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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 8th December, 2016
Judgment pronounced on: 24th December, 2016

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Crl.A.966/2013

JITENDER @ KALLA

..... Appellant

Through : Mr. Amit Sharma with Mr. Ashish Dixit
and Mr. Harpreet Singh Rai, Advocates

Versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through : Ms. Aashaa Tiwari, APP

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Crl.A.967/2013

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..... Appellant

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CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. Both appeals filed by the appellant Jitender @ Kalla are being decided by a common judgment.
2. Crl. A. 966/2013 arises out of a judgment dated 01.07.2013 pertaining to FIR No. 67/1999 under Sections 302/307/34 of the Indian Penal Code by which the appellant stands convicted and also the order on sentence of the same date by which the appellant has been sentenced to rigorous imprisonment for life with a direction that he shall not be considered for grant of remission till he undergoes the actual sentence of 30 years and fine for a sum of Rs. 3,00,000/-, in default of payment of fine further simple imprisonment for a period of three years. Out of the fine of Rs. 3,00,000/-,

a sum of Rs. 1,00,000/- is to be paid to the State and Rs. 2,00,000/- to be paid to the family of the deceased Anil Badana as compensation under Section 357 of the Code of Criminal Procedure. For the offence under Section 307 of the Indian Penal Code, the appellant has been sentenced to rigorous imprisonment for ten years and a fine of Rs. 1,00,000/-, in default of payment of fine further simple imprisonment for a period of one year. The period of sentences are to run concurrently.

3. Crl. A. 967/2013 arises out of FIR No. 68/1999 under Sections 120-B/302 of the Indian Penal Code. The order of conviction and sentence is also of the same date i.e. 01.07.2013 by which the appellant stands convicted and has been sentenced to undergo rigorous imprisonment for life – Till the rest of his life and also to pay fine for a sum of Rs. 3,00,000/- for the offence under Section 302 of the Indian Penal Code, in default of payment of fine to further undergo simple imprisonment for three years. Out of the fine recovered, Rs. 1,00,000/- is to be paid to the State and Rs. 2,00,000/- are to be paid to the family of the deceased Kimti Lal Nayyar. This sentence is to start running consequent to and only after the conclusion of sentences imposed in FIR No. 67/1999.

Crl. A. 966/2013

4. The case of the prosecution as noticed by the trial court is as under :

“(2) The case of the prosecution is that on 10.03.1999 the marriage reception party of one Vijay Sharma was being held at A-1, Block, Community Center, Keshav Puram, Delhi wherein his number of friends from Satyawati College (where Vijay Sharma also used to study) had come to attend the said function. Inside the main ‘pandal’ a DJ was being played and hence some of his friends went outside the pandal and stood near the space where the food was being prepared by the ‘halwais’. Some of the boys so present were Anil Badana (since deceased), Narender Badana, Raj Kumar Bhati, Sumit Nayyar etc. Suddenly at around 11:00 PM accused Jitender @ Kalle came over there and started staring at

Anil Badana on which Anil Badana asked accused Jitender as to why he was staring at him and they have no relation with each other so, he should go away. However, accused Jitender all of a sudden took out a pistol from the pocket his pant and fired twice in the air and stated "Pahle to tu bach gaya tha, ab nahi bachega" and while coming forwards towards Anil Badana fired at him which bullet hit on his chest as a result of which Anil fell down. Accused Jitender @ Kalle thereafter started fleeing away and the other friends of Anil, who were present nearby started chasing him and even threw stones towards him. While fleeing outside through the main pandal accused Jitender again stopped and fired at the persons who were chasing him and in the process another bullet hit Sh. Madan Lal the father of the bridegroom Vijay Sharma, on his leg. The accused Jitender managed to flee away from over there. Friends of Anil Badana returned back and saw that there two other friends namely Inder and Sanjay Sharma were removing Anil Badana in the car of Inder to the hospital. The other friends namely Raj Kumar Bhati, Janesh, Narender and Sumit Nayyar followed them in the car of Anil Badana whose keys were already with Sumit Nayyar. Sumit in the meantime had also rung up the police at No. 100 from the mobile of Anil Badana bearing No. 9811162283. In fact three successive calls were made at No. 100 after the interval of two minutes each through the same cell phone as probably the phone was getting disconnected. The doctors at Sunderlal Jain Hospital where Anil Badana was taken by his friends declared him to 'brought dead'. Sh. Madan Lal Sharma, the other injured in the meantime was taken by his other relatives to a nearby 'Garg Nursing Home' where he was provided necessary medical treatment.

(3) Information about the incident was received at Police Station Keshav Puram vide DD No. 15A and SI Om Prakash along with Ct. Surender Singh went to the spot where they came to know that the injured has been removed to the hospital on which they both reached the hospital where they found the injured Anil Badana having been declared by the doctors to be 'brought dead'. In the meantime SHO Police Station Keshav Puram Inspector Pradeep Kumar also reached the hospital and collected the MLC of deceased Anil Badana. Statement of Raj Kumar Bhati, as eye witness of the incident, was recorded by the Investigation Officer, on the basis of which the rukka was prepared that the FIR was got registered. Thereafter Inspector Pradeep Kumar along with Raj Kumar Bhati and other police officials came back to the spot

where they found three empty cartridges of 7.65 mm at the spot. The spot was also got inspected from the Crime Team and was also got photographed. The photographer Harpreet Singh who was covering the function was asked to show the Video Cassette prepared by him till that time and statement of other friends of Anil Badana, who were also present at the time of incident and were eye witness of the same were also recorded.

(4) On the next day the dead body was sent to mortuary for postmortem examination and in the postmortem examination one bullet was found embedded in the body of Anil Badana which was collected by the Autopsy Surgeon. After postmortem examination, the dead body was handed over to the relatives of Anil Badana for last rites. Efforts were made to trace out the accused but the same proved futile. Later on 26th March, 1999 one Maruti Zen car bearing No. DL8CA-9383 belonging to accused in which he had allegedly fled away from the spot was found lying abandoned in St. Stephen's Hospital parking”.

