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# IN THE HIGH COURT OF JUDICATURE AT PATNA

**DEATH REFERENCE No.3 of 2016**

Arising Out of PS. Case No.-231 Year-2011 Thana- BUXAR District- Buxar

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The State Of Bihar

... ... Petitioner

Versus

Onkar Nath Singh @ Sheru Singh, son of Krishna Singh, resident of Village Dullahpur, P.S. Simri, District Buxar.

... ... Respondent

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With

**CRIMINAL APPEAL (DB) No. 587 of 2016**

Arising Out of PS. Case No.-231 Year-2011 Thana- BUXAR District- Buxar

==========

Onkar Nath Singh @ Sheru Singh son of Krishna Singh, resident of Village Dullahpur, P.S. Simri, District Buxar.

... ... Appellant

Versus

The State Of Bihar

... ... Respondent

==========

**Appearance :**

(In DEATH REFERENCE No. 3 of 2016)

For the State : Dr. Mayanand Jha, Addl. P.P

For the Respondent : Mr. Vikram Deo Singh

Mr. Alka Verma (Amicus Curiae)

(In CRIMINAL APPEAL (DB) No. 587 of 2016)

For the Appellant : Mr. Vikram Deo Singh,

Mr. Manoj Kumar, Advocates

For the Respondent : Dr. Mayanand Jha, Addl. P.P.

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**CORAM: HONOURABLE THE CHIEF JUSTICE**

**And**

**HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY**

**CAV JUDGMENT**

**(Per: MR. JUSTICE ANIL KUMAR UPADHYAY)**

**Date : 07.02.2020**

Both Death Reference No. 3 of 2016 and Criminal Appeal (DB) No. 587 of 2016 have been heard at length and Judgment was reserved on 16.01.2020. Both Death Reference No. 3 of 2016 and Criminal Appeal (DB) No. 587 of 2016 are

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being decided by this common judgment.

2. At about 10.30 a.m. the fardbeyan of the informant Anand Keshri (PW 1) was recorded with regard to the incident of murder of Rajendra Keshri, proprietor of Bhojpur Chuna Bhandar at 09.05 a.m. In his fardebayn the informant has stated that when he had gone to purchase *Paint* at the shop of his cousin brother Rajendra Keshri, three persons riding on the motorcycle came and stopped their motorcycle in front of shop. Out of three, two got down from the bike and out of two, one was standing facing road and the other armed with pistol came and made indiscriminate firing over Rajendra Keshri. The third person remain seated over the motor-cycle and after firing all three escaped. He claimed that he can identify the culprit. It is stated that the injured was taken to Sadar Hospital where he was declared dead. The police recorded the fardbeyan of the informant at the Hospital in presence of Gopal Keshri. PW 2, full brother of deceased Rajendra Keshri

3. On the basis of the fardbeyan, the police registered Buxar Town P.S. Case No. 231 of 2011 and after investigation, the police submitted charge sheet. Thereafter cognizance was taken and the case was committed to the Court of Session. One of the accused namely, Raushan Pandey Chhotu was declared

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juvenile and his case was sent to the Juvenile Justice Board. When the trial commenced and five witnesses were examined, the appellant escaped from judicial custody and as such, his trial was separated. The trial of other accused persons continued being Sessions Trial No. 244 of 2011 whereas the split-up trial being Trial No. 65 of 2012 was conducted separately.

4. In the present case, the prosecution has examined 13 witnesses and the prosecution has also exhibited several documents enumerated hereinafter:

P.Ws. Examined in the court

| P.Ws. | Name of witness | |
|---|---|---|
| 1. | Anand Kumar Keshri | Informant-Eye witnesses-cousin- not examined |
| 2 | Gopal Keshri | Eye witness- full brother-identified in T.I.P. |
| 3 | Rakesh Kumar Keshri | Hearsay-supported rangdari-son of deceased |
| 4 | Rahul Keshri | Son of the deceased- identified from balcony – in court identified. |
| 5 | Pardeep Kumar Ojha | Advocate- demand of rangdari from him. |
| 6 | Dr. Anil Kumar Singh | One doctor who held P.M. |
| 7 | Dwijendra Kumar | J.M. held T.I.P. |
| 8 | Govind Kumar Keshri @ Govind Keshri | Brother of deceased - identified in T.I.P. |
| 9 | Dr. Bhupendra Nath | One doctor who held P.M. |
| 10 | Dr. Harish Chandra Hari | One doctor who held P.M. |
| 11 | Rajesh Prasad | J.M. - recorded 164 Cr.P.C.-statement |
| 12 | Awadhesh Kumar | Police who went Kolkatta and |

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| | | |
|---|---|---|
| | | arrested accused |
| 13 | Uday Chandra Jha | I.O. |

Eye Witness:-

1) Anand Kumar Keshwri- Informant -E.W. - not identified.

2) Gopal Keshri - T.I.P.

4) Rahul Keshri - From his house identified.

8) Govind Keshri- T.I.P.

Exhibits on behalf of prosecution

1- P.M. report of deceased Rajendra Keshri

2- C.J.M. appointed Sri P.Kumar, JM. For holding T.I.P.

2/1- C.J.M. appointed Sri Rajesh Pd. J.M. for recording statement u/s 164 Cr.P.C.

3- Appointment of Magistrate Sri Manoj Kumar

3/1 to 3/6 – Signature of Jail authority on T.I. chart.

3/7 Sign of Gopal Keshri, Govind Keshri on Inquest Report.

3/8- Statement u/s 164 Cr.P.C. signed by Govind Kumar

3/9- Sign of Dr. Bhupendra Nath on P.M.

3/10 Initial sign of Dr. Harish Ch. Hari on P.M.

3/11 Initial sign of C.J.M. on request letter.

4 to 4/5- 6 T.I. chart

5 to 5/3 Statements of Gopal Keshri, Govind Keshri, Rahul Keshri u/s 164 Cr.P.C.

6 to 6/2 Seizure of List of article from accused.

6/3 Seizure List

6/4 Seizure List

7. Fardbeyan

8- Attestation on fardbeyan

9- Formal F.I.R.

10- Carbon Copy of Inquest Reprot.

11- C.D.R. of Mobile No. 76544801458

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11 to 11/10 “ “ some mobile number

12- C.D. Para 60-82

12/1 C.D. Para 156-164

12/2- C.D. Para 228

12/3- C.D. Para 319-320

12/4 C.D. Para 314 to 317

13- Charge sheet

13 to 13/8 “ “

14 to 14/8 “ “

Material Exhibits

1) I to I/A Two mobile sets recovered from Sheru Singh

2) II- Cash recovered from Sheru Singh

3) III to III/6- S.T. No. 244/11 ka 7 empty cells

5. The original Trial being Session Trial No. 244 of 2011 was concluded and accused namely, Dinbandhu Singh, Chandan Mishra and Surendra Mishra @ Chhotu Mishra have been convicted by judgment dated 29.09.2012 and by order of sentence dated 03.10.2012, all of them were sentenced to rigorous imprisonment for life and a fine of Rs. 10,000/- under Section 302/34 of the IPC and Chandan Mishra has been inflicted rigorous imprisonment for life as well as fine of Rs. 10,000/- each in default thereof to undergo imprisonment for one month additionally relating to the offence under Sections 302/120B of the IPC. Convict Chandan Mishra has been sentenced to undergo rigorous imprisonment for life and well as

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fine of Rs.10,000/- and in default thereof, to undergo imprisonment for one month under Section 302/34 of the IPC, convict Deenbandhu Singh to undergo rigorous imprisonment for three years as well as fine of Rs. 2000/- in default thereof, to undergo imprisonment for 15 days under Section 212 IPC. Chandan Mishra and Surendra Mishra @ Chhotu Mishra each has been sentenced to undergo rigorous imprisonment for ten years as well as fine of Rs.2000/- in default thereof, undergo imprisonment for 15 days additionally under Section 386 IPC rigorous imprisonment for two years under Section 465 IPC, rigorous imprisonment for seven years as well as fine of Rs. 2000/- in default thereof, to undergo imprisonment for 15 days additionally under Section 471 IPC and rigorous imprisonment for two years under Section 468 IPC. Chandan Mishra has further been sentenced to undergo rigorous for seven years as well as fine of Rs.3000/- in default thereof to undergo imprisonment for 15 days under Section 27 of the Arms Act.

6. Many aspects of the present Death Reference and the Criminal Appeal categorize this case as unique one. The occurrence which took place on 21.08.2011 at 09.05 a.m., the first information report was registered on the same day which was received in the court on the very next day. The appellant

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was arrested on 07.09.2011 at Kolkatta and he was brought before Buxar Court on 09.09.2011. The place of occurrence is the Main Road Chuna Bhandar Buxar which is in the vicinity of 2 K.M. of the police station. Buxar Town P.S. Case No. 231 of 2011 was registered on 21.08.2011 for the offence under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act. The police after investigation of the case submitted charge sheet on 26.09.2011. Cognizance was taken by the learned Magistrate on 12.10.2011 and the case was committed to the Court of Session on 20.12.2011. Charge was framed on 16.11.2011. The appellant absconded at the stage of trial and as such, his trial was split up.

7. Trial of accused Raushan Pandey @ Chhotu Pandey was separated as he was found juvenile and he was sent to the Juvenile Justice Board. As stated above, the trial of this appellant was also separated and numbered as Sessions Trial No. 65 of 2012. The trial court convicted the appellant for the offence under Section 302/34 of the Indian Penal Code and Section 27 (3) of the Arms Act. The relevant part of the discussion of the learned Sessions Judge in paragraphs 11 to 15 of the judgment dated 12.05.2016 is quoted hereinbelow:-

*"11. First of all I would like to discuss, one point*

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*raised by Sri Arun Kumar Rai, Ld. Counsel for the accused that some paras of Case diary have been marked Exhibits on behalf of the prosecution. It is to mention here that in this regard that some paras of Case Diary have also been marked on behalf of Defence. No doubt there are some irregularities in the marking of Exhibits on some para of the case Diary but, they do not vitiate the case and violate the mandate of Section 162 Cr.P.C. This is a case of circumstantial and direct evidence at the same time so far is the question is concerned regarding charges framed u/s 386, 465, 468, 471 & 302 read with Section 120(B) I.P.C., there is no evidence to prove the alleged Sections. It is clear from the perusal of all records that the call received by Rakesh Kumar Singh Son of the deceased who went to his sister's house with the gift of 'Teej" on 20.08.2011 was made on his Mobile no. 9334206824 from Mobile No. 7654801458 by Chandan Mishra who has been convicted in Original Sessions Trial No. 244/11 & nothing is on record which can suggest that Onkar Nath Singh @ Sheru Singh made a demand of extortion & the accused Onkar Nath Singh @ Sheru Singh is acquitted from the Charge u/s 386 I.P.C. Charge of Criminal conspiracy of murder of deceased has also been framed against the Onkar Nath Singh @ Sheru Singh with some other accused persons but nothing is on record which can suggest that the accused persons made a criminal conspiracy for the murder of deceased Rajendra Prasad Keshri. The Criminal conspiracy may not developed at the spot like common intention. Therefore, accused Onkar Nath Singh @ Sheru Singh is also acquitted from the Charge u/s 302 read with Section 120(B) I.P.C. It has been alleged on behalf of prosecution that accused persons have committed forgery for getting fake SIMs. But nothing is on record which can suggest that what type of forgery they have committed. Only using the SIM and Mobiles of others name does not prove forgery in itself. Therefore, accused Onkar Nath Singh @ Sheru Singh is also acquitted u/ss. 465, 468 & 471 I.P.C.*

