REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 490-491 OF 2011

SANGEET & ANR. .....Appellants

VERSUS

STATE OF HARYANA .....Respondent

J U D G M E N T

Madan B. Lokur, J.

1. In these appeals, this Court issued notice limited to the question of the sentence awarded to the appellants. They were awarded the death penalty, which was confirmed by the High Court. In our opinion, the appellants in these appeals against the order of the High Court should be awarded a life sentence, subject to the faithful implementation of the provisions of the Code of Criminal Code, 1973.

The facts:

2. In view of the limited notice issued in these appeals, it is not necessary to detail the facts. However, it may be mentioned that as many as six persons (including the appellants) were accused of various offences under the Indian Penal Code (for short the IPC) and the Arms Act, 1959. They were convicted by the Additional Sessions Judge, Rohtak by his judgment and order dated 13th November, 2009 in Sessions Case No. 47 of 2004/2009 of the offence of murder (Section 302 of the IPC), attempt to murder (Section 307 of the IPC), rioting, armed with a deadly weapon (Section 148 of the IPC), house trespass in order to commit an offence punishable with death (Section 449 of the IPC) read with Section 149 of the IPC (every member of an unlawful assembly is guilty of an offence committed in prosecution of a common object). Five of the accused were convicted of an offence under Section 25(1-B) of the Arms Act, 1959. Except the appellants, all of them were given a sentence of rigorous imprisonment for life and

payment of fine. The appellants, as mentioned above, were sentenced to death.

3. The Trial Judge found the accused guilty of having committed the murder of Ranbir, Bimla (his wife), Seema (wife of Amardeep) and Rahul the three-year-old child of Amardeep and Seema and grandson of Ranbir.

4. The Trial Judge found that accused Ram Phal believed that Amardeep's family had performed some black magic which led to the death of his (Ram Phal) son Ved Pal soon after his marriage. Apparently, with a view to take revenge, Ram Phal and the other accused committed the crimes aforementioned.

5. The Trial Judge found that the bodies of Ranbir, Bimla (his wife) and Seema (wife of Amardeep) had bullet injuries and other injuries inflicted by a sharp-edged weapon called 'Kukri'. The body of Seema was also burnt from below the waist. As far as Rahul (a three-year-old boy) is concerned the upper portion of his head was blown off by a firearm injury. Amardeep also had a grievous injury but he survived and was

the star witness for the prosecution. On these broad facts the Trial Judge convicted the appellants and others.

6. Thereafter, the Trial Judge heard the convicts under Section 235(2) of the Code of Criminal Procedure on the question of sentence. In his brief statement, appellant Sandeep stated that he is married and has a five-year-old daughter and aged parents to look after. Appellant Narender also gave a brief a brief statement that he is not married and has aged parents to look after. The Trial Judge considered the judgments of this Court, inter alia, in ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684*** and ***Machhi Singh and Ors. v. State of Punjab, (1983) 3 SCC 470***. Thereafter, by his order dated 18th November, 2009 the Trial Judge handed down the sentences mentioned above.

7. The Trial Judge found that the crime committed by the appellants was brutal in nature. As far as Narender is concerned he had blown off the upper portion of the head of three-year-old Rahul, son of Amardeep by the use of a firearm. As far as Sandeep is concerned, even after giving a gun shot injury on the head of Seema he poured kerosene oil on her

and set her ablaze. Taking note of the fact that the entire family of Ranbir (except Amardeep) was wiped out by the accused in a brutal and merciless manner, the Trial Judge held that the crime committed by them fell in the category of the rarest of rare cases, inviting the death penalty. The death sentence awarded to the appellants was however, subject to confirmation by the Punjab & Haryana High Court to which a reference was separately made.

8. The Punjab & Haryana High Court by its Judgment and Order dated 21st July, 2010 in Murder Reference No. 7 of 2009 confirmed the death sentence.

9. The High Court opined that the crime was committed in a pre-meditated, cold-blooded, cruel and diabolic manner while the victims were sleeping. The convicts were armed with deadly weapons like firearms and kukris etc. which they used unhesitatingly and indiscriminately to commit murders and cause a life threatening injury to Amardeep. It was held that Seema's body was burnt by Sandeep from below the waist with a view to destroy evidence of her having been subjected to sexual harassment and rape. Narender was found to be a

professional killer. It was held that the act of the appellants fell in the category of rarest of rare cases and as such a death penalty was warranted.

10. We heard the learned Legal Aid Counsel on behalf of the appellants and record our appreciation for the keen interest taken by him in the case and the efforts put in. We also heard learned counsel for the State and have gone through the record as well as the statement given by the appellants under Section 235 (2) of the Criminal Procedure Code. We have given our anxious consideration to the question of sentence to be awarded to the appellants.