Crl. A. 967/2013

5. The case of the prosecution as noticed by the trial court is as under :

“(2) The case of the prosecution is that on the night intervening 10th and 11th March, 1999 at around 12:30 AM door bell of House No. 2718, Mukherjee Nagar, Delhi was rung by someone on which Sh. Kimti Lal Nayyar the owner of the house and the father of Sumit Nayyar got up and came out to check as to who had rang the door bell. As soon as he went near the main gate of his house someone fired upon him with a gun and three bullets hit his body as a result of which he fell down and died at the spot itself. On hearing the sound of firing the of Kimti Lal Nayyar namely Sandeep Nayyar who was present inside the house along with his wife and daughter, came out while his mother also came out from another room and they found Kimti Lal Nayyar lying on the floor in injured condition. They also heard sound of a car speeding away from over there. Immediately information about the incident was given to police at No. 100 and a PCR van removed Kimti Lal Nayyar to Hindu Rao Hospital where the doctors declared him 'brought dead'. In the meantime on receipt of information of the incident at Police Station Mukherjee Nagar Inspector Jagdish Parshad along with his other staff members went to the spot but the injured was already removed to hospital

hence, after leaving SI Dinesh Chand and Ct. Lal Chand at the spot he went to Hindu Rao Hospital and collected MLC of Kimti Lal Nayyar. Sandeep Nayyar also met him in the hospital itself and gave his statement to SI Dinesh Chand who thereafter returned back to the spot where the spot was got inspected from the Crime Team and was also got photographed. Huge amount of blood was found lying at the spot besides three empty cartridges. The empty cartridges were taken into possession and blood was also collected from the spot besides the earth control sample. A rukka was thereafter prepared and the present case was got registered at Police Station Mukherjee Nagar for the offence under Sections 302 IPC read with 25/27 Arms Act, 1959. In the meantime Sumit Nayyar the other son of Kimti Lal Nayyar also came home and his statement was also recorded by the Investigating Officer Inspector Jagdish Parshad.

(3) On the next day after carrying out the necessary inquest proceedings the dead body of Kimti Lal Nayyar was sent for postmortem examination and Autopsy Surgeon Dr. C. B. Dabas carried out the postmortem examination and also recovered three bullets found embedded inside the body of Kimti Lal Nayyar which were handed over to the Investigation Officer along with the blood stained clothes found on the dead body.

(4) It is also the case of the prosecution that on the night of 10th and 11th March, 1999 itself about 1 ½ hour prior to the present incident accused Jitender @ Kalla was allegedly involved in the murder on one other person namely Anil Badana in the marriage reception party of one Vijay within the area of Police Station Keshav Puram. Sumit Nayyar the son of Kimti Lal Nayyar the deceased in the present case was an eye witness to the said incident in which Anil Badana was murdered and had immediately informed the police by making PCR calls wherein he had specifically named the accused Jitender @ Kalle as the person who had committed the crime. On 26.03.1999 Sumit Nayyar made a supplementary statement to the Investigation Officer wherein he expressed his suspicion upon accused Jitender @ Kalla and accused Jitender Pal Gulati in the commission of murder of his father. Subsequently on 30th March, 1999 accused Jitender Pal Gulati was arrested and his disclosure statement was recorded wherein he allegedly admitted his role in the murder of Kimti Lal Nayyar. The other accused Jitender @ Kalla was however found to be absconding. However, on 23.01.2000 the accused Jitender @ Kalla was arrested by SI Ram Avtar Crime

Branch, Homicide Section from bus stand Naraina on the basis of a secret information and his disclosure statement was recorded wherein he also allegedly admitted about his involvement in the present case. At the instance of accused Jitender @ Kalle the weapon of offence used in the present case i.e. the pistol of 7.65 mm was recovered from beneath of tree of DDA Park, Haiderpur. The records of the licenced pistol purchased by accused Jitender @ Kalla along with live cartridges was also collected from Bahadurgarh Gun House and also from ADM-Jammu from where the licence was issued to accused Jitender @ Kalla. Later on the recovered bullets from inside the dead body of Kimti Lal Nayyar and the empty cartridges were recovered from the spot were sent to CFSL for comparison with the licensed pistol of accused Jitender @ Kalla as was already sent to CFSL in case FIR No. 67/1999 Police Station Keshav Puram. Upon receipt of the report of Ballistic Expert who opined that bullets and empty cartridges so recovered were indeed fired from the licensed pistol of accused Jitender @ Kalla, challan was prepared and was filed in court for trial”.

6. At the outset, learned counsel for the appellant on instructions has submitted that the appellant does not press the appeals on merits with respect to the judgment on conviction but has laid challenge to the order on sentence passed in both the appeals.
7. In ***Crl.A. 966/2013***, the prosecution examined 34 witnesses in all. 6 defence witnesses were examined by the appellant in his defence. Statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure while in ***Crl. A. 967/2013***, 29 witnesses were examined by the prosecution. 6 defence witnesses were examined by the appellant in his defence. Statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure.
8. The case of the prosecution is based on the testimony of the eyewitnesses.
9. PW-1 Madan Lal is the injured father of the bridegroom. As per the case of the prosecution, he had received injury on his left leg. Although this witness has not supported the case of the prosecution entirely but as the law

permits, his entire evidence cannot be discarded and his evidence would show that he has testified that he had seen the pistol in the hand of the appellant.

10. PW-3 Raj Kumar Bhati is one of the eyewitnesses and also the complainant who has supported the case of the prosecution. PW-4 Sumit Nayyar is also an eyewitness and has fully supported the case of the prosecution as also PW-5 Narender Kumar. PW-6 Janesh has also supported the case of the prosecution being an eyewitness. Another eye witness is PW-8 Inder Raj and evidence of this witness is also found to be reliable and trustworthy. PW-9 Daljeet Singh is an independent witness to recovery. Though, he has not supported the prosecution on all aspects but he has admitted that a parcel was prepared on the spot and was unable to tell that it was the pistol which was sealed on the spot.
11. PW-12 Dr. Bhupender proved having examined the injured Madan Lal at M/s Garg Nursing Home, Jai Mata Market, Tri Nagar vide Ex. PW-12/A on 11.03.1999 at 12:05 a.m. He also testified that Madan Lal received a gunshot injury over the left leg lateral aspect at junction of upper 2/3 and lower 1/3 about an hour earlier and on local examination he found wound of entry and exit present on the left leg, lower 1/3 with subcutaneous track, part clean and trape. He further testified that the track was laid open and debrided washed and repaired under L.A. He also deposed that patient was discharged after local aid and by prescribing medicines.
12. PW-15 Dr. K. Goel had performed the post-mortem examination on 11.03.1999 on the dead body of Anil Badana with the alleged history of sustained gunshot injury and having been declared brought dead. He has also described the wound, the injuries and the cause of death.
13. The MLC was proved by PW-28 Sh. Vijay Shankar Singh.
14. The FSL Expert (Ballistic Expert) Sh. A. R. Arora (PW-33) examined the