*12. As I understand the "theory of relatively" laid*

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*down by Great Scientist Albert Einstein, the phrase "beyond the shadow of all reasonable doubts" is a relative term and not absolute. Satisfaction of the Court, in a particular case is called that prosecution has proved its case beyond the shadow of all reasonable doubts. In this Case, from the perusal of deposition of P.W.2 Gopal Keshri in para 17 that the person is in blue T. Shirt was firing inside the Shop and he told his name Sheru Singh who has also been identified by in T.I.P. before Ld. Magistrate. From perusal of deposition of para 4 of P.W.4 Rahul Keshri that accused Onkar Nath Singh @ Sheru Sigh has fired upon deceased inside his shop by the Pistol of 9 M.M. to kill him in furtherance of common intention and the accused Chandan Mishra was standing at the Gate of the Shop towards Road & the fact is corroborated from the perusal of para 12 of P.W.8 Govind Kumar Keshri who told weeping that the accused in Dock was firing upon deceased and this is a Court note that the accused Onkar Nath Singh @ Sheru Singh was facing trial at the time and the fact also corroborate from the Order sheet dated 28.08.2013 that the accused Onkar Nath Singh @ Sheru Sing was sole accused facing trial on the date. By the Ext. 11, C.D.R. of Mobile No. 7654801458 and a call from that number on Mobile No. 9324206824 on 20.08.2011 at 07.54 P.M. received by the son of deceased and the call received by P.W.5 Pradeep Kumar Ojha, Ld. Advocate on his Land line at about 04.45 P.M. on 04.09.2011 from the Mobile No. 9163676540, it is crystal clear that accused Onkar Nath Singh @ Sheru Singh has killed the deceased by indiscriminate firing from the Pistol of 9 M.M. prohibited bore which 7 (seven) used cartridges also recovered from the P.O.*

*13. Sri Arun Kumar Rai, Ld. Counsel for the accused has raised the point that P.W.1 Anand Kumar Keshri told in para 3 of his deposition that the accused was firing inside the Shop had pistols in his both hands. P.W. 8 Govind Kumar Keshri deposed in para 3 of his deposition that the persons standing at the Gate of the Shop had two*

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*Pistols in his both hands. It has been established by the T.I.P. identification of accused persons in the Court and the Statement of 164 Cr.P.C. that the persons standing at the Gate of the Shop was Chandan Mishra, the reply of the question of Ld. Counsel for the accused was given by P.W.4 Rahul Keshri, son of the deceased in para 4 that both the accused persons had Pistols in their both hands except driver of the Motorcycle.*

*14. Considering the above discussions, I am of the considered opinion that prosecution has proved beyond the shadow of all reasonable doubts that accused Onkar Nath Sigh @ Sheru Singh has murdered the deceased Rajendra Prasad Keshwri by indiscriminate firing from the Pistol of prohibited bore of 9 M.M. in furtherance of common intention with the other accused persons due to non fulfillment of their demand of extortion made before one day prior to the occurrence. Therefore, Onkar Nath Singh @ Sheru Singh has found guilty u/s 302 read with 34 I.P.C. for the murder of deceased Rajendra Prasad Keshri. Another Section remains to be discussed in which Charge has been framed against the accused Onkar Nath Singh @ Sheru Singh with other accused persons in Section 27 of the Arms Act. While, it has been established that accused Onkar Nath Singh @ Sheru Singh has killed the deceased by indiscriminate firing from the Pistol of prohibited bore of 9 M.M. by which it is crystal clear that the act of the accused falls within the sub Section 3 of Section 27 of Arms Act and accused Onkar Nath Singh @ Sheru Singh is also found guilty u/s 3 of Section 27 Arms Act for using the prohibited weapon and committing the death of the persons consequently. Though, not necessary but medical evidence in this case fully corroborated the prosecution case and the blackening found on the dead body of fire arm injuries confirm the close range firing. Absence of rigor mortis confirms the time of murder Recovery of 7 (seven) used cartridges from inside the Shop of 9 M.M. (prohibited Bore), leaves no doubt that accused Onkar Nath Singh @ Sheru Singh has murdered*

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*the Rajejdra Prasad Keshri in furtherance of common intention due to non fulfillment of demand of extortion.*

*15. In the light of above discussions, Court is of the considered opinion that prosecution has fully proved its case beyond the shadow of all reasonable doubts against the sole accused Onkar Nath Singh @ Sheru Singh u/s 302 read with 34 I.P.C. and Sub Section 3 of Section 27 Arms Act for the murder of Rajendra Prasad Keshri by using prohibited weapon of 9 M.M. bore. Hence, sole accused Onkar Nath Singh @ Sheru Singh is found and held guilty u/s 302/34 I.P.C. & Section 3 of 27 Arms Act. The convict is already in custody be sent to Jail and produce for hearing on the point of sentence on 16.05.2016."*

8. As discussed hereinabove, in split-up Sessions Trial No. 65 of 2012, the learned Sessions Judge, Buxar by judgment dated 12th May, 2016 convicted the sole appellant Onkar Nath Singh @ Sheru Singh for the offence under Section 302 read with Section 34 of the Indian Penal Code and sub-section (3) of Section 27 of the Arms Act for the murder of Rajendra Prasad Keshri. The learned Sessions Judge, after hearing the parties on sentence on 16.05.2016, has inflicted the punishment of life imprisonment against the appellant till his natural life beyond the application of remission by the appropriate government with a fine of Rs. 1,00,000/- for offence under Section 303/34 and hanged by the neck till he is dead for the offence under sub-section (3) of Section 27 of the Arms. The order of sentence dated 16.05.2016 in Sessions Trial

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No. 65 of 212 is quoted below for ready reference:-

*"16.05.2016 16. Heard Ld. Addl. P.P. Sri Anand Mohan Upadhyaya, Ld. Counsel for accused Sri Arun Kumar Rai and the accused Onkar Nath Singh @ Sheru Singh on the point of Sentence.*

*Ld. Addl. P.P. prayed to pass maximum sentence against the convict. He stated that this case is a much publicised case of the Buxar Town & the convict is a History sheeter & it appears from Ext. 14 to 14/8 that in 09 Cases Charge sheets have been submitted against the convict and he possessed huge criminal history and reformative theory is not made for such born criminals and prayed to pass Death Sentence against the convict in both the Sections in which he has been found and held guilty.*

*Accused Onkar Nath Singh @ Sheru Singh and his Ld. Counsel Sri Arun Kumar Rai prayed to have a soft corner against the convict & considering his young age and no previous conviction on record prayed to pass minimum Sentence prescribed by the Sections.*

*Considering the submissions of both the parties, Court is of the opinion that this murder has been committed for non fulfillment of demand of extortion in day light with cold blood and it shocked the society <u>but considering the Principle laid down by Hon'ble Apex Court in Bachan Singh Versus State of Punjab "rarest of the rare cases". This Case may be a rare case but not rarest of the rare.</u> Further huge criminal history of the convict has no much importance at the time of Sentence and the previous conviction, matters at this stage, the prosecution has been unable to bring any previous conviction of the convict on record. As permitted by the Hon'ble Apex Court in Union of India versus Sri Haran @ Murugan Supreme Court W.P.C.R. 48/2014 <u>I imposed Life Imprisonment against the convict till his natural life and make it beyond the application of remission by the appropriate government with a Fine of Rs. 1,00,000/-. Since, he would have no extra breaths</u>*

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*to serve additional Sentence in default of payment of fine so, the fine imposed against the convict shall be recovered u/s 421 Cr.P.C. How far is the question regarding Section 27(3) Arms Act 1959, it has satisfactorily been proved against the convict that he used weapon of prohibited Bore an consequently the person has died. Sub-section 3 of Section 27 Arms Act provided only punishment (Capital Punishment) for the offence and leaves no discretion with the Court. Though, Sub-section 3 of Section 27 Arms Act has been declared ultra vires and void by the Hon'ble Apex Court in State of Punjab versus Dalbir Singh and laid down the ratio which was laid down much earlier in Mithu Singh versus State of Punjab and on the basis of that ratio Section 303 I.P.C. was declared unconstitutional & having spirit in the mind of Section 235(2) Cr.P.C. Hon'ble Apex Court empowered the Court with discretion.*

*These days, prohibited weapons are being used like a toy. Sprite (sic) behind the enactment of Section 27(3) Arms Act is to save the society from lethal weapons. The use of prohibited arms and deadly weapons turned out to be a regular feature and it is a bounden obligation upon the Courts of Law to attribute the intention of legislature behind the enactment in widest possible form.*

*Being a trial Judge I have watched the conduct of the convict during the trial. Keeping in mind the conduct of the convict that he had absconded during the trial shooting the police constable discretion provided to the Court u/s 235(2) Cr.P.C., ratio laid down in Dalbir Singh versus State of Punjab (Supra) and sprite (sic) behind the sub Section 3 of Section 27 of the Arms Act 1959, I am unable to impose the Sentence against the convict Onkar Nath Singh @ Sheru Singh less than Capital. Hence, I imposed Death Penalty against the convict Onkar Nath Singh @ Sheru Singh under Sub Section 3 of Section 27 Arms Act 1959. He be hanged by the neck till he is dead.*

*The fine recovered shall be distributed*

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*among class 1 heirs of the deceased Rajendra Prasad Keshri in equal shares. Secretary, D.L.S.A., Buxar after satisfying himself will pay the fine into class 1 heirs of the deceased. The cash of Rs. 10,000/- recovered from the convict shall be deposited in the Victim Compensation Fund of District Legal Services Authority & the other seized articles as used cartridges, Mobile phones & SIMs shall be destroyed as per Rule after disposal of Criminal Appeal, if any or after the expiry of the period of Criminal Appeal which is later. If he wishes may prefer an appeal within 30 days.*

*Office is directed to prepare Conviction Warrant & sent the convict Onkar Nath Singh @ Sheru Singh to Central Jail, Buxar for serving out Sentence imposed against him. Office is further directed to provide a Certified copy of the judgment & Order of Sentence to the convict at once free of cost. A Copy of this judgment & Order of sentence be sent to the D.M., Buxar for information u/s 365 Cr.P.C.*

*A reference to the Hon'ble High Court Patna be sent for the approval of the Death Sentence imposed against convict Onkar Nath Singh @ Sheru Singh with entire Record of this Sessions Trial and the record of Sessions Trial No. 244/2011 which was pending before Hon'ble Court in Criminal Appeal (DB) Nos.1000/2013 & 1068/2013."*

*(Underlined for emphasis)*

9. Sentencing is a delicate process which require due application of judicious mind. The entire criminal jurisprudence of sentencing is based on balancing of competing interest of individual, society and the State. Justice Bhagwati in his dissenting judgment in **Bachan Singh Vs. State Punjab (1982) 3 SCC 24** has sounded caution on the exercise of

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discretion in the process of sentencing. The dilemma in sentencing process particularly in the process of awarding capital sentence at the level of Sessions Trial is deep-rooted. Guideline and the principle laid down by the Apex Court in its judgment are definite guideline for judicial choice making in the case of death sentence or life imprisonment. Notwithstanding heralding Jurisprudence of "rarest of the rare cases" in **Bachan Singh Vs. State of Punjab** reported in (1980) 2 SCC 684 followed by **Macchi Singh vs. the State of Punjab Singh** (1983) 3 SCC 470 and insertion of the new provision in the Code of Criminal Procedure under Section 354(3) regarding assigning special reasons for opting death sentence as "rarest of the rare cases" the trial courts are still fashioning the concept of awarding death sentence as a rule.

