IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION
WRIT PETITION NO. 1181 OF 2014

Mohd. Salim Mohd. Kudus Ansari
Age about 27 years, Occ. - Punching Operator,
Residing at Vishnu Nagar Building,
Room No. 2, Near Datta Mandir,
Mahul Village, Vashi Naka,
Mumbai – 400 074. ....Petitioner

V/S

1. State of Maharashtra
[Summons to be served upon
Ld. Public Prosecutor appointed
u/s. 24 of the Code of Criminal
Procedure, 1973].

2. Ujwal D. Nikam
Special Public Prosecutor,
appointed in Sessions Case
No. 846/2013 AND 914/2013
at Bombay Sessions Court
through DCB CID, Unit – III,
Mumbai. ....Respondents

WITH
WRIT PETITION NO. 1182 OF 2014

Mohd. Kasim Mohd Hasim Shaikh
Age about 19 years, Occ. - Mason,
Residing at Zopda No. 188,
Maulana Azad Road, Agripada,
Mumbai. ....Petitioner

V/S

1. State of Maharashtra
[Summons to be served upon
Ld. Public Prosecutor appointed
u/s. 24 of the Code of Criminal
Procedure, 1973]

2. Ujwal D. Nikam
Special Public Prosecutor,
appointed in Sessions Case
No. 846/2013 AND 914/2013
at Bombay Sessions Court
through DCB CID, Unit – III,
Mumbai. ....Respondents

WITH
WRIT PETITION NO. 527 OF 2018

Vijay Jadhav
Age about 22 years,
presently incarcerated at
Yerwada Central Prison, Pune
R/o. Vishnunagar building No. R/2,
3rd Floor, Room No. 307,
Mahul Village, Vashi Naka,
Mumbai – 400 074. ....Petitioner

V/S

1. State of Maharashtra
Through P.P. Appellate Side, High Court.

2. Union of India ....Respondents

Dr. Yug Mohit Chaudhary, Sr. Advocate with Ms. Ragini Ahuja and Ms. Payoshi Roy for Petitioners.

Mr. A.A. Kumbhakoni, Advocate General a/w Mr. Ashutosh Kulkarni, Panel 'A' Counsel, Mr. Gaurav Sharma, Ms. Chandni Sachade, Mr. Sagar Ghogare, Ms. Mrinalika Devarapalli, Mr. S.B. Lolage and Mr. J.P. Yagnik, for the Respondent No.1-State of Maharashtra.

Mr. Anil C. Singh, Additional Solicitor General, a/w Mr. Sandesh Patil, Ms. Manjiri Parasnis, Mr. Aditya Thakkar, Ms. Geetika Gandhi, Mr. Amogh Singh, Mr. Carina Xavier, Ms. Divya Pawar i/b Mr. D.P. Singh for the Respondent - Union of India.

Mr. Aabad Ponda, *Amicus Curiae* a/w Mr. Karma Vivan, Mr. Ashish Raghuvanshi and Mr. Bhomesh Bellam.

CORAM : B.P. DHARMADHIKARI &
REVATI MOHITE DERE, JJ.

RESERVED ON : 5th March, 2019
PRONOUNCED ON : 3rd June, 2019

JUDGMENT (Per Revati Mohite Dere, J.) :

1. The constitutional validity of Section 376-E inserted in the Indian Penal Code (`IPC') by the Criminal Law (Amendment) Act of 2013, with effect from 3rd February 2013, is under challenge before us, in these petitions. The said Section reads thus :

> ***"376-E. Punishment for repeat offenders:-*** *"Whoever has been previously convicted of an offence punishable under section 376 or section 376-A or section 376-AB or section 376-D or section 376-DA or section 376-DB, and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death".*

2. These petitions arise in somewhat peculiar circumstances. The petitioners were tried for the offence punishable under Section 376 of the IPC and other offences, in two cases i.e. in Sessions Case Nos. 914 of 2013 and 846 of 2013. Both the cases were tried simultaneously and on 20th March 2014, the order of conviction was pronounced in both these trials. The Sessions Court adjourned the cases to 21st March 2014 for hearing the petitioners on the point of sentence. On the said day, the learned Judge pronounced the sentence and awarded life sentence to the accused in Sessions Case No. 914 of 2013. Thereafter, Sessions Case No. 846 of 2013 was taken up, when the learned Special Public Prosecutor presented an application before the learned Sessions Judge under Section 211(7) of the Code of Criminal Procedure (`Cr.P.C') and prayed for framing of charge

under Section 376-E as against the petitioners - Vijay Jadhav, Mohd. Kasim Mohd Hasim Shaikh and Mohd. Salim Mohd. Kudus Ansari. On 24th March 2014, the learned Sessions Judge allowed the said application. The petitioners sought stay of the operation of the order for a period of two weeks to enable them to approach the High Court, however, the same was refused. Pursuant thereto, the petitioners pleaded not guilty to the charge framed against them, under Section 376-E of the IPC. The petitioners - Mohd. Salim Mohd. Kudus Ansari and Mohd. Kasim Mohd Hasim Shaikh, filed two writ petitions, being Writ Petition Nos.1181 of 2014 and 1182 of 2014 respectively before this Court, challenging the constitutional validity of Section 376-E of IPC and for striking down the same and also for quashing of the order dated 24th March 2014 passed by the learned Judge, framing charge under Section 376-E of the IPC and for stay of the proceedings. This Court, after hearing the parties at length, vide order dated 27th March 2014, issued notice to the Attorney General. Since the trial was at the fag end, the trial was not stayed, but all questions/issues were kept open. Thereafter, the trial proceeded and the petitioners were awarded death sentence under Section 376-E of IPC in Sessions Case No.846 of 2013. In 2018, petitioner - Vijay Jadhav also filed a petition,

being Criminal Writ Petition No. 527 of 2018, challenging the constitutional validity of Section 376-E of the IPC and prayed that Section 376-E be declared as unconstitutional and for striking down the same. Accordingly, all the aforesaid three petitions have been tagged together for consideration. We may note, that as the petitioners' confirmation appeals are being looked into by the Coordinate Bench, we are not concerned with the actual facts involved in the said confirmation cases, and as such have narrated only the events that led to the filing of these petitions.

Submissions of Dr. Yug Chaudhary :

3. Dr. Chaudhary, learned senior counsel for the petitioners submitted that Section 376-E of the IPC is unconstitutional, as it violates Articles 14 and 21 of the Constitution, on the following grounds:-(i) that it creates a new category of punishment, namely imprisonment till the remainder of one's natural life, which is not envisaged as a punishment in the IPC; (ii) that Section 376-E denudes constitutional powers of remission; (iii) that Section 376-E denudes the statutory powers of remission; (iv) that Section 376-E violates the principle of proportionality by prescribing a sentence of death, which is disproportionate to the nature of offence

therein; (v) that Section 376-E indirectly imposes a mandatory death sentence, and as such is violative of Article 21 of the Constitution. Reliance is placed on the Apex Court decision in ***Mithu vs. State of Punjab***[1]; (vi) that Section 376-E is discriminatory and arbitrary; (vii) that no procedure exists for implementation of Section 376-E, and (viii) that Section 376-E is void for vagueness. Since some of the grounds are overlapping, the same will be dealt with together in detail, hereinunder.

4. According to Dr. Chaudhary, Section 376-E creates a new category of punishment namely, imprisonment for life, which means imprisonment for the remainder of that person's natural life, which is not envisaged as a punishment in the IPC. He submits that Section 53 of the IPC prescribes various punishments that can be imposed by a Court of law, however, the said Section does not include the punishment of imprisonment for remainder of one's natural life. It is submitted that by creating this new category of punishment under Section 376-E i.e. imprisonment for life, which means imprisonment for the remainder of that person's natural life, a new category of punishment is created, which is inconsistent with the existing provisions, relating to punishment in the IPC.

1 (1983) 2 SCC 277

Learned senior counsel invited our attention to the decisions of the Apex Court in ***Maru Ram vs. Union of India and Ors.***[2], ***Gopal Vinayak Godse vs. State of Maharashtra***[3], ***and Union of India vs. V. Sriharan***[4] and submitted that the concept of imprisonment for life has been explained by the Apex Court therein, and the same cannot be lost sight of, while examining the challenge in these petitions. According to Dr. Chaudhary, punishment must be certain and known to an accused clearly, beforehand and there must be no confusion or vagueness. Our attention is invited to Section 376 of IPC, particularly its sub-sections, to highlight the difference in punishments prescribed in those sub-sections. It is further submitted that there is no accompanying machinery provided in the Cr.P.C for the execution of the said sentence i.e. imprisonment till the remainder of one's natural life under Section 376-E. He relied on Section 418 of the Cr.P.C in this regard, to show that there is no mention of imprisonment till the remainder of one's natural life, resulting in no mechanism to execute the said sentence. This, according to the learned senior counsel, makes Section 376-E violative of Article 21. He submits that it is well established, that life and liberty cannot be taken away, except by procedure established by

2 (1981) 1 SCC 107
3 (1961) 3 SCR 440
4 (2016) 7 SCC 1

law.

5. Dr. Chaudhary submits that arbitrariness can be a ground to challenge the law enacted by the Parliament. According to the learned senior counsel, Section 302 of IPC i.e. murder, a more serious offence, allows punishment for varying period i.e. from life till death, whereas, the offence under Section 376-E, though of a lesser degree, prescribes punishment which is more grave, namely for imprisonment till the remainder of that person's natural life or with death. He submitted that Section 376-E is manifestly arbitrary, as there is no determining principle for creating a harsher standard of punishment under Section 376-E, by lowering the criteria for enhanced punishment as opposed to Section 75 of the IPC. According to Dr. Chaudhary, Section 75 already prescribes enhanced punishment for repeat offenders, who have been previously convicted and who subsequently commit another offence, which he calls as an `offence model', and that Section 376-E falls foul of the principles of enhanced punishment, which already exists. He submits that Section 376-E creates a new model of enhanced punishment, which only requires the existence of a previous conviction, irrespective of the chronology of

offences. Learned senior counsel submits that Section 75 and Section 376-E cannot be allowed to have different outcomes, when they are both part of the same code and have the same objective. According to Dr. Chaudhary, an arbitrary and discriminatory outcome under Section 376-E cannot be permitted, when a person's life is at stake. To buttress his submission, learned senior counsel relied on the decisions in ***Shayara Bano vs. Union of India***[5]***, John Vallamattom vs. Union of India***[6]***, Ajay Hasia and Ors. vs. Khalid Mujib Sehravardi and Ors.***[7]***, Reg. vs. Sakya Valad Kavji***[8]***, State vs. Badri***[9] and ***Jagdish Prasad vs. State of U.P.***[10]

6. Advancing further arguments on the ground of arbitrariness, Dr. Chaudhary, submits that Section 376-E promotes inequality. Learned senior counsel relied on the decision of the Apex Court in ***Ajay Hasia (supra)*** to show that Article 14 has been interpreted to include guarantee against arbitrariness and that arbitrariness in state-action either by the legislature or the executive, is sufficient to initiate that action mentioned in para 16 of the said judgment. To buttress his submission, learned senior counsel points

5 (2017) 9 SCC 1
6 (2003) 6 SCC 611
7 (1981) 1 SCC 722
8 (1863) 5 BHCR 36
9 AIR 1965 Raj 152
10 AIR 1966 SC 290

out the scheme in the IPC to show that there are numerous provisions for punishing repeat offenders and that Section 376-E does not follow the `offence paradigm' as envisaged in IPC. According to him, in the scheme of IPC, higher or enhanced punishment is for second offence i.e. the offence which is committed after the first conviction. He took us through Sections 303, 307(2) and the language of Section 75 of IPC for this purpose. According to him, the object behind this scheme is to give an opportunity to a convict to reform, whereas, such an opportunity is not provided under Section 376-E, and hence, Section 376-E suffers from the vice of arbitrariness, warranting it to be declared as unconstitutional.

7. Reliance is also placed on Form 32 in Schedule II of Cr.PC. to show how the charge for higher punishment after previous conviction needs to be framed. It is submitted that as Section 376-E overlooks this aspect, it adheres to the conviction paradigm only. Dr. Chaudhary placed reliance on the provisions of Sections 396 and 460 IPC to show that if death occurs while committing some other offence, higher punishment is prescribed, whereas, there is no higher punishment for second dacoity, or second robbery or second trespass, etc. and as such, there is no rationale for

treating second rape differently. According to Dr. Chaudhary, Section 376-E deviates from the offence paradigm in IPC.

8. Learned senior counsel relied upon the 42nd report of the Law Commission of India (on IPC) published in June, 1971, to show the purpose and object of Section 75 of IPC. He submits that this report takes note that Section 75 itself accepts an interval between previous conviction and subsequent offence. Dr. Chaudhary points out that this chance to reform insisted upon by the Law Commission is lost in Section 376-E. The Division Bench judgment of this Court in the case of ***Sayad Abdul Sayad Imam vs. Emperor***[11] is also relied upon by the learned senior counsel to buttress his submission. The decision in ***Sakya Valad Kavji_(supra)*** is also relied upon to show that Section 75 of IPC is attracted only if the second offence is committed subsequent to any conviction. The decision in the case of ***Badri (supra),*** in particular, paras 4 and 11 is also relied upon in this connection. The said case was under the Prevention of Food Adulteration Act. In the said case, the Rajasthan High Court held that while interpreting law which provides enhanced penalty, legal meaning of phrases used therein should prevail over the grammatical construction thereof and

11 AIR 1926 Bom 305

hence the phrase "the second offence" should be construed as that offence which has been committed after the offender had been convicted for the first offence. This according to the learned senior counsel, has also been accepted by the Apex Court in ***Jagdish Prasad (supra).***

9. Dr. Chaudhary, thus submits that while introducing Section 376-E of IPC, no corresponding new procedure has been added in Cr.P.C. He submits that Section 211(7) of Cr.P.C requires the subsequent offence to be after the previous conviction and that there is no procedure contemplated to frame charge under Section 376-E.