Leading judgments on the death penalty:

11. Any discussion on the subject of death penalty should actually commence with the Constitution Bench decision in ***Bachan Singh.*** However, it may be more appropriate to travel back in time to ***Jagmohan Singh v. State of U.P. (1973) 1 SCC 20*** for the limited purpose of indicating an important legislative change that had taken place in the meanwhile.

12. ***Jagmohan Singh*** was decided when the Code of Criminal Procedure, 1898 (for short the old Code) was in force. Section 367(5) of the old Code provided that if an accused person is convicted of an offence punishable with death, and he is sentenced to a punishment other than death, the Court was required to state the reason why a sentence of death was not passed. Section 367(5) of the old Code reads as follows:-

> "If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed."

13. ***Bachan Singh*** was, however, heard and decided when the Code of Criminal Procedure, 1973 (for short the Cr.P.C) had come into force with effect from 1st April, 1974. The Cr.P.C contained Section 354(3), which provided that for an offence punishable with death, the first option for punishment would be imprisonment for life (or imprisonment for a term of years) and the second option would be a sentence of death. Section 354(3) of the Cr.P.C reads as follows:-

> "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall

state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

14. The Cr.P.C. effectively reversed the position as it existed under the old Code and also placed a requirement that if a sentence of death is awarded, the Court should record special reasons for awarding that sentence.

15. In ***Bachan Singh***, two issues came up for consideration before the Constitution Bench. The first issue related to the constitutional validity of the death penalty for murder as provided in Section 302 of the IPC and the second related to "the sentencing procedure embodied in sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973".

16. While answering the above issues, the following questions were framed for consideration:-

> "(i) Whether death penalty provided for the offence of murder in Section 302 of the Penal Code is unconstitutional.
>
> (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the Code of Criminal Procedure, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or

freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life."

17. Insofar as the first question is concerned, the Constitution Bench answered it in the negative. As regards the second question, the Constitution Bench referred to and considered ***Jagmohan Singh*** and culled out several propositions from that decision. The Constitution Bench did not disagree with any of the propositions, except to the extent of tweaking proposition (iv)(a) and proposition (v)(b) in view of the changed legislative policy. For the present, we are concerned only with these two propositions. However for convenience, all the propositions culled out from ***Jagmohan Singh*** are reproduced below:-

"(i) The general legislative policy that underlines the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii)-(a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (referred to McGoutha v. California, (1971) 402 US 183).

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in Furman v. Georgia (1972) 408 US 238 decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and unguided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

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

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

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

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

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302 Penal Code, "the court is *principally* concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the CrPC. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the court. The only thing that remains is for the Judge to decide on the

guilt and punishment and that is what Sections 306(2) and 309(2), CrPC purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21"."(emphasis added in the judgment).

18. It will be seen from proposition (iv)(a) that ***Jagmohan Singh*** laid down that discretion in the matter of sentencing is to be exercised by the judge after balancing all the aggravating and mitigating circumstances "of the crime".

19. ***Jagmohan Singh*** also laid down in proposition (v)(b) that while choosing between the two alternative sentences provided in Section 302 of the IPC (sentence of death and sentence of life imprisonment), the Court is *principally* concerned with the aggravating or mitigating circumstances connected with the "particular crime under inquiry".

20. Since the focus was on the crime, we call this, for convenience, Phase I of an evolving sentencing policy.

21. As mentioned above, while accepting all other propositions laid down in ***Jagmohan Singh***, the Constitution

Bench in ***Bachan Singh*** did not fully accept proposition (iv)(a) and (v)(b). This is explained in paragraph 161 to paragraph 166 of the Report where it is specifically mentioned that these two propositions need to be "adjusted and attuned" to the shift in the legislative policy.

22. The Constitution Bench observed that under the old Code, both the sentence of death and the sentence of imprisonment for life provided under Section 302 of the IPC could be imposed after weighing the aggravating and mitigating circumstances of the particular case. However, in view of Section 354(3) of the Cr.P.C. a punishment of imprisonment for life should normally be imposed under Section 302 of the IPC but a sentence of death could be imposed as an exception. Additionally, as per the legislative requirement if a sentence of death is to be awarded, special reasons need to be recorded. In a sense, the legislative policy now virtually obviated the necessity of balancing the aggravating and mitigating circumstances of the crime for the award of punishment in respect of an offence of murder (although "aggravating and mitigating circumstances" are

repeatedly referred to in the judgment, including as "relevant circumstances" that must be given "great weight"). Therefore, the Constitution Bench (after a discussion in paragraphs 161 and 162 of the Report) "adjusted and attuned" proposition (iv) (a) by deleting the reference to "balancing all the aggravating and mitigating circumstances of the crime" to read as follows:-

> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence."