10. In **Jagmohan Singh vs State of UP: (1973) 1 SCC 20,** the Constitution Bench of the Apex Court held as follows: -

> *"20. Absence of any discretion with regard to the sentence raised strong criticism in England because it was recognised, as was done in many other countries, that death penalty was not the only appropriate punishment for murder. A Royal Commission was thereupon appointed in 1949 to consider and report whether liability under the Criminal Law in Great Britain, to suffer capital punishment for murder should be limited or modified and if so to what extent and by what*

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*means. In its report published in 1953 the Commission found it impossible to improve the position either by redefining murder or by dividing murder into degrees. In para 535 of the Report it pointed out that "the general liability under the existing law to suffer capital punishment for murder cannot be satisfactorily limited by such means, (i.e. re- defining murder or dividing murder into degrees) because no legal definition can cover all the multifarious considerations, relating to the offender as well as to his crime, which ought to be taken into account in deciding whether the supreme penalty should be exacted in each individual case." Ile Commission considered various alternatives- one of them being a provision on the lines of section 302-IPC which was pressed with great force, by Sir John Beaumont a former Chief Justice of the Bombay High Court, and later a Privy Councillor. He pressed on the Commission the advisability of leaving it to the Judge whether the death sentence should be imposed or the lesser sentence, adding further that this procedure had worked quite well in India for generations and there was no reluctance on the part of the Judges to assume the responsibility to pass the death sentence. The Judges in England, however unanimously refused to accept such a responsibility. The question then arose whether the responsibility for the death sentence may be given to the Jury as was done in some of the States in America. The Royal Commission fell in with this suggestion and ex pressed itself as follows (See para 595 of the Report).*

> *"It is not questioned that the liability to suffer capital punishment under the existing law is rigorous to excess. We cannot but regard it as a reproach to our criminal law that this excessive rigour should be tolerated merely because it is corrected by executive action. The law itself should mitigate it. We have been forced to the conclusion that this cannot be done by a redefinition of murder or by dividing murder into degrees. No formula is possible that would provide a*

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*reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished. This conclusion is borne out by American experience : there the experiment of degrees of murder, introduced long ago, has had to be supplemented by giving to the courts a discretion that in effect supersedes it. Such a discretion, if it is to be part of the legal process, and not an act of executive clemency, must be given either to the Judge or to the jury. We find that the Judges 'in this country, for reasons we respect, would be most reluctant to assume this duty. There remains the method of entrusting it to the jury. We are satisfied that as long as capital punishment is retained this is the only practicable way of correcting the outstanding defects of the existing law."*

*23. Indeed these are not the only aggravating or mitigating circumstances which should be considered when sentencing an offender. The list is not intended to be exhaustive. In fact the Punjab High Court has held that considerable delay in the disposal of a case may be a factor in awarding lesser punishment. See Municipal Committee v. Baisakhi Ram(1)*

*25. American experience is not different. In some of the States murder and rape were punishable with death. But that was not the only punishment. The, Law gave the Jury discretion in capital sentencing, and the question arose recently before the Supreme Court of America in McGauthn v. California(1) whether in tile absence of any standards for deciding when the accused should be sentenced to death or to life imprisonment the provision of law which gives the discretion to the Jury was constitutional. Mr. Justice Harlan delivered the opinion of five Judges and Mr.Justice Black substantially agreed with that*

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*opinion in a separate judgment. The majority held that "the infinite variety of cases and facets to each case would make general standards either meaning less 'boiler plate' or a statement of the obvious that no Jury would need." The majority agree with the view of the Royal Commission already referred to and observed "those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." The model Judicial ('ode which was presented to the court as an attempt towards standardization was strongly criticised by the majority who pointed out that tile Craftsmen of the Model Judicial Code had expressly agreed with, the conclusion of the Royal Commission that the factors which determined whether the, sentence of death is the appropriate penalty in particular cases are too complex to be expressed within the limits of a simple formula. Some of the circumstances of aggravation and mitigation were mentioned in the Appendix to, the Code. But it was pointed out that the Draftsmen of the Code did not restrict themselves to the items referred to in the Appendix but expressly stated that besides the above circumstances the court was bound to take into consideration "any other facts that the court deems relevant".This only meant that any exhaustive enumeration of aggravating or mitigating circumstances is impossible-the admission of which emphasizes the view that standardisation is impossible. Finally the majority observed at page 726 :*

*"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital, cases is*

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*offensive to anything in the Constitution."*

11. The Apex Court dealing with the dilemma of sentencing of life imprisonment has noted the dilemma of Judges in awarding the death sentence under old Code of Criminal Procedure contained in Section 367(5) which requires special reason to be assigned for awarding the life imprisonment. The Court noted the situation of wide discretion at the hands of the Judges. The Court coined the concept of balancing of aggravating and mitigating circumstance in the matter of awarding death sentence.

12. In **Rajendra Prasad Singh Vs. The State of UP** reported in (1979) 3 SCC 646, the Court laid down several tests how to exercise discretion in the matter of awarding death sentence. The Apex Court after scrutiny of the issue of capital sentence in the contemporarily world and noticing the Penalogical purpose behind the capital punishment approved death sentence as constitutionally valid. However, the Apex Court while reading the scheme of Code of Criminal Procedure 1973 has coined special justifications in the said judgment which are quoted hereinbelow:-

> *"160. The successful campaign to abolish the death penalty in Britain has been achieved in a comparatively short period of time by no more than a handful ardent penal reformers like Sydney*

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*Silverman who carried out the unfinished work of Romilly and other reformers, pertinacious in their lobbying and propaganda, in the face of majority opinion favouring retention of an admittedly barbaric but, to that majority, necessary penal instrument. If the final debates were protracted-Silverman's private members' Bill (with invaluable Legislative time given by the Government) was introduced on December 4, 1964, and reached the Statute Book only on November 2, 1965-the history of the campaign is a remarkable testament to British democracy which can convert convinced minority opinion into progressive legislative action.*

162. D.A. Thomas in his article "Development in Sentencing 1964-1973" observes:

*"As a society, we have made inconsistent demands on our official system of social control expecting greater security from violence, disorder and depreciation and simultaneously requiring that penal sanctions become less rigorous and more adopted to the individual offender."*

*The learned author proceeds to say:*

*"The provisions of the Murder (Abolition of Death Penalty) Act 1965 provides a simple illustration. Taken in isolation, they provide that a person convicted of murder shall be sentenced to life imprisonment, and the judge passing such a sentence may make a recommendation that a specified minimum period should elapse before the offenders may be released on licence. The mandatory life sentence, part of the political price of the abolition of the death penalty, cannot be defended on any rational grounds."*

*And then concludes:*

*"In assessing the future trend of penal policy in this country, it is probably wise to bear in mind that the problems facing the criminal justice system are unlikely to diminish during the next decade of their own accord-things will almost certainly become worse rather than better. There seems to be no reason to suppose that the relatively steady rate of increase in the volume of reported crime over the last ten years will not continue."*

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*164. In de Freitas case the Privy Council confirmed the sentence of death passed by the Court of Appeal of Trinidad and Tobago, and held that there was no violation of the human rights and fundamental freedoms guaranteed under ss. 1 and 2 of the Constitution of Trinidad and Tobago inasmuch as the sentence of death was passed according to the "due process of law". In repelling the alternative argument based upon delay, it observed that " the delay was of the appellant's own making" and he could not put forth this as a ground for commutation of the sentence of death. It stated:*

*"It is not contended that the executive infringed the appellant's constitutional rights by refraining from executing him while there were still pending legal proceedings that he himself had instituted to prevent this execution."*

*There was evidence that prior to independence, the normal period spent in condemned cell by the prisoner before execution was five months and that this practice was sufficient to give rise to an 'unwritten rule of law' in force at the commencement of the Constitution. The contention was that the executive was, therefore, bound to so organise the procedure for carrying out the death sentence that the average lapse of time is not more than five months, and the carrying out of the death sentence beyond the period was incompatible with the right of the individual under section 1 (a) of the Constitution not to be deprived of life "except by due process of law" because it involves the imposition of "cruel and unusual punishment" within the meaning of Section 2,(b). The Judicial Committee rejected the contention saying:*

*"This contention in their Lordships' view needs only to be stated to be rejected. Not only does it involve attributing to the expression "unwritten rule of law" in section 105(1) of the Constitution a meaning which it is incapable of bearing, but it conflicts with the very concept of the nature of*

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*law."*

*170. The five Justices in the majority each wrote a concurring opinion which approached the matter from a different angle so that clear categorisation is impossible. It can thus be seen that the multiple opinions did not rule out altogether re-imposition of the death penalty in the future provided there was legislative structuring of a permissible system providing for sufficient procedural safeguards. This is exactly what has happened in the United States where the death penalty has been re-imposed and the judicial approach stands re-oriented.*

*177. Due to the ambiguity of the Furman decision, it is fortunate that the Supreme Court gave further indication of its intentions regarding the death penalty in subsequent decisions. But Furman was not determinative of the issue on the merits, namely, the constitutionality of the penalty because it violates the Eighth Amendment cruel and unusual punishment. It was widely assumed that the Court had not declared capital punishment unconstitutional per se but only its unpredictable and fortuitous use.*

*202. I am afraid, if the Courts were to be guided by the classification made by the majority the death sentence for an offence of murder punishable under s. 302, for all practical purposes would be virtually non-existent.*

*206. If Parliament thought it right to give to the Judges discretion as to the sentence, I do not think they would or ought to shrink from the onerous responsibility. I feel it would not be appropriate for this Court to curtail the ambit of their discretion by judicial process. We cannot but be oblivious that a sentence of a wrong type, that is, to substitute a sentence of imprisonment for life where the death sentence is called for, causes grave miscarriage of justice. A sentence or pattern of sentences which fails to take due account of the gravity of the offence can seriously undermine respect for law."*

*It is seen that though the Apex Court has formulated a rigid formula for categorizing "rarest of the rare cases" but the Apex Court has noted the requirement of balancing of aggravating and*

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*mitigating circumstances and requirements of assigning the special reason in terms of Section 354(3) of the Cr.P.C.*

13. It is useful to mention here that the Code of Criminal Procedure was amended and the new jurisprudence of sentencing was heralded. The legislative intention in this regard can be gathered from Section 354 (3) Cr.P.C which reads as follows:-

> *"354 ... ... ...*
> *xxx xxx xxx*
> *(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence".*
>
> (underlined for emphasis)

14. The Legislature in its wisdom has decided that the death penalty should be exception and life imprisonment should be rule. The amended provisions of the Code of criminal Procedure obliges the Court to assign special reason for awarding death penalty.

15. The Constitution Bench of the Apex Court in Bachan Singh Vs. State of Punjab: (1980) 2 SCC 684 has settled the proposition that the death sentence has penalogical purpose and it is to be retained and death sentence has been declared as constiutionally valid. However, the Apex Court has coined the

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doctrine of the "rarest of the rare cases" and formulated the following guidelines in Bachan Singh's case. Relevant part of Bachan Singh's case is quoted below;

> *"72. The Law Commission of India, after making an intensive and extensive study of the subject of death penalty in India, published and submitted its 36th Report in 1967 to the Government. After examining, a wealth of evidential material and considering the arguments for and against its retention, that high-powered Body summed up its conclusions at page 354 of its Report, as follows:*
>
> *The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.*
>
> *It is difficult to rule out the validity of the strength behind many of the arguments for abolition nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.*
>
> *Having regard, however, to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present Juncture, India cannot risk the experiment of abolition of capital punishment.*
>
> *99. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as*

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*follows: "In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:*

*(a) Basically, every human being dreads death.*

*(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.*

*(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers - are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.*

*(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.*

*(e) Whether any other punishment can possess all the advantages of Capital punishment is a matter of doubt.*

*(f) Statistics of other countries are in conclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.*

*Views of the British Royal Commission:*

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

*The general conclusion which we reach, after*

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

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

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

*That retribution is still socially acceptable function of punishment, was also the view expressed by Stewart, J., in Fur-man v. Georgia at page 389, as follows:*

> *...I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man. and channelling*

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> *that instinct, in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law.*

*104. Patrick Devlin, the eminent jurist and judge, in his book, "The Judge" emphasises the retributive aspect of the purpose of punishment and criminal justice, thus:*

> *I affirm that justice means retribution and nothing else. Vindictiveness is the emotional out flow of retribution and justice has no concern with that. But it is concerned with the measurement of deserts. The point was put lucidly and simply by the Vicar of Longton in a letter to The Times, from which with his permission I quote; Firstly, far from pretending that retribution should have no place in our penal system, Mr. Levin should recognize that it is logically impossible to remove it. If it were removed, all punishments should be rendered unjust. What could be more immoral than to inflict imprisonment on a criminal for the sake of deterring others, if he does not deserve ft? Or would it be justified to subject him to a compulsory attempt to reform which includes a denial of liberty unless, again he deserves it?*