weapon of offence which was recovered at the instance of the appellant vis-a-vis empty cartridges recovered from the spot and the bullet taken out from the dead body of deceased Anil Badana by the Autopsy Surgeon. According to him, parcel No. 1 contained one 7.65 mm pistol bearing serial no. 621251 along with an empty magazine and he marked the pistol and magazine as W/1. He has testified that parcel No. 2 contained six 7.65 mm cartridges which were marked by him as C/1 to C/6; parcel no. 3 contained three 7.65 mm fired cartridge cases marked by him as C/7 to C/9 and parcel no. 4 contained one 7.65 mm deformed/fired bullet marked by him as DC/1. The witness has further deposed that parcel nos. 4, 5 and 6 were first examined in the Biological/Serology Division of CFSL and thereafter parcel no. 4 was examined in the Ballistic Division. He has proved that three 7.65 mm cartridges marked by him as C/1 to C/3, contained in parcel no. 2 were test fired by him from 7.65 mm pistol marked W/1, contained in parcel no. 1. The witness has also deposed that the fired cartridge cases were then kept by him along with the bullets in the same parcels. He has proved the result of examination that :

- (i) 7.65 mm pistol marked W/1 contained in parcel no.1 is a firearm as defined under the Arms Act and has been fired through and was in working condition.
- (ii) Six 7.65 mm cartridges marked C/1 to C/6 contained in parcel no. 2 are ammunition as defined under the Arms Act and were live.
- (iii) Three 7.65 mm cartridge cases contained in parcel no. 3 marked as C/7 to C/9 have been fired from 7.65 mm pistol marked W/1 by him.
- (iv) 7.65 mm fired bullet marked DC/1 contained in parcel no. 4 has been fired from 7.65 mm pistol marked W/1.

- (v) Sign of tampering of the parts (such as firing pin and trigger etc.) of 7.65 mm pistol marked W/1 contained in the parcel no.1 could not be detected.
- (vi) 7.65 mm pistol marked W/1 contained in parcel no.1 could be dismantled and reassembled by any user having knowledge /training of the firearm.

He has proved his detailed report of examination which is Ex. PW-25/C.

15. The prosecution also examined PW-7 SI Mohan Lal, who proved having prepared the scale site plan Ex.PW-7/A. PW-10 HC Ram Pal proved that on 11.03.1999, at 01:30 a.m., Ct. Surender brought a rukka which was sent by Inspector Pradeep Kumar on the basis of which he prepared the FIR No. 67/1999, copy of which is Ex.PW-10/A. He also proved the copy of the DD No. 17-A which is Ex.PW-10/B and copy of the Special Report is Ex.PW-10/C.
16. PW-11, Head Constable Raj Singh was the duty officer at the Police Station Keshav Puram, New Delhi on the night intervening 10/11th March, 1999 from 5:00 pm till 1:00 am. He had received the initial information and recorded it vide DD No.15A, copy of which was exhibited as PW11/A.
17. PW-14, Lady Head Constable Santra was posted in the PCR at about 23:15 hours who had received a message from telephone no.9811162283 that a firing incident had taken place near Shiv Mandir, Lawrence Road and the firing had been done by one Kallu and it had perhaps hit one person. He proved the filled up form Ex.PW14/A.
18. FIR was recorded by PW-16, Head Constable Harminder Singh, copy of which was exhibited as PW16/A.
19. Statement of Sumit Nayyar under Section 164 Cr.P.C. was recorded by PW-17, Sh. M.C. Gupta, the then Metropolitan Magistrate.

20. Surender Singh (PW-18), Record Keeper from the office District Magistrate, Jammu proved the record pertaining to the gun licence.
21. PW-19, Paramjit Singh, Partner of Bahadurgarh Gun House, Jhajjar Road, Delhi proved sale of the gun and other related documents.
22. Based on the testimonies of these witnesses, the trial court held the appellant to be guilty. Although the counsel for the appellant had submitted that he does not challenge the judgment on conviction yet we have carefully examined the testimonies of these witnesses and, in our view, the trial court has correctly held the appellant to be guilty.
23. In ***Criminal Appeal No. 967/2013***, the prosecution examined 29 witnesses. PW-2 Sandeep Nayyar is the son of deceased Kimti Lal Nayyar and is also the complainant. As per his testimony, on 10.03.1999 at about 10:00 p.m., he was sleeping in his house when at about 12:30 a.m. somebody rang the door bell. His father opened the door and after one or two minutes, he heard gunshot having been fired. On hearing the same, he rushed to the place and found his father lying on the floor and blood was coming out from the left side of his chest. There were three bullet marks. He gave a call at number 100. He removed his father to the hospital where he was declared dead.
24. PW-3 S.K.Kathuria, brother-in-law of the deceased has testified that after post mortem, dead body of the deceased was handed over to him.
25. PW-4 Sumit Nayyar (son of the deceased) testified that in the year 1999 he was studying at Satyawati College in B.Com (Hons) IInd year. Anil was his friend and was President of the Student Union and Jitender @ Kalla used to support the other group opposed to Anil. He also testified that one Jitender Gulati also used to roam around in the college along with Jitender @ Kalla. On 10.03.1999, he was attending the reception party of Vijay when at about 11:00 p.m. Anil was murdered by Jitender @ Kalla behind

the *pandal* where he had seen the occurrence. According to this witness, Jitender @ Kalla escaped from the spot after firing. Anil was removed to the hospital where he was declared brought dead at 11:45 p.m. At 4.45 a.m., when he reached home after completing the formalities relating to murder of Anil he learnt that his father had been murdered. After reflecting upon the incident, he told the police that Jitender Gulati might have shown his house to Jitender @ Kalla. He had suspected Jitender Gulati and Jitender @ Kalla for murder of his father since he was a witness to the murder of Anil by Jitender @ Kalla and both the accused bore strong ill-will against him as he used to support Anil in the elections.