10. While pointing out absence of procedure, Dr. Chaudhary, invited our attention to Section 219 of Cr.P.C. to urge that if two offences of rape occur in a year, they could be tried together and that in such a circumstance, there would be no previous conviction and the question of applying Section 376-E would not arise. He points out how Section 220 of the IPC deals with the offence of lurking house tresspass and rape committed during it, how Section 376(2)(n) does not envisage multiple

rapes on a single woman, as second offence, and how the offence under Section 302 and 326 though repeated, are punishable under those very Sections, and that there is no special provision like 376-E.

11. On the point of remission, Dr. Chaudhary submits that Article 161 of the Constitution of India confers power upon the Governor to grant pardon while Article 72 confers a similar power upon the President. He submits that now with the insertion of Section 376-E in the IPC, and the punishment prescribed therein, this power of the Governor and the President is taken away. Similarly, the welfare measures of remission etc. under Sections 432 and 433 of Cr.P.C. are also declined. Learned senior counsel adds, that though there is no non-obstante clause like Section 31 of the Narcotic Drugs and Psychotropic Substances Act, (`NDPS Act'), the petitioners would not be entitled to be released, either under Sections 432 or 433 Cr.P.C, if convicted under Section 376-E.

12. Learned senior counsel relied on the decision of the Apex Court in ***Maru Ram (supra),*** to urge that where the sentence is indeterminate and of uncertain duration, result of subtraction from that

uncertain quantity is still an uncertain quantity. He pointed out that in ***Godse (supra),*** the Apex Court held that imprisonment for life means imprisonment for the whole of the remaining period of the convicted person's natural life. Para 26 of ***Maru Ram (supra)*** is also relied upon to show that the language of Section 433A Cr.P.C, where life sentence is dealt with, remission leads nowhere and the prisoner is not entitled to release. The relevant portion of para 26 of ***Maru Ram (supra),*** relied upon is reproduced below:-

> *"..... In this view, the remission rules do not militate against s. 433A and the forensic fate of Godse (who was later released by the State) who had stock-piled huge remissions without acquiring a right to release, must overtake all the petitioners until 14 years of actual jail life is suffered and further an order of release is made either under s. 432 or Arts. 72/161 of the Constitution."*

13. Dr. Chaudhary, learned senior counsel also submitted that Section 376-E is violative of Article 21, as it violates the principle of proportionality, by prescribing a sentence of death for an offence where no death has been caused. He submitted that a balance must be struck between the harm caused and the punishment awarded and that the sentence of death may be given only where death is caused. He submitted that the offence of

302 i.e. murder, is far graver than the offence of rape, inasmuch as, death is caused, however, under Section 376-E, death sentence can be awarded to an accused for repeat offence even when death is not caused. According to Dr. Chaudhary, there are other non-homicidal offences, where death sentence is prescribed, however, the said offences cannot be treated at *par* with the offence of repeat rape i.e. 376-E. He submitted that the introduction of death sentence under Section 376-E violates the standard laid down in ***Bachan Singh vs. State of Punjab***[12]**,** wherein, it has been held that it is only in the rarest of rare cases that death can be awarded and only when the alternative option is foreclosed. He submitted that even the Verma Committee did not consider death to be an appropriate sentence, in cases of rape. He relied on paras 24 and 25 of the Verma Committee report. Dr. Chaudhary also relied on ***Om Kumar and Ors. vs. Union of India***[13], ***Vikram Singh vs. Union of India***[14], ***Kennedy vs. Louisiana***[15] and ***Shayara Bano (supra),*** in support thereof. He submitted that the Apex Court in ***Vikram Singh (supra),*** while upholding the constitutional validity of Section 364-A IPC, read down the scope of the applicability of death

12 (1980) 2 SCC 684
13 (2001) 2 SCC 386
14 (2015) 9 SCC 502
15 554 US 407 (2008)

sentence in this section.

14. He submitted that the Supreme Court of the United States of America in ***Kennedy (supra),*** relying upon the decision in **Ehrlich Anthony Coker vs. State of Georgia[16],** held that the sentence of death is unconstitutional in case of rape of a minor, which was not accompanied by taking of life. According to Dr. Chaudhary, Section 376-E is an outcome of an excessive and disproportionate legislation, making it arbitrary and violative of Article 14 of the Constitution.

15. Our attention is also drawn to the decision of the Supreme Court of United States in ***Coker's case (supra),*** particularly, para 16 onwards to show that the offence of rape is not seen as equivalent to murder. Learned senior counsel relying on ***Earl Enmund vs. Florida[17],*** in particular para 26 of the judgment, submitted that the Court after referring to ***Coker's case (supra),*** observed that proportionality as regards capital punishments not only requires an enquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the

16 433 US 584 (1977)
17 458 US 782 (1982)

magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness. Decision of the Supreme Court of United States in ***Kennedy (supra)*** is also relied upon for the same purpose and observations in part II of the judgment are pressed into service. This judgment, in conclusion, records that there are moral grounds to question rule barring capital punishments against an individual that did not result in death and as the offence is against the individual, the moderation or restraint in application of capital punishment was called for.

16. Learned senior counsel drew our attention to the communication by T.R. Macaulay on capital punishment, where, while explaining his reasons for not prescribing death as punishment for rape, Lord Macaulay observed that lesser punishment would be strong inducement to spare lives of victims. According to Dr. Chaudhary, a law which hangs an accused for rape would not deter him, in his design to commit the crime, to also commit the offence of murder, as punishment for murder and rape is the same. Dr. Chaudhary relied upon the 262nd report of the Law Commission which envisages death only for terrorism. He adds

that the celebrated judgment of the Apex Court in ***Bachan Singh (supra)*** upheld death punishment only because it was for an offence where life was taken away.

17. Dr. Chaudhary submits that Section 376-E, by introducing death as a sentence, effectively makes death mandatory. According to him, if an accused is already convicted under Section 376-A, in a repeat offence, there is no option for Courts, but to impose death penalty, as no other "enhanced" punishment is possible. According to Dr. Chaudhary, when Section 376-E of IPC is resorted to, there is no discretion left by the law, with the Court but to impose the highest punishment, which is death. Dr. Chaudhary submits that Section 376-E violates Article 21, inasmuch as, it robs the discretion of sentencing an accused, from a judge, which is at the heart of the sentencing jurisprudence in Indian Criminal Law. Learned senior counsel submits that with respect to Sections 376-A and 376-E, the purpose of enhanced punishment cannot be met as both the Sections carry the same punishment, thereby rendering Section 376-E otiose. According to the learned senior counsel, with respect to Section 376 and Section 376-D, the observations in ***Mohammadi vs. State***[18]**,** would imply that if

18 1957 Cri. LJ 275

upon the first conviction under Section 376-A or 376-D, a sentence of life imprisonment is awarded, a charge under Section 376-E would necessarily demand enhanced punishment i.e. death. He submits that the only way Section 376-E is not rendered otiose, is, if on subsequent conviction, the punishment awarded under Section 376-E is greater than the first punishment of life imprisonment, which can only be a sentence of death. He submitted that in view of ***Saibanna vs. State of Karnataka***[19], there cannot be two consecutive life sentences, and hence there will be no discretion vested in the trial Court to award any other sentence, other than death. Reliance was also placed on ***Mithu (supra),*** wherein, the Apex Court struck down Section 303 of IPC, as it provided mandatory death sentence, for an offence committed under Section 302, whilst undergoing a sentence of imprisonment for life; as well as on the decision of the Apex Court in ***State of Punjab vs Dalbir Singh***[20]***,*** wherein Section 27(3) of the Arms Act, 1959 was struck down, as it provided mandatory death sentence, for the said offence.

19 (2005) 4 SCC 165

20 (2012) 3 SCC 346

18. Learned senior counsel also relied upon ***Saibanna (supra)*** to urge that in the said case, the Apex Court found that there can be no imposition of second life term, as it would be a meaningless exercise. He has, however, also invited our attention to the observations of the Apex Court in the case of ***Santoshkumar Satishbhushan Bariyar vs. State of Maharashtra***[21] to show that these observations were found to be inconsistent with the earlier view of the Apex Court in ***Mithu (supra) and Bachan Singh (supra).*** He explains that in ***Saibanna (supra),*** the Apex Court relied upon ***Bachan Singh (supra)*** to note that death sentence is constitutional, only when it is prescribed as an alternative sentence. According to Dr. Chaudhary, Section 376-E makes death sentence mandatory.

19. Lastly, Dr. Chaudhary submits that in view of the errors and lacunae pointed out by him, the burden to show constitutionality of Section 376-E which deprives the citizen of his life, lies on the Government. He relied on the decision of the Apex Court in ***Deena vs. Union of India***[22]**,** in particularly paras 11, 15, 17 and 21, in support thereof. He submits that as

21 (2009) 6 SCC 498

22 (1983) 4 SCC 645

the State is relying upon the procedure for depriving the petitioners of their lives, the burden is upon the State to show that there exists a procedure in the Cr.P.C and that the said procedure is just, reasonable and fair and not unconstitutional.

Submissions of Mr. Anil Singh, the learned Additional Solicitor General :

20. Learned Additional Solicitor General (`ASG') submitted that every woman has a fundamental right to live her life with dignity and honour, without any violation and that the State is under an obligation to safeguard it. He invited our attention to the reply affidavit filed by the Union of India, to show that the ratio of crime against women is on the rise and that they face risks not only in the society but also from relatives. He submits that certain offences are seen as causing stigma on the women and hence, several women do not come forward to complain against the perpetrator. Learned ASG relied on the decision of Apex Court in ***Jugendra Singh vs. State of U.P.***[23], to show how in Indian society, rape is seen as a more serious offence than murder. According to the learned ASG,

23 (2012) 6 SCC 297

this obliges the Government to be more cautious and pragmatic. He further submitted that an unfortunate event led to the appointment of a Committee, headed by a retired Chief Justice of India, Shri Verma, which report was then viewed by the Parliamentary Committee after inviting objections and then the Bill was finalized. He, therefore, states that the insertion of Section 376-E in the IPC, is after due deliberation and with a definite object, which object needs to be honoured by the Courts of law. He submits that in India, offence of murder and of rape, stand on different footings. He submits that Section 53 of IPC needs to be understood in the light of Section 45 which defines what "life" means. He relied upon the Constitution Bench decision of the Apex Court in ***V. Sriharan (supra),*** in support of his submission. He also relied upon the observations made by the Apex Court in paras 51, 52 and 53 of the said judgment for this purpose. He also relied on para 57 therein, which refers to an earlier judgment in the case of ***Ranjit Singh vs. UT of Chandigarh***[24]***,*** to show that two life sentences can run consecutively to ensure that even if any remission is granted for the first life sentence, the second one can commence thereafter. He pointed out that in para 61, the Constitution Bench has held that `imprisonment for life' in terms of

24 (1984) 1 SCC 31

Section 53 read with Section 45 of IPC, means imprisonment for rest of the natural life of the prisoner, subject however, to the right to claim remission under Articles 72 and 161 of the Constitution and also as provided under Section 432 of Cr.P.C. He also relied upon the observations made in para 87 in ***V. Sriharan (supra)***, to show that it cannot be said that by specifying the period upto which sentence of life should remain, the Court is encroaching on the powers of the executive. He pointed out that the Constitution Bench has also observed that the punishment prescribed under Section 376-E is not in conflict with any legal principle. He submits that the constitutional powers, both under Article 72 and Article 161 of the Constitution remain untouched. He also submitted that the bar to grant relief under Sections 432 and 433 of Cr.P.C. is lifted after the specified period of imprisonment is undergone.

21. Dealing with the other grounds, learned ASG submits that Section 418 of Cr.P.C. takes care of the procedure to be followed under Section 376-E as observed by the Constitution Bench in ***V. Sriharan's (supra)***. On the aspect of proportionality, learned ASG relied on ***Vikram Singh (supra),*** in particular para 52, in which the Apex Court has observed

that capital punishment is considered to be different, in kind and degree from the sentence of imprisonment and hence, this cannot be the basis to examine the principle of proportionality. He also relied upon the observations made in para 53 of the said decision, wherein the Apex Court has held that discretion to choose one of the two sentences is to be exercised by the Court judiciously, keeping in mind the principle, that death sentence is awarded only in the 'rarest of rare case'. He submitted that the legal provision permitting death sentence cannot be seen per se, as inhuman or barbaric. Learned ASG also relied on para 96 of the Constitution Bench judgment, in ***V. Sriharan (supra)***, to show the crimes for which, death penalty and life is prescribed. He also pointed out that in the IPC, there are Sections like 120-B, 121, 132, 194 etc., which permit awarding of death sentence as a punishment, even though no death has occurred.

22. Mr. Singh, learned ASG relied upon ***Bachan Singh (supra),*** to show how the Apex Court upheld the constitutionality of death sentence. He submits that Section 302 as also Section 376-E are not required to stand the test of Article 19(1) of the Constitution of India. He relied upon the

observations in para 62 of ***Bachan Singh (supra),*** to show how vicious and pernicious crimes are distinguished from other types of crime. He also pointed out the observations of the Apex Court in para 131 of the said decision to show that efforts made in the Parliament to abolish or restrict the area of death penalty had failed and submits that the reasons recorded by the Apex Court in the said para are valid even today, when the validity of Section 376-E is being considered.