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*124. A review of the world events of the last seven or eight years, as evident from Encyclopaedia Britannica Year Books and other material referred to by the learned Counsel, would show that most countries in the world are in the grip of an ever-rising tide of violent crime. Murders for monetary gain or from misdirected political motives, robbery, rape, assault are on the increase. India is no exception. The Union of India has produced for our perusal a statement of facts and figures showing the incidence of violent crime, including murder, dacoity and robbery, in the various States of India, during the years 1965 to 1975. Another statement has been furnished showing the number of persons convicted of murder and other capital offences and sentenced to death in some of the States of India during the period 1974 to 1978. This statement however, is incomplete and inadequate. On account of that deficiency and for the general reasons set out above, it cannot, even statistically, show conclusively or with any degree of certainty, that capital punishment has no penological worth. But the first statement does bring out clearly the stark reality that the crimes of murder, dacoity and robbery in India are since 1965 increasing.*

*129. Surveyors and students of world events and current trends believe that the reversal of the attitudes towards criminals and their judicial punishments in general, and capital punishment in particular, in several countries of the world, is partly due to the fact that milder sanctions or corrective processes, or even the alternative of imprisonment, have been found inadequate and wanting to stem the mounting tide of serious crime. Writing in Encyclopaedia Britannica, 1978 Book of the Year under the caption, 'Changing Attitudes Towards Criminals",Richard Whittingham sums up the cause that has led to the adoption of this New Hard Line, thus:*

*Horror story after horror story of dangerous*

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*criminals sent back into society on bail or parole from a penitentiary or (in many cases) release from a mental institution to commit further crimes nave forced people to say that enough is enough. The consensus seemed to be that there must be no repetition of such situations as the one described by Chicago some time Columnist Roger Simon in a Sep. 4, 1977, article about a man who had just been convicted of a particularly despicable crime.*

*129A. Faced with the specter of rising crime, people and sociologists alike, have started questioning the rehabilitation policy.*

*In California another study from the Rand Co-operation, suggests that keeping habitual criminals locked up would do more to reduce crime than any rehabilitation efforts. Despite treatment or preventive measures, habitual criminals commonly go back to crime after they are released from prison, the study showed. In addition, the study found that deterrence to crime was in direct proportion to the relative certainty of going to jail, after being caught.*

*131. India also, as the statistics furnished by the respondent (Union of India) show, is afflicted by a rising rate of violent crime, particularly murder, armed robbery and dacoity etc., and this has been the cause of much public concern. All attempts made by individual members to move Bills in the Parliament for abolition or restriction of the area of death penalty have ended in failure. At least four of such unsuccessful attempts were made after India won Independence, in 1949, 1958, 1961 and 1978. It may be noted that the last of these attempts was only to restrict the death penalty to a few types of murders specified in the Bill. Though it was passed by the Rajya Sabha after being recast, it has not been passed by Lok Sabha.*

*132. To sum up, the question whether or not death*

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*penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light Of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the! framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it*

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*took up revision of the Code of 1898 and replaced it by the CrPC, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19.*

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

*A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.*

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

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

*152. In the context, we may also notice Section 235(2) of the Code of 1973, because it makes not only explicit, what according to the decision in Jagmohan's case was implicit in the scheme of the Code, but also bifurcates the trial by providing for*

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*two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:*

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

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

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

*The aims of sentencing:- Themselves obscure become all the more so in the absence of information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard.*

*We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to co-operate in the process." By enacting Section 235(2) of the new Code, Parliament has accepted that recommendation of the Law Commission. Although Sub-section (2) of Section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. "Of course", as was pointed out by this Court in Santa Singh v. State of Punjab AIR 1976 SC 2386 "care would have to be taken by the Court to see that this hearing on the question of sentence*

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*is not turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.*

*160. In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in Jagmohan's case. These propositions may be summed up as under:*

*(i) The general legislative policy that underlies the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment. With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where me maximum punishment is the death penalty.*

*(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (Referred to McGantha v. California (1971) 402 US 183). (b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.*

*(iii) The view taken by the plurality in Furman v. Georgia decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and un-guided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not*

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*applicable in India. We do not have in out Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.*

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

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

*In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an un-guided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.*

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

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*challenges the facts.*

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

*(emphasis added).*

*161. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan's case. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No. (iv) (a) which postulates, that according to the then extant CrPC both the alternative sentences provided in Section 302, Penal Code are normal sentences, and the Court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or*

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*imprisonment for a term of years, not to ins-pose the sentence of death on that person unless there are "special reasons" - to be recorded - for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only hi extreme cases.*

*162. In this view we are in accord with the dictum of this Court in Balwant Singh v. State of Punjab , wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J.) speaking for the Court, summed up the scope and implications of Section 354(3), thus:*

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

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

*164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v) (b) in Jagmohan, shall have to be recast and may be stated as below:*

*(a) The normal rule is that the offence of murder shall be punished with the sentence of life*

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*imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence,*

*(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.*

*197. In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.*

*202. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":*

*Aggravating circumstances : A Court may, however, in the following cases impose the penalty*

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*of death in its discretion:*

*(a) if the murder has been committed after previous planning and involves extreme brutality; or*

*(b) if the murder involves exceptional depravity; or*

*(c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -*

*(i) while such member or public servant was on duty; or*

*(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or*

*(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.*

*203 Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other,*

*204. In Rajendra Prasad, the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)." Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is*

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*not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302, Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its 'ethos'; nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302, Penal Code, fully apply to the case of Section 354(3), CrPC, also. The same criticism applies to the view taken in Bishnu Deo Shaw v. State of West Bengal , which follows the dictum in Rajendra Prasad (ibid).*

*205. In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of 'murder' or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of 'special reasons' in Section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.*

*206. Dr. Chitaley has suggested these mitigating factors:*

*Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:*

*(1) That the offence was committed under the*

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*influence of extreme mental or emotional disturbance.*

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

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

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

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

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

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

16. In the process of exercise of discretion in awarding sentence, the judgment of Apex Court in ***Machhi Singh Vs. State of Punjab*** reported in (1983) 3 SCC 470 is a landmark decision which explained the doctrine of "rarest of the rare cases" and indicated the circumstances where death sentence is justified as "rarest of the rare cases". The guidelines of the Apex Court in the Machhi's case (supra) for exercising discretion while awarding death sentence set out in Paragraph 32, 33 and 34 of the judgment are quoted below:-

*"32. The reasons why the community as a whole does not endorse the humanistic*

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

> *I Manner of Commission of Murder When the murder is committed in an extremely brutal, grotesque, diabolical. revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,*
>
> *(i) When the house of the victim is set aflame with the end in view to roast him alive in the*

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*house.*

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

*(iii)When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner. II Motive for Commission of murder When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.*

*III Anti Social or Socially abhorrent nature of the crime*

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

*(b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry*

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*another woman on account of infatuation. IV Magnitude of Crime When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. V Personality of Victim of murder When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.*

*33. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:*

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

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

*(iii)Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an*

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*altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.*

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

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

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

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

17. One has to keep in mind that with passage of time and emergence of new constitutional regime particularly after Maneka Gandhi vs. Union of India reported in (1980) 2 SCC 684), the Apex Court, on consideration of the constitutional scheme, held out section 303 of the IPC providing mandatory death penalty as unconstitutional in Mithu Singh's case (1983) 2 SCC 277.

18. In the process of determining "rarest of the rare

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cases", there is no consistency. The Apex Court had occasion to notice the deviation in the rarest of rare rule in the matter of awarding death sentence. It is true that Judges are enjoying discretion in the matter of awarding sentence but in the system governed by rule of law, discretion is always exercised in rational manner and not in humorous manner.

19. It may be relevant to mention here that noticing the departure in numerous cases from the principle laid down in the Constitution Bench of the Apex Court as to "rarest of the rare cases" in Bachan Singh's case and doctrine of proportionality, Apex Court once again in **Santosh Kumar Satish Bhushan Bariar** (2009) 6 SCC 498 has formulated the guideline for awarding of death sentence. Paragraphs 71 to 89, 92 and 157 to 166 are quoted hereinbelow for ready reference;

> *"71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.*
>
> *72. We must also point out, in this context, that there is no consensus in the court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from*

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*Bachan Singh (supra) in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigor and fairness are given primacy over sentiments and emotions.*

*73. In Panchhi (supra), the court downplayed the heinous nature of crime and relied on mitigating circumstances in the final opinion. The court held:*

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

*74. in Vashram Narshibhai Rajpara v. State of Gujarat [(2002) 9 SCC 168], this court relied on the dictum of Panchhi and further explained the approach:*

*"....As to what category a particular case would fall depends, invariably on varying facts of each case and no absolute rule for invariable application or yardstick as a ready reckoner can be formulated. In Panchhi v. State of U.P. it has been observed that the brutality of the manner in which*

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*the murder was perpetrated may not be the sole ground for judging whether the case is one of the "rarest of rare cases", as indicated in Bachan Singh v. State of Punjab and that every murder being per se brutal, the distinguishing factors should really be the mitigating or aggravating features surrounding the murder. The intensity of bitterness, which prevailed, and the escalation of simmering thoughts into a thirst for revenge or retaliation were held to be also a relevant factor."*

*75 This court also gave primacy to mitigating circumstances in the final analysis:*

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

*76. In Om Prakash v. State of Haryana, [(1999) 3*

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*SCC 19], K.T. Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the Bachan Singh (supra) dictum of balancing the "mitigating and aggravating circumstances". The court was of the view that the sentencing court is bound by Bachan Singh (supra) and not in specific terms to the incoherent and fluid responses of society:*

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

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

*"The offence was obviously not committed for lust of power or otherwise or with a view to grab any property nor in pursuance of any organized criminal or anti-social activity. Chances of*

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*repetition of such criminal acts at his hands making the society further vulnerable are also not apparent. He had no previous criminal record."*

*78. The court also stated the law in the following terms:*

*"20. Every murder is a heinous crime. Apart from personal implications, it is also a crime against the society but in every case of murder death penalty is not to be awarded. Under the present legal position, imprisonment for life is the normal rule for punishing crime of murder and sentence of death, as held in different cases referred to above, would be awarded only in the rarest of rare cases. A number of factors are to be taken into account namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying any kind of lust, greed or in pursuance of anti-social activity or by way of organized crime, drug trafficking or the like. Chances of inflicting the society with a similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future and ultimately as held in several cases, mitigating and aggravating circumstances of each case have to be considered and a balance has to be struck. The learned State counsel as indicated earlier has already indicated the aggravating circumstances by reason of which it has been vehemently urged that sentence of death deserves to be confirmed."*

*79. Whether primacy should be accorded to aggravating circumstances or mitigating circumstances is not the question. Court is duty bound by virtue of Bachan Singh (supra) to equally consider both and then to arrive at a conclusion as to respective weights to be accorded. We are also bound by the spirit of Article 14 and Article 21 which forces us to adopt a principled approach to sentencing. This overarching policy flowing from Bachan Singh (supra) applies to heinous crimes as*

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

*2(E). Public Opinion in Capital Sentencing*
*80. It is also to be pointed out that public opinion is difficult to fit in the rarest of rare matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is*
*extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of Bachan Singh (supra).*

*81. Rarest of rare policy and legislative policy on death punishment may not be essentially tuned to public opinion. Even if presume that the general populace favours a liberal DP policy, although there is no evidence to this effect, we can not take note of it. We are governed by the dictum of Bachan Singh (supra) according to which life imprisonment is the rule and death punishment is an exception.*

*82. We are also governed by the Constitution of India. Article 14 and 21 are constitutional safeguards and define the framework for state in its functions, including penal functions. They introduce values of institutional propriety, in terms*

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*of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict. The position is, if the state is precariously placed to administer a policy within the confines of Article 21 and 14, it should be applied most sparingly. This view flows from Bachan Singh (supra) and it this light, we are afraid that Constitution does not permit us to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument.*

*83. The fact that we are here dealing with safeguards entrenched in the Constitution should materially change the way we look for reasons while awarding the death punishment. The arguments which may be relevant for sentencing with respect to various other punishments may cease to apply in light of the constitutional safeguards which come into operation when the question relates to extinguishment of life. If there are two considerations, the one which has a constitutional origin shall be favoured.*