26. PW-5 Yogesh Bhati, is a friend of Sumit Nayyar who allegedly witnessed the incident taking place. He deposed that in the year 1999, he was a student of Satyawati College. On 11.03.1999 at about 1:30 a.m., he was going to Mukherjee Nagar to meet his friend Sumit Nayyar and was at a distance of 20-25 yards from his friend's house when he heard three gunshots. As per this witness, he ran towards the house of his friend Sumit Nayyar and noticed Jitender @ Kalla coming out of the house having a pistol in his hand. He testified that when he came out he saw a Maruti Zen DL-8CA-9383 parked in front of the house of Sumit Nayyar and when the door of the the driver side of the car opened, he saw Jitender Gulati coming out of the car and sat on the seat next to the driver. This witness testified that Jitender Gulati was an old friend of Sumit Nayyar and he had also met him six to seven times prior to this incident, thus he knew him quite well. This witness also testified that Jitender @ Kalla took the driving seat, started the Maruti Car and took a turn and went towards Hakikat Nagar. This witness also identified Jitender @ Kalla.
27. PW-16, Paramjit Singh was the owner of Bahadurgarh Gun House who proved the record relating to sale of a pistol along with cartridges to

Jitender @ Kalla against the Arms Licence issued to him by the ADM, Jammu. As per the post mortem report proved by PW-8 Dr. C.B. Dabas, the following injuries were found on the body of the deceased:

- “1. One fire arm entry wound 0.5 x 0.5 cm round in shape surrounded by a collar of abrasion in an area of 0.7 x 0.7 cm. The tattooing was present around the wound. There was no evidence of blackening and singeing. Wound was located on right side front of chest.*
- 2. One firearm entry wound 0.5 x 0.5 cm round in shape surrounded by a collar of abrasion in area of 0.8 x 0.8 cm. There was no evidence of blackening singeing and tattooing around the wound. Wound was located on right side front of chest outer to injury No.1.*
- 3. One firearm entry wound 1 x 0.5 cm irregular in shape surrounded by a collar of abrasion in an area of 1.2 x 0.7 cm. There was no evidence of blackening, singeing, tattooing around the wound. The wound was located left side front of chest in upper part.*
- 4. One firearm entry wound 0.5 x 0.5 cm round in shape surrounded by a collar of abrasion in an area of .7 x .7 cm. There was no evidence of blackening, singeing, tattooing around the wound. The wound was located on back of left hand in the web space of thumb and index finger. The wound was communicating another wound (exit wound) on the palmer surface of left hand i.e. injury No.5.*
- 5. The one firearm exit wound as described above measuring 1 x 0.2 cm irregular in shape with averted edges and communicating with injury No.4”.*

28. Forensic Expert (Ballistic) PW-22 A.R. Arora, Senior Scientific Officer, Lodhi Road, Delhi testified that three 7.65 mm cartridge cases marked C-1 to C-3 contained in parcel no.1 and three 7.65 mm bullets marked BC-1 to BC-3 contained in parcel no.2 had been fired from 7.65 mm pistol marked W-1 contained in parcel no.1 received earlier on 25.02.2000 in case FIR No.67/99, under Section 302/307/34 of the Indian Penal Code and 25/54 of

Arms Act, Police station Keshav Puram, District North-West and mentioned in his report CFSL No.2000 F-121 dated 24.04.2000.

29. In our view, the trial court based on the testimonies of various witnesses including eyewitness and based on the scientific evidence rightly convicted the appellant under Section 302 of the Indian Penal Code.
30. Mr. Amit Sharma, learned counsel appearing on behalf of the appellant submits that the trial court while holding the appellant guilty for the offence under section 302 of the Indian Penal Code has passed an order on sentence by which the appellant has to undergo the actual sentence of 30 years without any remission. Counsel submits that the order of the sentence fails to give reasons for awarding such a sentence to the appellant. He further submits that in the present case, as per the case of the prosecution, the appellant has shot one person and injured another person and having regard to the offence so committed the punishment is not commensurate with the offence. He further submits that in the connected appeal arising out of separate FIR the prosecution alleged that the appellant shot another person. In that appeal the trial court while holding the appellant guilty for the offence under section 302 of the Indian Penal Code has awarded ***rigorous imprisonment for life – Till the rest of his life***. The counsel for the appellant has raised two-fold arguments: ***firstly*** that the same trial court should not have passed orders in the second appeal having formed an opinion in the first appeal and ***secondly*** the trial court has held that both the orders to run consecutively and not concurrently.
31. Learned counsel for the appellant has submitted that the learned trial court exceeded its jurisdiction and did not appreciate law in the right perspective. It is contended that although the trial court has placed reliance on various judgments of the Supreme Court, but has not correctly applied the law to the facts of the present case. It is contended that the trial court has failed to

take into account the mitigating circumstances and has given more weightage to the arguments raised by the counsel for the State. It is also contended that having regard to the orders so passed on sentence, the trial court should have adjourned the matter to enable the counsel for the appellant to address arguments on the sentence rather than pass an order with a pre-determined mind and in haste. Counsel further submits that the trial court did not afford a reasonable opportunity to the appellant to defend himself as the appellant had lost his parents and he was only getting support from his old sister, who was more than 60 years of age and did not have the financial means to engage a proper lawyer. It is submitted before us that a counsel from the Legal Aid Society was appointed and a week's time was granted to him to address arguments in both the matters but no time was granted either to engage a counsel or to the counsel who was available to make submissions on the order on sentence. Counsel submits that such was the hurry of the learned Sessions Judge that two cases arising out of two separate FIRs pertaining to the same appellant were decided on the same date, whereas in case the Sessions Judge decided the first case and convicted the appellant, the second case should have been decided by another Court. Counsel submits that the learned Sessions Judge failed to observe the guidelines provided under the High Court Rules, Chapter 26, wherein it is the direction from the High Court that Judge who had already formed or given an opinion against the accused or his case, should not hear the matter of the same accused and the matter should be transferred.

32. Counsel for the appellant submits that once the Sessions Judge had already formed an opinion against the appellant, the second case should not have been heard by her.
33. Counsel for the appellant further clarifies that as noticed by the trial court, the deceased Anil Badana had already testified in court on 09.10.1997

which finally led to the acquittal of the appellant. Thus, it cannot be said that he wanted to eliminate the deceased Anil Badana as he was a witness in his case which fact has been ignored by the learned trial court. He further submits that the present case does not fall in the category of rarest of rare cases where such a punishment could have been awarded. The learned trial court has also failed to take into account that the appellant was merely 25 years of age at the time of incident i.e. on 10.03.1999.