23. On the aspect of arbitrariness, learned ASG submits that Section 376-E is a substantive provision, while Section 211(7) is merely procedural and hence there cannot be any comparison between the two. According to the learned ASG, under the scheme of Section 211(7) Cr.P.C, the words "subsequent offence" refers to an offence which is under a separate trial. He adds, that such a separate trial need not be subsequent to the first trial. He submits that efforts of the petitioners to use Section 376(2)(n) of IPC to throw light on Section 376-E must be discouraged and that if an interpretation as urged by the petitioners is accepted, the very purpose of introducing Section 376-E would stand defeated.

24. Learned ASG submits that Section 376-E does not make death mandatory but it allows the competent Court to choose between life imprisonment which is for rest of one's natural life or with death, and hence all norms evolved by the Apex Court, in this regard, governing the imposition of such punishment will apply. He submits that the decision of the Apex Court in ***Saibanna (supra)*** relied upon by the petitioners has been dealt with and explained in ***Santoshkumar Bariyar (supra).*** He reiterates that death is not the only option available under Section 376-E, and that the decision of the Apex Court in ***Mithu (supra)*** will not be applicable in the facts.

Submissions of Mr. Kumbhakoni, learned Advocate General :

25. Mr. Kumbhakoni, learned Advocate General (AG), while adopting the arguments of Mr. Singh, learned ASG, submitted that the very basis for advancing the challenge on the ground of proportionality resorted to by the petitioners is misconceived. He submitted that there cannot be any comparison between an offence of murder and an offence of rape. According to the learned AG, rape has very serious consequences, inasmuch as, the victim thereafter remains a living corpse. He points out

that under Section 299 of the IPC, intention or knowledge is a must for constituting an offence of culpable homicide, and that the offence of murder is explained by pointing out exceptions first, however, the same perspective cannot be adopted vis-a-vis rape, inasmuch as, the accused cannot point out lack of intention or knowledge, as there are no exceptions. He points out the unfortunate attack on a nurse, and the leading judgment on euthanasia in this regard. He submits that many women resort to suicide or attempt to commit it, as rape takes out the "meaning" of life and that life thereafter, is mechanical and not a delightful life. He invited our attention to the decision of the Supreme Court of United States in ***Coker's case (supra)*** to show how in para 48, the minority verdict has described rape and found it as a more serious offence by observing that it is destructive of a woman's personality. He relied on the decision in ***Bodhisattwa Gautam vs. Subhra Chakraborty***[25], wherein the Apex Court in para 10, has pointed out the effects of rape on the social status of woman, on their personality and why rape is the most hated crime and against Article 21 of Constitution of India. He also relied on the decision in ***Delhi Domestic Working Women's Forum vs. Union of India***[26], in particular, paras 13 and 14 to submit that

25 (1996) 1 SCC 490
26 1995 (1) SCC 14

the Apex Court had taken notice of the increasing violence against women and the serious problem posed by it, in the criminal justice system. He submits that as observed therein, the real life of victims is lost. The observations in para 14 are pressed into service to show how victims of rape receive inappropriate and inhuman treatment. He, therefore, submits that there cannot be any mathematical precision in selection of punishments and the said aspect must be left for the legislature to legislate. According to him, the report of Lord Macaulay in 1860 and the reasons given by him for not selecting death as a punishment for rape are not germane, in view of the later social and legal developments. Mr. Kumbhakoni, learned AG also relied on the decision of the Apex Court in ***Mukesh and Anr. vs. State (NCT of Delhi) and Ors.***[27], in particular, paras 372, 496, 497, 505, 509 and 510. He submits that as per the ratio of crimes appearing in para 372, there is a manifold rise in rape cases as against the offence of murder. He submitted that the Apex Court in para 496 approved the emphasis on making the sentencing process a principled one, rather than a Judge-centric one. According to the learned AG, the tests applied by the Court like "Crime Test", "Criminal Test" and "rarest of the

27 *(2017) 6 SCC 1*

rare case test" are also looked into while awarding sentence of death, in cases of offences against women, children and aged persons, where the accused is shown to have no remorse. Mr. Kumbhakoni submits that in cases of rape, it is not only a question of the rights of a criminal but also the rights of a victim and the society at large which have to be considered. He adds that the offence of rape is grave and a serious one and hence, legislature, in its wisdom, thought it fit to introduce Section 376-E in the IPC and hence the same must not be lightly disturbed by any Court of law.

26. Learned AG also relied upon the observations of the Apex Court in ***Shayara Bano (supra),*** in particular, para 101, to explain, how touchstone of real and manifest arbitrariness is relevant, only when the law is questioned on the ground that it is arbitrary. He also relied upon the observations of the Apex Court in ***Vikram Singh (supra),*** in particular, para 34, to show that where the Parliament had prescribed alternative sentences, it was left for the Courts concerned to award what is considered suitable in the facts and circumstances of a given case, and that the parliamentary wisdom underlying it must be honoured.

27. Mr. Kumbhakoni also relied upon ***Vikram Singh (supra),*** in particular para 52 to submit that provisions of legislation must prevail and Courts cannot interfere with the prescribed punishment, only because the punishment is perceived to be excessive. He further adds that the discussion in para 54 of the said judgment would also apply to the challenge to Section 376-E, that death sentence can be awarded only in the rarest of rare case. He also relied on the Apex Court decision in ***Bhanumati and Ors. vs. State of U.P***[28], in particular, paras 82 and 86 of the said judgment. The decision in ***Sushil Kumar Sharma vs. Union of India***[29] is also relied upon to show that mere possibility of abuse of power conferred by law cannot make Section 376-E unconstitutional. He emphasized the difference between "action" and "section" spelt out in this judgment. He thereafter placed reliance on ***Bachan Singh (supra),*** in particular, para 175, to show how Courts must respect the legislature and the law. He submitted that the Apex Court has observed that, `The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits.'

28 *(2010) 12 SCC 1*

29 (2005) 6 SCC 281

Para 36 in ***Deena (supra)*** is also relied upon to urge that the Courts cannot be made a third chamber of the legislature.

28. While challenging the very foundation to assail Section 376-E of the IPC on the ground of proportionality, Mr. Kumbhakoni, learneed AG, draws support from the decision of the Apex Court in ***State of Rajasthan vs. Kheraj Ram***[30], in particular paras 36, 37 and 38 thereof. He submits that generally the principle of proportionality in prescribing liability according to culpability for each kind of criminal conduct is adhered to in criminal law and there cannot be comparison between the punishments prescribed for two offences, which are of a different nature. The decision of the Apex Court in ***Gopal Singh vs. State of Uttarakhand***[31] is also pressed into service for this purpose. He argues that `just punishment' is the cry of the Society and that proportionality cannot be decided by mathematical precision. He submits that the legislature, in such a situation, confers discretion on the Judge who is guided by certain rational parameters, regard being had to the factual scenario of a particular case, as to whether death penalty is to be awarded or not. Learned AG relies on the decision of

30 (2003) 8 SCC 224
31 *(2013) 7 SCC 545*

the Apex Court in ***Vinay Sharma vs. State of NCT of Delhi***[32], in particular, paras 24 and 25 therein, to substantiate this submission. He adds that Section 376-E has been inserted in the Statute Book after due deliberation and proper application of mind and that the experts as well as the Parliamentary Committee has looked into the same. Learned AG also submits that Section 376-E does not create a fresh or a new offence and that it is a provision which only deals with punishment for repeat offenders. He claims that because of the mandate of Section 211(7) of Cr.P.C., a separate charge is required to be framed in respect of an earlier conviction to rule out any prejudice to the accused.

Submissions of Mr. Aabad Ponda, learned *Amicus Curiae:*

29. Mr. Ponda, learned *amicus curiae* submits that Section 376-E cannot be seen as prescribing an alien punishment and that the ingredients and chronology necessary to attract Section 75 of IPC and Section 376-E are the same. He points out that Section 376-E does not employ the word "enhanced" unlike Section 31 of NDPS Act, where that word has been used. He submits that Section 376-E prescribes only a different punishment

32 (2018) 8 SCC 186

for repeat offence. He further submits that IPC has been extensively amended again, after 2013, i.e. with effect from 14th August 2018, by adding Sections 376-AB as also 376-DB, where punishment of death has been prescribed for the first offence itself. He submits that these amendments show the will of the people and when for first offence such a punishment is not unconstitutional, it cannot be viewed as unconstitutional when it is also made available for a repeat offence. He further submits that Section 376(2)(n) provides for the unfortunate contingency in which there are several rapes, without any conviction in between them.

30. He submitted that in 2014, legislature amended the Code of Criminal Procedure, by adding eight Sections therein and that suitable amendments have been made to Sections 24, 154, 161, 164, 173, 197, 327 and 357-C to bring it in harmony with Section 376-E and that Sections 53A and 146 of Evidence Act have also been amended.

31. He submits that the decision in ***Maru Ram (supra)*** relied upon by the petitioners, in particular, para 19, shows why Section 433-A of Cr.P.C. was introduced i.e. to ensure that commutation of life sentence

shall not reduce the actual duration of imprisonment below 14 years. He submits that the Constitution Bench judgment in ***V. Sriharan (supra)***, in paras 89 and 92 has also referred to Section 376-E. He also relied upon para 62, wherein, it is laid down that there is no question of a life convict getting any remission under Section 432 or 433A, unless the period of life imprisonment is commuted to a punishment for a fixed period of time as the concept of life imprisonment means till the remainder of life. He relies upon the Apex Court judgment in ***Swamy Shraddananda (2) alias Murali Manohar Mishra vs. State of Karnataka***[33] for this purpose.

32. Coming to the contention of the petitioners, that the punishment of death can be imposed when during the crime or offence, a death occurs, Mr. Ponda points out certain Sections in the IPC, like Sections 121, 132, 195A, 194 and 307(2) where though there is no death caused, sentence of death can be awarded. He submits that after the 2018 amendment, the list of such offences in the IPC has gone upto 33.

33 (2008) 13 SCC 767

33. In this backdrop, Mr. Ponda relies upon the Division Bench judgment of this Court in ***Indian Harm Reduction Network vs. Union of India and Ors.***[34], in particular, paras 88 and 89 to submit that the word "shall" therein, has been read as "may" and that the constitutionality of Section 31-A of the NDPS Act, prescribing punishment of death has been upheld. We may note here, that the said provision has thereafter been amended.

34. Mr. Ponda commented upon the judgment cited by the petitioner in the case of ***Kennedy (supra)*** to show how the rape of a 8 year old girl by her step father has been dealt with and the amendment prohibiting death penalty for the said offence. He has also invited our attention to the said Eighth amendment and relevant history including various judgments looked into therein. He submits that the opinion of the Courts in the US shows that the said crime i.e. of rape has been seen as a crime against the individual, whilst in India the offence is viewed not only as a crime against the individual but also as a crime against the society. Learned *amicus curiae* has also attempted to show the factual error in the case of ***Kennedy (supra)*** with reference to the observations that rape was a

34 2011 (4) AIR Bom R 657

capital offence in only six States. We, however, in the present matter, do not find it necessary to delve into that aspect.

35. Mr. Ponda heavily relied on and drew our attention to the Apex Court decision in ***State of Himachal Pradesh vs. Asha Ram***[35] in particular, para 22 to show that the offence of rape is graver in nature and more heinous than murder. The judgment reported in ***Bodhisattwa Gautam (supra),*** in particular para 10 is also relied upon for this purpose.

36. Mr. Ponda submits that law requires first a conviction and then an offence and another conviction for it, to attract Section 376-E. Learned *amicus curiae* relied upon the observations made in ***V. Sriharan's case (supra)*** in para 97 to urge that the extreme punishment of death prescribed for crimes of the brutest nature is upheld and submits that Section 376-E has been included in the Statute Book for that purpose only. The observations in paras 98 and 99 are relied upon to state that the law makers have to prescribe punishments and leave it to the Courts to choose one. He also heavily relies upon paras 101 and 102 to urge that the punishment is prescribed in the IPC, while its procedural part is dealt with in Cr.P.C. and

35 2005 (13) SCC 766

that both these laws are not in conflict with each other. He also points out how in para 101, the majority view in ***V. Sriharan (supra)*** finds that the procedural provisions contained in Cr.P.C. relating to grant of remission, commutation, suspension or constitutional functions under Articles 72 and 162 cannot be held to be or can in any manner overlap the power, already exercised by the Courts of Justice.

37. He also points out that the contention of the petitioners, that Section 376-E makes the sentence of death mandatory, stands refuted as Section 376-E allows life imprisonment which is for remainder of that person's natural life also, as one of the punishments. He adds that a convict has no unfettered right to claim remission and submits that as per the Constitution Bench, no remission can be claimed till the minimum period of imprisonment is over.

38. Mr. Ponda relied upon para 106 of ***V. Sriharan (supra)*** to show that the ratio laid down in ***Swamy Shraddananda (2)(supra)*** imposing a special category of sentence instead of death, thereby, putting that category beyond remission, has been upheld and the earlier view of Apex Court in

the case of ***Sangeet and Anr. vs. State of Haryana***[36], has been specifically overruled. He submitted that the law on the point of life imprisonment as laid down in ***Godse (supra)*** has been reiterated in ***V. Sriharan (supra).*** Our attention has been also invited to the minority view in this respect, in paras 273 and 286 of ***V. Sriharan (supra).***

39. While dealing with the aspect of repeat offender, the meaning given to the words "first offender", "habitual offender" and "repeat offender" in Black's Law Dictionary, 10th Edition is pressed into service to show that if someone who has been convicted of the crime more than once, that person, has been held to be a repeat offender.

