

Dina Bawri Vs. State of Assam

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Court : Guwahati

Decided On : May-08-2000

Judge : N.C. Jain and P.C. Phukan, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 235(2), 313, 354, 354(3), 360, 361, 386(C), 397 and 401; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 562; [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 307 and 326; [Constitution of India](#) - Articles 14, 19 and 21; Terrorist and Disruptive Activities Act

Appeal No. : Criminal Appeal No. 120(J) of 1996

Appellant : Dina Bawri

Respondent : State of Assam

Advocate for Def. : Mr. K. Deka, Mr. T.N. Srinivasan and Mr. D.R. Saikia, Advs.

Advocate for Pet/Ap. : Mr. H. Roy, Amicus Curiae

Disposition : Appeal dismissed

Judgement :

This appeal has been filed by the appellant against the judgment of the learned Sessions Judge, Jorhat, convicting him under section 302 of the Indian Penal Code. On conviction, the appellant has been sentenced to undergo rigorous imprisonment for life. A fine of Rs. 1000 has been imposed. In default of payment of fine, the appellant has been sentenced to undergo further rigorous

imprisonment for 6 months.

1. In this case the appellant is alleged to have committed double murder of his own mother and sister aged 7 years. Two questions one factual and the other legal are involved in the appeal. The factual question is whether the prosecution has been able to prove its case beyond reasonable doubt. If it is held that the appellant is guilty of the commission of the murders, the important and significant question of law which arises in the appeal is whether the case in hand falls under the category of rarest of rare case warranting imposition of maximum penalty of death.

Coming to the first question about the guilt of the accused, the prosecution case as has been unfolded in the First Information Report (FIR) and the evidence brought on the record the case needs discussion in details.

2. The FIR in this case was lodged in the police out post Deberapara, District-Jorhat, at 2.15pm on 16.5.1993 by none else than the elder brother of the accused Bhim Bawri alleging therein that on 15.5.1993 at about 7.30 p.m. his younger brother Dina Bawri closed the door of the house, poured kerosene oil on his mother and 7 years old sister and set them on fire inside the house. It is further alleged in the FIR that thereafter the accused ran away and hid himself in a nearby Nagabasti. The condition of the mother and the sister was alleged to be serious. The victims, it was stated, were undergoing treatment at Cinnamora Central Hospital. It was further stated in the FIR that with the help of the local people the accused has been caught from Nagabasti and was handed over at the outpost. The case which was registered under section 326/307 of the Indian Penal Code was ultimately converted to section 302 IPC after the victims died in the hospital.

3. During trial the prosecution examined PW.1 Dr. Golap Chandra Deka who performed the post-mortem examination on the dead body of Sukumoni Bawri, the mother of the accused, PW. 8 Dr. Bipul Chandra Borah who performed post-mortem examination on the dead body of Basanti Bawri, the sister of the accused, PW.2 Anil Borkakati a neighbour, PW.3 Smti Janu Dowerah - a Staff Nurse of the hospital, PW.4 Bhim Bawri - the informant, PW.5 Smti. Sukumoni Bawri-a close relation of the accused, PW.6 Bhada Bawri- another close relation, PW.7 Sri

Gajeng Bawri- another relation and PW.9 Debeswar Gogoi- the Investigating Officer of the case. The accused was also examined u/s 313 Cr.P.C. His case is one of denial. In reply to the question whether the accused wanted to produce defence evidence, he stated that he did not want to produce any evidence.

4. Before adverting to the question whether in the present case maximum penalty provided under Section 302 IPC is to be imposed or not, we must reappraise the entire prosecution evidence for determining the complicity of the accused in the crime.

5. PW.2 Anil Borkakati stated that the accused was his neighbour and that the occurrence took place about 8 months back at about 7.00 p.m. The witness stated that he was at his house when Bhada Bawri came to him and asked the witness to accompany him to the house of the accused as there was 'golmal'. The witness went there and found Sukumoni, mother of the accused sitting in the verandah of the house with burn injuries. She, according to the witness, told him that her son Dina Bawri set fire to her and her daughter. The witness claims to have seen the daughter lying with burn injuries. He also saw other family members of the family who had already extinguished the fire. The witness went on state that both the mother and daughter were then removed to Naginijan garden hospital and ultimately to Central Hospital, Cinnamora. It was further stated by the witness that police came to the place of occurrence and seized an empty bottle of kerosene oil and one chaki in his presence, vide seizure list Ext. 1 Material Exbt. 1 was the bottle and Mat. Ext. 2 was the chaki. The witness put his signature as Ext.1(1). In cross-examination the witness stated that he found Dhatu Bawri's sister and other persons at the place of occurrence on his arrival there. He further stated in cross-examination that he did not state before the Investigating Officer that Bhada Bawri went to his house to call him. He denied the suggestion that he stated before the I/O that he found Sukumoni lying in the courtyard of her house and that some persons poured water on her body to extinguish the fire and that her daughter Basanti was in the cowshed. The witness further stated that he did not find the accused at the place of occurrence and that he could not say if the accused went to his brother's house.

6. PW. 3 Smt. Janu Dowerah - the Staff Nurse of Cinnamora Hospital stated that Sukumoni Bawri along with her daughter were brought to the hospital with burn injuries. The upper portion of Sukumoni's daughter was almost burnt and Sukumoni had also burn injury on the upper side. She claimed to be on night duty. She also stated that the police came and Sukumoni gave a dying declaration before the police in her presence in which it was stated the 'her son Dina Bawri had burnt her and her daughter after pouring kerosene oil in her house. Dying declaration was made, according to the witness, in the hospital at about 8.20 p.m. Ext. 2 was the dying declaration which was signed by her as Ext.2{I}. The witness further stated that Sukumoni died after 2 days ; where as her daughter died after a week. The witness was not cross-examined at length. Her brief cross examination reads as under :

"I was on duty from 7 p.m. to 7 a.m. on the day. Police put question to which Sukumoni answered. At that time no doctor was present. I heard declaration myself. Her injured face was swollen due to burns."

7. PW.4 Sri Bhim Bawri the elder brother of the accused stated that the deceased Sukumoni, his mother and deceased Basanti, his younger sister used to live with the accused and that he lived at a distance of less than a furlong from the house of the accused. He after hearing halla (noise) at about 7.00 p.m. came to his mother's house, saw his mother in the courtyard with burn injuries and that his sister was still burning. According to him many persons gathered there who poured water on the body of his sister in order to extinguish the fire. It is further stated by him that his other brothers, namely, Bhatow and Gagang also poured water. The witness went on to state that his mother told him that the accused Dina Bawri burnt her and Basanti after pouring kerosene oil on their bodies. The victims were brought to the hospital for treatment. The accused fled away and was apprehended by the villagers on the following day from Nagabasti. The witness further stated that he also accompanied the villagers and they handed over the accused to the police. In cross-examination he admitted the presence of Sukumoni, the aunt of the witness, at the place of occurrence. It was further stated in the cross-examination that the witness found his sister Basanti inside the house while the mother was lying outside the house. The mother and sister both had

senses, The witness denied the suggestion that he was deposing falsely. He further stated that his elder brother was living at Nagabasti at the time of occurrence and that at the time of recording the evidence he was living at Lakhimpur.

8. PW.5 Smt. Sukumoni Bawri stated that the accused is the son of her husband's elder brother and that Sukumoni was the mother of the accused. The house of the witness was stated to be situated at a distance of 50 feet from the house of the deceased. The witness further stated that she was present in her house when the occurrence took place in the evening. She claims to have heard the cry from the house of the deceased whereupon she along with her husband and her son Gagang rushed to the place of occurrence and saw Sukumoni under flame. The deceased, according to her, was lying in the outer courtyard rolling on the ground when her flame was extinguished. The daughter, according to her, was still burning inside the house. The witness categorically stated that Sukumoni told them that her son Dina Bawri set fire upon her and upon her daughter and that this statement was heard by her clearly. The son of the witness was also not cross-examined at length. Her only cross-examination reads as under :

"It is not a fact that deceased Sukumoni did not make any dying declaration to us and that I have deposed falsely."

9. PW.6 Shri Bhada Bawri described the accused to be the son of his elder brother. He claims that his house was adjacent to the house of the deceased and that he was present at the time of occurrence in his house. When the cry of the mother of the accused was heard by him, his wife and son and he himself went to the house of the accused and saw that the mother was rolling on the ground in the outer courtyard and that she was burning. The witness further stated that her daughter Basanti who was inside the house was also on fire. According to the witness, PW.4 Bhim Bawri poured water on Basanti and fire was extinguished. Sukumoni was in a position to talk and told that her son Dina Bawri burnt her and that her daughter was also burnt by her son inside the house. The son of the witness and other took the victims to the hospital. He claims to have seen Dina accused standing, who after seeing the witness fled away. On the following day

the accused was apprehended by the villagers from Nagabasti, the witness stated. The cross-examination of this witness is not much which is reproduced below :

"It is not a fact that I stated before the Investigating Officer that I found Dina standing at the place of occurrence and on seeing me he fled away. Sukumoni told me personally that she had been burnt by her son accused Dina. It is not a fact that I have deposed falsely."