34. On the converse, Ms. Aashaa Tiwari, learned Additional Public Prosecutor appearing on behalf of the State submits that there is no infirmity in the judgment of the trial court as also the order on sentence. It is submitted that the trial court has correctly applied the law to the facts of the present case and what prevailed upon the trial court to award such a sentence was that the appellant had shot Anil Badana in public as he was a witness in a case FIR No. 125/1996. The counsel further submits that on account of indiscriminate firing, the appellant injured Madan Lal Sharma and thereafter with a view to eliminate the eye witnesses he went to the house of Sumit Nayyar and on not finding him he shot his father Sh. Kimti Lal Nayyar. Additionally, he is also involved in nine other cases and also declared as BC (Bad character) of the area.
35. We have heard learned counsel for the parties. The first submission of the learned counsel for the appellant is that the orders passed on sentence are unjust and have been passed in haste. The appellant was hardly 25 years of age at the time of the incident and at the time of the passing of the order, he had already remained in jail for more than 13 years.
36. In **Crl.A. 967/2013**, the learned trial court vide order on sentence dated 01.07.2013 held as under:

*“The law is well settled in the decision in **Bachan Singh Vs. State of Punjab [AIR 1980 SC 898]**, wherein it was held that the death penalty can be inflicted only in the gravest of the grave cases. It*

was also held that such death penalty can be imposed only when the life imprisonment appears to be inadequate punishment. Again it was cautioned that while imposing the death sentence, there must be balance between circumstances regarding the accused and the mitigating circumstances and that there has to be overall consideration of the circumstances regarding the accused as also the offence. Some aggravating circumstances were also culled out, they being:

- (a) Where the murder has been committed after previous planning and involves extreme brutality; or*
 - (b) Where the murder involves exceptional depravity.*
- The mitigating circumstances which were mentioned in that judgment were:*

- (a) That the offence was committed under the influence of extreme mental or emotional disturbance;*
- (b) The age of the accused. If the accused is young or old, he shall not be sentenced to death;*
- (c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;*
- (d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above;*
- (e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;*
- (f) That the accused acted under the duress or domination of another person; and*
- (g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.*

*The law was further settled in the decision in **Machhi Singh & Ors. Vs. State of Punjab [AIR 1983 SC 957]**, wherein the Hon'ble Supreme Court insisted upon the mitigating circumstances being balanced against the aggravating circumstances. The aggravating circumstances were described as under:*

- (a) When the murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.
- (b) When the murder of a large number of persons of a particular caste, community, or locality is committed.
- (c) When the murder of an innocent child, a helpless woman is committed.

It was also observed by the Hon'ble Court that at the same time it must be kept in mind that the principle of there being a proportion between punishment and offences ought not to be so mathematically followed so as to render the laws subtle, complicated and obscured. Brevity and simplicity are a superior good. Something of exact proportion may also be sacrificed to render the punishment more striking, more fit to inspire people with a sentiment of aversion for those vices which prepare the way for crimes.

*In the case of **Shivaji Vs. State of Maharashtra** reported in 2008 (4) AD (CR.) SC 665 the Hon'ble Apex Court considered as to whether or not circumstantial based conviction should be taken to be the mitigating factor and had observed that the plea that in case of a circumstantial evidence, death should not be awarded, is without any logic. It was also observed that if the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, which forms the foundation for conviction, that have nothing to do with the question of sentence as has been observed in various cases while awarding death sentence. The Hon'ble Court was of the view that to treat circumstantial evidence as mitigating circumstances would amount to consideration of an irrelevant aspect and in a case which falls in the Rarest of Rare category death sentence should be awarded.*

*However, the Hon'ble Apex Court in the case of **Swami Shradhanand Vs. State of Karnataka** reported in 2008 (13) SCC 767 considered an alternative option and substituted the death penalty with life imprisonment with the directions that the convict must not be released for the rest of his life.*

The question now before this court is whether a punishment lesser than death would be wholly inadequate or whether the alternative option as proposed in the case of Swami Shradhanand Vs. State of Karnataka reported in 2008 (13) SCC 767 and Shree Gopal @ Mani Gopal Vs. State, Crl. Appeal No. 528/09 decided on 31.8.2009 would be adequate.”

37. Thereafter, the trial court also took into account various other judgments and noted that the victim in the present case was none else but the father of an eye witness to the killing of Anil Badana. It was further held that by threatening and killing witnesses, the eyes and ears of a Court are under attack and the stream of justice gets polluted while relying upon **Shree Gopal v. State**, (Crl.Appeal No.528/2009) decided on 31.08.2009.
38. Keeping the above factors in mind, the appellant in **Crl.A. 967/2013** was convicted to rigorous imprisonment for life- Till the rest of his life besides a fine of Rs.3,00,000/-. The sentence was to run consequent to and only after the conclusion of sentence imposed upon the appellant in in Crl.A. 966/2013 arising out of FIR No.67/99.
39. In **Crl.A.966/2013**, while relying upon the same judgments as referred in the above paragraphs, the learned trial court considered the following aggravating factors:

*“The aggravating factors are **firstly** that the victim in the present case namely Anil Badana was none else than the witness against the convict Jitender @ Kalle in another FIR No.125/06 under Section 307 IPC PS Model Town being the injured and the motive behind the murder of Anil Badana was of revenge between the deceased and the convict. **Secondly** the murder of Anil Badana a young man, has been committed in full public view at a marriage reception and on the way to escape from the spot the convict fired indiscriminately and one such bullet injured Madan Lal the father of the bridegroom who had organized the function. **Thirdly** after committing the murder of Anil Badana and injured Madan Lal in the present case the convict Jitender @ Kalle rushed to the residence of Sumit Nayyar an eye witness to the incident in the present case who had made a police call on 100 number and*

*learning that Sumit Nayyar had not reached, he shot his father Kimti Lal Nayyar an innocent in the present FIR No. 61/99 his part. **Fourthly** the fact that the incident in the second case bearing FIR no. 68/99 where Kimti Lal Nayyar had been shot dead occurred at 12:30 AM, the intent was clearly to finish off the witness who would have deposed against him. **Fifthly** the present convict had also **escaped from police custody** and according to the prosecution had extended threats to the witnesses during this period showing that the convict did not have any remorse of ghastly killings for which he was undergoing trial. **Lastly** the convict Jitender @ Kalle is a habitual offender being involved in number of cases and is the BC (Bad Character of the area)."*