40. The decision of the Apex Court in ***Rajendra Wasnik vs. State of Maharashtra***[37]**,** in Review Petition, in particular**,** paras 64 to 66, 68, 70 to 72 are heavily relied upon to show how the prior history of the convict or criminal antecedents are seen/taken into consideration, whilst affording the convict an opportunity to reform. He submitted that the Apex Court, in the said case, commuted the sentence of death awarded to the accused

36 (2013) 2 SCC 452
37 (2012) 4 SCC 37

therein, with a direction that he should not be released from custody for the rest of his natural life. It is submitted that the observations made by the Apex Court in para 17 would apply to Section 376-E IPC and show that the second offence has to be after the first conviction. Reference made by the Apex Court to the decisions of the Supreme Court of Canada in para 77 and of the Supreme Court of Northern Part of Australia in para 78 are also relied upon to buttress his submission, that the second offence must be committed after the first conviction. The principle underlying it being, the accused does not face the jeopardy of an increased penalty unless he has previously been convicted and sentenced.

Counter submissions of the learned ASG and the AG :

41. Learned ASG, Mr. Singh and learned AG, Mr. Kumbhakoni advanced their arguments briefly on the submissions of Mr. Ponda, learned *amicus curiae*. They submit that Section 376-E envisages only two separate convictions. They also add that there is no contradiction in the stand of Union of India and the State Government on the question of admissibility of remission. Learned AG states that the language of Section 376-E is plain and therefore, must be given effect to. He relies upon the Constitution

Bench decision in ***Commissioner of Customs (Import) Mumbai vs. Dilip Kumar and Company and Ors.***[38] for this purpose. He further adds that Section 376-E does not constitute an `offence' as defined in Section 40 IPC or Section 2(n) of Cr.P.C. It is submitted that the moment two conditions are fulfilled i.e. (a) there is a previous conviction for one of the offence mentioned in Section 376-E and (b) the same person is subsequently convicted of any offence mentioned therein, Section 376-E gets attracted and as such, no positive "act" on the part of the accused is necessary.

Counter submissions of Dr. Yug Chaudhary :

42. In reply, Dr. Chaudhary, learned senior counsel submits that there are at least three Constitution Bench decisions which explain the scope of punishment of imprisonment for life. He submits that in Section 376-E, certain words qualifying this punishment have been inserted and they give rise to serious issues of ambiguity and create confusion, as to whether the rights of a convict under Section 432 or 433 Cr.P.C. are curtailed or not. He relies upon the affidavit-in-reply filed by Union of India in Writ Petition No. 527 of 2018, particularly paras 10 and 11 therein

38 (2018) 9 SCC 1

to show that it explains the availability of such a right. He points out that the learned AG and the learned *amicus curiae* are, however, not agreeing with learned ASG in this respect. He submits that this confusion, is itself sufficient to strike down Section 376-E. He draws support from the judgments relied upon by the learned *amicus curiae* for this purpose.

43. He argues that though the convict has no right to claim remission, he certainly has the right to apply for it and to have his application considered and that the said right cannot be killed sub-silentio. He again invites our attention to Section 31 of NDPS Act to show how it expressly takes away such a right. He adds that if such a right to apply is being taken away in this manner, the procedure mandated by Article 21 is not satisfied. He states that every law or change therein must be known to all concerned in advance and that the Courts settling such confusion inherent in the law, after the incident or offence, may tantamount to rewriting legislation.

44. To answer the question, whether Section 376-E of IPC points out a change in the perspective of “why death” to “why not death”, he relies

upon Section 367(5) of Cr.P.C. prevalent in 1898 and the then statutory requirement of a Court giving reasons for not inflicting death punishment. He pointed out the position before the amendment of Section 367(5) Cr.P.C. by the Criminal Procedure Code (Amendment) Act, 1955 (Act 26 of 1955) which came into force on January 1, 1956 and submits that the Court, has now to record very strong reasons for awarding death sentence. He claims that Section 376-E of IPC indirectly restores the earlier position and cannot stand even on this ground. To substantiate this submission, he draws support from para 147 and other paras in ***Bachan Singh (supra).***

45. He submits that the offence falling under Section 376-E cannot be equated with either waging of war or mutiny. He pointed out that the Apex Court in ***Vikram Singh (supra)*** upheld the constitutional validity of Section 364(A) of IPC and that the same has been approved by the Constitution Bench in ***V. Sriharan (supra)***. He submits that death penalty is to be imposed only when during the commission of a crime, death takes place and not otherwise. Para 54 of ***Vikram Singh (supra)*** is relied upon by him for this purpose.

46. Coming to the observations of the Apex Court in ***V. Sriharan (supra)***, he argues that these observations do not lay down any law relevant for the present controversy. He reiterates how provisions of Section 219 and 220 of Cr.P.C. can be misused in a case, resulting in prosecutorial discrimination.

47. While dealing with the decision of the Apex Court in ***Rajendra Wasnik (supra),*** he submits that the said case was concerned with offences prior to the addition of Section 376-E to the Statute Book, and that in review, Section 376-E has only been noted. He contends that thus the observations therein, do not lay down the law on Section 376-E. He points out that the said decision is more on the approach of a welfare state towards the victim.

REASONING

48. We have heard the learned senior counsel for the parties and the learned *amicus curiae* at length and have gone through the judgments cited by each of them. Although several judgments were cited before us, we will deal with only those judgments, as are relevant for deciding these petitions.

Before we proceed to deal with the submissions advanced by the parties, it would be necessary to consider the parameters laid down by the Apex Court, which Courts must bear in mind, while examining the validity of any Statute. In ***State of Bihar and Ors. vs. Bihar Distillery Limited***[39], the Apex Court in para 17, has laid down certain principles, to be borne in mind while judging the constitutionality of an enactment. The Apex Court held, that the approach of the Courts, while examining the challenge to the constitutionality of an enactment, (a) is to start with the presumption of constitutionality; (b) to sustain the validity of the impugned law to the extent possible and should strike down the enactment only when it is impossible to sustain it; (c) not to approach the enactment with a view to pick holes or to search for defects of drafting or for the language employed, much less inexactitude of language employed; (d) consider that the Act made by the legislature represents the will of the people and that cannot be lightly interfered with; (e) strike down the Act, only when the unconstitutionality is plainly and clearly established; and, (f) Courts must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it.

39 (1997) 2 SCC 453

49. Infact, in the said case i.e. ***Bihar Distillery Limited (supra)***, the Apex Court also considered the perceptive observations of Lord Denning in ***Seaford Court Estates Ltd. vs. Asher***[40] highlighting the job of a judge in construing a Statute. Lord Denning observed that a judge must proceed on the constructive task of finding the intention of Parliament and he must do this not only from the language of the Statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then if necessary, he must supplement the written word so as to give 'force and life' to the intention of the legislature. According to Lord Denning, the principles laid down in ***Heydon's case***[41] were one of the safest guides. The Apex Court accepted these principles. The Apex Court in ***Dharam Dutt and Ors. vs. Union of India and Ors.***[42] held that if the legislature is competent to pass a particular law, the motive which impelled it to act is really irrelevant. If the legislature has competence, the question of motive does not arise at all and any inquiry into the motive which persuaded the Parliament into passing the Act would be of no use at all.

40 (1949) 2 KB 481
41 76 ER 637
42 (2004) 1 SCC 712

50. The Apex Court (Constitution Bench) in ***State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and Ors.***[43] in para 39 of the said judgment has reproduced the ratio summed up in ***Pathumma and Ors vs. State of Kerala***[44] ***(seven judge bench decision),*** wherein it is held that the legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution, and that the Courts will interfere in the legislative process only when the Statute is clearly violative of the rights conferred on a citizen under Part III of the Constitution; or when the Act is beyond the legislative competence of the legislature. It is further observed that Courts have recognized that there is always a presumption in favour of the constitutionality of the Statutes and the onus to prove its invalidity lies on the party which assails it. The same was again reiterated by the Apex Court in ***Bhanumati (supra)***.

51. In his treatise, *'Principles of Statutory Interpretation'* Justice G.P. Singh has lucidly pointed out the importance of construction of Statutes in a modern State as under:

43 (2005) 8 SCC 534
44 1978 AIR 771

> *"Legislation in modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite "referents" are bound to be, in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction."*

52. In ***Commissioner of Customs (Import) (supra),*** the Apex Court observed that an Act of Parliament/Legislature cannot foresee all types of situations and all types of consequences and that it was for the Court to see whether a particular case falls within the broad principles of law enacted by the legislature and it is in such circumstances, that the principles of interpretation of Statutes come in handy. It is further observed that inspite of the fact that experts in the field assist in drafting the Acts and Rules, there are many occasions where the language used and the phrases employed in the Statute are not perfect and therefore, Judges and Courts need to interpret the words and that the purpose of interpretation is essentially to know the intention of the legislature. It was further observed that it was well accepted that the Statute must be construed according to

the intention of the legislature and the courts should act upon the true intention of the legislature while applying and interpreting law and that if a statutory provision is open to more than one meaning, the Court has to choose the interpretation which represents the intention of the legislature.

53. Keeping the aforesaid parameters in mind and before we proceed to examine the challenges raised to Section 376-E, it would also be apposite to consider the history and the background, which necessitated the insertion of Section 376-E in the IPC. Infact, any attempt to properly understand the true scope and purport of Section 376-E must, in our opinion, start with the background in which the provision came on the Statute Book.

OBJECT OF THE CRIMINAL LAW (AMENDMENT) ACT OF 2013 AND INSERTION OF SECTION 376-E:

54. As reflected in the Report of the Department–related Parliamentary Standing Committee on Home Affairs, the Ministry of Home Affairs in its background note which was furnished, has stated that in the year 1997, Sakshi (NGO), a non-governmental organization engaged

in empowering women, had filed a Writ Petition in the Supreme Court of India seeking, *inter alia,* directions concerning definition of the expression 'sexual intercourse' as contained in Section 375 of the Indian Penal Code, 1860. The Supreme Court directed the Law Commission of India to file its response with respect to the issue raised in the Writ Petition. The Commission filed an affidavit in July 1998. The Supreme Court, however, directed Sakshi to draw a note containing the precise issues involved in the petition and directed the Law Commission of India to examine the said issues afresh. The Law Commission, in its 172nd Report, made recommendation for widening the scope of rape and to make it gender neutral.

The Ministry of Home Affairs in the background note has further stated that since the Criminal Law and the Criminal Procedure were in the Concurrent List of the Seventh Schedule to the Constitution of India, the Report of the Law Commission was referred to the State Governments for their views/comments. The State Governments were consulted on the recommendations made by the Law Commission. Most of the State Governments supported the views of the Law Commission. Thereafter, on

the basis of the Law Commission's Report, the Legislative Department drafted a Bill. Meanwhile, the National Commission for Women ('NCW') forwarded a separate Bill on the same subject. Accordingly, the recommendations of the Law Commission of India, the draft Bill prepared by the Legislative Department and the Bill forwarded by NCW were discussed by the then Home Minister with the then Law Minister where the then Chairperson, NCW was also present. It was stated that during the discussion, the view that emerged was that various sexual offences specifically relating to males and females should be differentiated and the crime should remain gender specific, and therefore, the recommendations of the Law Commission would need a re-look taking into account the suggestions made by the NCW.

The Ministry further stated in the background note that the Legislative Department, accordingly, having regard to the sensitivity of the subject, was requested to revise the draft Bill taking into consideration the above suggestions. It was also requested that the revised Bill should address the existing inadequacies in the laws relating to sexual offences and also provide for measures to deal with the sexual abuse of children through

stringent provisions. Accordingly, the Legislative Department prepared a revised Bill. The NCW recommended some changes relating to 'rape' in its Annual Report 2004-05. Since the Criminal Law and the Criminal Procedure were in the Concurrent List of the Seventh Schedule to the Constitution of India and the laws are also being administered/implemented by the State Governments/Union Territory Administrations, their views were sought on the recommendations made by the NCW in its aforesaid Report. In order to get a quicker response, a Conference of the Home Secretaries of the State Governments and Union Territory Administrations was convened on 7th July, 2008 in Delhi to discuss the matter relating to rape/sexual assault. There was no agreement as to the amendments that should be carried out in IPC, Cr.P.C. and the Indian Evidence Act.

In the background note on the Bill, the Ministry of Home Affairs has stated that as the subject matter relating to rape is sensitive in nature, it was decided that the Bill on rape laws may be finalized after an in depth consultation with all concerned. Therefore, a High Powered Committee ('HPC') was constituted on 29th January, 2010 under the Chairmanship of the former Union Home Secretary comprising Secretary,

Ministry of Women and Child Development; Secretary, Department of Legal Affairs; Secretary, Legislative Department; Member Secretary, NCW; Member Secretary, Law Commission of India; Special Secretary, Ministry of Home Affairs ('MHA') and Consultant (Judl.), MHA as members, to examine the issue relating to the review of rape laws. The HPC discussed the matter in its meetings held on 12th February, 2010 and 15th March, 2010. The suggestions made by the HPC were formulated into a draft Criminal Law (Amendment) Bill, 2010 which was referred to the State Governments for their comments/views. The draft Bill was also posted on the website of the MHA for comments of the general public. The HPC after going into the comments received from the various individuals and NGOs, the State Governments and also after further consultation amongst its members on 10th August, 2010, 4th October, 2010 and 8th February, 2011 finalized its report along with the draft Criminal Law (Amendment) Bill, 2011 and recommended it to the Government for its enactment.

The Committee was further apprised that the provisions of the draft Criminal Law (Amendment) Bill, 2011 as formulated by the HPC, were further examined in the MHA in consultation with Legislative

Department, Ministry of Law and Justice. After necessary modifications, the Legislative Department provided a revised draft Criminal Law (Amendment) Bill, 2012. After consultation with other stake holders like Ministry of Law and Justice and Ministry of Women and Child Development, a Cabinet Note on "Review of legal provisions pertaining to sexual assault - Proposal to amend the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872" was finalized and sent to the Cabinet for consideration on 2nd July, 2012. The Cabinet considered the note on 19th July, 2012 and approved the proposal of introduction of the Bill i.e. the Criminal Law (Amendment) Bill, 2012 in the Parliament. Although, the Bill was introduced in the Lok Sabha on 4th December, 2012, it appears that in pursuance to the rules relating to the Department–related Parliamentary Standing Committees, the Chairman, Rajya Sabha, in consultation with the Speaker, Lok Sabha referred the Criminal Law (Amendment) Bill, 2012, as introduced on 4th December, 2012 in the Lok Sabha and pending therein, to the Committee on 28th December, 2012 for examination and report within three months.