*84. An inherent problem with consideration of public opinion is its inarticulate state. Bachan Singh (supra) noted that judges are ill-equipped to capture public opinion:*

*"125. Incidentally, the rejection by the people of the approach adopted by the two learned Judges in Furman, furnishes proof of the fact that judicial opinion does not necessarily reflect the moral attitudes of the people. At the same time, it is a reminder that Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.*

*..."The highest judicial duty is to recognise the limits on judicial power and to permit the*

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*democratic processes to deal with matters falling outside of those limits." As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted. judicial "made-to-order* standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair- play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting; down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may very from Judge to Judge.."*

*85. Justice Powell's dissent in Furman (supra) also bears repetition in this regard:*

*"But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery not the core of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function."*

*86. The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent we play a countermajoritarian role. And this part of debate is not only relevant in the annals of judicial review, but also to criminal jurisprudence. Justice Jackson in West Virginia*

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*State Board of Education v. Barnette, [319 U.S. 624 (1943)] also opined on similar lines:*

*"The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."*

*87. Public Opinion may also run counter to the Rule of law and constitutionalism. Bhagalpur Blinding case or the recent spate of attacks on right to trial of the accused in the Bombay Blast Case are recent examples. We are also not oblivious to the danger of capital sentencing becoming a spectacle in media. If media trial is a possibility, sentencing by media can not be ruled out.*

*88. Andrew Ashworth, a leading academic in the field of sentencing, who has been at the center of sentencing reforms in U.K., educates us of the problems in factoring in public opinion in the sentencing. He (with Michael Hough), observes in an article, Sentencing and the Climate of Opinion (1996, Criminal Law Review):*

*"The views of sentencing held by people outside the criminal justice system-- "the general public"--will always be important even if they should not be determinative in court. Unfortunately, the concept of public opinion in relation to sentencing practices is often employed in a superficial or simplistic way. In this short article we have identified two major difficulties with the use of the concept. First, members of the public have insufficient knowledge of actual sentencing practices. Second, there is a significant but much-neglected distinction between people's sweeping impressions of sentencing and their views in relation to particular cases of which they know the*

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*facts. When it is proclaimed that the public think the courts are too lenient, both these difficulties are usually suppressed. To construct sentencing policy on this flawed and partial notion of public opinion is irresponsible. Certainly, the argument is hard to resist that public confidence in the law must be maintained. It is also hard to resist the proposition that public confidence in sentencing is low and probably falling. However, since the causes of this lie not in sentencing practice but in misinformation and misunderstanding, and (arguably) in factors only distantly related to criminal justice, ratcheting up the sentencing tariff is hardly a rational way of regaining public confidence.*

*This is not to deny that there is political capital to be made, at least in the short term, by espousing*

*sentencing policies which have the trappings of tough, decisive action. However, the underlying source of public cynicism will not have been addressed; and once politicians embark on this route, they may be committing themselves long-term to a treadmill of toughness, "decisiveness", and high public expenditure. The political costs of withdrawing from tough policies, once embarked on, may be too high for politicians of any hue to contemplate. The United States serves as an example.*

*If the source of falling public confidence in sentencing lies in lack of knowledge and understanding, the obvious corrective policy is to explain and to educate, rather than to adapt sentencing policy to fit a flawed conception of public opinion. But who should be the target of such explanation and education? We have serious doubts whether attempts to reach the ordinary citizen directly will have any impact at all. On the other hand, we think it feasible, within limits, to educate those who shape public opinion. Newspaper and television journalists, for example, responded well to the initiatives in the 1980s intended to curb the reporting of crime in ways that needlessly fuelled fear of crime. A similar initiative*

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*should now be mounted in relation to sentencing."*

*89. Capital sentencing is one such field where the safeguards continuously take strength from the Constitution, and on that end we are of the view that public opinion does not have any role to play. In fact, the case where there is overwhelming public opinion favouring death penalty would be an acid test of the constitutional propriety of capital sentencing process.*

*92. Bachan Singh 's case observes that the superior courts must correct wrong application of section 302. It is very obvious that appellate courts can not discharge review function without taking aid of established principles. In Jagmohan Singh v. State of U.P., [(1973) 1 SCC 20], the Court's observation in this context was subsequently followed noting:*

*"...The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion in the matter of sentence is, as already pointed out, liable to be corrected by superior courts. Laying down of standards to the limited extent possible as was done in the Model Judicial Code would not serve the purpose. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguards for the accused."*

*157. The doctrine of proportionality, which appears to be the premise whereupon the learned trial judge as also the High Court laid its foundation for awarding death penalty on the appellant herein, provides for justifiable reasoning for awarding death penalty.*

*However while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand falls within the rarest of the rare case.*

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*158. The reasons assigned by the courts below, in our opinion, do not satisfy Bachan Singh Test. Section 354 (3) of the Code provides for an exception. General rule of doctrine of proportionality, therefore, would not apply. We must read the said provision in the light of Article 21 of the Constitution of India.*

*Law laid down by Bachan Singh (supra) and Machhi Singh (supra) interpreting Section 354 (3) of the Code should be taken to be a part of our constitutional scheme.*

*159. Although the Constitutional Bench judgment of the Supreme Court in Bachan Singh (supra) did not lay down any guidelines on determining which cases fall within the `rarest of rare' category, yet the mitigating circumstances listed in and endorsed by the judgment gives reform and rehabilitation great importance, even requiring the state to prove that this would not be possible, as a precondition before the court awarded a death sentence. We cannot therefore determine punishment on grounds of proportionality alone. There is nothing before us that shows that the appellant cannot reform and be rehabilitated.*

*160. in Dhananjoy Chatterjee v. State of W.B. [(1994) 4 SCC 220], this Court has taken notice of the fact that shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility. Although the increasing number of cases which affect the society may hold some value for the sentencing court, but it cannot give a complete go-by to the legal principle laid down by this court in Bachan Singh (supra) that each case has to be considered on its own facts.*

*161. Mr. Adsure has placed strong reliance on a decision of this Court in Mohan and Others v. State of T.N. [(1998) 5 SCC 336] to contend that the manner in which the murder was committed itself point out that all the accused deserved death penalty. In our opinion the facts of that case are clearly distinguishable from the present one. That*

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*case involved the murder of a minor. It clearly is not applicable to the present case. Moreover, the court in that case too recognized that proper and due regard must be given to the mitigating circumstances in every case.*

*162. Further indisputably, the manner and method of disposal of the dead body of the deceased was abhorrent and goes a long way in making the present case a most foul and despicable case of murder. However, we are of the opinion, that the mere mode of disposal of a dead body may not by itself be made the ground for inclusion of a case in the "rarest of rare" category for the purpose of imposition of the death sentence.*

*It may have to be considered with several other factors.*

*163. This Court has dealt with the issue in Ravindra Trimbak Chouthmal v. State of Maharashtra [(1996) 4 SCC 148]. In this case of dowry death, the head of the deceased was severed and her body cut into nine pieces for disposal. This court however expressed doubts over the efficacy of the deterrent effect of capital punishment and commuted the death sentence to one of RI for life imprisonment.*

*164. The issue of deterrence has also been discussed in the judgment of Swamy Shraddananda - I (supra), thus:*

*"70. It is noteworthy to mention here the Law Commission in its Report of 1967 took the view that capital punishment acted as a deterrent to crime. While it conceded that statistics did not prove these so-called deterrent effects. It also said that figures did not disprove them either."*

*[Emphasis supplied]*

*Most research on this issue shows that the relationship between deterrence and severity of punishment is complicated. It is not obvious how deterrence relates to severity and certainty. Furthermore criminal policy must be evidence-led rather than based on intuitions, which research*

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*around the world has shown too often to be wrong. In the absence of any significant empirical attention to this question by Indian criminologists, we cannot assume that severity of punishment correlates to deterrence to an extent which justifies the restriction of the most fundamental human right through the imposition of the death penalty. The goal of crime reduction can be achieved by better police and prosecution service to the same or at least to a great extent than by the imposition of the death penalty.*

*165. In this respect, we may furthermore add here that in the most recent survey of research findings on the relation between the death penalty and homicide rates, conducted for the United Nations in 1988 and updated in 2002, it was stated:*

*"... it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment." [See Roger Hood, The Death Penalty: A World-wide Perspective, Oxford, Clarendon Press, third edition, 2002, p. 230] [See also Kennedy v. Lousiana (128 S. Ct. 2641)]*

*MITIGATING CIRCUMSTANCES*

*166. Determination, as to what would be the rarest of rare cases, is a difficult task having regard to different legal principles involved in respect*

*thereof. With the aforementioned backdrop, we may notice the circumstances which, in our opinion, should weigh with us for not imposing the extreme penalty."*

20. It is to be kept in mind that jurists have coined various theories of punishment as a rational behind punishment choice making.

21. Three Judges of the Apex Court in the case of

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**Deepak Rai Vs. State of Bihar** reported in (2013) 10 SCC 421 once again considered the sentencing process and requirement of assigning special reasons under Section 354 (3) of the Cr.P.C. The relevant consideration of the Apex Court in the aforesaid judgment is quoted below:-

> *"38. With the aforesaid in view, let us now examine the issues before us.*
> *Issue one: "Special reasons" under Section 354(3) of the Code*
>
> *39. Under Section 367(5) of the Code of Criminal Procedure, 1898 (for short "old Code"), the normal sentence to be awarded to a person found guilty of murder was death and imprisonment for life was an exception. The Amending Act 26 of 1955 amended Section 367(5) of the old Code resulting in vesting of discretion with the Court to inflict the sentence of life imprisonment or death each according to the circumstances and exigencies of the case. The amended Section 367(5) of the old Code reads as follows:*
>
> *"367. (5) 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 reason why sentence of death was not passed."*
>
> *40. The present Code which was legislated in 1973 brought a shift in the then existing penological trend by making imprisonment for life a rule and death sentence an exception. It makes it mandatory for the Court in cases of conviction for an offence punishable with imprisonment for life to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Court awards the death penalty, "special reasons" for such sentence shall be stated in the judgment. It*

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*reads as follows :*

*"354(3)When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."*

*(emphasis supplied)*

*41. For the first time, this shift in sentencing policy has been observed by Krishna Iyer J. (as he then was) in Ediga Anamma v. State of Andhra Pradesh, (1974) 4 SCC 443, as follows:*

*"18. It cannot be emphasised too often that crime and punishment are functionally related to the society in which they occur, and Indian conditions and stages of progress must dominate the exercise of judicial discretion in this case.*

* * *

*21. It is obvious that the disturbed conscience of the State on the vexed question of legal threat to life by way of death sentence has sought to express itself legislatively, the stream of tendency being towards cautious, partial abolition and a retreat from total retention." (Also Ambaram case (supra), Joseph v. State of Goa, (1977) 3 SCC 280, Triveniben v. State of Gujarat)*

*42. Further, this Court in Harnam v. State of U.P., (1976) 1 SCC 163 supplemented the aforesaid observations and noted as follows:*

*"4. ...The seminal trends in current sociological thinking and penal strategy, tampered as they are by humanistic attitude and deep concern for the worth of the human person, frown upon death penalty and regard it as cruel & savage punishment to be inflicted only in exceptional*

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*cases. It is against this background of legislative thinking which reflects the social mood and realities and the direction of the penal and procedural laws that we have to consider whether the tender age of an accused is a factor contraindicative of death penalty."*

*(emphasis supplied)*

*43. In Allauddin Mian v. State of Bihar, (1989) 3 SCC 5 this Court has examined the purpose of inclusion of "special reasons" clause as follows:*

*"9. ... When the law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the "special reasons clause" in the above provision implies that the court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be... While rejecting the demand of the protagonist of the reformatory theory for the abolition of the death penalty the legislature in its wisdom thought that the "special reasons clause" should be a sufficient safeguard against arbitrary imposition of the extreme penalty. Where a sentence of severity is imposed, it is imperative that the judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the judge would not award the death sentence. It may be stated that if a judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall*

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*on the lower sentence. In all such cases the law casts an obligation on the judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. ..."*