10. PW.7 Gajeng Bawri stated on the same lines as that of his father, PW.6 Bhada Bawri. The cross-examination of this witness is only this much :

"It is not a fact that I have deposed falsely."

11. PW.9 Debeswar Gogoi - the Investigating Officer of the case stated that he was in charge of Deberapara Police-Out post under Mariani Police Station on 16.5.1993 when he received the FIR (Ext. 1) from Bhim Bawri and sent the same to Mariani P.S. for registering a case. The witness having been entrusted with the investigation stated that he visited the place of occurrence, examined witnesses and arrested the accused who was already apprehended by the public. He claims to have visited the hospital and met the injured Sukumoni Bawri and her daughter. He further stated that Sukumoni was In a fit condition to give statement and he recorded her statement (Ext.2) in presence of witnesses. The victim succumbed to her injuries after 2 days. He made the inquest over the dead bodies of Sukumoni and Basanti and Inquest reports are Exts.3 and 4. The witnesses were present at the time of inquest also and their signatures were obtained upon the same. He also claims to have seized one empty kerosene bottle (Mat. Ext.1) and one Chaki (Mat. Ext. 2). He prepared the Sketch map of the place of occurrence and thereafter he sent the dead bodies to the Civil Hospital for post-mortem examination. In cross-examination he stated that he recorded the statement of Sukumoni on 16.5.1993 whereas she died on 18.5.1993. Sukumoni, according to the witness was in her senses. She could speak distinctly, according to the I/O. The witness further stated in cross-examination that sister Janu Dowerah and one Gagan Bawri were also present when he recorded the statement Sukumoni. The doctor was not available. The witness claims to have asked the deceased as to how the occurrence took place and she narrated the story about the occurrence.

The witness was constrained to admit in cross-examination that he did not record in the statement of Sukumoni that accused used Chaki for the purpose of burning her. The victim had spoken in Assamese language. Her claims to have completed the writing of the statement of Sukumoni in 10 minutes. The witness admitted that there were burn injuries on chin and chest and round the neck on the person of Sukumoni.

12. PW. 1 and PW.8 are doctors who performed post-mortem examination. Dr. Golap Chandra Deka, PW.1 performed the postmortem examination on the dead body of Sukumoni on 19.5.1993 and found the following injuries on the person of the deceased.

"External appearance : Rigor mortis absent Average built. External injury :

Sloughed out areas of burn with scatters pus points and occasional brown crust formation in the following areas, namely, burn injury in 75% of the back, burn injury in whole neck, both cheeks, lips, tips of nose. There was burn injury of 75% in front of the chest wall in the upper part. There were burn injury on left and right shoulders and in upper part of left fore-arm. There was burn injury on the posterior aspect of both legs from knee to heel.

On dissection :

Membrane, brain, pleurae, larynx trachea, lungs were all congested Mouth, Pharynx and esophagus-congested. Liver spleen, kidney were all congested.

Death in the opinion of the doctor was due to shock as a result of septicemia due to burn injuries. In cross-examination the witness admitted that the patient could have survived if she had been given proper treatment in time. He further stated in cross-examination that after such burn injuries, a person would be in a position to talk.

13. PW.8 is another doctor who performed autopsy on the dead body of Basanti. He found the following injuries on the person of the deceased :

External appearance :

(Rigor mortis present. Injuries) Deep burn over the both hands, face and neck with slough.

External injury :

There was also burnt Is in the genital area, chest right side of the back over the both thigh and the lateral surface of the right leg. Burn area slough and puss points present. Percentage of burn was more than 70 percent.

On dissection :

Liver, spleen and kidney-conjuncted. Thorax : Right lung and left lung conjuncted."

In cross-examination the doctor clearly stated that for such injuries, there was no chance of a person to survive even if immediate treatment had been given. This is the entire evidence brought on record by prosecution. The first question that arises is whether the prosecution has been able to prove its case. The guilt or innocence of the accused has to be examined in the light of the evidence noticed above and the arguments of the learned counsel for the appellant and the State.

14. Mr. H Roy, learned counsel for the appellant appearing as Amicus Curiae counsel has vehemently argued that the prosecution has not been able to bring home the guilt to the accused beyond reasonable doubt. It has also been argued that there being no eye witness to the occurrence, the appellant should have been given the benefit of doubt.

15. We have given deep thought to the arguments of the counsel for the appellant and have gone through the prosecution evidence minutely. On reappraisal of the entire evidence, we are of the considered view that the prosecution has been able to prove the guilt of the accused beyond shadow of doubt.

16. Although there is no eye witness, yet we are of the view that the dying declaration of the deceased and the circumstantial evidence coupled with the conduct of the accused can be safely relied upon for upholding the conviction. It is clear from the statements of the prosecution witnesses that they arrived at the place of occurrence immediately after the incident. PW.4 extinguished the fire of

Basanti by pouring water ; whereas Sukumoni somehow or the other was able to manage to extinguish the fire by rolling herself in the courtyard. PW.4 is the elder brother who deposed against his own younger brother. Similarly, PW.5 and 6 are the aunt and uncle of the accused. They have also deposed against the accused. PW.7 being a cousin of the accused cannot also be disbelieved. All these witnesses have stated with one voice that the deceased Sukumoni told them that the appellant had set her and her daughter on fire in the house. The dying declaration is consistent to all these witnesses. PW.2, a neighbor, is an independent witness whose presence was natural at the place of occurrence. The witnesses were attracted to the place of occurrence after they heard alarm raised by the deceased. It has come in the evidence of the prosecution witnesses that Sukumoni was in a position to talk and this is precisely the statement of the doctor as well who performed to the post-mortem examination. He has stated as noticed above that after such burn injuries, a person would be in a position to talk. The dying declaration, therefore given to several prosecution witnesses immediately after the incident is believable. The conduct of the accused in fleeing away from the place of occurrence is another strong circumstance that goes against the accused. It has come in the statement of PW.6 that he found the accused after his arrival at the place of occurrence, he was standing nearby but after seeing him, fled away from the place of occurrence. The accused was apprehended from Nagabasti on the next day. The accused was living with his mother and sister in the house and none else lived with him as has been deposed by his elder brother. The living of the accused with the deceased persons and immediately after the incident, his fleeing away are strong circumstances which unerringly point to the guilt of the accused. In short the complicity of the accused is proved by dying declaration made to the relation witnesses and the independent witness.

17. As regards the dying declaration made by the deceased Sukumoni to the Investigating Officer the counsel for the appellant is right to a grant extent that the same could not be the sole basis of conviction. It has been held in several judicial pronouncements that the dying declaration recorded by the Investigating Officer should not be the sole basis for conviction. In the instant case, the dying declaration was recorded by I.O. on 16.5.1993 at 8.30pm whereas the deceased Sukumoni breathed her last on 18.5.1993. It has not been stated by the I.O. that

he made any attempt to procure the presence of a Magistrate for recording dying declaration. None the less guilt is otherwise proved in view of our discussion above.

18. The question then arises whether the conviction of the appellant under Section 302 of the Indian Penal Code can be upheld or not when the mother according to Doctor PW -1 could survive, if she had been given proper treatment. Our answer is that the offence committed by the appellant deserves punishment under Section 302 of the Indian Penal Code, may be - the mother could have survived if proper treatment had been given as has been stated by the Doctor PW1. In the case of Basanti, Doctor Bipul Kumar Borah has stated in so many words that she could not have survived with such injuries. He further stated that the death of Basanti in his opinion was due to shock as a result of burn injuries which was sufficient to cause death in the ordinary course of nature. The accused by burning his own mother and sister by pouring kerosene oil upon them, in our considered view intended to cause their death.

19. Adverting to the question whether the accused deserve death sentence or not, the case has to be examined keeping in view the principles of law laid down by the Hon'ble Supreme Court in several judicial pronouncements. The Trial Court sentenced the appellant to undergo rigorous imprisonment for life after observing that the accused was 27 years of age. It has further been observed that he was illiterate and earns his livelihood as a day labourer. According to the Trial Court the motive of the crime was not known and there was no enmity of the appellant with the deceased. The murder, according to the Trial Court, was not premeditated. In short, the Trial Court held that the case was not rarest of a rare case attracting death penalty.

20. This court suo motu issued show cause notice to the accused by recording the following order :

"The instant appeal has been filed by the appellant who is alleged to have committed the murder of his mother and sister aged 7 years. He has been sentenced to undergo imprisonment for life.