40. The trial court, thus, classified the present case as a rare case which calls for the exercise of alternative options by the Court and sentenced the appellant to rigorous imprisonment for life with a direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 30 years and a fine of Rs.3,00,000/-. For the offence under Section 307 of the Indian Penal Code, he was sentenced to rigorous imprisonment for 10 years and a fine of Rs.1,00,000/-.
41. The appellant has been in incarceration for more than 16 years. As noticed above, counsel for the appellant has not laid challenge to the order on conviction but to the order on sentence passed in both the appeals. In the light of the submission made by the counsel for the appellant, the argument with respect to the guidelines provided under the High Court Rules, Chapter 26, holds no ground.
42. Two broad issues arise for consideration before this Court. The **first issue** which arises for consideration is whether the order of the trial court that both the sentences are to run consecutively requires interference or not? The **second issue** which arises is if the sentences are not to run consecutively, whether the order on sentence in both the appeals require interference?

43. The answer to the first question lies in Section 427 (2) of the Code of Criminal Procedure itself which provides that a person who has already undergone a sentence of imprisonment for life and is sentenced to life imprisonment by a subsequent conviction, the subsequent sentence is to run concurrently with the previous sentence. Section 427 (2) reads as under:

“Section 427 of the Code Of Criminal Procedure, 1973

(1) xxxxxx

(2) *When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.”*

44. In a recent judgment reported in ***Shashi Shekhar @ Neeraj @ Raju v. NCT of Delhi***, reported at 2015(8) SLT 644, a similar issue came up for consideration before the Supreme Court of India. The relevant paragraphs of the judgment reads as under:

“11. In the present case, as the Appellant was convicted for the offence Under Section 302 and was sentenced to imprisonment for life in a previous case as well, and hence he is already undergoing the sentence of imprisonment for life, the subsequent conviction of the imprisonment for a term i.e. fixed period or imprisonment for life should run concurrently with such previous sentence.

12. We are of the view that the Trial Court was not correct in directing that the sentence imposed pursuant to Sessions Case No.385/96 shall not be concurrent with the sentence in case FIR No. 509/95. The High Court also failed to notice the fact and affirmed the above portion of judgment.”

45. Accordingly, in view of Section 427 of the Code of Criminal Procedure and the law laid down by the Apex Court in the case of *Shashi Shekhar @ Neeraj @ Raju v. NCT of Delhi* (supra), we are of the view that the learned trial court clearly overlooked Section 427 (2) of the Code of Criminal Procedure.
46. As far as the second question is concerned, the trial court while awarding the sentence has taken into account various factors and also considered the judgments of the Supreme Court as well as of this Court. We may say that there is no quarrel with the proposition of the law laid down. However, what requires consideration is as to whether the judgments are applicable to the facts of the present case or not?
47. In the case of *Swamy Shraddananda (2) v. State of Karnataka*, reported in (2008) 13 SCC 767, a three Judge Bench of the Supreme Court was seized of the issue that whether the conviction of the appellant under Section 302 and 201 of the Indian Penal Code had attained finality. The trial court and High Court had sentenced the appellant to death. On an appeal before the Supreme Court, a two Judge Bench in *Swamy Shraddananda (1) v. State of Karnataka*, reported in (2007) 12 SCC 288 unanimously upheld the appellants conviction but the Court was unable to agree as to the punishment to be meted out to the appellant. One of the learned Judges felt that the punishment of life imprisonment rather than death would serve the ends of justice. The Judge also had made it clear that the appellant would not be released from prison till the end of his life. The other learned Judge, on the other hand, took the view that the appellant deserved death. Resultantly, the matter was placed before a three Judge Bench whereby the death sentence was commuted to imprisonment for life with a direction that the appellant would not be released from prison till the end of his life. In the aforesaid matter, while re-visiting the entire law on the issue of

sentencing, the Supreme Court held that the sentence of imprisonment for actual life given to a convict as a substitute for death sentence must be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice. The Court analysed that when a death sentence comes up for confirmation, the Court is often faced with two punishments - one is sentence for imprisonment, which for all intents and purposes relates to fourteen years and the other is death. Resultantly, the Court may feel tempted and finds itself nudged into endorsing the death penalty. The Court also held that it was far more reasonable and proper to expand the options and take recourse to the expanded option for a special category and substitute the sentence of life imprisonment and attract actual term of imprisonment to be undergone by a convict without the same be subject to remission, computation, etc. It would be useful to refer to the following paragraphs of the judgment with regard to the issue of computation and remission:

“75. It is now conclusively settled by a catena of decisions that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life. (See the decisions of this Court in Gopal Vinayak Godse vs. The State of Maharashtra & others, (1961) 3 SCR 440 (Constitution Bench); Dalbir Singh & others vs. State of Punjab, (1979) 3 SCC 745; Maru Ram vs. Union of India, (1981) 1 SCC 107 (Constitution Bench); Naib Singh vs. State of Punjab, (1983) 2 SCC 454; Ashok Kumar alias Golu vs. Union of India, (1991) 3 SCC 498; Laxman Naskar (Life Convict) vs. State of W.B., (2000) 7 SCC 626; Zahid Hussein vs. State of West Bengal, (2001) 3 SCC 750; Kamalanantha vs. State of Tamil Nadu, (2005) 5 SCC 194; Mohd.Munna vs. Union of India, (2005) 7 SCC 416 and C.A.Pious vs. State of Kerala, (2007) 8 SCC 312).

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77. This takes us to the issue of computation and remission etc. of sentences. The provisions in regard to computation, remission,

suspension etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of 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 of any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the Constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the Rules framed by the different States.

78. *Section 432 of the Code of Criminal Procedure deals with the power to suspend or remit sentences and Section 433 with the power to commute sentences. Section 433A, that was inserted in the Code by an amendment made in 1978, imposes restriction on powers of remission or commutation in certain cases. It reads as follows:*

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

xxxxx.

80. *From the Prison Act and the Rules it appears that for good conduct and for doing certain duties etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an under trial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. 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.*

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89. Here, it may be noted that this has been the position for a very long time. As far back as in 1973, in **Jagmohan Singh** (supra) a Constitution Bench of this Court made the following observation:

"14. In the context of our criminal law which punishes murderer, 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 that sole alternative will be an adequate substitute for the death penalty."

