme Court further observed that the standardization and categorization of crimes in Machhi Singh has not received further importance from the Supreme Court though it is referred to from time to time. In the same paragraph it is further observed that Phase-II in the development of sound sentencing policy is still alive but little unsteady in its application despite Bachan Singh. In paragraph 52 of Sangeet Supreme Court referred to Swamy Shraddananda and some of the decisions referred to in that case whereunder Phase-II of the sentencing policy has been evolved for giving punishment to a death row convict whose punishment has been altered from capital punishment to life imprisonment but the said sentence is inadequate in view of power of remission available with the appropriate Government under Section 432 Cr.P.C. In the same paragraph Supreme Court has raised the question as to which punishment is



commensurate for such convict. In paragraph 53 of Sangeet Supreme Court observed that the aforesaid question was answered in Swamy Shraddananda and the Court noted the mandate of Bachan Singh that Court must not only look to the crime but also give due consideration to the circumstances of the criminal as would appear from paragraph 56 of the said judgment. In paragraph 54 of Sangeet Supreme Court has referred to the constitutional power under Articles 72, 161 of the Constitution and observed that neither the two constitutional provision nor power of commutation under Section 433 Cr.P.C. is under discussion as in the said case the Court is required to discuss only the power of remission available to the appropriate government under Section 432 Cr.P.C. In paragraph 55 of Sangeet Supreme Court observed that in some recent decisions delivered by the Supreme Court the power of the appropriate government to award remission has been nullified by awarding sentences of 20, 25 years and in some cases without any remission and then posed the question is it permissible for the Court to restrain the appropriate Government from granting remission of sentence to a convict and observed that Supreme Court



in Swamy Shraddananda and several other cases by giving sentence of 20 or 30 years imprisonment without remission is effectively injuncting the appropriate government from exercising its power of remission for specified period and opined that the issue needs further greater discussion but observed that the same is not permissible and held that appropriate Government cannot be told that it is prohibited from granting remission of a sentence whatever be the reason. Similarly a convict cannot be told that he cannot apply for remission. In paragraph 56 Supreme Court with reference to the judgment in the case of **State of Haryana Vs. Mahender Singh (2007) 13 SCC 606 and State of Haryana Vs. Jagdish (2010) 4 SCC 216** observed that the convict does not have a right to get remission but he certainly has a right to have his case considered for grant of remission. In paragraph 57 of Sangeet Supreme Court referred to Swamy Shraddananda in which Supreme Court quoted paragraph 14 of **Dalbir Singh Vs. State of Punjab (1979) 3 SCC 745** in paragraph 56 of Swamy Shraddananda which is also quoted hereunder :

“56.....’14..... we may suggest that life



imprisonment which strictly means imprisonment for the whole of the man'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 indication of murderous recidivism and the community cannot run the risk of the convict being at large."

and looked at the same issue in paragraph 58 from a slightly different perspective and referred to Section 45 I.P.C. which defines life and observed that when a punishment for murder is awarded it might be imprisonment for life where life denotes the life of the convict or death. The term of sentence spanning the life of convict can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers under Section 432 Cr.P.C. Court further observed that this Section statutorily empowers the appropriate Government to suspend the execution of sentence or to remit whole or any part of punishment of a convict as per the procedure with substantive checks on the arbitrary exercise of that power. In paragraph 59 of Sangeet Supreme Court observed that there does not



appear any decision of the Supreme Court detailing the procedure to be followed for exercising power under Section 432 Cr.P.C. that sub-sections (2) to (5) of Section 432 Cr.P.C. lays down the basic procedure for making an application to the appropriate Government for the suspension, remission of sentence either by the convict or someone on his behalf. In this connection it also referred to the suggestion made in **Samjuben Gordhanbhai Koli v. State of Gujrat (2010) 13 SCC 466** where it was observed that since remission can only be granted by the executive authorities the appellant would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 Cr.P.C. In paragraph 60 of Sangeet Supreme Court incorporated the provisions of Section 432 Cr.P.C. and observed in paragraph 61 that there cannot be suo motu exercise of power by the appropriate Government under sub-section (1) of Section 432 Cr.P.C. for the simple reason that the sub-section is only an enabling provision. It also observed that appropriate Government is unable to override the judicially pronounced sentence subject to the fulfillment of certain conditions found either in the Jail Manual or in statutory rules. Sub-