After going through the records, we are of the prima facie view that the sentence awarded to the appellant is inadequate. Show cause notice is ordered to be issued for 5th of Oct' 99 to the accused appellant as to why the sentence of imprisonment for life be not enhanced to death sentence. Show cause notice would be served by the Registry through special messenger upon the accused appellant in District Jail, Jorhat, where the accused appears to be lodged, as the present appeal has been filed through Superintendent, District Jail, Jorhat. If the accused appellant wishes to be heard in person on 5th of Oct'99, the Superintendent District Jail, Jorhat, would make appropriate arrangements for the appearance of the accused appellant."

21. The accused in pursuance of the show cause notice sent the reply in writing stating that he had been suffering from acute mental conflict for a long time and did not know what he had done under that mental state. He has further stated that he had been repenting. The entire reply reads as under :

"To

The Hon'ble the Chief Justice,

Gauhati High Court, Guwahati, Assam.

Dated 3.10.1999

Through the Supdt. Dist. Jail, Jorhat

Sub : Prayer in connection with the Notice from Hon'ble High Court

Petitioner : Shri Dina Bawri

District Jail, Jorhat.

Sir,

Humble submission is that upon a judgment dt. 30.5.1996, passed by the District Sessions Judge, Jorhat, in a case against me, I have been in jail.

That Sir, I had petitioned to the Hon'ble High Court praying for lessening Of the Jail-term imposed on me. Regarding my case, I beg to inform your honour that I had been suffering from acute mental conflict since a long time back. So, I did not know what I had done under the mental state. Till today, I have been repenting for that.

I, therefore, request your honour to exempt me from my said unpardonable crime and to facilitate my release from jail. Further, I beg to inform your honour that I have not been able to mentally prepare myself to appear before that Hon'ble Court on 5.10.1999 as directed by you honour. So I request the Hon'ble Court to excuse me for that.

This is my humble submission before your honour.

Forwarded Finish

Sd/Illegible This is my humble submission before your honour.

Forwarded Finish

Sd/-Illegible Yours faithfully.

3, 10 L.T.I, of Dina Dawri

Supdt. Dist. Jail Jorhat.

3/10/1999 Attested sd/- Illegible Asstt. Jailor, Dist. Jail, Jorhat."

22. Mr. Roy, learned counsel for the accused after referring to the above mentioned reply has vehemently argued that this court should not enhance the sentence in view of the fact that the appellant is a poor and illiterate man. The repentance shown in the reply has also been heavily relied upon by Mr. Roy during the course of arguments. With reference to the case law which would be noticed in the later part of the judgment of the counsel argued that the present is not a case falling in the category of rarest of a rare case warranting imposition of death penalty. Mrs. K. Deka on the other hand has argued with equal vehemence that the instant case is one of the rarest of a rare case in which this court must

give death sentence as the accused has killed none else but his own mother and helpless sister. She has also relied upon some judgments which we would be dealing with shortly.

23. Before discussing the case law laying down principles governing the imposition of death sentence, it is necessary to make a note of the two judgments of the Apex Court with regard to the power of this court to enhance the sentence. It has been held in *Sahab Singh and others v. State of Haryana* (1990) 2 SCC 385 that the High Court is competent to enhance sentence in exercise of its suo motu revisional jurisdiction in an appeal against conviction even if no appeal against sentence has been filed by the State. Notice and opportunity of hearing has been held to be necessary in *Sahab Singh*' case (supra). The Apex Court again after a period of fortnight ruled in *Govind Ranjijadav v. State of Maharashtra* (1990) 4 SCC 718 that the High Court can even suo motu enhance the sentence but must provide predecisional opportunity of showing cause and hearing to the accused- It was held in *Govind Ranjijadav*'s case (supra) that it was permissible for the High Court while exercising its revisional jurisdiction under Section 397 read with Section 401 IPC to exercise the power of a court of appeal under Section 386(C) for enhancement of sentence.

24. Both the counsel for the parties, in support or against Imposition of death sentence have relied upon the following judgments :

1. (1974) 4 SCC 443. - *Ediga Anamma v. State of Andhra Pradesh*.
2. (1979) 3 SCC 646 - *Rajendra Prasad v. State of U.P.*
3. (1979) 3 SCC 714 - *Bishnu Deo Sahaw v. State of W.B.*
4. (1979) 3 SCC 727 - *Bechan Singh v. State of Punjab*.
5. AIR 1980 SC 898 - *Bachan Singh v. Union of India*.
6. (1981) 1 SCC 574 - *Ummilal Singh v. State of Punjab*.
7. AIR 1983 SC 957 - *Macchi Singh & Ors. v. State of Punjab*.

8. (1985) 1 SCO 505 - State of U.P. v. M.K. Antony.
9. AIR 1988 SC 1883 - Kehar Singh & Ors. v. The State (Delhi Admn).
10. (1996) 6 SCC 250 - Kamta Tiwari v. State of M.P.
11. 1999 Cri LJ 1836 - Nirmal Singh & another v. State of Haryana.
12. 1999 Cri LJ 3134 - State of Tamil Nadu v. Nalini, & Ors
13. AIR 1999 SC 1926 - Mahendra Nath Das (r) Gobind Das v. State of Assam.
14. AIR 1999 SC 1860 - Jai Kumar v. State of M. P.

25. In Ediga's case (Supra) a married woman of 24 years living with her parents along with her only child having been abandoned by her husband and in-laws developed illicit connections with the middle aged widower. The said middle aged widower simultaneously was having affairs with another young woman and it is this young woman along with her little baby who were done to death by the accused in a jungle. The Hon'ble Supreme Court after making following observations commuted the death sentence into life imprisonment :

"15. The prisoner is a young woman 24 flogged out of her husband's house by the father-in-law, living with her parents with her only child-sex starved and single. The ethos of the rural area where the episode occurred does not appear to have been too strict or inhibitive in matters of sex, for the deceased and the accused were both married and still philandered out of wedlock with PW. 16, a middle-aged widower who made no bones about playing the free-lance romancer simultaneously with them. Therefore, the accused incautiously slipped down into the sex net spread by PW. 16, and while entangled and infatuated. discovered in the deceased a nascent rival. With the reckless passion of jealous mistress she planned to liquidate her competitor and crudely performed the double murder, most foul. Perhaps it may be a feeble extenuation to remember that the accused is young woman who attended routinely to the chores of domestic druggery and allowed her flesh to assert itself salaciously when invited by uncensored opportunity for lonely meetings with PW.

16. It may also be worth mentioning that, apart from her youth and womanhood, she has a young boy to look after. What may perhaps be an extrinsic factor but recognised by this court as of human significance in the sentencing context is the brooding horror of 'hanging' which has been haunting the prisoner in her condemned cell for over two years. The Sessions Judge pronounced the death penalty on December 31, 1971, and we are now in February, 1974. This prolonged agony has ameliorative impact according to the rulings of this court. The leading case in *Piare Dusahh v. Emperor*, was relied upon by this court in *Neti Sreeramulu v. State of Andhra Pradesh*. The following passage from the Federal Court decision is telling :

In committing the offence the appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death.

The decision in *State of Bihar v. Pashupati Singh*, strikes a similar note. Although this consideration is vulnerable to the criticism made by Counsel for the State that as between two capital sentence cases that which is delayed in its ultimate disposal by the courts receives the less terrible punishment while the other heard with quick despatch, for that very reason, fails to relieve the victim from condemnation to death.

27. Here, the criminal's social and personal factors are less harsh, her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy - these individually inconclusive and cumulatively marginal facts and circumstances tend towards award of life imprisonment. We realise the speculative nature of the correlation between crime and punishment in this case, as in many others, and conscious of fallibility dilute the death penalty. The larger thought that quick punishment, though only a life term, is more deterrent than leisurely judicial death award with liberal interposition of executive clemency, and that stricter checking or, illicit weapons by the police deters better as social defence against murderous violence than a distant death sentence, is not an

extraneous component in a court verdict on form of punishment."

26. In Rajendra Prasad's case (supra) the majority judgment of Hon'ble Mr. Justice V.R. Krishna Iyer, and Hon'ble Mr. Justice D.A. Desai laid down criteria and considerations for the award of death sentence keeping in view the trend world over and the effect of change made by section 354 of the Cr. P.C. It was also held that the stress while awarding the sentence should be on criminal and not its crime. It was further held that the number of deaths caused was not decisive. The Following observations can be reproduced :

"18. Law must be honest to itself. It is not true that some judges count the number of fatal wounds, some the nature of the weapon used, others count the corpses or the degree of horror and yet others look into the age or sex of the offender and even the lapse of time between the trial court's award to death sentence and the final disposal of the appeal? With some judges, motives, provocations primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex and other odd factors enter the sentencing calculus. Stranger still, a good sentence of death by the trial court is sometimes upset by the Supreme Court because of law's delays. Courts have even directed execution of murderers who are mental cases, who do not fall within the McNaghten rules, because of the insane fury of the slaughter. A big margin of subjectivism, a preference for old English precedents, theories of modern penology, behavioural emphasis or social antecedents, judicial hubris or human rights perspectives, criminological literacy or fanatical reverence for outworn social philosophers buried in the debris of time except as part of history this plurality of forces plays a part swinging the pendulum of sentencing justice erratically. Therefore, until Parliament speaks, the court cannot be silent. (Hopefully, Section 302 IPC is being amended, at long last, but it is only halfway through as the Rajya Sabha proceedings show. We will revert to it latter).