After the gruesome incident that took place in Delhi on 16th December 2012 i.e. the Nirbhaya case, there was public outrage and outcry, which led to the formation of a Committee headed by Justice J. S. Verma. The Committee so constituted was set-up with the object of making recommendations for amending the laws, to deal with crimes against women, for enhancing punishment for offenders in cases of sexual assault of extreme nature and for providing speedy justice. Justice Verma Committee submitted its Report to the Government (recommendations) on 23rd January 2013, after hearing the stakeholders on the said subject. The Department - Related Parliamentary Standing Committee on Home Affairs, after considering the report submitted by Justice Verma Committee, report of the MHA, 172nd Report on Review of Rape Laws of Law Commission of India, The Criminal Law (Amendment) Bill, 2012, The Criminal Law (Amendment) Ordinance, 2013, Comments of the MHA on the memoranda received from individuals/public, women's organizations, NGOs, suggestions of State/UT Governments and Members of Parliament and the Committee and so on, prepared a Report dated 26th February 2013. The Committee vide the said report, felt it necessary to bring the revised laws into effect as expeditiously as possible.

The Committee, in its meeting held on 21st February, 2013, held a clause-by-clause consideration of the Bill. The Committee decided to consider the Bill clause-by-clause in the light of the provisions of the Ordinance promulgated by the Government. While discussing Section 376-A, some Members felt that the Government will have to take a decision regarding death penalty. It was stated that several countries had abolished death penalty whereas India was continuing with it. However, majority of the Members felt that the issue of abolishing death penalty was completely a different matter and needed to be discussed and decided separately, and that since, death penalty existed as on date, in the law, the Committee decided that it cannot recommend abolishing of death penalty. The Committee also took note of the fact, that death penalty is proposed in Section 376-A only in an extreme case, where the victim had died or gone in a vegetative state and in Section 376-E in the case of a repeat offender. Accordingly, majority of the Members agreed to the view of accepting death sentence.

The Committee tabled its report in the Parliament. Keeping in view the recommendations of the Department-related Parliamentary

Standing Committee on Home Affairs, the recommendations of Justice Verma Committee and the views and comments received from various quarters including women groups, the Government drafted the Criminal Law (Amendment) Bill, 2013. The Bill of 2013 sought to amend the IPC, Cr.P.C, the Indian Evidence Act and Protection of Children from Sexual Offences ('POCSO') Act. **The statement of Objects and Reasons, of the Criminal Law (Amendment) Act, 2013 reads as under :**

"The Criminal Law (Amendment) Bill, 2012 was introduced in the Lok Sabha on 4th December, 2012 in order to provide for stringent punishment for crimes against women, as also to provide for more victim friendly procedures in the trials of such cases. After the horrendous incident of gang rape, which occurred on 16th December, 2012 in Delhi, a Committee, headed by Justice J. S. Verma was set up to make recommendations on amending the various laws to provide for speedy justice and enhanced punishment for offenders in cases of sexual assault of extreme nature. The Justice Verma Committee submitted its Report on 23rd January, 2013.

2. It was felt necessary to bring the revised laws into effect as soon as possible, as any crime against women committed during the period when the law is in making will be punishable only under the existing laws. In view of the urgency of the matter, the Criminal Law (Amendment) Ordinance, 2013 was promulgated on 3rd February, 2013.

3. The Department-related Parliamentary Standing Committee on Home Affairs examined the Criminal Law (Amendment) Bill, 2012 and tabled its Report in Parliament on 1st March, 2013. Keeping in view the recommendations of the Department-related Parliamentary Standing Committee on Home Affairs, the recommendations of Justice Verma Committee and the views and comments received from various quarters including women groups, the Government drafted the Criminal Law (Amendment) Bill, 2013.

4. The Criminal Law (Amendment) Bill, 2013 seeks to amend the Indian Penal Code, 1860, the Criminal Procedure Code, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences

Act, 2012. These amendments seek to:-

(a) make specific provisions for punishment for the offences of causing grievous hurt by acid attack and also for an attempt thereof;

(b) define and prescribe punishment for the offences of stalking, voyeurism and sexual harassment;

(c) widen the definition of rape; broaden the ambit of aggravated rape; and enhance the punishment thereof;

(d) prescribe for punishment extending to the sentence of death, for an offence where in the course of commission of an offence of rape, the offender inflicts any injury which causes the death of the victim or causes the victim to be in a persistent vegetative state;

(e) punish the repeat offenders of rape with imprisonment for life, which shall mean the remainder of the person's natural life, or with death;

(f) prescribe punishment for the offence of gang rape with rigorous imprisonment for a minimum of twenty years extendable to life (which shall mean the remainder of that person's natural life) and fine; to be paid to the victim to meet the medical expenses;

(g) enhance punishment under Sections 354 and 509 of the IPC;

(h) make corresponding amendments to certain provisions in the Cr.P.C,

with the object of providing women friendly procedures; greater sensitivity to the requirement of physically and mentally disabled persons, under-aged children and old persons in the course of investigation and trial; for speedy trial of rape cases, and better recording of evidence;

(i) provide that all hospitals shall immediately provide first aid and/or medical treatment, free of cost, to the victims of acid attack or rape; and provide for punishment for contravention thereof;

(j) provide for compensation payable by the State, in addition to the payment of fine to the victim;

(k) to make corresponding amendments in the Indian Evidence Act in order to protect the dignity of women; and

(l) amend POCSO so as to harmonise the said Act with the provisions of the Bill."

(emphasis supplied)

A perusal of the statement of Objects and Reasons of the Criminal Law (Amendment) Act, 2013, clearly shows the object behind introducing new offences, gradation of punishment, introduction of harsher punishment etc. Apart from the Criminal Law (Amendment) Act of 2013, a special Act was enacted to protect the children from sexual abuse. Under

the POCSO Act, the term `child' is gender neutral and the punishment is stringent. There are several presumptions under the said Act, which cast an obligation on the accused to prove his case and there are provisions as to how the case is to be investigated as well as conducted, keeping in mind the sensitive nature of the cases.

55. The rival contentions of the parties detailed supra need appreciation in this background. Having heard the learned senior counsel and the learned *amicus curiae* and keeping in mind the broad parameters laid down by the Apex Court, whilst considering the constitutional validity of a Statute, in this case, the constitutional validity of Section 376-E, and the background and circumstances in which Section 376-E was inserted in the Criminal Law (Amendment) Act, 2013, we are of the considered opinion that Section 376-E is not ultra vires the Constitution and as such is not required to be struck down, for the reasons which will be dealt with, in detail, hereinunder.

56. With regard to the issue, whether Section 376-E creates a new category of punishment i.e. imprisonment for life, which means

imprisonment for the remainder of one's natural life, our answer is in the negative. Dr. Chaudhary vehemently contended that Section 376-E creates a new category of punishment unknown to IPC. He relies on Section 53 of the IPC in support of the said submission. We may note that the said issue has been settled by a catena of judgments, with which we will deal with, in some detail. But before we deal with the said judgments, it would be apposite to reproduce Section 53 and Section 45 of IPC to understand the real purport of the said submission. Section 53 and Section 45 of IPC, read thus;-

> ***53. Punishments**. —**The punishments to which offenders are liable under the provisions of this Code are**—*
> *First — Death;*
> ***Secondly. — Imprisonment for life**;*
> *[***]*
> *Fourthly.— Imprisonment, which is of two descriptions, namely: —*
> *(1) Rigorous, that is, with hard labour;*
> *(2) Simple;*
>
> *Fifthly. — Forfeiture of property;*
>
> *Sixthly — Fine."*
>
> ***45. "Life". — The word "life" denotes the life of a human being, unless the contrary appears from the contex**t."*

57. As far as judicial pronouncements are concerned, which have a bearing on this issue, it would be appropriate to refer to the decision of the Apex Court in ***Godse (supra)***, wherein the Apex Court held that a sentence of imprisonment for life is one of `imprisonment for the whole of the remaining period of the convicted person's natural life'. ***Godse's judgment (supra)*** is an authority on this proposition. The Apex Court in ***Maru Ram (supra),*** in para 25, has observed as under :

> *"25. Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant-release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of the sentence which has been highlighted in Godse's case. Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment a la Section 55 I. P. C. On the basis of a rule which did make that equation, Godse sought his release through a writ petition under Article 52 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. 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 long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898***

> ***(corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Articles 72 or 161 of the Constitution. Godse (supra) is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life"*** *….....*
>
> (emphasis supplied)

58. The same is again reiterated by the Apex Court in ***Laxman Naskar (Life Convict) vs. State of West Bengal***[45]**,** and in ***Jayawant Dattatray Suryarao and Ors. vs. State of Maharashtra.***[46] In ***Swamy Shraddananda (2)(supra),*** the Apex Court referring to the legal position as enunciated in ***Kishori Lal vs. Emperor***[47]**,** ***Godse (supra), Maru Ram (supra), State of Madhya Pradesh vs. Ratan Singh***[48] ***and Shri Bhagwan vs. State of Rajasthan***[49]**,** in paras 91 and 92, recognised the right to impose a punishment beyond mere life imprisonment, by terming it as a `special category case', where death sentence is considered to be too excessive and mere life imprisonment inadequate, by taking into consideration the manner in which remissions were allowed in cases where life imprisonment was awarded and how convicts were being released prematurely, on completion of 14 years, on their sentence being commuted. ***Swamy Shraddananda (2)***

45 (2000) 7 SCC 626
46 (2001) 10 SCC 109
47 AIR (32) 1945 PC 64
48 (1976) 3 SCC 470
49 (2001) 6 SCC 296

(supra) was first such case creating a special category of sentence i.e. imprisonment till remainder of one's life.

In paras 92 to 94 of the said judgment, it is observed as under :

"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.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the

rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh (supra) besides being in accord with the modern trends in penology.

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

(emphasis supplied)

59. It is worthwhile to note, that the said decision was put to test and considered by the Constitution Bench in ***V. Sriharan (supra)***. The Apex Court in ***V. Sriharan (supra)*** held that such an imprisonment i.e. imprisonment for remainder of one's life falls within the purview of Section 53 of the IPC. In para 61 it is noted that imprisonment for life in terms of Section 53 read with Section 45 of the IPC, means imprisonment for the rest of the life of the prisoner subject, however, to the right to claim remission etc., as provided under Article 72 and Article 161 of the Constitution and also as provided under Section 432 of the Cr.P.C. Infact, in para 89 of ***V. Sriharan (supra),*** the Apex Court, after taking into consideration several decisions, including the Constitution Bench decision in ***Vikram Singh (supra),*** concluded that it is nowhere prescribed in the

Penal Code or for that matter, any of the provisions where death penalty or life imprisonment is provided for, any prohibition from imposing imprisonment for a specific period, within the said life span. It is further observed that, `when life imprisonment means the whole life span of the person convicted, can it be said, that the Court which is empowered to impose the said punishment cannot specify the period up to which, the said sentence of life should remain befitting the nature of the crime committed, while at the same time applying the rarest of rare principle, the Courts' conscience does not persuade it to confirm the death penalty.'

60. It is pertinent to note, that the submission canvassed by Dr. Chaudhary in these petitions that a new category of punishment is sought to be created i.e. imprisonment for life, which means imprisonment for remainder of one's natural life, has been repelled by the Apex Court in para 90 of ***V. Sriharan (supra)***. It is categorically held that there is no violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code and that, the Court has not carved out a new punishment. It is further observed that the nature of punishment to be imposed is well within the prescribed limit of punishment of life

imprisonment and that the punishment will be awarded having regard to the nature of offence committed and would be proportional to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court. We may observe here, that the special category created by the Apex Court in ***Swamy Shraddananda (2) (supra)*** has stood the scrutiny and test of the Constitution Bench in ***V. Sriharan (supra)***.

61. The Apex Court in ***V. Sriharan (supra)***, further observed that the prescription of different types of punishments in other countries would not dissuade them from declaring the legal position based on the punishment prescribed in the IPC and the enormity of the crimes being committed in this country. After noting in para 96, the twelve crimes for which the penalty of death and life is prescribed, and after noting in para 96.10, the punishment prescribed under Section 376-E, the Apex Court in paras 97 to 99 in ***V. Sriharan (supra)***, has observed as under :

> *"97. Thus, each one of the offences above noted, for which the penalty of death or life imprisonment or specified minimum period of imprisonment is provided for, are of such magnitude for which the imposition of anyone of the said punishment provided for cannot be held to be excessive or not warranted. In each individual case, the manner of commission or the modus operandi*

adopted or the situations in which the act was committed or the situation in which the victim was situated or the status of the person who suffered the onslaught or the consequences that ensued by virtue of the commission of the offence committed and so on and so forth may vary in very many degrees. It was for this reason, the law makers, while prescribing different punishments for different crimes, thought it fit to prescribe extreme punishments for such crimes of grotesque (monstrous) nature.

98. While that be so it cannot also be lost sight of that it will be next to impossible for even the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary who is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the nature of such grave offences found proved and depending upon the facts noted what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. ***In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the Courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae.***

99. The said process of determination must be held to be available with the Courts by virtue of the extent of punishments

> *provided for such specified nature of crimes and such power is to be derived from those penal provisions themselves. We must also state, by that approach, we do not find any violation of law or conflict with any other provision of Penal Code, but the same would be in compliance of those relevant provisions themselves which provide for imposition of such punishments."*
>
> *(emphasis supplied)*

62. The same principle is reiterated in para 101, where such an interpretation is held to be in harmony with the Cr.P.C. and the IPC. Para 101 reads as under :

> *"101. Such prescription contained in the Code of Criminal Procedure, though procedural, the substantive part rests in the Penal Code for the ultimate Confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Code of Criminal Procedure and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal Code and the Code of Criminal Procedure, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment."*

63. Infact, even the minority view in para 260 of ***V. Sriharan's (supra)*** has noted that life imprisonment means imprisonment for the rest of the life or the remainder of the convicts life.