*(emphasis supplied)*

*44. In Bachan Singh case (supra), while determining the constitutional validity of the death penalty, this Court has examined the sentencing procedure embodied in Section 354(3) of the Code. Following issue was framed by this Court in the aforesaid context:*

*"15. (ii)...whether the sentencing procedure provided in Section 354(3) of the Code of Criminal Procedure, 1973 (2 of 1974) is unconstitutional on the ground that it invests the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other*

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*capital offence punishable under the Penal Code with death or, in the alternative, with imprisonment for life."*

*45. To answer the said issue, this Court referred to and considered Jagmohan Singh v. State of U.P. (which was decided under the old Code) and culled out several propositions from that decision. Keeping in view of the changed legislative policy, this Court agreed with all the observations in Jagmohan Singh case (supra) but for two- first, that the discretion in the matter of sentencing is to be exercised by the Judge after balancing all the aggravating and mitigating circumstances of the crime and second, that while choosing between the two alternative sentences provided in Section 302 of the IPC, i.e., sentence of death and life imprisonment, the court is principally concerned with the aggravating or mitigating circumstances connected with the particular crime under inquiry. This Court observed that whilst under the old Code, both the sentence of death was the rule and life imprisonment was an exception, Section 354(3) of the Code has reversed the sentencing policy with the legislative mandate that if a sentence of death is to be awarded, special reasons need to be recorded by the Courts. That is to say, the legislative policy now virtually obviated the necessity of balancing the aggravating and mitigating circumstances for the award of punishment in respect of an offence of murder. The Court observed as follows in context of departures from Jagmohan Singh case (supra):*

*"164. (a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are*

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*special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.*

*(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."*

*(emphasis supplied)*

*46. In the aforesaid background this Court observed that special reasons, in the context of the said provision, obviously mean "exceptional reasons" founded on the exceptionally grave circumstances relating to the crime as well as the criminal. It being extremely difficult to catalogue such special reasons, they have to be construed in the facts of the case and relative weight has to be given to mitigating and aggravating factors. This Court observed that these two aspects are so intertwined that isolation of one from the other would defeat the mandate of law and held with hope that in view of the "broad illustrative guidelines" laid down therein, the Courts:*

*"209. ... will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception." (Also: State of Maharashtra v. Goraksha Ambaji Adsul, (2011) 7 SCC 437; Sangeet v. State of Haryana, (2013) 2*

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*SCC 452; Sandesh v. State of Maharashtra, (2013) 2 SCC 479)*

*47. In Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 this Court opined that the term "special reasons" as explained in the Bachan Singh case (supra) indicates a relative category based on comparison with other cases under Section 302 as under:*

*"44. The matter can be looked at from another angle. In Bachan Singh it was held that the expression "special reasons" in the context of the provision of Section 354(3) obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. It was further said that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. In conclusion it was said that the death penalty ought not to be imposed save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Now, all these expressions "special reasons", "exceptional reasons", "founded on the exceptional grave circumstances", "extreme cases" and "the rarest of rare cases" unquestionably indicate a relative category based on comparison with other cases of murder. Machhi Singh, for the purpose of practical application sought to translate this relative category into absolute terms by framing the five categories. (In doing so, it is held by some, Machhi Singh considerably enlarged the scope for imposing death penalty that was greatly restricted by Bachan Singh)."*

*(emphasis supplied)*

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*49. The Constitutional Bench of this Court in Shashi Nayar v. Union, (1992) 1 SCC 96 has observed that the "special reasons clause" means reasons, specific to the fact of a particular case, which can be catalogued as justifying a severe punishment and unless, such reasons are not recorded death sentence must not be awarded. Under this provision, if the basis for awarding the higher sentence can be explained with reasonable accuracy, after examining the pros and cons of sentencing options achieving proportional balance with the severity of the crime committed only then should the higher punishment be awarded. This Court has noted that thus, Section 345(3) is a sufficient safeguard against the arbitrary imposition of the extreme penalty and unless the nature of crime and the circumstances of the offender reveal that the sentence to life imprisonment would be wholly inadequate, the Courts should ordinarily impose a lesser punishment.*

*50. This Court in Sandesh v. State of Maharashtra, (2013) 2 SCC 479 has discussed the aforesaid principles and observed as follows:*

*"22……it is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354(3) CrPC for imposing death penalty but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion."*

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*51. The aforesaid would reflect that under this provision the legislature casts a statutory duty on the Court to state reasons for choice of the sterner sentence to be awarded in exceptional cases as against the rule of life imprisonment and by necessary implication, a legal obligation to explain them as distinguished from the expression "reasons" follows. The legislative mandate of assigning "special reasons" assures that the imposition of the capital punishment is well considered by the Court and that only upon categorization of the case as "rarest of rare", thus leaving no room for imposition of a less harsh sentence, should the Court sentence the accused person to death.*

*52. Incontrovertibly, the judicial approach towards sentencing has to be cautious, circumspect and careful. The Courts at all stages- trial and appellate must therefore peruse and analyze the facts of the case in hand and reach an independent conclusion which must be appropriately and cogently justified in the "reasons" or "special reasons" recorded by them for imposition of life imprisonment or death penalty. The length of the discussion would not be a touchstone for determining correctness of a decision. The test would be that reasons must be lucid and satisfy the appellate Court that the Court below has considered the case in toto and thereafter, upon balancing all the mitigating and aggravating factors, recorded the sentence."*

*(Underlined for emphasis)*

22. After judgment of the Apex Court laying down the principle to be applied, courts, particularly the trial court, while exercising discretion are expected to apply scrupulously the

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rigorous test of "rarest of the rare cases" but consistency in sentencing process particularly at the level of trial court is conspicuously lacking.

23. It may be relevant to quote paragraph 21 of the judgment in the case of State of U.P. Vs. Sanjay Kumar reported in (2012) 8 SCC 537 where the Apex Court has discussed the core principles for exercise of discretion in the matter of awarding sentence. Paragraph 21 reads as follows:-

> *"21. Sentencing Policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society*

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*could not long endure under serious threats."*

24. It would be a travesty of justice if the Judges are allowed to exercise discretion in the matter of sentencing in humorous manner. The constitutional mandate of the rule of law is applicable in the decision making process and Courts are no exception. It may be mentioned here that the constitutional validity of Section 27(3) of the Arms Act was the subject matter of adjudication in the case of ***State of Punjab Vs. Dalbir Sing (2013) 3 SCC 346***. The Apex Court after due consideration of the constitutional scheme held out the mandatory death sentence under sub-section (3) of Section 27 of the Arms Act is unconstitutional. The relevant part of decision of the Constitutional Bench of the Apex Court in paragraphs 25, 41, 43, 46, 81, 88 to 91 read as under:-

> *"25. But in the case of Section 27(3) law is totally devoid of any guidelines and no exceptions have been carved out. It is common ground that the said amendment of Section 27 was brought about in 1988 which was much after the Constitution of India has come into operation.*
>
> *41. On such consideration, the Full Bench, on a careful reading of Rules 3 and 4 and two Schedules, came to a conclusion that in the absence of a notification by the Government declaring 303 rifle as a prohibited arm, the said weapon cannot be treated as the one prohibited under the Act and accordingly affirmed the view taken in the case of Santokh Singh (supra). However, the Full Bench did not answer the question No.2 in the light of the law declared in*

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*Mithu (supra). Therefore the constitutional validity of Section 27(3) has not been decided by the Full Bench.*

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

*"23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention. The Section also assumes that life convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on "Capital Punishment":*

*"There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is not so. Most find themselves in prison because they have yielded to temptation under the pressure of a combination of circumstances unlikely to recur."*

*In Dilip Kumar Sharma v. State of M.P., this Court was not concerned with the question of the vires of Section 303, but Sarkaria, J., in his concurring judgment, described the vast sweep of that Section by saying that "the section is Draconian in severity, relentless and inexorable in operation" [SCC para 22, p. 567: SCC (Cri) p.*

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*92]. We strike down Section 303 of the Penal Code as unconstitutional and declare it void. It is needless to add that all cases of murder will now fall under Section 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder."*

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

*81. The Court formulated the following proposition:*

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

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

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

*The imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum. Making the sentence mandatory would therefore be an affront to the human rights of the accused. Section 204 of the Penal Code is*

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*unconstitutional and ought to be declared a nullity. Alternatively the word 'shall' ought to be construed as 'may'.*

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

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

*88. It has already been noted hereinabove that in our Constitution the concept of o 'due process' was incorporated to view of the judgment of this Court in Maneka Gandhi (supra). The principles of Eighth Amendment have also been incorporated in our laws.*

*This has been acknowledged by the Constitution Bench of this Court in Sunil Batra (supra). In para 52 at page 518 of the report, Justice Krishna Iyer speaking for the Bench held as follows:*

*"52. True, our Constitution has no 'due process' clause or the VIII Amendment;*

*but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."*

*89 . Almost on identical principles mandatory death penalty provided under Section 303 of the*

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*Indian Penal Code has been held ultra vires by the Constitution Bench ODF this Court in Mithu (supra).*

*Apart from that it appears that in Section 27(3) of the Act the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The work 'use' has not been defined in the Act.*

*Therefore, the word 'use' has to be viewed in its common meaning. In view ODF such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the words' use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test.*

*90. A law which is not consistent with notions of fairness which it imposes an irreversible penalty like death penalty is repugnant to the concept of right and reason.*

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

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

**The Apex Court finally declared Section 27(3) of Arms Act**

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**as void.**

25. It is true that the Judges exercise discretion in the process of sentencing. The Session Courts are not expected to do only lipservice but apply their judicious mind and follow the basic guidelines laid down by the Apex Court and after balancing the aggravating and mitigating circumstances choose the sentence. The choice of imposing death sentence involves competing interest and security of the individual, society and the State and as such the choice of decision making process is a complicated one. The Apex Court has very seriously discussed the importance of sentencing jurisprudence in the case of **Balwant Singh Vs. State of Punjab**

> *"163. In this view we are in accord with the dictum of this Court in Balwant Singh v. State of Punjab , wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J.) speaking for the Court, summed up the scope and implications of Section 354(3), thus:*
>
> *Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special*

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*reasons which may justify the passing of the death sentence in a case.*

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

*166. 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 guideline 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 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-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).”*

26 During course of hearing of these two cases,

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manifold submissions have been advanced on behalf of the parties. Counsel appearing in support of the death reference submitted that the accused has committed the murder on non-fulfillment of *Rangdari* and has created reign of terror and as such, there is no infirmity in awarding death sentence for committing the murder in a broad day light in the heart of town of Buxar

27. Counsel appearing on behalf of the appellant Onkar Nath Singh @ Sheru Singh has highlighted manifold infirmities in conduct of trial and passing the judgment of conviction and the order of sentencing.

28. Mr. Vikram Deo Singh appearing on behalf of the appellant Onkar Nath Singh alias Sheru Singh submitted that the appellant has suffered prejudice on account of non-examination of the witnesses as the accused was not provided the assistance of the Advocate during the trial and as such the right envisaged under Section 303 of the IPC was violated in the present case. From the materials available on record it appears that the lawyer of the choice of the appellant was available namely, Mr. Arun Kumar Rai. Neither the appellant nor the Advocate was availed the opportunity of cross-examination of the witnesses and as such, we do not find any infirmity. His next contention is that

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the examination of the accused under Section 313 of the Cr.P.C. was only ritual completed by the Sessions Court.