19. Prof. Black shield, on an analytical study of Indian death sentence decisions, has remarked with unconventional candour :

But where life and death are at stake, inconsistencies which are understandable may not be acceptable.

His further comments are noteworthy :

The fact is that in most cases where the sentence of death under Section 302 is confirmed by the Supreme Court, there is little or no discussion of the reasons for confirmation. Sometimes there is a brief assertion of "no extenuating circumstances" (which means to imply that the court is making its own discretionary judgment), at other times there is a brief assertion of "no ground to interfere" (which seems to imply that the court is merely reviewing the legitimacy of the High Court's choice of sentence.) The result is to obfuscate, probably beyond any hope of rationalisation, the analytical issues involved.

The twists and turns in "sentencing pattern and the under emphasis on the sentence's circumstances in decided cases make an in-depth investigation of the principles ; Justifying the award of death sentence a constitutional duty of conscience. This court must extricate, until Parliament legislates, the death sentence sector from judicial subjectivism and consequent uncertainty. As Justice Cardozo, bluntly states :

There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights : and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of man do not turn aside in their course and pass the judges by.

20. It is fair to mention that the humanistic imperatives of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, have hardly been explored by courts in this field of 'life or death' at the hands of the law. The main focus of our judgment is on this poignant gap in 'human rights jurisprudence' within the limits of the Penal Code, impregnated by the Constitution. To put it pithily, a world order voicing the worth of the human person, a cultural legacy charged with

compassion, an interpretative liberation from colonial callousness to life and liberty, a concern for social justice as setting the sights of individual justice, interact with the inherited text of the Penal Code to yield to goals desiderated by the Preamble and Articles 14, 19 and 21.

23. Let us leave 'law' a while and begin with drawing the backdrop with a lurid brush. Every sombre dawn a human being is hanged by the legal process, the flag of humane justice shall be hung half-mast. Such is the symbolic reverence the land of Gandhi should pay to human life haltered by the lethal law. The values of a nation and ethos of a generation mould concepts of crime and punishment. So viewed, the lode-star of penal policy today, shining through the finer culture of former centuries, strengthens the plea against death penalty. Moreover, however much judicially screened and constitutionally legitimated, there is a factor of fallibility, a pall that falls beyond recall and a crore of sublimated cruelty implied in every death penalty. This is the starting point of our re-appraisal of precedential and legislative texts, with a view to evolving clearer criteria for choice between the Life-Death Alternatives enacted into the Penal Code. We may, for emphasis, recall Section 302. IPC, - at once laconic and draconic, which reads :

Punishment for murder - whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

We approach the resolution of the punishment predicament in a manner at once legal, logical and criminological and impregnated with values constitutional. Therefore, we will first study the significant legislative developments in the two interacting Codes and related parliamentary essays at change. Where broad conclusions' emerge from such an investigation, constitutional reinforcement may be sought. Since the Constitution is paramount and paramountcy is paramountcy its expansive humanism must overpower traditional 'terrorism' in the practice of sentencing. When this stage is reached and formulation of guidelines made, we will consider the criminological foundations of theories of punishment which harmonise with the human rights jurisprudence of our cultural cosmos. Finally, we will set down the salient cynosures for judges in their day-to-day labours.

54. As stated earlier you cannot be unusually cruel for that spells arbitrariness and violates. Article 14, Douglas, J, made this point clear :

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty... should be considered 'unusually' imposed if it is "administered arbitrarily or discriminatorily."

'They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

In Maneka Ganghi, this court wrote : (SCC p.283, para 7)

We must reiterate here what was' pointed out by the majority in E.P. Royappa v. State of Tamil Nadu namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch."

59. Thus, we are transported to the region of effective social defence as a large component of social justice. If the murderous operation of a discharged criminal jeopardizes social security in a persistent, planned and perilous fashion, then his enjoyment of fundamental rights may be rightly annihilated.

60. When, then, does a man hold out a terrible and continuing threat to social security In the setting of a developing country He does so if, by his action, he not only murders but by that offence, poses a grave peril to societal survival. If society does not survive, individual existence comes to nought. So, one test for imposition of death sentences is to find out whether the murderer offers such a traumatic threat to the survival of social order. To illustrate, if an economic offender who intentionally mixes poison in drugs professionally or willfully adulterates intoxicating substances injuriously, and knowingly or intentionally causes death for the sake of private profit, such trade in lethal business is a menace to social security and is, therefore, a violator of social justice whose extinction becomes necessary for society's survival. Supposing a murderous band of armed dacoits

intentionally derails a train and large number of people die in consequence, if the ingredients of murder are present and the object is to commit robbery inside the train, they practise social injustice and imperial social security to a degree that death penalty becomes a necessity if the crime is proved beyond doubt. There may be marginal exceptions or special extenuations but none where this kind of dacoity or robbery coupled with murder becomes a contagion and occupation, and social security is so gravely imperiled that the fundamental rights of the defendant becomes a deadly instrument whereby many are wiped out and terror strikes community life. Then he, 'reasonable' forfeits his fundamental rights and takes leave of life under the law. The style of violence and systematic corruption and deliberately planned economic offences by corporate top echelons are often a terrible technology of knowingly causing death on a macro scale to make a flood of profit. The definition of murder will often apply to them. But because of corporate power such murderous depredations are not charged. If prosecuted and convicted for murder, they may earn the extreme penalty for taking the lives of innocents deliberately for astronomical scales of gain.

61. Likewise, if a man is a murderer, so hardened, so bloodthirsty, that within the prison and without, he makes no bones about killing other or carries on a prosperous business in cavaders, then he becomes a candidate for death sentence. If psychoanalysts and psychiatrists find him irredeemable in the reasonable run of time then his being alive will involve more lives being lost at his hands. If, however, he can be reformed in a few years' time by proper techniques of treatment, imprisonment for life is good enough. But, on the other hand, if he is far too hardened that it has become his second nature to murder, society cannot experiment with correctional strategy, for, when he comes out of jail, he may kill to others. Such an incurable murderer deserves to be executed under the law as it stands. Difficult to imagine though, but even the bizarre may happen. The social setting, the individual factors and like imponderables still remain to be spelt out. While the world is spiralling spiritually towards a society without State sanctioned homicide, a narrow category may under current Indian societal distortions deserve death penalty although realistically the law is held at bay by corporate criminals killing people through economic, product, environmental and like crimes.

64. We may constellate some of the principles. Never hang unless society or its members may probably lose more lives by keeping alive an irredeemable convict. If rehabilitation is possible by long treatment in jail, if deterrence is possible by life-long prison terms, capital sentence may be misapplied. Death penalty is constitutionalised by reading into Section 354(3) Cr. P.C. those 'special reasons' which validate the sentence as reasonably necessitous and non-arbitrary, as Just in the special societal circumstances. -

69. Even in extreme cases, one has to judge carefully whether the social circumstances, personal remorse, the excruciation of long pendency of the death sentence, with the prisoner languishing in near-solitary suffering all the time, are not adequate infliction, so as to make capital sentence too cruel and arbitrary and agonising not to violate Article 14. Our penal pharmacopoea must provide for the extreme remedy of extinction of the whole personality only in socially critical situations. This is spiritual-social Justice.

91. Where the accused is convicted for an offence under section 302 IPC the court should call upon the Public Prosecutor at the stage of section 235(2) to state to the court whether the case is one where the accused as a matter of justice should be awarded the extreme penalty of law or the lesser sentence of imprisonment for life. If the Public Prosecutor Informs the court that the State as prosecutor is of the opinion that the case is not one where extreme penalty is called for and if the Session Judge agrees with the submission, the matter should end there.

92. If on the other hand the Public Prosecutor stated that the case calls for extreme penalty prescribed by law, the court would be well advised to call upon the Public Prosecutor to state and establish, if necessary, by leading evidence, facts for seeking extreme penalty prescribed by law. Those reasons and the evidence in support of them would provide the special reasons according to the State which impel capital punishment. It would be open to the accused to rebut this evidence either by submission or if need be, by leading evidence. At that stage the only consideration relevant for the purpose of determining the quantum of punishment would be the consideration bearing on the question of sentence along and not on the validity of the verdict of guilty. After considering the

submissions and evidence it would be for the court with its extreme judicious approach and bearing in mind the question that the extreme penalty is more an exception, to determine what would be the appropriate sentence. This would ensure a proper appreciation of vital considerations entering judicial verdict for determining the quantum of sentence."