(emphasis added)

Five years after Jagmohan, Section 433A was inserted in the Code of Criminal Procedure, 1973 imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433A another Constitution Bench of this Court in **Bachan Singh** (supra) made the following observation:

"156. It may be recalled that in Jagmohan 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 and 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 an imprisonment for life in most cases worked out to a dozen years of imprisonment and after its introduction it works out to fourteen years' imprisonment. But the observation in Jagmohan that this cannot be accepted as an adequate substitute for the death penalty still holds true.

90. Earlier in this judgment it was noted that the decision in **Shri Bhagwan** (supra) there is a useful discussion on the legality of remission in the case of life convicts. The judgment in **Shri Bhagwan**, in paragraph 22, refers to and quotes from the earlier decision in **State of M.P. vs. Ratan Singh** (supra) which in turn quotes a passage from the Constitution Bench decision in **Gopal**

Vinayek Godse (supra). It will be profitable to reproduce here the extract from Ratan Singh:

"4. As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer res integra and stands concluded by a decision of this Court in Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 where the Court, following a decision of the Privy Counsel in Pandit Kishori Lal v. King Emperor, AIR 1954 PC 64 observed as follows: (AIR pp 603-03, paras 4-5)

'4. Under that section a person transported for life or any other terms before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.

5. If so the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life'.

The Court further observed thus:

'7. But the Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act.....Under the said rules the order of an appropriate Government under Section 401 Criminal Procedure Code, are a pre-requisite for a release. No other

rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

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

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

(emphasis supplied)

*Further, in paragraph 23, the judgment in **Shri Bhagwan** observed as follows: (SCC pp. 306-07)*

"In Maru Ram vs. Union of India, (1981) 1 SCC 107, a Constitution Bench of this Court reiterated the aforesaid position and observed that the inevitable conclusion is that since in Section 433A we deal only with life sentences, remissions lead nowhere and cannot entitle a prisoner to

release. Further, in Laxman Naskar (Life Convict) vs. State of W.B. & Anr., (2000) 7 SCC 626, after referring to the decision of the case of Gopal Vinayak Godse vs. State of Maharashtra, (1961) 3 SCR 440, the court reiterated that sentence for "imprisonment for life" ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term is served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose."

(emphasis supplied)

91. *The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Mau Ram, Ratan Singh and Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.*

92. *The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission*

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

48. The view taken by the three Judge Bench in the case of **Swamy Shraddananda(2)** (supra) was also considered by a five Judge Bench of the Supreme Court in the case of **Union of India v. V. Sriharan @ Murugan & Ors.**, reported in 2015(13) SCALE. The following seven issues arose for consideration before the Full Bench:

- “(a) Maintainability of this Writ Petition under Article 32 of the Constitution by the Union of India.*
- (b) (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?*
- (ii) Whether as held in Shraddananda case a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?*
- (c) Whether the Appropriate Government is permitted to grant remission under Sections 432/433 Code of Criminal Procedure after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its Constitutional power(s) under Article 32?*
- (d) Whether Union or the State has primacy for the exercise of power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission?*
- (e) Whether there can be two Appropriate Governments under Section 432(7) of the Code?*

(f) Whether the power under Section 432(1) can be exercised suo motu, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not?

(g) Whether the expression “Consultation” stipulated in Section 435(1) of the Code implies “Concurrence”? ”

49. Since in ***Crl.A.966/2013***, the trial court has awarded rigorous imprisonment for life to the appellant with a direction that the appellant would not be considered for remission till he would undergo an actual sentence of 30 years and in ***Crl.A.967/2013***, the appellant was sentenced to rigorous imprisonment for life- Till the rest of his life. Both the sentences were ordered to run consecutively. Application of remission, for our purpose issue no.2 is of relevance. In paras 103, 104 and 105 of the judgment in ***Union of India v. V. Sriharan @ Murugan & Ors.*** (supra), it was held as under:

“103. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the concerned convict will get an opportunity to get such verdict tested by filing further appeal by way of Special Leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict’s life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

104. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified

offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.

105. Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in Sangeet and Anr. v. State of Haryana – 2013 (2) SCC 452 that the deprivation of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.”

50. Counsel for the State has relied upon the judgment in the case of **Birju v. State of M.P.**, reported in 2014 (3) SCC 421, more particularly, paragraphs 20, 21 in support of her argument that the sentence can run consecutively.
51. The submission of the learned counsel for the State is without any force in view of Section 427(2) of the Code of Criminal Procedure. In the case of **Birju v. State of M.P.**, (supra), the Apex Court was of the view that it was a fit case where 20 years of rigorous imprisonment, without remission, was granted to the appellant, over the period which he had already undergone. It is in this context that while awarding the sentence for imprisonment for life, the Court fixed a term of imprisonment of 20 years without remission. But the cap of 20 years was fixed.
52. In view of the decision rendered by the five Judge Bench of the Supreme Court in the case of **Union of India v. V. Sriharan @ Murugan & Ors.** (supra), more particularly as held in paragraphs 103 and 104, we are of the

view that the trial court exceeded its jurisdiction. Even otherwise, we are of the view that the trial court in this case has acted in utter haste by passing the order on sentence on the same day with a pre-determined mind. Having regard to the gravity of the matter, the trial court should have allowed reasonable opportunity to the counsel for the accused to address arguments on sentence. The trial court has shown utter impatience and also incorrectly applied the law. We may notice that the Full Bench of the Supreme Court in the case of *Union of India v. V. Sriharan @ Murugan & Ors* . (supra) held that the ratio laid down in the case of *Swamy Shraddananda* (supra) with a very special category of sentence instead of death for a term exceeding 14 years and put that category beyond application of remission is well-founded. We have extracted above the foregoing paragraph 92 in the case of *Swamy Shraddananda (2) v. State of Karnataka*, reported in (2008) 13 SCC 767 wherein the Hon'ble Supreme Court discussed a situation where a sentence may be excessive and unduly harsh or may be highly disproportionately inadequate. The Court may find that a case falls short of the rarest of the rare category. But at the same time, having regard to the nature of the crime, the court may strongly feel that a sentence of life imprisonment that subject to remission which normally works out to a term of 14 years may be grossly disproportionate and inadequate. Faced with this quandary with two alternates, *i.e.*, either death or life of not more than 14 years, the Court may be led to passing a death sentence. The Court cautioned of such a prejudice and viewed such a condition to be disastrous and held that the Court would take recourse to the expanded option.