29. In addition thereto, he submitted that the accused-appellant was a juvenile at the time of occurrence for which I.A. No. 304 of 2018 has been filed. It is submitted that the appellant Onkar Nath Singh @ Sheru Singh is a juvenile and he will suffer prejudice if the issue of juvenility is not considered in the case. He admitted that earlier he has approached this Court for declaration that the appellant is a juvenile in I.A. No. 1804 of 2016 showing his date of birth as "19.12.1995" but the same was rejected by the Division Bench of this Court vide CAV order dated 19.07.2017. The Division Bench of this Court, on consideration of various aspects of the materials, rejected the prayer of the appellant in I.A. No. 1084 of 2016. Paragraphs 18 to 20 of the order dated 19.07.2017 are quoted hereinbelow:-

> *"18. Adverting to facts of the case, it is apparent that appellant, in order to buttress his claim to be a juvenile, filed certificate of Class-X issued by Ucchatar Madhyamik Shiksha Mandal, Delhi. Furthermore, by another supplementary affidavit a communique issued by the said institution has also been placed to suggest that the same happens to be duly recognized as equivalent to matric for the purpose of appointment in government service. But, failed to produce any other notification of the Government of Bihar to the effect that the aforesaid Class-X degree has been recognized as equivalent degree of*

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*matriculation issued by the Bihar School Examination Board or Central Board of Secondary Education. Another document, the birth certificate has also been placed which has been issued in the year 2015, after the occurrence and so happens to be doubtful over its authentication as has been held by the Hon'ble Apex Court in Akbar Sheikh v. State of W.B. reported in (2009) 7 SCC 415 as well as Pawan v. State of Uttaranchal reported in (2009)15 SCC 259.*

*19. Accordingly, the documents so referred above do not inspire confidence to infer, prima facie regarding status of the appellant to be juvenile on the alleged date of concurrence.*

*20. That being so, prayer is found non-entertainable, consequent thereupon, I.A. No. 1804 of 2016 is rejected. Office to list for hearing."*

30. Mr. Vikramdeo Singh, learned counsel for the appellant, submitted that after the order rejecting I.A. No. 1804 of 2016 was passed, the matter in respect of age of the appellant was examined by the Juvenile Justice Board in connection with Bihia P.S. Case 75 of 2013 and based on the report of the Medical Board, the Juvenile Justice Board has determined that the age of the appellant Onkar Nath Singh @ Sheru Singh was 23 years on 19.09.2017 and as such he submitted that if the age of the appellant as 23 years is taken on 22.09.2017 then the corresponding age of the appellant at the time of occurrence of the present case would be less than 18 years. It is submitted that the Medical Board has opined that the age of the appellant Onkar Nath Singh @ Sheru Singh is not 21 to 23 years. As such,

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he filed I.A. No. 304 of 2018. The matter requires consideration by the Juvenile Justice Board. Counsel for the State, on the other hand, submitted that while I.A. No. 1804 of 2016 was rejected by a reasoned order, the subsequent interlocutory application bearing I.A. No. 304 of 2018 is not maintainable. On consideration of the rival contentions of the parties, earlier I.A. was rejected by the Division Bench disbelieving authenticity of the certificate, now the petitioner-appellant has placed reliance on the medical report and the order of the Juvenile Justice Board in Trial No. 1065 of 2017.

31. Section 313 of the Cr.P.C. obliges the trial court to examine the accused. The Sessions Judge, while examining the accused under Section 313 of the Code of Criminal Procedure, is not expected to perform rituals, the trial court is under solemn duty to confront the accused persons with all the facts and circumstances which have surfaced adverse to the accused during the trial and the materials which which has formed basis of conviction . From perusal of record it transpires that only general question was put to the accused and he was not confronted with the adverse material in a session trial where the trial was based on the basis of claim of witnesses that they can identify the accused (s) who have committed the crime and fled

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away. The Apex Court had occasion to lay down the principle to be followed while examining the accused persons under Section 313 of the Cr.PC. In this connection reference is made to the judgment of the Apex Court in the case of Sukhjit Singh Vs. State of Punjab: (2014) 10 SCC 270, Paragraphs 11 to 14 of the judgment reads as follows:-

> "11. In this context, we may profitably refer to a four-Judge Bench decision in Tara Singh v. The State wherein[AIR 1951 SC 441], Bose, J. explaining the significance of the faithful and fair compliance of Section 342 of the Code as it stood then, opined thus:
>
> > "30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to (2009) 6 SCC 595 AIR 1951 SC 441 Page 7 be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate

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> person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12. In Hate Singh Bhagat Singh v. State of Madhaya Bharat [AIR 1953 SC468}, Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:-

> "8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal P.C. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak AIR 1953 SC 468 Page 8 on oath in his own defence. This may operate for the protection of the accused is some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and

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> the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box."

13. The aforesaid principle has been reiterated in Ajay Singh v. State of Maharashtra [JT 2007 (8) SC 644: 2007 (12) SCC 341] in following terms:

> "14. The word "generally" in sub-section (1) (b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

14. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the when the requisite questions have not been put to the accused it has caused immense prejudice to him, more so, when there is no evidence to establish his

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complicity in the alleged abduction.

32. As stated above, in the present case, the examination of the accused under Section 313 of the Cr.P.C. appears to be only exercise of the formality. Contrary to the principle laid down by the Apex Court. The examination of the accused under Section 313 of the Cr.P.C. in the present case is quoted below;

"Schedule XLIII-High Court [(M)3. (Old) (M) 85]

FORM OF RECORDING EXAMINATION OF ACCUSED

EXAMINATION OF ACCUSED PERSON

(Section 313 of the Criminal Procedure Code)

The examination of Sheru Singh aged about 24 years

taken before me P.K. Malik Sessions Judge at Buxar on the 22nd date of June 2015 in the language interpreted by

My name is Sheru Singh @ Onkar Nath Singh my father's name is Krishna Singh my age is 24 years. I am religion Hindu My nationality is indian and I belong Schedule cast/Schedule Trib, I am by occupation. My home is at Mauza Dularpur Police Station Simri District Buxar

I reside at

प्रश्न :– आप साक्षियों का साक्ष्य सुना है ?

उ0 :– जी हा

प्रश्न :– साक्षियों का साक्ष्य है कि दिनांक 21.08.2011 को 09.05 बजे सुबह सूचक आनन्द कुमार केशरी के चचेरा भाई राजेन्द्र केशरी उर्फ राजेन्द्र प्रसाद केशरी अमलाटोला ( मेन रोड आरा बक्सर), थाना बक्सर नगर जिला बक्सर को भोजपुर चुनाभंडार बक्सर में एक राय व सामान्य उद्वेश्य से गोली मार कर हत्या अन्य सहयोगियो के साथ कर दिये, क्या कहना है ?

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उ0 :– झूठा साक्ष्य है।

प्र0 :– साक्षियो का आपके विरूद्ध साक्ष्य है कि घटना स्थल से सात 9 एम. एम. गोली जिसे आप द्वारा घटना के समय प्रयोग किया गया था उक्त खोखा बरामद किया गया है ? जिसे अनुसंधानकर्त्ता ने घटना स्थल से बरामद किया है क्या कहना है। ?

उ0 :– झूठा साक्ष्य है।

प्र0 :– आपके विरूद्ध साक्षियों का साक्ष्य है कि आप दुकान के अन्दर से राजेन्द्र केशरी के हत्या के बाद फायरिंग करते हुए निकले क्या कहना है ?

उ0 :– झूठ है।

प्र0 :– आपके विरूद्ध साक्ष्य है कि साक्षी गोपाल केशरी, गोविन्द कुमार ने केन्द्रीयकारा में न्यायिक दंडा0 के समक्ष पहचान परेड़ ने आपका चन्दन मिश्र वा रोशन पाण्डेय का पहचान किया है क्या कहना है ?

उ0 :– झूठी पहचान की है।

प्र0:– आपके विरूद्ध साक्ष्य है कि मोटर साईकिल न0 बी0 आर0 44 बी0 2469 का उक्त हत्या के (अस्पष्ट) में प्रयोग किया गया जिससे विचारण के क्रम में प्रदर्श अंकित कराया गया है क्या कहना है ?

उ0 :– कुछ नही

प्र0 :– आपके विरूद्ध साक्ष्य है कि घटना कारित करने के पूर्व आप एवं आपके अन्य सहयोग चंदन मिश्र, दीन बन्धु सिंह, छोटू मिश्र उर्फ सुरेन्द्र मिश्र व रौशन पान्डेय उर्फ छोटू पाण्डेय ने हत्या तथा उद्यापन (रंगदारी माँग) का घटना कारित करने के लिऐ आपसी सहमति से अपराधिक षड़यंत्र में सम्मिलित हुए आपके क्या कहना है ?

उ0 :– जी नही

प्र0 – आपके विरूद्ध साक्ष्य है कि राजेन्द्र केशरी की हत्या करने के पूर्व दिनांक 20 अगस्त 2011 को संध्या में सह अभियुक्त चंदन मिश्र तथा रोशन पान्डे के द्वारा बक्सर मुफ्फसिल थाना अन्तर्गत ग्राम कृतपुरा से मोबाईल फोन न0 7654801458 द्वारा मृतक राजेन्द्र केशरी के पुत्र राकेश कुमार केशरी के अलावे बक्सर के 19 अन्य व्ययसायी से भी रंगदारी की माँग कर उन्हे जान से मारने का धमकी दिया तथा भयभियत किया गया, क्या कहना है?

उ0 :– झूठा साक्ष्य है।

प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि आप व चंदन मिश्र ने राजेन्द्र केशरी के हत्या के बाद पुनः 04–09–2011 को कलकत्ता से मोबाईल द्वारा बक्सर के ( व्ययसायीयो के फोन एवं टेलीफोन पर रंगदारी का माँग कर उन्हे जान से मारने हेतु भयभित कि क्या कहना है ?

उ0 :– जी नही

प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि दिनांक 21.08.2011 को राजेन्द्र केशरी का हत्या के बाद सह अभियुक्त चंदन मिश्र के साथ घटना स्थल से पलायन कर अभियुक्त दीनबंधु सिंह अपने चाचा के पटना निवास पर वैधानिक दंड से बचने के लिये छिप गये क्या कहना है ?

उ0 :– जी नही

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प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि आपके चाचा अभियुक्त दीन बंधु सिंह आपलोगो का 9 एम.एम की गोली उपलब्ध कराते थे जो बिहार पुलिस में कार्यरत है क्या कहना है ?

उ0 :– जी हाँ

प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि हत्या के बाद आपको चन्दन मिश्र को अभियुक्त छोटू मिश्रा उर्फ सूरेन्द्र मिश्रा से मोबाईल पर संर्म्पक कर राजेन्द्र केशरी के हत्या के बाद कर वस्तु स्थिती से अवगत कराता था ?

उ0 :– जी नही

प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि राजेन्द्र केशरी का हत्या के पूर्व सिमरी प्रखंड के प्रमुख प्रमिला देवी के पति शिव जी खरवार, निजामुद्दिन खाँ, नौशाद खाँ, भरत राय, (अस्पष्ट) हत्या ना किये है तथा समाचार के माध्यम से उक्त घटना का जिम्मेवारी न लिया है तथा अपने पुलिस के समक्ष अपने सफाई बयान में उपरोक्त हत्याओं को करने की बात भी स्वीकार किया है क्या कहना है ?

उ0 :– जी नही

प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि आप चंदन मिश्रा के साथ कोलकत्ता जाकर छिपे रहे तथा दिनांक 07.09.2011 को कोलकत्ता में भवानीपूर कलब के समीप आप और चन्दन मिश्रा का गिरफ्तारी की गयीं आपके पास से एक नोकिया मोबाइल जिनका आई एम इ आई नं0 354835043550541 सीम नं0 8420249195 और मोबाईल लोशन कं0 जिसमें दो सीम का मोबाईल था जिनका आई एम इ आई न0 88858200153922 और दूसरा जिनका आई एम इ आई नं0 858582000253920 और दस हजार नगद रूपया बरामद हुआ क्या कहना है ?

उ0 :– झूठी बरामदगी है।

1ण प्र0 :– आपके विरूद्ध यह भी साक्ष्य है कि कि सह अभियुक्तों के साथ मिलकर आप दूसरे व्यक्ति के नाम से कूटरचित दस्तावेजों के माध्यम से फर्जी सीम हासिल कर यह जानते हुए कि आप द्वारा प्रयोग किया गया सीम कूटरचित है तथा दुसरे के नाम का है जिसे आपके द्वारा प्रयोग किया जाता रहा । समय समय पर (अस्पष्ट) दस्तावेज (अस्पष्ट) उसे प्रयोग में लाते रहे क्या कहना है ?