27. We need not notice the facts of the case of Rajendra Prasad as the Apex Court was dealing with several appeals and after considering the peculiar facts and circumstances of these cases and in the light of the observations made in the judgment which have been reproduced above by us, the case of each accused was considered for awarding lighter punishment.

28. In Bishnu Deo Shaw's case (supra) the accused had earlier killed his wife on the basis of suspicion of infidelity and underwent punishment. Later on he killed his own son suspecting that he was not his son. The Supreme Court committed the sentence of death into imprisonment for life after following the law as laid down in Rajendra Prasad's case. The observations of the Apex Court are as follows :

"3. Theories of punishment, there are many ; reformative, preventive, retributive, denunciatory and deterrent. Let us examine which cap fits capital punishment. The reformative theory is irrelevant where death is the punishment since life and not death can reform. The preventive theory is unimportant where the choice is between death and life imprisonment as in India.

4. The retributive theory is incongruous in an era of enlightenment. It is inadequate as a theory since it does not attempt to justify punishment by any beneficial results either to the society or to the persons punished. It is however, necessary to clear a common misunderstanding that the retributive, theory justifies the death penalty. According to the retributivist, society has the right and the duty to vindicate the wrong done to it and it must impose a punishment which fits the crime. It does not mean returning of evil for evil but the righting of a wrong. It implies the imposition of a just but no more than a just penalty and automatically rules out excessive punishment and, therefore, capital punishment. According to a modern exponent of the retributive theory of justice.

Capital punishment... is without foundation in a theory of justice punishment. Indeed one could go further and assert that capital punishment is antithetical to the purpose and principles of punitive sanctions in the law. Requitel, when properly understood in terms of a concept of just law, undoubtedly does have a legitimate role in punishment. However, neither requital nor punishment in general is a returning of evil for evil, and, therefore, I see no support for the demand that a murder (or an act of treason, or some other serious offence) be paid for with a life.

The Biblical injunction 'an eye for an eye and a tooth for a tooth' is often quoted as if it was a command to do retributive justices. It was not, Jewish history shows that it was meant to be merciful and set limits to harsh punishments which were imposed earlier including the death penalty for balsphemy. Sabbath breaking, adultery, false prohecy, cursing, striking a parent, etc. And, as one abolitionist reminds us, who one may ask, remembers the voice of the other Jew : "Whoever shall smite on thy right cheek, turn to him the other also."?

5. The denunciatory theory of punishment is only a different shade of the retributive theory but from a sternly moral plane. Lord Dening advanced the view before the Royal Commission on Capital Punishment.

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 ultimate justification of any punishment is not that it is deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely, the death penalty. The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether is it a different or not.

The implication of this statement is that the death penalty is necessary not because the preservation of society requires it but because society demands it. Despite the high moral tone and phrase, the denunciatory theory, as propounded, is nothing but an echo of the retributive theory as explained by Stephen who had said earlier : "The criminal law stands to the passion of revenge in much the same

relation as marriage to the sexual appetite". The denunciatory theory is as inadequate as the retributive theory since it does not justify punishment by its results. As Prof. Hart points out the idea that we may punish offenders not to prevent harm or suffering or even the repetition of the offence but simply as a means of emphatically expressing out condemnation, is uncomfortably close to human sacrifice as an expression of righteousness. And the question remains : "Why should denunciation take the form of punishment?"

6. The deterrent theory may now be considered. It is important to notice here that the question is not whether the penalty of death has deterrent effect on potential murderers but whether it deters more effectively than other penalties, say, a sentence of imprisonment for a long-term? Is capital punishment the most desirable and the most effective instrument for protecting the community from violent crime? What is the evidence that it has a uniquely deterrent force compared with the alternative of protracted imprisonment? If the death penalty really and appreciably decreases murder, if there is equally no effective substitute and if its incidents are not injurious to society, we may well support the death penalty. But all studies made on the subject, as I will presently point out, appear to have led to the conclusion that the death penalty is inconsequential as a deterrent.

17. "The death penalty, rather than deterring murder, actually deters the proper administration of criminal justice." There is the absolute finality and irrevocability of the death penalty. Human justice can never be infallible. The most conscientious judge is no proof against sad mistakes. Every criminal lawyer of experience will admit that cases are not unknown where innocent persons have been hanged in India and elsewhere. And, it is not the only way the death penalty strikes at the administration of criminal justice. Some judges and juries have an abhorrence of the death penalty that they would rather find a guilty person not guilty than send even a guilty person to the gallows. The refusal of juries to convict persons of murder because of the death penalty is a well known phenomenon throughout the world. A perusal of some of the judgments of the superior courts in India dealing with cases where trial courts have imposed sentences of death reveals the same reluctance to convict because the result would otherwise be to the sentence of death. Thus a guilty person is prevented from conviction by a possibility that a death penalty may

otherwise be the result.

18. That is not all. There is yet a more 'grievous injury' which the death penalty inflicts on the administration of criminal justice. It rejects reformation and rehabilitation of offenders as among the most important objectives of criminal justice, though the conscience of the World Community speaking through the voices of the Legislature of several countries of the world has accepted reformation and rehabilitation as among the basic purposes of criminal justices. Death penalty is the brooding giant in the path of reform and treatment of crime and criminals, 'Inevitably sabotaging any social or institutional programme to reformation'. It is the 'fifth column' in the administration of criminal justices.

19. There is also the compelling class complexion of the death penalty. A tragic by-product of social and economic deprivation is that the 'have-nots' in every society always have been subject to greater pressure to commit crimes and so fewer constraints than their more affluent fellow citizens. So, the burden of capital punishment falls more frequently upon the ignorant, the impoverished and the underprivileged. In the words of Marshal, J.: "their impotence leaves them victims of a sanction that the wealthier, better represented, just as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily-forgotten members of society, legislators are content to maintain the status quo because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate and we have today's situation". As a matter of historical interest it may be mentioned here that when in 1956, in Great Britain, the House of Commons adopted a resolution : That this House believes that the death penalty for murder no longer accords with the needs or the true interests of a civilised society, and calls on Her Majesty's Government to introduce forthwith legislation for its abolition or for its suspension for an experimental period", and the Death Penalty Abolition Bill was introduced, "from the hills and forest of darkest Britain they : the hilted the lame, the deaf, the obscure ; the senile and the forgotten - the hereditary peers of England, united in their determination to use their medieval powers to retain a medieval institution," and the bill was torpedoed by the House of Lords. Capital punishment was however abolished in Great Britain in 1966.

20. There is finally the question whether the death penalty conforms to the current standards of 'decency'. Can there be any higher basic human right than the right to life and can anything be more offensive to human dignity than a violation of that right by the infliction of the death penalty Brennan, J., observed in *Furman v. Georgia* (supra) :

In comparison to all other punishments today ... the deliberate extinguishment of human life by the State is uniquely degrading to human dignity .. death for whatever crime and under all circumstances is truly an awesome punishment. The calculated killing of human being by the State involves, by its very nature, a denial of the executed person's humanity .. as executed person has indeed lost the right have rights.

Senior Tejera of Uruguay in the debate in the United Nations said :

A death penalty is an anachronism in the twentieth century and it is significant that no one in the committee has defended it. It is the duty of the United Nations to promote progress and to protect man from the prejudices and barbarity surviving from the past.

21. In a large number of countries in the world where the murder rate is higher than in India, the death penalty has been abolished. In most Latin American Countries, in Argentina, Brazil, Columbia, Costa Rica, Ecuador, Mexico Panama, Peru and Uruguay, Venezuela, in European countries, in Austria, Belguim Denmark, Germany, Italy, Netherlands, Norway Sweden and Switzerland, in Iceland, is Isreal, in many Australian State and in many of the States in the United States of America, death sentence has been abolished.