64. Thus, not only has the Apex Court by its judicial pronouncements, recognised the sentence of imprisonment for life, to mean imprisonment for remainder of one's life, but, now there is a statutory recognition to this punishment under the Criminal Law (Amendment) Act, 2013.

65. We also cannot loose sight of the fact, that Section 376-E is not the only Section which prescribes imprisonment for life, which means imprisonment for the remainder of one's natural life, but there are other Sections i.e. Sections 370(6), 370(7), 376-A, 376-D and recently, in 2018, Sections 376-AB, 376-DA, 376-DB, 376(3) were introduced, which prescribe the same sentence i.e. imprisonment for life, which means imprisonment till the remainder of one's natural life and that there is no challenge to the same.

66. As far as Dr. Chaudhary's submission that there is no mechanism to execute the said sentence, inasmuch as, in Section 418 Cr.P.C, there is no mention of imprisonment till the remainder of one's natural life and that life and liberty can be taken away, only by procedure

established by law, which procedure is amiss, is also devoid of merit. Section 418 of the Cr.P.C which deals with the execution of sentence of imprisonment for life is the answer. As noted above, it is evident from the judicial pronouncements and the relevant provisions in the IPC, that the term imprisonment for life used in Section 418 Cr.P.C, is to be understood to mean imprisonment till the remainder of one's natural life and hence, there is a mechanism in place to execute such a sentence. Thus, there is no violation of Article 21 of the Constitution, as there is a machinery/procedure for implementation and execution of the sentence of imprisonment for life, which means till the remainder of one's life, under Section 376-E.

67. ***In Vikram Singh (supra),*** it is noted that prescribing punishments is the function of the legislature and not the Courts and that the legislature is presumed to be supremely wise and aware of the needs of the people and the measures that are necessary to meet those needs. It is further observed that the Courts must show deference to the legislative will and wisdom and be slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences.

68. Having regard to the discussion as aforesaid, there is no merit in either of Dr. Chaudhary's submission, that Section 376-E creates a new category of punishment i.e. imprisonment for life, which means imprisonment till the remainder of a convict's life, unknown to the IPC and that there is no mechanism provided to execute the said sentence.

69. Coming to Dr. Chaudhary's next submission, that Section 376-E denudes constitutional as well as statutory powers of remission, we find, that there is no merit in the same, inasmuch as, the Constitution Bench in ***V. Sriharan (supra)*** has concluded the said issue. In para 8 of ***V. Sriharan (supra)***, the Apex Court framed seven issues, out of which we are concerned with the first two issues, which read thus;

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

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

70. The first question, finds its answer in ***Godse (supra)*** and ***Maru Ram (supra).*** The Constitution Bench decision in ***Maru Ram***

(supra), while endorsing the earlier ratio laid down in ***Godse (supra),*** held as under;

> "30. A possible confusion creeps into this discussion by equating life imprisonment with 20 years' imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. ***Even if the remissions earned have totaled up to 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoners cannot claim his liberty. The reason is that life sentence is nothing less than lifelong imprisonment. Moreover, the penalty then and now is the same-life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by Section 433-A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14-year jail life once we realise the truism that a life sentence is a sentence for a whole life. (See Sambha Ji Krishan Ji. v. State of Maharashtra (1974) 1 SCC 196 and State of M.P v. Ratan Singh, (1976) 3 SCC 470.)"***
>
> (emphasis supplied)

It is further held in para 72 as under;

> *"72. (4) We follow Godse's case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government."*

71. The Apex Court in ***Ranjit Singh (supra),*** while commuting the sentence of death to life imprisonment, held that "the two life sentences should not run concurrently, to ensure that even if any remission is granted for the first life sentence, the second one can commence thereafter".

72. In ***Subash Chander vs. Krishan Lal***[50]**,** the Apex Court following ***Godse (supra) and State of Madhya Pradesh vs. Ratan Singh,***[51] held that a sentence for life means a sentence for entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence under Section 401 of the Criminal Procedure Code, 1898 [present Section 432 Cr.P.C, 1973].

73. In ***Ratan Singh (supra),*** the Apex Court held that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions.

50 (2001) 4 SCC 458
51 (1976) 3 SCC 470

74. The Constitution Bench in ***V. Sriharan (supra),*** after noting the two Constitution Bench decisions in ***Godse (supra) and Maru Ram (supra)*** which were consistently followed in ***Ratan Singh (supra), Subash Chander (supra) etc,*** held in para 61 that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Criminal Procedure Code.

75. In para 92 of ***V. Sriharan (supra)*** it is further observed that the highest executive power prescribed under the Constitution in Articles 72 and 161 remains untouched for grant of pardon, suspension, remission or commutation of any sentence awarded. The said position is again reiterated in paras 93 and 102, where it is observed that the powers of remission under Articles 72 and 161 of the Constitution are untouched. The said paras reads as under :

> *"93. As far as the reference to prescription of different type of punishments in certain other countries need not*

dissuade us to declare the legal position based on the punishment prescribed in the Penal Code and the enormity of the crimes that are being committed in this country. For the very same reasons, we are not able to subscribe to the submissions of Mr. Dwivedi and Shri Andhyarujina that by awarding such punishment of specified period of life imprisonment, the Court would be entering the domain of the Executive or violative of the principle of separation of powers. By so specifying, it must be held that, the Courts even while ordering the punishment prescribed in the Penal Code only seek to ensure that such imposition of punishment is commensurate to the nature of crime committed and in that process no injustice is caused either to the victim or the accused who having committed the crime is bound to undergo the required punishment. It must be noted that the highest executive power prescribed under the Constitution in Articles 72 and 161 remains untouched for grant of pardon, suspend, remit, reprieve or commute any sentence awarded. As far as the apprehension that by declaring such a sentencing process, in regard to the offences falling Under Section 302 and other offences for which capital punishment or in the alternate life imprisonment is prescribed, such powers would also be available to the trial Court, namely, the Sessions Court is concerned, the said apprehension can be sufficiently safeguarded by making a detailed reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure which we shall make in the subsequent paragraphs of this judgment. As far as the other apprehension that by prohibiting the consideration of any remission the executive power Under Sections 432 and 433 are concerned, it will have to be held that such prohibition will lose its force the moment, the specified period is undergone and the Appropriate Government's power to consider grant of remission will automatically get revived. Here again, it can be stated at the risk of repetition that the higher executive power provided under the Constitution will always remain and can be exercised without any restriction."

> *"102. Once we steer clear of such distinctive features in the two enactments, one substantive and the other procedural, one will have no hurdle or difficulty in working out the different provisions in the two different enactments without doing any violence to one or the other. Having thus noted the above aspects on the punishment prescription in the Penal Code and the procedural prescription in the Code of Criminal Procedure, we can authoritatively state that the power derived by the Courts of law in the various specified provisions providing for imposition of capital punishments in the Penal Code such power can be appropriately exercised by the adjudicating Courts in the matter of ultimate imposition of punishments in such a way to ensure that the other procedural provisions contained in the Code of Criminal Procedure relating to grant of remission, commutation, suspension etc. on the prescribed authority, not speaking of similar powers Under Articles 72 and 162 of the Constitution which are untouchable, cannot be held to be or can in any manner overlap the power already exercised by the Courts of justice."*
>
> (emphasis supplied)

76. The majority view in ***V. Sriharan (supra)***, has, in para 177, summarized that the power of the President and the Governor under Articles 72 and 161 of the Constitution remains untouched in special category cases. It is held that the right to claim remission, commutation, reprieve, etc. as provided under Article 72 or Article 161 of the Constitution will always be available being constitutional remedies untouched by the

Court. This position is again reiterated by the minority view in para 260, which is ad idem with the majority view on the power of the President and the Governor under Article 72 and 161 of the Constitution.

77. From the aforesaid discussion, it is evident that an accused if convicted under Section 376-E, to suffer imprisonment for the remainder of his life, he would be entitled to claim remission, commutation, etc. as provided under Article 72 or Article 161, being the constitutional remedies. Infact, both Mr. Singh, learned ASG and Mr. Kumbhakoni, learned AG, do not dispute the said constitutional right of a convict and therefore, the submissions of the petitioners that Section 376-E denudes constitutional remission, does not hold ground.

78. As far as the submission, that Section 376-E denudes statutory powers of remission, is concerned, the same is also covered by the decisions in ***V. Sriharan (supra) and Swamy Shraddananda (2)(supra)***. By inserting Section 376-E in the IPC, the legislature, has introduced a punishment in the nature of a special category punishment i.e. till the remainder of the natural life of the convict. As noted above, the decision in

Swamy Shraddananda (2)(supra) creating a special category of punishment i.e. till the remainder of the natural life of a convict was recognized for the first time and was thereafter reiterated by the Constitution Bench in ***V. Sriharan (supra).*** As also noted above, a life convict has a constitutional right to apply for remission under Articles 72 and 161 of the Constitution as clarified in the judgments referred to hereinabove, but has no unfettered statutory right to claim remission. The same is reflected in para 67 of ***Swamy Shraddananda (2) (supra),*** which reads as under :

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

79. In para 62 of ***V. Sriharan (supra)***, it is held that there is no scope to count the earned remission, unless the period of life imprisonment is commuted to any specific period, as the concept of life imprisonment means till the entirety of one's life. In other words, in the absence of any stipulation of the life sentence restricting the period to less than the entire life of the said convict, there is no question of the convict getting earned remissions. Therefore, the constitutional challenge to Section 376-E based on statutory power of remission being taken away, does not arise.

80. In ***V. Sriharan (supra)***, both the majority and minority views were unanimous on the powers of the President and the Governor, as regards constitutional power of remission, however, as regards the statutory provisions relating to remission under Section 432 and 433 Cr.P.C, in respect of special category cases, the majority view was to the effect that statutory powers of remission were not available to such categories. It is pertinent to note that in ***Swamy Shraddananda (2) (supra)***, although the special category of sentence was carved out by the judiciary and not by the legislature, even in such cases, the prohibition on the grant of statutory

remission was not considered to be unconstitutional. The Apex Court in ***V. Sriharan (supra)***, has, in para 63 observed that the exclusion of the statutory powers of remission in special category cases, putting the said punishment beyond the application of remission as held in paras 91 and 92 of ***Swamy Shraddananda (2) (supra),*** has come to stay as on date and in para 76 again affirms the said principle of exclusion of statutory powers of remission in cases of special category of sentence. In para 77, it differentiates between the constitutional powers and the statutory powers of remission as noted in ***Maru Ram (supra)*** and in para 78, it reiterates that the executive has to give due weightage to a judicial decision already pronounced. It would be apposite here to reproduce para 78 of ***V. Sriharan's (supra)***. The same reads as under :

> *"78. Though we are not attempting to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It is not to be said that such distinctive role to be played by the Executive of the State would be in the nature of a subordinate role to the judiciary. In this context, it can be said without any scope of controversy that when by way of a judicial decision, after a detailed analysis, having regard to*

the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his life or for a specific period of 20 years, or 30 years or 40 years, such a conclusion should survive without any interruption. Therefore, in order to ensure that such punishment imposed, which is legally provided for in the Indian Penal Code read along with Code of Criminal Procedure to operate without any interruption, the inherent power of the Court concerned should empower the Court in public interest as well as in the interest of the society at large to make it certain that such punishment imposed will operate as imposed by stating that no remission or other such liberal approach should not come into effect to nullify such imposition."

81. In para 102, it is held that there is no right to remit or commute, as the executive authority cannot overlap the power already exercised by the Courts of justice and in para 106, it gives legal sanctity and upholds the power to withhold the statutory powers of remission. It is thus evident, that there is no unfettered statutory right to claim remission. Both, learned ASG and the learned AG do not dispute that the powers under Sections 432 and 433 Cr.P.C are intact, however, the same, according to us, lies in the domain of the Punishing Court, before the remission powers are exercised by the appropriate Government.

82. The next question that arises for consideration is, whether Section 376-E violates the principle of proportionality, by prescribing a sentence of death, though no death is caused? Is it arbitrary ? Is it violative of Articles 14 and 21 of Constitution of India? According to Dr. Chaudhary, a balance must be struck between the harm caused and the punishment awarded and the sentence of death may be awarded only where death is caused i.e. for an offence under Section 302, as murder is far graver than the offence of rape. He further submitted that although there are non-homicidal offences, where death sentence is prescribed, the said offences cannot be treated *at par* with repeat offence of rape (376-E). According to Dr. Chaudhary introduction of death sentence under Section 376-E violates the standard laid down in ***Bachan Singh's case (supra)***, wherein it has been held that it is only in the rarest of rare cases that death can be awarded and only when the alternative option is foreclosed. The said submissions were vehemently refuted by the learned A.S.G., learned AG and the learned a*micus curiae*. They submitted that there are certain offences in the IPC which prescribe death sentence for an act, even if the said act does not result in death. They submitted that the offences of rape and murder are incomparable and that such a comparison is unrealistic in law, as, the

consequences of both are different and that there can be no mathematical exactitude. According to the learned counsel for the respondents, rape is far more graver offence than the offence of murder, inasmuch as, it takes the victim's right of life under Article 21. We have noted the submissions on the point of proportionality and arbitrariness and have considered the Judgments relied upon by the parties on the said aspect. First and foremost, we may note that the punishment prescribed under Section 376-E would have to be evaluated in the Indian context and not in the American context. Reliance placed on the English cases by Dr. Chaudhary cannot be considered in the Indian context, inasmuch as, the U.S. Courts treat crimes of rape as crimes against individuals, unlike Indian law, which treats an offence of rape not only as a crime against the victim but, as a crime against the entire society.