section (1) of Section 432 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 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. In paragraph 62 of Sangeet Supreme Court observed that it must be remembered that it was held in State of Haryana Vs. Mohinder Singh that 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 432 does provide this check on the possible misuse of power by the appropriate Government. In paragraph 63 of Sangeet Supreme Court noticed Section 433A Cr.P.C. which provides procedural and substantive check and indicates the circumstances in which remission of sentence is granted in a capital offence, the convict must serve at least 14 years of imprisonment. Of-course the requirement of minimum of 14 years' incarceration may perhaps be relaxed in exercise of power under Articles 72, 161 of the Constitution and Section 433 Cr.P.C. but, as mentioned above, Supreme Court was presently not concerned with those provisions. In paragraphs 65 to 68 of Sangeet Supreme Court referred to Gopal Vinayak Godse, Maru Ram and Ashok Kumar and quoted paragraph 8 from Godse, and paragraph 25 from Maru Ram, which is also quoted hereinbelow :

“8. Briefly stated the legal position is this :
Before Act 26 of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous



imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions-ordinary, special and the remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable an appropriate Government to remit the sentence under Section 401(now Section 432) of the Code of

Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned.

25.....Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of the long accumulation of remissions.”

On the basis of the above conclusions were drawn in Ashok Kumar that remissions have a limited scope and has no significance till the exercise of power under Section 433 Cr.P.C. is made, as would appear from Paragraph 15 of Ashok Kumar which is quoted hereinbelow:

“15. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the



remission would be subject to limitation of Section 433A of the Code, or constitutional power has been exercised under Article 72/161 of the Constitution.”

In Paragraph 69 of Sangeet Supreme Court noted the question raised in Paragraph 5 of Godse :

“.....whether there is any provision of law whereunder a sentence of life imprisonment, without any formal remission by the appropriate Government, can be automatically treated as one for a definite period.”

and observed that no such provision is found in the Penal Code, Code of Criminal Procedure or the Prisons Act. It was noted that though the Government of India stated before the Judicial Committee of Privy Council in **Kishori Lal Vs. King Emperor AIR 1945 PC 64** that having regard to Section 57 of the Penal Code 20 years' imprisonment was equivalent to a sentence of transportation for life. The Judicial Committee did not express its opinion on the question but in Godse Paragraph 7 the Constitution Bench addressed this in the light of the Bombay Rules governing the remission system and concluded that orders of appropriate Government under Section 401 of



the Code of Criminal Procedure (now Section 432 of the Cr.P.C.) are a pre-requisite for release. It was held that a prisoner sentenced to transportation for life has no indefeasible right 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 for transportation for life. Aforesaid view was followed in **State of M.P. Vs. Ratan Singh (1976) 3 SCC 470**, as would appear from Paragraph 4 which is also quoted herein below:

“4.....It is, therefore, manifest from the decision of this Court in Godse 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 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 the sentence for life would enure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death and remissions given under the rules could not be regarded as a substitute of a lesser sentence for a sentence of transportation for life. In these circumstances, therefore, it is clear that the High Court was in error in thinking that the respondent was entitled to be released as of right on completing the term of 20 years including the remissions."

In view of above in Sangeet Paragraph 71 Supreme Court observed that there is a misconception that the prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years imprisonment. The prisoner has no such right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life subject to any remission granted by the appropriate Government under Section 432 Cr.P.C. which in turn is subject to the procedural checks in that Section and the substantive checks in Section 433A Cr.P.C. In Paragraph 72 Supreme Court observed that application of Section



432 Cr.P.C. to a convict is limited. A convict serving a definite term of imprisonment is entitled to earn a period of remission or even be awarded period of remission under statutory rules framed by the appropriate Government or under the Jail Manual. This period is then offset against the term of punishment given to him. In such an event if he has undergone the requisite period of incarceration, his release is automatic and Section 432 Cr.P.C. will not even come into play. This Section will come into play only if the convict is to be given an additional period of remission for his release i.e. a period in addition to what he has earned or has been awarded under the Jail Manual or the Statutory Rules. In Paragraph 73 Supreme Court held that in case of a convict undergoing life imprisonment he will be in custody for an indeterminate period, therefore, remissions earned by or awarded to such a life convict are only notional. In his case to reduce the period of incarceration a specific order under Section 432 Cr.P.C. will have to be passed by the appropriate Government but the reduced period cannot be less than 14 years as per Section 433A Cr.P.C. In paragraph 74 Supreme Court held that Section 432 Cr.P.C. has application only