23. Judges in India have the discretion to impose or not to impose the death penalty. It is one of the great burdens which judges in this country have to carry. In the past, the reasons which weighed in the matter of awarding or not awarding the sentence of death varied widely and there was certainly room for complaint that there was an unequal application of the law in the matter of imposition of the sentence of death. The varying outlook on the part of judges was well brought out a few years ago by two decisions of the Andhra Pradesh High Court. In the first

case, while confirming the conviction of certain "Naxalites" for murder, the judges set aside the sentence of death and awarded life imprisonment instead. That the murder was not for any personal motive but was in pursuit of some mistaken ideology was the reason which weighed with the judges for substituting the sentence of life imprisonment for the sentence of death. Within a few months this view was subjected to severe criticism by two other judges, who, in the second case confirmed the sentence of death. Realising that discretion, even judicial, must proceed along perceptive lines, but, conscious, all the same, that such discretion cannot be reduced to formulas or put into pigeon-holes, this court has been at great pains ever since *Ediga Anamma* to point the path along which to proceed. In the latest pronouncement of this court in *Rajendra Prasad v. State of U.P.* (supra), several relevant principles have been enunciated to guide the exercise of discretion in making the choice between the penalties of death and life imprisonment. I express my agreement with the elucidation of the principles in *Rajendra Prasad v. State of U.P.*

26. Apart from section 354(3), there is another provision in the Code which also uses the significant expression 'special reasons'. It is section 361, section 360 of the 1973 Code re-enacts, In substance, section 562 of the 1898 Code provides for the released on probation of good conduct or after admonition any person not under twenty-one years of age who is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or any person under twenty-one years of age or any woman who is convicted of an offence not punishable with death or imprisonment for life, if no previous offence is proved against the offender, and if it appears to the court, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct or after admonition. If the court refrains from dealing with an offender under section 360 or under the provisions of the Probation of Offenders Act, or any other law for the treatment, training or rehabilitation of youthful offenders, where the court could have done so, section 361, which is a new provision in the 1973 Code makes it mandatory for the Court to record in its judgment the 'special reasons' for not doing so. Section 361 thus casts a duty upon the court to apply the provisions of section 360 wherever it is possible to do

so and, to state 'special reason' if it does not do so. In the context of section 360, the 'special reason' contemplated by section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitates the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the Legislature that reformation and rehabilitation of offenders, and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and section 354(3) have both entered the Statute Book at the same time and they are part of the emerging picture of acceptance by the Indian Parliament of the new trends in criminology. We will not, therefore, be wrong in assuming that the personality of the offender as revealed by his age, character antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reason must have some relations to these factors.

27. Criminal justice is not a computer machine. It deals with complex human problems and diverse human beings. It deals with persons who are otherwise like the rest of us, who work and play, who laugh and mourn, who love and hate, who yearn of affection and approval, as all of us do, who think, learn and forget. Like the rest of us they too are the creatures of circumstances. Heredity, environment home neighbourhood, upbringing, school friends, associates, even casual acquaintances, the books that one reads, newspapers, radio and T.V., the economics of the household the opportunities provided by circumstances and the calamities resulting therefrom, the success and failure of one's undertakings the affairs of the heart, ambitions and frustrations, the ideas and ideologies of the time, these and several other ordinary and extraordinary incidents of life contribute to a person's personality and influence his conduct. Differently shaped and differently circumstanced individuals react differently in given situations. A judge has to balance the personality of the offender with the circumstances, the situation and the reactions and choose the appropriate sentence to be imposed. A judge must try to answer a myriad questions such as was the offence committed without premeditation or was it after due deliberation What was the motive for the crime Was it for gain? Was it the outcome of a village feud Was it is result of a petty,

drunken, street brawl, or a domestic bickering between helpless husband and a helpless wife? Was it due to sexual jealousy? Was the murder committed under some stress, emotional or otherwise? What is the background of the offender? What is his social and economic status? What is the level of his education or intelligence? Do his actions betray a particularly callous indifference towards the welfare of society or, on the other hand, do they show a great concern for humanity and are in fact inspired by such concern? Is the offender so perpetually and constitutionally at war with society that there is no hope of ever reclaiming him from being a menace to society? Or is he a person who patently amenable to reform? Well may one exclaim with Prof. Vrij : "what audacity is involved in these three tasks : too interpret life explain an act, predict the latest inclination of a human mind".

28. 'Special reasons' we may therefore, say are reasons which are special with reference to the offender, with reference to constitutional and legislative directives and with reference to the times, that is, with reference to contemporary ideas in the fields of criminology and connected sciences. Special reasons are those which lead inevitably to the conclusion that the offender is beyond redemption, having due regard to his personality and proclivity, to the legislative policy of reformation of the offender and to the advances made in the methods of treatment etc. I will not attempt to catalogue any 'special reasons'. I have said enough and perhaps more than what I intended, to indicate what according to me should be the approach to the question. Whatever I have said is but to supplement what my brother Krishna Iyer has already said in *Rajendra Prasad v. State of U.P.*

29. The Apex Court instead of following the guidelines as were laid down in *Rajendra Prasad's* case referred the matter to a larger Bench in the case of *Bachan Singh v. State of Punjab*. P.S. Kailasam and R. S. Sarkaria, JJ. In (1979) 3 SCC 727 - *Bachan Singh v. State of Punjab* observed that the guidelines and restrictions on the discretion of the court to award death sentence or imprisonment as spelt out in *Rajendra Prasad's* case (*supra*) were contrary to the decision of the Constitution Bench in the case of *Jagmohan Singh v. State of U.P.* (1973)1 SCC 20). It was further observed that the court had no power to legislate and lay down guidelines for infliction of death penalty. Kailasm, J, unable to agree with the

reasoning or conclusion in Rajendra Prasad's case referred the matter to a larger bench by making the following observations :

"Hence, in the result I find myself unable to agree with the reasoning or conclusion arrived at by this court in Rajendra Prasad case mainly on the ground that it is not in conformity with the decision of the Constitution Bench of this court in Jagmoan case and that the propositions laid down are not within the competence of the court. Though the decision cannot be treated as a binding precedent yet as it is a decision of a bench of this court I direct the matter be placed before the Hon'ble the Chief Justice for constituting a larger bench to decide the case".

Sarkaria, J, while agreeing with Kailasam, J. made the following observation :

"While reserving my own opinion on the various questions raised in this case including the one with regard to the scope, amplification and application of section 354(3) of the Code of Criminal Procedure, 1973, I would, in agreement with my learned brother, direct that the records of this case be submitted to the Hon'ble Chief Justice, for constituting a larger bench which would resolve the doubts, difficulties and inconsistencies pointed out by my learned brother in his order, particularly in last paragraph".

30. The majority judgment of the Constitution Bench of the Apex Court (Bhagwati, J, taking a contrary view) while deciding the case of Bachan Singh in AIR 1980 SC 898 after reference by Kailasam and Sarkaria, JJ. Held that the provisions of death penalty as an alternative punishment in section 302 of the Penal Code was not unreasonable and that it was in public interest. Section 302 of the Penal Code, it was observed, did not violate the letter or ethos of Article 19 of the Constitution. As regards sections 235(2) and 354(3) of the Criminal Procedure Code, it has been held that the procedure provided in the Criminal Procedure Code for imposing capital punishment cannot, by any reckoning, be said to be unfair, unreasonable and unjust. It has further been held that the sentencing discretion with which the courts are invested did not amount to delegations of power of the Legislature by the Parliament. Section 354(3) did not violate Articles 14, 19 and 21 of the [Constitution of India](#), the Apex Court ruled. The view taken in this respect by the Apex Court in the cases of Rajendra Prasad and Bishnu Deo Sahaw was

overruled. The relevant observations of the Hon'ble Supreme Court about the interpretation of section 235(2) and 354(3) and Articles 14, 19 and 21 of the Constitution are reproduced below :

"151. Section 354(3) of the Code of Criminal Procedure, 1973 marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentence 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 Panel 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 :

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

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law". The Law Commission in its 48th

Report had pointed out this deficiency In the sentencing procedure :

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

The aims of sentencing:- Themselves obscure become all the more 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 cooperate in the process".

By enacting section 235(2) of the new Code, Parliament has accepted that recommendation of the Law Commission. Although sub-section (2) of section 235 does not contain a specific provisions as to evidence and provides only for hearing of the accused 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 "case would have to be taken by the Court to see that his hearing on the question of sentence is not turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings".

164. Another proposition, the application of which to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under section 302 Penal Code, the court

is principally concerned with the circumstances connected with the particular crime under inquiry. Now, section 235(2) provides for a bifurcated trial and specifically gives the accused person a right or pre-sentence hearing at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in section 354(3) a bearing on the choice of sentence. The present legislative particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in section 354(3) a bearing on the choice of sentence. The Present legislative policy discernible from section 235(2) read with section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under section 302 Penal Code, the court should not confine its consideration "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances if the criminal.

178. From what has been extracted above, It is clear that this court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature in section 354(3) can be laid down. Before we come to this aspect of the matter, it will be fair to notice briefly the decisions of the Supreme Court of U.S.A., in Gregg v. Georgia and companion cases.

195. 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 crystalised 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 section 354(3) and 235(2), namely, 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.

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

204. Dr. Chitale has suggested these mitigating factors : "Mitigating circumstances :- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances :-

- (1) That the offence was committed under the influence of extreme mental or emotional disturbances.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy 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 impaired his capacity in appreciate the criminality of his conduct."

205. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several states of India, there are in force special enactments, according to which a 'child' that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The Special Acts provide for a reformatory procedure for such juvenile offenders or children.