83. There can be no dispute, that punishments must be proportionate to the nature and gravity of the offences, for which, the same were prescribed and that prescribing punishments is the function of the legislature and not of Courts. The legislature, in its wisdom, while enacting Section 376-E was aware of the needs of the people and the measures that

were necessary to be taken to meet those needs i.e. the growing incidents of rape. No doubt, Courts have jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency. However, Courts do not interfere with the prescribed punishment only because a punishment is perceived to be excessive. The legislature is in the best position to understand the needs of the people as enjoined in the Constitution. The Court will interfere in this process only when the Statute/provision is clearly violative of the right conferred on a citizen under Part III or when the Statute/insertion of a provision is beyond the legislative competence of the legislature. In ***Vikram Singh's case (supra)*** in para 40, it is observed as under:

> ***"40. In a Parliamentary democracy like ours, laws are enacted by the Parliament or the State legislature within their respective legislative fields specified under the Constitution. The presumption attached to these laws is that they are meant to cater to the societal demands and meet the challenges of the time, for the legislature is presumed to be supremely wise and aware of such needs and challenges. The means for redressing a mischief are also in the realm of legislation and so long as those means are not violative of the constitutional provisions or the fundamental rights of the citizens, the Courts will show deference towards them. That, however, is not to say that laws that are outrageously barbaric or penalties that are palpably inhuman or shockingly***

> ***disproportionate to the gravity of the offence for which the same are prescribed cannot be interfered with.*** *As observed by Chandrachud, C.J. in Mithu's case (supra) if the Parliament were tomorrow to amend the Indian Penal Code and make theft of cattle by a farmer punishable with cutting of the hands of the thief, the Courts would step in to declare the provision as constitutionally invalid and in breach of the right to life.* ….....
>
> *(emphasis supplied)*

In para 37, it was further observed that a legislation is presumed to be constitutionally valid with the burden of showing the contrary, lying heavily upon any one who challenges its validity.

84. It is pertinent to note, that IPC itself recognizes offences, which fetch a death term, even if no death is caused, and as such, there is no merit in Dr. Chaudhary's submission that under Section 376-E, death sentence is not justified, as no death is caused. In IPC, the offences which prescribe death sentence for an act, which does not result in death are; Section 120B(1) dealing with conspiracy; Section 121 for waging war against the Government of India or attempting to wage a war or abetting the same; Section 132 which deals with a person who abets the committing of mutiny by a soldier, officer, sailor or airman in the Army, Navy or Air

Force, and in the event of such mutiny being committed as a sequel to such abetment; Section 195A which punishes a person, if he threatens any other to give false evidence and as a consequence of such act, any person, though innocent, is convicted and sentenced to death in consequence of such false evidence; Section 307(2) which deals with attempt to murder by a person who is already convicted and sentenced to life imprisonment; Section 376-A which deals with rape of an aggravated nature and even if the woman is not killed but the act of rape causes her to be in a vegetative state. We may note, that the Division Bench of this Court in ***Indian Harm Reduction Network (supra),*** upheld the validity of Section 31A of the NDPS Act and read down the word `shall' to read `may' for awarding death sentence to repeat offenders and included life imprisonment as an alternative punishment. Here again, under Section 31A, legislature had prescribed death sentence, even though no death was caused.

85. In fact, after the insertion of Section 376-E in the IPC in 2013, by virtue of the Amendment Act of 2018, two provisions have been inserted in the IPC i.e. Section 376-AB and Section 376-DA, which also provides for death, as one of the sentence. Section 376-AB provides punishment for

rape on a woman below twelve years and Section 376-DA provides for punishment for Gang rape on a woman under sixteen years.

86. It would be highly unrealistic to compare cases of rape with the offence of murder, as the consequences are incomparable. A victim of rape undergoes a traumatic experience with which she has to live for the rest of her life. The effects of rape are not only physical, but also psychological. Her right to live with human dignity is infringed, which is constitutionally guaranteed to her under Article 21 of the Constitution. Rape is a highly reprehensible crime and demonstrates a total contempt for the personal integrity and autonomy of the victim. It is an `ultimate violation of self right to live with dignity'. The effect of rape can even have disastrous consequences, for example, can leave the person in a vegetative state; can compel her to commit suicide and can have lifelong impact on her mental and emotional psyche. Needless to state, that the stigma that is attached to rape victims is lifelong. In a sense, the offence of rape can be said to be graver than that of murder.

87. In ***Bodhisattwa Gautam (supra),*** the Apex Court observed that 'unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not play things for center spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.' The Apex Court has further observed that 'rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will power

that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished fundamental right, namely, the right to life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.'

88. In ***Delhi Domestic Working Women's Forum (supra),*** the Apex Court observed that rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often at times, such cries eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have to suffer further agony during legal proceedings.

89. The Apex Court in the case of ***The State of Punjab v. Gurmit Singh and Ors.***[52] in para 21 observed that crime against women in general and rape in particular is on the increase; that while we are celebrating women's rights in all spheres, we show little or no concern for her honour; that it is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes; and that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. It was further observed that rape is not merely a physical assault - it is often destructive of the whole personality of the victim; that a murderer destroys the physical body of his victim, whereas, a rapist degrades the very soul of the helpless female and therefore, Courts shoulder a great responsibility while trying an accused on charges of rape; that they must deal with such cases with utmost sensitivity; that they should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case; that if the evidence of the prosecutrix inspires confidence, it must be relied

52 1996 (2) SCC 384

upon without seeking corroboration of her statement in material particulars; that if for some reason, the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice; and that the testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

90. In ***Asha Ram (supra),*** the Supreme Court in para 22 observed that ordinarily, the offence of rape is grave by its nature. More so, when the perpetrator of the crime is the father against his own daughter, it is more graver and the rarest of rare, which warrants a strong deterrent judicial hand. Even in ordinary criminal terminology a rape is a crime more heinous than murder, as it destroys the very soul of hapless woman. This is more so when the perpetrator of the grave crime is the father of the victim girl. Father is a fortress, refuge and the trustee of his daughter. By betraying the trust and taking undue advantage of trust reposed in him by the daughter, serving food at odd hours at 12.30 a.m. he ravished the chastity of his daughter, jeopardized her future prospect of getting married, enjoying

marital and conjugal life, has been totally devastated. Not only that, she carries an indelible social stigma on her head and deathless shame as long as she lives.

91. Rape cases including gang rapes are on a staggering high and statistics bear testimony to that. Judicial notice can also be taken of the rise in such cases. Despite legislation, and stringent punishment, cases of sexual assault are committed by predators with impunity, with no fear of law. Not only young girls or women, but even children, new-borns or toddlers are not spared. Where are we as a society heading? Do children, women, not have the right to live with human dignity guaranteed to them under Article 21 of the Constitution? Do women not have the right to move freely, without fear of invasion of their privacy? Of course, they do and nobody has a right to take away this invaluable freedom, guaranteed to them under Article 21 of the Constitution. An act of sexual assault, invades the privacy of the survivor, leaving an indelible scar on the survivor, which is not only physical, but also emotional and psychological. The survivor undergoes post-traumatic stress disorder, sleep disorder, feeling of guilt, anger, distrust of others, feeling of personal powerlessness (feels that the rapist has robbed

her of control over her body), stigma in the society etc. The survivors many a time experience a long-term impact on their personal lives needing greater psychological assistance. Effects of sexual assault are lifelong, as the act affects the soul of the person, her bodily integrity, and her right over a body. If the girl/woman gets pregnant on account of sexual assault, the trauma is even greater. If a child is born as a result of sexual assault, the question arises, who will look after the child? Thus, considering the impact an offence of sexual assault has on the survivor, by no stretch of imagination, it can be said that rape is less foul than murder. The rising crime rate and falling standards have echoed the need for a deterrent law. The statistics of the National Crime Records Bill of 2017 shows that rapes have gone up since 2016 in Mumbai and Delhi.

92. In ***Vikram Singh (supra),*** the Apex Court while deciding the constitutional validity of Section 364A observed, that the background in which the law was enacted and the concern shown by the Parliament for the safety and security of the citizens and the unity, sovereignty and integrity of the country, the punishment prescribed for the offence under Section 364A, cannot be dubbed as being outrageously disproportionate to the nature of

the offence, for it to be declared unconstitutional. It was further observed that judicial discretion was available to the Courts to choose one of the two sentences prescribed in Section 364A and that Courts along judicially recognized lines, would award death sentence only in the rarest of rare cases; that just because sentence of death is a possible punishment that may be awarded in appropriate cases cannot make it per se inhuman or barbaric; and that in the ordinary course and in cases which qualify to be called rarest of the rare, death may be awarded only where kidnapping or abduction has resulted in the death either of the victim or anyone else in the course of the commission of the offence.

93. Having regard to what is stated aforesaid and the background in which 376-E was enacted shows the concern of the Parliament for the safety and security of its women and children and as such, cannot be dubbed as being either arbitrary or outrageously disproportionate or violative of Articles 14 and 21 of the Constitution. There is always a judicial discretion available to the Courts to choose one of the two sentences prescribed for those falling under Section 376-E i.e.

imprisonment for remainder of one's life or death and the discretion will undoubtedly be exercised by Courts along the judicially recognized lines and death sentence, in the rarest of rare case. Needless to state, that while awarding death sentence, the Courts will have to follow the parameters laid down by the Apex Court in ***Bachan Singh (supra)*** and ***Machhi Singh vs. State of Punjab***[53].

94. Section 376-E would be applicable only to those offenders, who are previously convicted for an offence punishable under Sections 376 or 376-A, or 376-D or 376-AB or 376-DA or 376-DB and are subsequently convicted for an offence punishable under any of the said Sections.

95. Infact, ***V. Sriharan (supra),*** in para 96.10 read with para 97 holds that the penalty provided under Section 376-E, cannot be held to be excessive or unwarranted. In paras 98 and 99 of the said judgment, the Apex Court after noting down the punishments prescribed for various offences in para 96, which includes the punishment prescribed for Section 376-E, has held that there is no violation of law or conflict with

53 (1983) 3 SCC 470

any other provision of the IPC by imposition of such minimum and maximum sentences for crimes of such diabolic nature. It was further observed that the process for determination of an appropriate punishment was left to the adjudication of the institution of the judiciary which is fully equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each case and apply the legal principles and the law on the subject. It was also observed that the ever rising crime rate of sexual offences echoes the need for a deterrent punishment, including for repeat offenders under Section 376-E.

96. Having said so, we hasten to add, that once the Government acknowledges and recognises the need for enacting the legislation, to curb incidents of sexual assault, which are on the rise, its duty does not end by passing the Legislation. Infact, its duty and responsibility continues even thereafter. Undoubtedly, prevention of sexual assault is the primary responsibility of the State, however, the responsibility does not stop here. Once the State accepts and recognises the dreadful impact and effects that sexual assault has on a rape survivor, it is incumbent on the State to have a system/mechanism in place, which will provide not only medical help to

such survivors, but also a place where they can be rehabilitated and assistance of counsellors, psychiatrists, psychologists can be provided for dealing with their trauma. Government/State must be alive and sensitive to such issues and have a mechanism to help such survivors, post sexual assault. Where the survivor gets pregnant and delivers a child, as a result of the sexual assault, the need to provide all assistance is even greater. Survivors cannot be left high and dry to fend for themselves, post incident, when they require utmost help. Incidents of sexual assault, to a great extent are a result of the failure of the State, to protect its citizens. In these circumstances, it becomes the responsibility and bounden duty of the State to extend all possible help, emotional and psychological assistance to such survivors, apart from medical assistance. Financial assistance is provided through schemes such as the Manodhairya, but apart from such financial help, rebuilding the soul of the survivor is crucial and imperative, considering the trauma that the survivor undergoes. The plight of the survivor cannot be overlooked. We find that all parties are ad-idem on the fact, that a rape victim survivor looses her soul, personal integrity and dignity, then, under these circumstances, once having recognised the said fact, the State cannot shirk its responsibility by not providing assistance to

such, survivors. We hope and expect, that the State will come up with a mechanism or policy to help such survivors, post incidents of sexual assaults, in the light of what is observed. State must also come up with a policy/mechanism to take full responsibility of the children born to survivors, as a result of the sexual assault.

97. Another aspect, which we strongly feel, is that there must be a mechanism to keep a track/watch on sex offenders, to prevent repeat crimes. In this context, we may refer to the Parliamentary Committee Report, in particular para 5.42.1, wherein it is observed as under:-

"The Committee has been given to understand that in our country, there is no system of keeping a watch on repeat sex offenders. The Committee has also been given to understand that, according to a study conducted on the sex offenders, majority of the offenders had committed a sex crime earlier and escaped notice of the police authorities and were roaming freely. The Committee has also been given to understand that Western European countries and the US have developed a mechanism for tracking such type of sex offenders and are maintaining a data base in this regard. The Committee recommends that a suitable mechanism may be

evolved to keep a watch on habitual and repeat sex offenders. The Committee also recommends that after the conviction on first offence, the names of the convicted persons should be publicized for information of the public. The Central Crime Records Bureau should include the data in their records. The State and UT Governments also should set up crime records bureaus and the data, including the names of convicted people must be maintained and updated, from time to time".

It is, thus, time for the Government to work on these lines as suggested by the Committee and provide a mechanism to create a database of offenders involved in cases of sexual offences. Infact, by monitoring, a tab can also be kept on such offenders, whether such offenders are on the path of reformation or likely to deviate, so that future crimes by such offenders can be obviated. Infact, sexual offenders, whilst in jail can also be provided with counselling and psychiatric/psychological help, as may be necessary, so that they realise the consequences of playing with human lives, and as such minimize the prospect of repeating the offence.