53. In appeal being *Crl.A.966/2013*, the appellant had committed the murder of Anil Badana and also caused gun shot injury to Madan Lal Sharma. The evidence on record shows that when the appellant was being chased, he in

order to ward off the persons chasing him had fired indiscriminately and one bullet had hit on Madan Lal Sharma. The injury of Madan Lal Sharma was not dangerous. While awarding the sentence, one of the aggravating factor which was taken into account by the trial court was that victim Anil Badana was a witness against the convict in another FIR No.125/2006 under Section 307 of the Indian Penal Code, P.S. Model Town. This aggravating factor, in our view, is misplaced for the reason that the evidence on record would show that Anil Badana had already testified in the aforesaid case which finally led to the acquittal of the appellant. The judgments sought to be relied upon by the trial court are misplaced. Therefore, award of sentence for life with a direction that he shall not be granted remission till he undergoes an actual sentence of 30 years is misplaced and exceedingly harsh. For the reasons aforesaid, this order on sentence requires to be modified.

54. In the second appeal being *Crl.A.967/2013*, the appellant in order to commit murder of Sumit Nayyar at his house in Mukherjee Nagar having not found him committed the murder of Kimti Lal, father of Sumit Nayyar. For the murder of Kimti Lal, the trial court while taking into account that the appellant was involved in nine other cases and that the victim was the father of an eye witness to the killing of Anil Badana, subject matter of *Crl.A.966/2013*, the appellant was sentenced to rigorous imprisonment for life- Till the rest of his life with a fine of Rs.3,00,000/-. It was also made clear that the sentence in the present case would start running consequent to and only after the conclusion of sentence imposed upon the convict in case FIR No.67/99, P.S. Keshav Puram, subject matter of *Crl.A.966/2013*.
55. The Apex court in *State of M.P. v. Babulal*, AIR 2008 SC 582, two learned Judges, while delineating about the adequacy of sentence, have expressed thus:

“19. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

20. The object of punishment has been succinctly stated in Halsbury's Laws of England, (4th Edition: Vol. II: para 482) thus:

The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided.”

(Emphasis supplied)

56. In this context, we may refer with profit to the pronouncement in ***Jameel v. State of Uttar Pradesh***, (2010) 12 SCC 532, wherein the Apex Court, speaking about the concept of sentence, has laid down that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and

circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

57. The Apex Court in ***Gopal Singh v. State of Uttarakhand***, 2013 (2) SCALE 533, while dealing with the philosophy of just punishment which is the collective cry of the society, a two Judge Bench has stated that just punishment would depend on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.
58. Sentencing is a significant task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. In ***Sham Sunder v. Puran and Anr.***, reported in (1990) 4 SCC 731, the Hon'ble Supreme Court laid down that the court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed and the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence. The sentence imposed by the trial court appears to be so grossly and entirely inadequate as to involve a failure of justice. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process shall be stern where it should be, and tempered with mercy where it needs to be warrants.

59. The Apex Court laid down the following principles in ***Dulla and Ors. v. State***, reported in AIR 1958 All 198 and the subordinate Courts should also take the aid of these principles in deciding the quantum of punishment for all persons found guilty by them:-

“The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent others from committing similar crimes. The sentence passed on the offender must be the least that will achieve both these objects. In deciding the measure of punishment the Court ought to take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, and his age, character and antecedents.

The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious preconceptions should be strictly disregarded. The Court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty provided for any offence is meant for only the worst cases.

An excessive sentence defeats its own object and tends to further undermine the respect for law. The jails should be reserved for the reception of those who perform criminal acts of not merely a technical but of a criminal character. If the law permits a sentence of fine as an alternative, there is no need of the sentence of imprisonment, unless of course the gravity of the offence or the antecedents of the offender demand it.

First and/or youthful offenders should invariably be treated leniently, and in applying provisions of law like the First Offenders' Probation Act or Section 562, Cr. P. C., it would be better for the Court to err on the side of liberality. On the other hand, a person who has taken to a life of crime or who has refused to take a lesson from his previous convictions should be meted out severe punishment.

A deterrent sentence is wholly justifiable when the offence is the result of deliberation and preplanning, is committed for the sake of personal gain at the expense of the innocent, is a menace to

the safety, health or moral well-being of the community, or is difficult to detect or trace. Unlike those acts which are universally acknowledged to be of a criminal nature, an act which has only recently been made an offence or which is not unlawful in other parts of the country or State or which is not essentially criminal in character, deserves leniency, except in the case of persistent offenders.”

60. In the case of ***Sumer Singh v. Surajbhan Singh & Ors.***, reported in 2014 (3) JCC 2282, it was held by the Hon’ble Supreme Court which reads as under:

“32. Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the

society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the Respondent is sentenced to undergo rigorous imprisonment of two years apart from the fine that has been imposed by the learned trial judge.”

61. We believe that being a civilised society -- a tooth for a tooth and an eye for an eye ought not to be the criterion and as such the question of there being acting under any haste in regard to the life imprisonment would not arise; Rather our jurisprudence speaks of the factum of the law courts being slow in that direction and it is in that perspective a reasonable proportion has to be maintained between the heinousness of the crime and the punishment. While it is true, punishment disproportionately severe ought not to be passed but that does not even clothe the law courts, however, with an opinion to award the sentence which would be manifestly inadequate having due regard to the nature of offence since an inadequate sentence would not subserve the cause of justice to the society. The Courts would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of “just deserts” that serves as the foundation of every criminal sentence that is justifiable. In other words, the “doctrine of proportionality” has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.
62. In the contextual facts, on considering the aforesaid principles and having regard to the nature of the offence and the methodology adopted, we are convinced that the power to impose a modified punishment providing for

any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised depending on the facts of the case. Further, the punishment awarded to the appellant herein is in excess of the requirement of the situation and as such the mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy on the appellant. We are of the considered view that to meet the ends of justice, the cap of 30 years must be removed. Hence, we modify the order on sentence to the period already undergone by the appellant i.e 16 years and 10 months.

63. Consequently, the appeals are allowed in part, the conviction recorded by the trial court is maintained and the sentences imposed by the learned trial Judge is modified to the extent indicated hereinabove. The appellant be released forthwith, if not required in any other case. The fine imposed, if not paid, shall be paid by the appellant.
64. The trial court record be sent back along with a copy of this order.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

DECEMBER 24th, 2016
pst//