206. According to some Indian decisions, the post-murder remorse penitence or repentance by the murder is not a factor which may induce the Court to pass the lesser penalty (e.g. Mominuddin Sardar), AIR 1935 Cal 591. But those decision can no longer be held to the good law in view of the current penological trends and the sentencing policy outlined in section 235(2) and 354(3). We have already extracted the views of Messinger and Bittner (ibid), which are in point.

207. There are numerous other circumstances justifying the passing of the lighter sentence ; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological Imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354(3), Judges should never be blood thirsty. Hanging of murderer has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show

that in the past, courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in section 354(3), viz. That for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

31. In Ummilal's case (supra) the Apex Court altered the death sentence to life imprisonment considering the young age and provocation of the accused as mitigating circumstances.

32. In Machhi Singh's case (supra) a Division Bench of three Hon'ble Judges after relying upon the law as laid down in Bachan Singh's case (supra) has observed as follows :

33. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be called out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh'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 along with circumstances of the 'crime';

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose

sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances ;

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances 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?

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

33. The aforementioned observations were made by the Apex Court in a case where 17 lives were lost in 5 incidents which occurred in a quick succession in 5 different villages of Punjab between 2 families. Machhi Singh and his 11 close relatives and associates faced prosecution in 5 Sessions trials. Machhi Singh was common accused in all trials. Four accused were sentenced to death whereas others were given life imprisonment. The Apex Court after confirming the death sentence of Machhi Singh, Jagir Singh and Kashmir Singh, acquitted the remaining accused from the charge of murder.

34. In case of *State of U.P. v. M. K. Antony* a Division Bench of the Apex Court commuted the death sentence into life imprisonment in the case of commission of murder by the accused of his wife and minor daughter. It was held that the

accused committed murder as he in his utter helplessness could not find few chips to help his ailing wife and he saw the escape route by putting an end to their lives. The Apex Court was of the view that the accused did not commit murder of this wife and children of any lust, sense of vengeance or for gain.

35. In 'Kehar Singh' case (supra) Hon'ble Supreme Court was dealing with the case of the accused persons who assassinated Smti. Indira Gandhi Former Prime Minister of India, the Apex Court found that the case was one of the rarest of rare cases. The death sentence was held to be proper in the case of Kehar Singh and his conspirator. Hon'ble Mr. Justice G. L. Oza while confirming the death sentence observed as follows :

"91. Then is the question of sentence which was argued to some extent. But it must be clearly understood that it is not a case where X is killed by Y on some personal ground or personal vendetta. The person killed a lady and no less than the Prime Minister of this country who was the elected leader of the people. In our country we have adopted and accepted a system wherein change of the leader is permissible by ballot and not by bullet. The act of the accused not only takes away the life of popular leader but also undermines our system which has been working so well for the last forty years. There is yet another serious consideration, Beant Singh and Satwant Singh are persons who were posted on the security duty of the Prime Minister. They are posted there to protect her from any intruder or from any attack from outside and therefore, if they themselves resort to this kind of offence, there appears to be no reason or no mitigating circumstances for consideration on the question of sentence. Additionally, an unarmed lady was attacked by these two persons with a series of bullets and it has been found that a number of bullets entered her body. The manner in which mercilessly she was attacked by these two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. In this view of the matter, even the conspirator who inspired the persons who actually acted does not deserve any leniency in the matter of sentence. In our opinion, the sentence awarded by the trial court and maintained by the High Court appears to be just and proper ;"

B.C. Ray, J in a separate observation described the murder to be gruesome and held the case to be rarest of the rare cases. Shetty, J observed as follows :

" 142. The crime charged is not simply the murdering of a human being, but it is the crime of assassination of the duly elected Prime Minister of the country. The motive for the crime was not personal, but the consequence of the action taken by the Government in the exercise of constitutional powers and duties. In our democratic republic, if the Government becomes subversive of the purpose of its creation, the people will have the right and duty to change it by their irresistible power of ballot and have the Government of their own choice wisely administered. But no person who is duly constituted shall be eliminated by privy to conspiracies. Indian citizens are committed to the Constitution. They have faith in the ballot box. They have confidence in the democratic institutions. They have respect for constitutional authorities. The assassination of Mrs. Indira Gandhi, the third Prime Minister of India, has therefore, come as a rude shock. It - has sent shudder through the civilised world. The issues joined in these appeals involve the highest interest of the whole people of this country. It is matter of great importance to the people of this country that the accused be lawfully tried and lawfully convicted or acquitted. A wrongful conviction or a wrongful acquittal may shake the confidence of the people in our justice delivery system. The matter, therefore, required utmost concern."

36. In *Kamta Tiwari v. State of M.P.*, the Apex Court held the case to be one of the rarest of rare case where a 7 years old girl was murdered after rape. Paragraph 8 which is relevant is reproduced below :

"Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances - but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him Tiwari Uncle'. Obviously her closeness with appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for

some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder - as the numerous injuries on her person testify ; and the finale was the dumping of her dead body in a well. When an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

37. In Nirmal Singh's case (supra) Dharampal, the accused committed rape of Punam and he administered the threat that if anybody gave evidence, he would not be spared. The evidence of victim Punam in Court led to the conviction of Dharampal. He was sentenced to undergo rigorous imprisonment for life.

38. He having been released on bail, he and his brother committed the murder of Punam's father Tale Ram, her mother Krishna, her sister Nirmala and two brothers, namely, Tinu and Parveen. On the evidence of raped victim both the accused were given death sentence. The death sentence of Nirmal was commuted ; whereas the death sentence of Dharampal was confirmed by holding that his case did fall in rarest of rare cases. Nirmal Singh who had assaulted only one person by giving 1/4 blows was held to be not one of the rarest of rare cases and his sentence was commuted to life.

39. In Jai Kumar case (supra) the accused aged 22 years entered the room of his sister-in-law who was asleep. She was in advanced stage of pregnancy and was sleeping with her daughter aged 8 years. The accused committed the murder of his sister-in-law by giving parul blows and thereafter by giving axe blows on her neck, severed her head from the body and took her 8 years old daughter and killed her in jungle by giving axe blows for offering sacrifice to Mahuva Maharaj and

buried her in the sand covered with stones. Thereafter he came back home and carried the dead body of his sister-in-law tied in a cloth and took it to the jungle and hung the head with the trunk of the tree. It was held by the Apex Court that the fact that the accused was 22 years could not in the factual matrix held to be a mitigating factor. It was observed that the murder of the two victims who were in helpless and hapless situation was cold blooded. It was further held that the facts established the depravity and criminality of the accused in no Uncertain terms who did not show any regard for precise life of the young child, the murder was held to be cold blooded and brutal without any provocation. The following observations of the Apex Court must be reproduced for ready reference :

17. "The order of the learned Sessions Judges as recorded above unmistakably depicts that both the parties were heard and none of the parties wanted to give any documentary or oral evidence with regard to sentence. But the factum of submissions and considerations thereof as appears from paragraphs 27 and 28 leads us to a definite conclusion that there has been no miscarriage of justice. Be it noted that the statute has engrafted in the statute book the provisions of sections 235(2) so as to see that proper appreciation of the evidence takes place and proper opportunity of hearing as regards punishment be afforded, but if there is no taker of such an opportunity in spite of there being lawyers appearing for the accused as well, question of further adjournment of the matter would not arise. It is true that the obligation is not discharged by putting formal question to the accused. The Judge is supposed to elicit materials from the accused which will have a bearing on the question of sentence and it is on this requirement of law, let us consider as to whether there was in fact such genuine attempt to elicit materials but as the record depicts there was no taker of this opportunity and the defence lawyer pleaded two facts to be considered in the matter for award of punishment viz. (a) The accused is aged 22 years and (b) No other past Criminal Record ; we wish to put on record that trying Judge has shown utmost concern and after much deliberation came to the conclusion as above in the matter of the grant of punishment. The ratio decedendi of the cases noticed is to see that there is no statutory mockery resulting in a total miscarriage of justice. The judgment was adjourned and the lawyer was asked - and prompt came the reply that the sentences ought to be considered by reason of the age and no past record. , Both

these aspects have been duly considered by the Sessions Judge and we do not see any infirmity therein.

20. The guidelines as formulated on Bachan Singh's case (AIR 1980 SC 898) (supra) and adopted in two subsequent decisions of this court in Machi Singh v. State of Punjab, AIR 1983 SC 957 and Kamta Tiwari v. State of M.P., 1996 Cri. LJ 4158 (AIR 1996 SC 2800 : 1996 AIR SCW 3567) do not lend any assistance to Mr. Muralidhar. This court in Kamta Tiwari's case as a matter of fact pointedly circumstances and a balance would be struck on the basis of the factual matrix of the matter in Issue, before the exercise of discretion in terms of the provisions of section 302. In the matter in issue, however, we do not find any balancing factor so as to strike a balance. As matter of fact aggravating factors there are aplenty and galore without any mitigating circumstances as noticed above. The age of the accused being 22 years cannot, in the factual matrix of the matter under consideration, be said to be a mitigating factor. Accused is of 22 years of age while the victim was aged 30 years and at the time of the unfortunate death, she was under pregnancy between 22 to 30 weeks the other victim was an innocent girl a child of 8 years ; the murder were cold blooded while two victims were in helpless and hapless situation. No amount of perversity would prompt a person to break open the door by removing the bricks from the wall and commit such gruesome murders on failure to satisfy the lust - the human lust ought to know its limits. Imaginations shall have to run wild to consider existence of any mitigating factors in the matter of sentence, having due regard to even the subsequent conduct of the accused in the matter of disposal of the bodies as noticed above.