in two situations- (1). Where a convict is to be given additional remission or remission for a period over and above the period that he is entitled to or he is awarded under statutory rule framed by the appropriate Government or under the Jail Manual. (2). Where a convict is sentenced to life imprisonment which is for an indefinite period subject to procedural and substantive checks. In Paragraph 75 Supreme Court observed that Section 302 I.P.C. provides for only two punishments- Life imprisonment and capital punishment. In several cases this Court has proceeded on the postulate that life imprisonment means 14 years of incarceration. After remissions the calculation of 14 years of incarceration is based on another postulate articulated in Swamy Shraddananda namely that a sentence of life imprisonment is first commuted or deemed converted to a fixed term of 20 years on the basis of Karnataka Prison Rules, 1974 and a similar letter issued by the Government of Bihar. Apparently rules of this nature exist in other States as well. Thereafter the remissions earned or awarded to a convict are applied to the commuted sentence to work out the period of incarceration to 14 years. In Paragraph 76 Supreme



Court observed that reengineered calculation can be made only after the appropriate Government artificially determines the period of incarceration. The procedure apparently being followed by the appropriate Government is that life imprisonment is artificially considered to be imprisonment for a period of 20 years. It is this arbitrary reckoning that has been prohibited in Ratan Singh. A failure to implement Ratan Singh has led this Court in some cases to carve out a special category in which sentences of 20 years or more are awarded even after accounting for remissions. If the law is applied as the Supreme Court understood it meaning thereby life imprisonment is imprisonment for lifespan of the convict with procedural or substantive checks laid down in Cr.P.C. for his early release. It would reach a legally satisfactory result on the issue of remissions which makes an order for incarceration for a minimum period of 20, 25 or 30 years unnecessary. In Paragraph 77 Supreme Court recorded the following seven conclusions:

“77.1. Supreme Court has not endorsed the approach of aggravating and mitigating circumstances in Bachan Singh but the same has been

adopted in several cases which need a fresh look. In any event there is little or no uniformity in the application of this approach.

77.2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance-sheet cannot be drawn up for comparing the two as both are distinct and unrelated and application of such approach needs a review.

77.3. In the sentencing process both crime and criminal are equally important and the courts have not taken sentencing process as seriously as it should be with the result that in capital offence it has become judge centric sentencing rather than principled sentencing.

77.4. Constitution Bench has not encouraged standardization and categorization of crimes which is even otherwise not possible.

77.5. The grant of remission is statutory and to prevent its arbitrary exercise the legislature has built in some procedural and substantive checks in the Statute which needs to be faithfully enforced.

77.6. Remission can be granted under Section 432 Cr.P.C. in the case of a definite term of





sentence power under this Section is available only for granting additional remission i.e. for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment) the power under Section 432 Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of 20 years.

77.7. Before actually exercising the power of remission under Section 432 Cr.P.C. the appropriate Government must obtain the opinion of the presiding Judge of the convicting or confirming court. Remission can therefore be given only on a case by case basis and not in a wholesale manner.

18. From the narratives made in Paragraphs 9 to 17 above, it will appear that the case of a convict, who has been imposed capital sentence but the sentence has been converted into rigorous imprisonment for life, is also required to be considered for grant of remission by the appropriate Government in view of the provisions contained in Sections 432, 433A Cr.P.C. The two provisions contain not only substantive but also procedural safeguards for such grant by the



Government and remission is not granted by way of right of the convict. Remission earned under the aforesaid provisions is always considered in the light of the remission policy of the Government and is subject to good behaviour by the convict during the period of his incarceration inside the prison. It is common knowledge that the conduct of the convict is watched by the prison authorities during the period of his incarceration in the prison and records maintained, which is always taken into account by the Government while considering the case of the convict for grant of remission. Good behaviour by the convict during the period of his incarceration is indicative of the fact that in course of time convict has reformed himself, which is the object of punishment as it is well-known that punishment is neither retribution nor revenge.

19. With the aforesaid modification in the sentence imposed on the appellant, the appeal is dismissed.

(V.N. Sinha, J)

(Jitendra Mohan Sharma, J)

P.K.P./A.F.R.

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