98. Apart from the aforesaid, the State also needs to take up measures to prevent incidents of sexual assault. Government must take necessary steps for promoting gender sensitization in schools, colleges, at workplace etc. School curriculum should include values which encourage children to respect their fellow human beings, especially women, poor and the needy. A healthy school curriculum can lay the foundation for an all round development of one's personality. Steps should be taken to ensure that respect for women is the norm. In achieving this objective, Government must undertake programmes towards gender sensitization, at all levels.

99. Having said that, we do not find that Section 376-E, by providing stringent punishment to repeat offenders, in anyway violates the principle of proportionality or is arbitrary or in anyway, violative of Articles 14 and 21 of the Constitution. Nor can it be said to be void for vagueness. As noted, there also exists a fair and just procedure in the Cr.P.C to deal with any contingency arising out of Section 376-E.

100. The next question that arises for consideration is, whether Section 376-E prescribes a mandatory death sentence? According to Dr. Chaudhary, law does not allow consecutive life sentence, inasmuch as, if a person is serving life imprisonment and if he is convicted again, he cannot be sentenced to life again. The answer to the said question lies in the Constitution Bench Judgment of the Apex Court in the case of ***Muthuramalingam and Ors vs. State represented by Inspector Of Police***[54] wherein it is held that it is perfectly legal for a person to be sentenced to more than one life term. Take for example, if a person commits two separate murders, and he is sentenced to life imprisonment in the first case, then must he be mandatorily sentenced to death in the second case, even if the said offence does not fall in the category of 'rarest of rare cases' ? Can he not be sentenced to life imprisonment again? Would the life term merge with the earlier life sentence? The answer to the first two questions is 'Yes', in view of the Constitution Bench Judgment in ***Muthuramalingam (supra)***. As far as the third question as to whether the life term merges with the earlier sentence of life and as such would not act as a deterrent is concerned, take for example, where the sentence is of life imprisonment

54 (2016) 8 SCC 313

simplicitor and a second sentence of life, is again awarded. The first sentence of life imprisonment simplicitor will run first and till such person does not complete 14 years, he would not be entitled to remission. The convict in such a case would have a statutory right to apply for being released on remission after 14 years after getting the sentence commuted. Even if a convict gets the benefit of the remission in the first case, the second sentence would act as a deterrent and the early release would only be by resorting to Articles 72 and 161 of the Constitution. The Apex Court has held, that multiple sentences for imprisonment for life can be awarded, however, such sentences would be superimposed over each other, so that any remission or commutation granted by the competent authority in one does not *ipso facto* result in remission of the sentence awarded to the prisoner for the other. Thus, Dr. Chaudhary's contention, that Section 376-E indirectly prescribes a mandatory death sentence, has no bearing and ought to be rejected.

101. Section 376-E contemplates two types of punishments i.e. imprisonment for the remainder of the person's life or with death. Thus, the question of mandatory death term, does not arise. Although

Dr. Chaudhary laid emphasis on Section 75 of the IPC to urge that there would be a mandatory death sentence, it may be noted that the principle of Section 75 of the IPC cannot be blindly adopted to a case under Section 376-E, as they operate in different fields. Section 75 restricts its applicability of Chapter XII and Chapter XVII of the IPC, whereas, Chapter XVI, which precedes Chapter XVII was deliberately omitted from Section 75 of the IPC, Section 376-E creates a new class of punishment for repeat offenders, similar to Section 31A of the NDPS Act. These repeat offenders cannot fall under Section 75 IPC.

102. The Apex Court in ***V. Sriharan's case (supra)*** has, in paras 97 to 99, after noting in para 96, the 12 crimes, for which death and life is prescribed (in para 96.10,- punishment under Section 376-E is noted), has observed that for each one of the offences noted in para 96 the punishment provided for i.e. penalty of death or life imprisonment or specified minimum period of imprisonment, cannot be held to be excessive or unwarranted, having regard to the magnitude of the offence. The Apex Court observed that having regard to the manner of commission of modus operandi, the situation in which the act was committed, the position of the

victim and so on, the law makers, while prescribing different punishments for different crimes, thought it fit to prescribe extreme punishments for such crimes of grotesque (monstrous) nature. It was further observed that it would not be possible for the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment and therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it to the Judiciary, who is appropriately equipped with the necessary knowledge of law and expertise, to study in detail each case based on legally acceptable evidence, apart from the guidance it gets from the jurists and judicial pronouncements, and determine from the nature of offence, what kind of punishment within the prescribed limits, under the relevant provision would appropriately fit in.

103. Dr. Chaudhary urged that Section 376-E makes death mandatory, by making reference to the past history of the provisions prescribing death penalty and submits that the said Section seeks to revive

Section 367(5) of Cr.P.C, then prevalent. The Apex Court in ***Bachan Singh (supra),*** has narrated the history and approves and supports the reasons recorded in ***Jagmohan Singh vs. State of U.P***[55]. The Apex Court in ***Bachan Singh (supra),*** has observed that before the amendment of Section 367(5) Cr.P.C. by the Criminal Procedure Code (Amendment) Act, 1955 (Act 26 of 1955) which came into force on January 1, 1956, on a conviction for an offence punishable with death if the Court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. Section 367(5) of the Code of Criminal Procedure before its amendment by Act 26 of 1955 provided that "if the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment state the reasons why sentence of death was not passed". This sub-section was construed before the Amendment Act, Act 26 of 1955 as meaning that the extreme sentence is the normal sentence and the mitigated sentence is the exception. In ***Dalip Singh and Ors vs. State of Punjab***[56] it was held that in a case of murder, the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be

55 AIR 1973 SC 947
56 (1979) 4 SCC 332

recorded considers it proper to award the lesser penalty. In ***Vadivelu Thevar vs. The State of Madras***[57] the Apex Court expressed its view that the question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of its case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. These two cases were rendered in relation to offences which were committed before the Criminal Procedure Code Amendment Act 26 of 1955 was enacted. The law therefore prior to the amendment was that unless there are extenuating circumstances the punishment for murder should be death and not imprisonment for life.

104. The development of law regarding the imposition of death sentence can be summarised as follows. While before the Amending Act 26 of 1955 was introduced the normal sentence for an offence of murder was death and that the lesser sentence was the exception. After the introduction

57 AIR 1957 S.C. 614

of sub-section (5) to Section 367 by Act 26 of 1955, it was not obligatory for the Court to state the reasons as to why the sentence of death was not passed. By the amendment the discretion of the Court in deciding whether to impose a sentence of death or imprisonment for life became wider. The Court was bound to exercise its judicial discretion in awarding one or the other of the sentences. By the introduction of Section 354(3) the normal sentence is the lesser sentence of imprisonment for life and if the sentence of death is to be awarded, special reasons will have to be recorded. In other words, the Court before imposing a sentence of death should be satisfied that the offence is of such a nature that the extreme penalty is called for. The decisions rendered after the introduction of the amendment to Section 354(3) by Act 2 of 1974 have reiterated this position. In ***Balwant Singh vs. State of Punjab***[58]**,** the Apex Court summing up the position observed that under Section 354(3) of the Cr.P.C, 1973, the Court is required to state the reasons for the sentence awarded and in the case of sentence of death special reasons are required to be stated. “It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances

58 AIR 1976 SC 230

in a given case, will warrant the passing of the death sentence". This view was reiterated in ***Ambaram vs. The State of Madhya Pradesh***[59]. In ***Sarveshwar Prasad Sharma vs. State of Madhya Pradesh,***[60] the Apex Court observed that in several cases, the Court had indicated guidelines in this problem area of life and death, however, the said guidelines were neither cut and dry nor exhaustive and that each case would depend upon the totality of the facts and circumstances and other matters revealed."

105. In paras 165 and 166 of ***Bachan Singh (supra)***, it was further observed as under;

> *"165. The soundness or application of the other propositions in Jagmohan, and the premises on which they rest, are not affected in any way by the legislative changes since effected. On the contrary, these changes reinforce the reasons given in Jagmohan, for holding that the impugned provisions of the Penal Code and the Criminal Procedure Code do not offend Articles 14 and 21 of the Constitution. Now, Parliament has in Section 354 (3) given a broad and clear guide-line which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder — a fact which*

59 AIR 1976 SC 2196
60 (1977) 4 SCC 596

demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom, thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well recognized principles crystallized by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).

166. The new Section 235(2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable and unjust. Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament. The argument to that effect is entirely misconceived. We would, therefore, reaffirm the view taken by this Court in Jagmohan, and hold that the impugned provisions do not violate Articles 14, 19 and 21 of the Constitution." *(emphasis supplied)*

106. The law explained above by the Apex Court holds good even today. With the insertion of Section 376-E, no separate corresponding change was required in the procedural law and that Section 211(7) Cr.P.C contains sufficient guidelines, to take care of such an eventuality. The challenge to Section 376-E IPC on a hypothetical ground that it would lead to a `prosecutorial abuse' (discrimination) is unsustainable and possibility of its abuse , if any, cannot form a ground to challenge the constitutional validity of said Section. The Petitioners would require to challenge the same, in the Appeals preferred by them against their conviction.

107. We may note, that the Constitution Bench of the Apex Court in ***Mithu (supra),*** struck down Section 303 IPC, as unconstitutional, as there was no judicial discretion to award a sentence other than death. Only one sentence, which is of death, was prescribed under Section 303 IPC. In this context, the Apex Court took the view that the mandatory death sentence deprived the Court of its wise and beneficial discretion in the matter of life and death, making it harsh, unjust and unfair. Same is not the case here. In the case in hand, the Parliament has prescribed alternative sentences, leaving it for the Courts concerned to award what is considered suitable in

the facts and circumstances of a given case, having regard to the gravity, severity and barbarity of the offence.

108. Section 376-E does not foreclose an alternative sentence and does not, in anyway, make death mandatory. The sentence prescribed for repeat offence under Section 376-E is either, imprisonment for life which means for the remainder of one's life or with death. Let us consider the punishments stipulated for the offences listed in Section 376-E. The offence under Section 376 is punishable with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and also with fine. The punishment prescribed under Section 376-A, for causing death or persistent vegetative state of the victim is, rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death. The punishment under Section 376-D for gang rape is, rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life, which means, imprisonment for the remainder of that person's natural life, and with fine. The enhanced punishment

prescribed under Section 376-E for repeat offence is imprisonment for remainder of one's life or death, the object being to send a strong signal to the accused persons not to indulge in the offence of rape. Repeat rape is to be viewed more seriously and therefore, a more stringent punishment is prescribed. This logic needs to be seen in Section 376-E. It is obvious, that the Parliament was aware of the needs of the society and the legal fetters, which did not permit it to provide "death", as the only apt punishment for the second proved offence, after the first conviction. In 2018, this intention of the Parliament became more explicit, when it added Sections 376-AB and 376-DB to the IPC and provided stringent punishment for the first offence itself i.e. a minimum of twenty years imprisonment, which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's life and with fine or with death.

109. The Parliament, while making its desire clear also did not encroach on the Court's power and discretion, and left the field of punishment open for the Court, to choose a "just" punishment. It has,

therefore, kept the choice in the area, between life imprisonment for rest of one's natural life or death, open for the Court to select and to formulate the most deserving punishment, in the facts of the case. It has, therefore, not made death mandatory under Section 376-E and has left the scope for its application on various factors, having a bearing on "death penalty". Choice left open by Section 376-E itself attracts the judicial discretion and all principles governing the award of the death penalty as per Section 354(3) Cr.P.C.

110. Neither, the Union of India nor the State accept that death is mandatory under Section 376-E IPC. We have found that Section 376-E IPC neither introduces a discordant note nor introduces any new paradigm in the criminal justice administration. Legislative developments reveal that it only adds to the efforts being made by the nation to infuse deterrence in the wrong elements and to caution them of serious consequences which may ensue if they continue to tread on the same road. Attempt is to strengthen the law. Convicts loose their liberty under Article 21 to a certain extent and one who has committed a heinous offence of rape or has repeated it, cannot be allowed to put his life before the lifelong plight of the

survivor. Needless to state, that in cases where Section 376-E is applied, the accused would be entitled to all the procedural safeguards, which already exist in the Cr.P.C. Thus, there is no vagueness and confusion inasmuch as, there exists a procedure which is just, reasonable and fair to deal with the implementation of Section 376-E.

111. As far as Dr. Chaudhary's submission that there has to be an interval between previous conviction and subsequent offence, the same can be raised before the Court deciding the confirmation appeal. We, in these petitions, do not think it necessary to deal with the same, as the challenge before us is the constitutional validity of Section 376-E, on the grounds which have been discussed in detail hereinabove. Although, we have upheld the constitutional validity of Section 376-E of the IPC, it is always open for the petitioners to challenge its application to the facts of their case, in their Appeals, which are pending before the Division Bench. Similarly, the submission with respect to application of Section 219 of Cr.P.C. is concerned i. e. whether, if two offences of rape occur in a year, they can be tried together and that in such a situation, there would be no previous conviction and as such, the question of applying Section 376-E would not

arise, is again a matter which can be raised before the Court hearing the petitioners' appeals.

Having regard to what is stated hereinabove, with regard to the constitutional validity of Section 376-E, we do not find any merit in the said challenge and accordingly dismiss the Petitions.

The Petitions are accordingly dismissed, with no order as to costs. Rule is discharged.

Before, we part, we would be failing in our duty, if we do not acknowledge the efforts taken by all the learned senior counsel and their teams, including the *amicus curiae* Mr. Ponda and his team, and the valuable assistance rendered by them.

REVATI MOHITE DERE, J. ***B.P. DHARMADHIKARI, J.***