उ0 :– जी नही

प्र0 :– आपके विरूद्ध साक्ष्य है कि अनुसंधान के दौरान मोबाइल एवं सीम का कॉल डिटेल रिपोर्ट उपलब्ध है जिसे विचारण के दौरान अभियोजन द्वारा प्रदर्श अंकित किया गया है क्या कहना है ?

उ0 :– कुछ नही

प्र0 :– सफाई मे आपका क्या कहना है?

उ0 :– हम निर्दोष है हमे झूठा फसाया गया।

प्र0 :–क्या आपको सफाई मे कोई साक्ष्य देना है।

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उ0 :– जी हाँ – सफाई साक्ष्य देना है

Sd/-

(Signature of mark of the accused)

The above examination was taken in my presence and hearing and contains a full and true account of the statement made by the accused. It was red over to the accused or interpreted to him in the language which he understands and was admitted by him to be correct.

Sd /-

Signature of Sessions judge"

It is clarified that the court has not confronted the accused with the specific admissible evidence against the accused as may witnesses were formal or hearsay and their evidence has no relevance in the process of examination of accused under Section 313 Cr.PC.

33. From the record it transpires that Criminal Appeal (DB) No. 587 of 2016 was admitted on 29.07.2016 for hearing and was directed to be listed along with Death Reference No. 03 of 2016. From the order sheet it transpires that Death Reference No. 03 of 2016 was directed to be listed along with Criminal Appeal (DB) No. 1000 of 2013; Criminal Appeal (DB) No. 1068 of 2013 and Criminal Appeal (DB) No. 17 of 2014. The order sheet dated 18.10.2016 further indicates that the Division Bench of this Court noted that all the Criminal Appeal (DB) No. 1000 of 2013; Criminal Appeal (DB) No. 1068 of

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2013; Criminal Appeal (DB) No. 17 of 2014 , Death Reference No. 03 of 2016 and Criminal Appeal (DB) No. 587 of 2016 arising out of Buxar P.S. Case No. 231 of 2011 registered for the offences 302/34 and 302/120B of the IPC were taken up together for hearing and the Court segregated Death Reference No. 03 of 2016 and Criminal Appeal (DB) No. 587 of 2016 from other cases as the issue of deciding I.A. No. 1804 of 2016 will take some time. The Division Bench of this Court after segregating the present Criminal Appeal and the Death reference vide CAV Judgment dated 25.11.2016 dismissed Criminal Appeal (DB) No. 1068 of 2013 and Criminal Appeal (DB) No. 17 of 2014 and allowed Criminal Appeal (DB) No. 1000 of 2013. For one reason or the other, Death Reference No. 03 of 2016 and Criminal Appeal (DB) No. 587 of 2016 remained pending in this Court for more than four years.

34. It is to be noted here that the conviction and sentence are two different propositions, scrutiny of evidence and scrutiny of fact and law is required to be meticulously done at the stage of recording the finding. The procedure of law and the rule of evidence are good guide in discovering the truth and recording the finding of guilt. At the stage of imposing sentence, the Court is supposed to exercise onerous job of exercising

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discretion. Judicial discretion is always guided by rules of reason. The guideline formulated by the Apex Court is always considered unsurmountable mandate on courts subordinate including Sessions Court in the process of dispensing justice. Howsoever high individual may be, the law is always above. The foundation of rule of law in the decision making process, judicial decorum, propriety demands strict adherence to the principle and guidelines issued by the Apex Court particularly Constitution Bench. It does not confer discretion on any judicial officer to decide the case according to the personal standards and parameters ignoring the mandatory guideline of the Constitution Bench of the Apex Court and declaration of law by the Apex Court which has the effect of law of land under Article 141 of the Constitution of India.

35. In the instant case, shocking part is the manner in which the Sessions Judge, Buxar has exercised his discretion in awarding the sentence. The Sessions Judge has noted the doctrine of "rarest of the rare cases" as coined in the case of ***Bachan Singh Vs State of Punjab (supra)***. The Sessions Judge came to a definite conclusion that this may be a rare case but not "rarest of the rare cases" and imposed life imprisonment till his natural life beyond the application of remission by the

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appropriate Government with a fine of Rs. 1,00,000/- but the most disgusting and disturbing part of the sentence is that the Sessions Judge has noted that sub-section (3) of Section 27 of the Arms Act which provides that mandatory death sentence has been declared ultra vires and void in the case of ***State of Punjab Vs. Dalbir Singh***. Following the decision in the case of ***Mithu Singh Vs. State of Punjab***, yet he has exercised discretion under Section 235(2) of the Code of Criminal Procedure and he claims that he has been empowered by the Apex Court while exercising discretion in awarding the sentence. The Apex Court has declared Section 27(3) of the Arms Act as unconstitutional void, yet the Sessions Judge has noted that the spirit behind enactment of Section 27(3) of the Arms Act is to save the society from lethal weapons. The use of prohibited arms and deadly weapons turned out to be a regular feature and it is a bounden obligation upon the courts of law to attribute the intention of Legislature behind the enactment in widest possible form. The aforesaid observation is sad commentary on the understanding of exercise of discretion of a Session Court. After declaration by the Apex Court, section 27(3) of the Arms Act is unconstitutional, and void insisting upon his right to exercise discretion under Section 235(2) of the Cr.P.C. cannot be considered as exercise of

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judicial discretion rather such exercise of discretion reflects judicial insanity. The reason for inflicting death sentence coined by the trial Judge noticing the conduct of the convict during the trial and exercising discretion provided to the court under Section 235(2) of the Cr.P.C. contrary to ratio laid down in the case of Dalbir Singh Vs State of Punjab (surpa), reflects total ignorance of basic principles, decorum and propriety as Sessions Court has absolutely no business to sit in appeal against the judgment of the Apex Court in **State of Punjab Vs. Dalbir Singh**, the order of awarding death sentence in this case indicates a dangerous trend and such judicial indiscipline cannot be tolerated.

36. The High Court is vested with power to remand a case in appropriate case while deciding death reference under Chapter XXXVIII. Reference in this connection is made to the decision of the Apex Court in the case of **Atma Ram Vs. State of Rajasthan** reported in AIR 2019 Supreme Court 1961. The relevant paragraph of the judgment is quoted below:

> *"21. The learned Amicus Curiae was right in relying upon the provisions of Chapter XXVIII (Sections 366 to 371 of The Code) and Chapter XXIX (Sections 372 to 394 of The Code). He was also right in saying that the Chapter XXVIII was more relevant in the present matter and the judgment of the High Court was supported more strongly by provisions of Chapter XXVIII.*

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*The provisions of Sections 366 to 368 and Sections 386 and 391 are quoted here for ready reference:-*

*"366. Sentence of death to be submitted by Court of Session for confirmation – (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.*

*(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.*

*367. Power to direct further inquiry to be made or additional evidence to be taken – (1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.*

*(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.*

*(3) When the inquiry or evidence (if any) is not made or taken by the High Court the result of such inquiry or evidence shall be certified to such Court.*

*368. Power of High Court to confirm sentence or annual conviction – In any case submitted under section 366, the High Court –*

*(a) may confirm the sentence, or pass any other sentence warranted by law, or*

*(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order of a a new trial on the same or an amended charge, or*

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*(c) may acquit the accused person:*

*Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.*

*386. Powers of the Appellate Court. – After perusing such record and hearing the appellant or his pleader, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may –*

*(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;*

*(b) in an appeal from a conviction –*

*(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or*

*(ii) alter the finding, maintaining the sentence, or*

*(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;*

*(c) in an appeal for enhancement of sentence –*

*(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or*

*(ii) Alter the finding maintaining the sentence, or*

*(iii) With or without altering the finding alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;*

*(d) in an appeal from any other order alter or reverse such order;*

*(e) Make any amendment or any consequential or*

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*incidental order that may be just or proper:*

*Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:*

*Provided further that the Appellate Court shall not inflict greater punishment for the offence which is in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.*

*391. Appellate Court may take further evidence or direct it to be taken – (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*

*(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*

*(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.*

*(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."*

*22. According to Section 366 when a Court of Sessions passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368 (c) of the Code and that is to "acquit the accused person". Pertinently, the power to acquit the*

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*person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent the proceedings under Chapter XXVIII which deals with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also entitles the Appellate Court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial". The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.*

*23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in Pandit Ukha Kolhe vs State of Maharashtra2, as under:-*

*"15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no*
*jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the*

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*proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in Ramanlal Rathi v. The State24 "If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.*

37. We have adopted this course of remand as we are of the considered view that deciding the appeal on the basis of the materials available on record may either cause prejudice to the prosecution or the accused inasmuch as if we hold that examination of the accuse under Section 313 of Cr.P.C. was not strictly in accordance with the principle laid down by the Apex Court then that may cause the prejudice to the prosecution. At

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the same time, if we decide the appeal ignoring the issue of juvenility involved in the present case, that may cause prejudice to the accused and to crown it all the manner in which the Sessions Court inflicted death sentence for the offence under Section 27(3) of the Arms Act which has been declared as unconstitutional reflects that the trial court has not impartially conducted the trial and as such, the ends of justice requires that fresh decision may be taken in the trial based on the materials on the record.

38. We also deem fit and proper in the situation conflicting factual position arsing out of the decision of the Division Bench disbelieving the certificate which was enclosed in I.A. 1804 of 2016, and the medical certificate enclosed with I.A. No. 304 of 2018 that the issue of juvenility of the accused is to be exercised afresh by Expert Doctors of repute. In the instant case, we deem fit and proper that the Medical Board of 5 expert Doctors are required to be constituted so that age of the accused may be ascertained with objectivity without being prejudiced by earlier decision taken in I.A. 1804 of 2016 or the earlier decision of the Medical Board enclosed with I.A. 304 of 2018.

39. Considering the totality of the fact situation, we are of the considered view that the judgment of conviction dated

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12th May, 2016 and the order of sentence dated 16.05.2016 cannot be sustained. It is accordingly quashed. However, the criminal jurisprudence is not designated to extend the benefit to the accused and as such, the defect in the trial cannot obliterate the criminal liability of the accused. Fair trial does not mean that the accused should be extended the benefit of lapses in trial. Balancing equity of situation warrants that the matter be remanded to the Sessions Court, Buxar for fresh adjudication on the following issues:-

(a) The Session Court has to endeavour to ascertain the issue of juvenility of the appellant by the process of Medical Board of at least Five expert doctors of PMCH.

(b) The trial court is required to formulate the relevant question in terms of the principle laid down by the Apex Court for examination of the accused under Section 313 of the Cr.P.C. by confronting the appellant with all the adverse materials specifically.

40. After examining the issue of juvenile; and fresh examination of the accused under Section 313 of the Code of

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Criminal Procedure, the trial court will pass appropriate judgment as to the guilt and sentence without being influenced by outcome of Criminal Appeal (DB) No. 1000 of 2013; Criminal Appeal (DB) No. 1068 of 2013 and Criminal Appeal (DB) No. 17 of 2014. The fresh decision on remand should be taken by the Sessions Court at the earliest preferably within a period of four months from today.

41. Before parting with the judgment, we feel it appropriate to record that keeping the death reference pending for four years where the death sentence is nullity is travesty of justice. Since the present case is an eye-opener, we deem it fit and proper that a copy of the judgment of this Court be forwarded to the Director, Bihar Judicial Academy, Patna to direct the training of judicial officers in the matter of exercise of discretion in the process of sentencing particularly in Sessions Trial, where they have to choose in between life and death as alternative punishment. The Director, Bihar Judicial Academy is required to formulate a course of training of all the judicial officers vested with the power of sessions trial. How to exercise judicial discretion and balancing of aggravating and mitigating circumstances at the same time balance of individual life and personal liberty and security of the society as well as the State is

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required to be part of training of all judicial officers.

42. Office is directed to send down the entire lower court records to facilitate the Session Court, Buxar to take fresh appropriate decision in accordance with law.

**( Anil Kumar Upadhyay, J)**

**Sanjay Karol, CJ** **I agree.**

**(Sanjay Karol, CJ)**

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