21. Can there be any mitigating circumstances on account of such a ghastly act - the answer cannot but be in the negative. The mother of the accused was bolted inside the room and she watches as a bewildered spectator from the creeks of the widows and it is the mother who had given evidence about the bad characteristics and the reputation of the accused in the locality ; the sister-in-law has been murdered along with an innocent child -is this a man who deserves any sympathy from the society - is this a man who can correct himself and the law courts ought to permit him to lead a decent life after he serves the sentence. The mother's evidence becomes material and it is on this score that we are unable to record our

concurrence with the submissions of Mr. Muralidhar that there are some mitigating circumstances and there is likelihood of the accused being reformed or rehabilitated. Incidentally, the High Court has described the accused as 'a living danger' and we cannot agree more therewith in view of the gruesome act as noticed above.

23. The facts established the depravity and criminality of the accused in no uncertain terms. No regard being had for precious life of the young child also. The compassionate ground of the accused being 22 years of age cannot in the facts of the matter be termed to be at all relevant. The reasons put forth by the learned Sessions Judge cannot be termed to be unassailable. The learned Judge has considered the matter from all its aspects and there is no infirmity under Section 235(2) or under section 354(3) of the Code and as such we are not in a position to record our concurrence with the submissions of Mr. Muralidhar.

24. In the present case, the savage nature of the crime has shocked our judicial conscience. The murder was cold blooded and brutal without any provocation. It certainly makes it a rarest of rare cases in which there are no extenuating or mitigating circumstances. The observations of this court in *Dhananjay Chatterjee alias Dhana v. State of West Bengal*. (1994) 2 SCC 220, to which one of us (CJI as he was then was a party) while confirming the sentence of death lend concurrence to the views expressed above. This court opined :

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime ; the conduct of the criminal and the defence less and unprotected state of the victim, imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim and crime and the society at large while considering imposition of appropriate punishment."

25. We do not see, by reason of the discussion as above, any mistake of justice has taken place and we record our concurrence with the observations and findings

of the High Court.

26. We, therefore, find no Infirmity in the sentence awarded by the Sessions Judge and as confirmed by the High Court. This appeal, therefore, falls and is dismissed."

40. In the State of Tamil Nadu v. Nalini, the Hon'ble Supreme Court was dealing with the case of assassination of Rajiv Gandhi, the former Prime Minister of India. The case was under Terrorist and Disruptive Activities Act. The special Judge after convicting several accused and after giving death sentence submitted the records to the Apex Court for confirmation of the death sentence. The Apex Court confirmed the death sentence of four persons by observing that without the role played by those accused, the commission of the offence would not have been possible.

41. In Mahendra Das @ Gobinda Das v. State of Assam, AIR 1999 SC 1926 the Apex Court confirmed the death sentence awarded by the learned Sessions Judge and affirmed by this High Court. The accused after dealing blows with sword to the deceased amputated his hand, severed his head after he fell down. The head was carried by the accused in one hand and blood dripping weapon in the other hand through a road leading to the police station. On the said facts, the Apex Court held that the murder committed was cold blooded, gruesome and heinous and the case was one of rarest of rare case warranting extreme sentence of death. The mitigating circumstances that the accused was aged 33 years and had three unmarried sisters and aged parents and was unwell at the time of commission of the murder were held to be not weighty enough in view of the circumstances that depicted extreme depravity of the accused.

42. In the light of authoritative judicial pronouncements of the Apex Court the following principles of law can be re-enunciated :

(i) According to the changed legislative policy as is patent on the face of Section 354(3) of the Criminal Procedure Code normal punishment for murder is imprisonment for life ; whereas death penalty is an exception ;

- (ii) The Court is mandatorily required to give special reasons while imposing extreme penalty of law i.e. death ;
- (iii) The court must hear the accused on the question of sentence ;
- (iv) Although section 235(2) of the Criminal Procedure Code does not contain any specific provision for recording evidence and it only provides for hearing of the accused regarding sentence, yet it is implicit in this provision that in case a request is made either by the prosecution or the accused or by both, the Court should provide the party or parties concerned an opportunity of producing evidence on the point of sentence ;
- (v) While providing an opportunity to the parties to lead evidence regarding sentence, the Court will have to take care that hearing on the question of sentence is not turned into an instrument for unduly protracting the proceedings and that the claim of proper hearing should be harmonized with the requirement of expeditious disposal of the case ;
- (vi) The present legislative policy discernible from section 235(2) read with section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under section 302 Penal Code, the court should not confine its circumstances "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal ;
- (vii) While ascertaining the existence of absence of 'special reasons' the court must pay due regard to both the crime and the criminal;
- (viii) What is the relevant weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case ;
- (ix) Judges should never be blood thirsty, Hanging of murderers has never been too good for them ;
- (x) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability ;

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

(xii) The Court must draw a balance sheet of aggravating and mitigating circumstances and while doing so the mitigating circumstances must be accorded full weightage and a just balance sheet has to be struck between the aggravating and mitigating circumstances before exercising the option between death penalty and life imprisonment;

(xiii) While exercising the option between the death sentence and life imprisonment the Court - shall keep in mind the mitigating circumstances as suggested by Dr. Chitaley which have been noticed in Bachan Singh's case (supra) ;

(xiv) The Court should award death sentence only in rarest of rare case.

43. The aforementioned principles of law have been deduced by us after going through the judicial pronouncements cited at the Bar. The learned counsel for the parties argued the case with ability and thorough preparedness. After hearing the case initially in the 3rd week of November, 1999, the judgment was kept reserved. The case was again heard in the month of April, 2000 before the start of Bihu holidays. We have given deep thought to the facts of the instant case and the law laid down by the Apex Court in several judicial pronouncements. Having given our thoughtful consideration to the entire matter, we are of the considered opinion that the present case does not fall within the category or rarest of rare case. It has been noticed by us in the earlier part of the judgment that the learned Sessions Judge while sentencing the appellant to undergo rigorous imprisonment for life has taken into consideration the fact that the appellant was a daily laborer and that there was no premeditation before the commission of the crime. In other words the poverty was one reason which has weighed with the learned Sessions Judge in awarding the ordinary punishment.

44. In reply to the show cause notice for enhancement, the accused has stated that he was suffering from acute mental conflict for a long time and that he did not know as to what he had done under that mental state. He has further stated that till

the date of filing the reply he had been repenting. It appears to us that the crime has been committed by the appellant under some mental stress for which he is repenting ever since the date of its commission. The repentance alone would not have been sufficient for giving the ordinary punishment for life imprisonment, but repentance coupled with other circumstances noticed above and to be noticed in the later part of the judgment is one of the factors which have impressed us for not interfering with the sentence awarded by the learned Sessions Judge.

45. Neither any motive was alleged by the prosecution nor the same has been proved in evidence. There is nothing on the record of the case that there is no probability that the accused would not be reformed and rehabilitated. There is also nothing on record of the case that the appellant ever committed even a minor offence in the past and, therefore, it would not be an improbable and impossible view that the accused would not commit criminal acts of violence in future and is not likely to constitute a continuing threat to the society. While making up our mind for maintaining life imprisonment we are keeping in our mind the observations of the Apex Court that Judges should never be blood thirsty and that the sentence of death should be awarded only if the sentence of imprisonment for life is found to be quite inadequate. Although there are some aggravating circumstances in the present case yet after taking into consideration the mitigating circumstances, we are of the considered view that the present is not a case where imprisonment for life can be held to be quite inadequate. There are no special reasons for us to enhance the sentence of imprisonment for life to the sentence of death. In short the present is not one of the rarest of rare case.

46. For the reasons recorded above, while dismissing the appeal, the sentence imposed by the trial court is maintained and the notice for enhancement of sentence is discharged. In view of the fact that the counsel amicus curiae must have spent several days in preparing and hearing of the case also took sufficient time, we while placing our full appreciation for Mr. H. Roy, learned counsel for the appellant, fix his fee at Rs.7500. We would be failing in our duty if we do not appreciate Mrs. K. Deka learned counsel for the State who has argued the case with equal ability. She also deserves double the fee beyond the one which State Counsel gets in normal circumstances.

47. The appeal is thus dismissed.

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