23. The Constitution Bench also did not fully accept the postulate in proposition (v)(b) that while making the choice of sentence, including the sentence under Section 302 of the IPC, the Court should be *principally* concerned with the circumstances connected with the particular crime under inquiry (paragraph 163 of the Report). The Constitution Bench laid down that not only the relevant circumstances of the crime should be factored in, but due consideration must also given to the circumstances of the criminal. Consequently, the

Constitution Bench re-formulated proposition (v)(b) to read as follows: -

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

24. The conclusion of the Constitution Bench under these circumstances was that the sentence of death ought to be given only in the rarest of rare cases and it should be given only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed".

25. ***Bachan Singh,*** therefore, made two very significant departures from ***Jagmohan Singh***. The departures were: (i) in the award of punishment by deleting any reference to the aggravating and mitigating circumstances of a crime and (ii) in introducing the circumstances of the criminal. These departures are really the crux of the matter, as far as we are concerned in this case.

26. ***Bachan Singh*** effectively opened up Phase II of a sentencing policy by shifting the focus from the crime to the crime and the criminal. This is where ***Bachan Singh*** marks a watershed in sentencing. But, how effective has been the implementation of ***Bachan Singh***?

Issue of aggravating and mitigating circumstances:

27. In making the shift from the crime to the crime and the criminal, the Constitution Bench in ***Bachan Singh*** looked at the suggestions given by learned counsel appearing in the case. These suggestions, if examined, indicate that in so far as aggravating circumstances are concerned, they refer to the crime. They are: -

> "(a) if the murder has been committed after previous planning and involves extreme brutality; or
> (b) if the murder involves exceptional depravity; or
> (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—
>
> (i) while such member or public servant was on duty; or
>
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such

member or public servant, as the case may be, or had ceased to be such member or public servant; or

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

In so far as mitigating circumstances are concerned, they refer to the criminal. They are: -

"(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(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 to appreciate the criminality of his conduct."

28. The Constitution Bench made it absolutely clear that the suggestions given by learned counsel were only indicators and

not an attempt to make an exhaustive enumeration of the circumstances either pertaining to the crime or the criminal. The Constitution Bench hoped and held that in view of the "broad illustrative guide-lines" laid down, the Courts "will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) [of the Cr.P.C.] viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception."

29. Despite the legislative change and ***Bachan Singh*** discarding proposition (iv)(a) of ***Jagmohan Singh,*** this Court in ***Machhi Singh*** revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. A balance sheet cannot be drawn up of two distinct and different

constituents of an incident. Nevertheless, the balance sheet theory held the field post ***Machhi Singh.***

30. The application of the sentencing policy through aggravating and mitigating circumstances came up for consideration in ***Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767***. On a review, it was concluded in paragraph 48 of the Report that there is a lack of evenness in the sentencing process. The rarest of rare principle has not been followed uniformly or consistently. Reference in this context was made to ***Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230*** which in turn referred to several earlier decisions to bring home the point.

31. The critique in ***Swamy Shraddananda*** was mentioned (with approval) in ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498*** while sharing this Court's "unease and sense of disquiet" in paragraphs 109, 129 and 130 of the Report. In fact, in paragraph 109 of the Report, it was observed that

> "... the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice

> of arbitrariness from our capital sentencing system. It can be safely said that the ***Bachan Singh*** threshold of "the ***rarest of rare*** cases" has been most variedly and inconsistently applied by the various High Courts as also this Court."

32. It does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented.

33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in ***Bachan Singh***. It appears to us that even though ***Bachan Singh*** intended "principled sentencing", sentencing has now really become judge-centric as highlighted in ***Swamy Shraddananda*** and ***Bariyar***. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in ***Bachan Singh*** seems to have been lost in transition.

Issue of crime and the criminal:

34. Despite ***Bachan Singh***, primacy still seems to be given to the nature of the crime. The circumstances of the criminal,

referred to in ***Bachan Singh*** appear to have taken a bit of a back seat in the sentencing process. This was noticed in ***Bariyar*** with reference to ***Ravji v. State of Rajasthan, (1996) 2 SCC 175***. It was observed that "curiously" only characteristics relating to the crime, to the exclusion of the criminal were found relevant to sentencing. It was noted that ***Ravji*** has been followed in several decisions of this Court where primacy has been given to the crime and circumstances concerning the criminal have not been considered. In paragraph 63 of the Report it is noted that ***Ravji*** was rendered *per incuriam* and then it was observed that:-

> "It is apparent that ***Ravji*** has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to [the] criminal are not pertinent."

35. It is now generally accepted that ***Ravji*** was rendered *per incuriam* (see, for example, ***Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775***). Unfortunately, however, it seems that in some cases cited by learned counsel the circumstances pertaining to the criminal are still not given the importance they deserve.

36. In ***Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713***, the principle of 'just desserts' was applied and the death penalty awarded to the convicts was upheld. The circumstances of the convicts were not considered for reducing the death penalty.

37. ***Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37*** was a case of rape and murder of a three-year-old child in a vicious and brutal manner. This Court confirmed the sentence of death after taking into consideration the brutal nature of the crime but not the circumstances of the criminal.

38. ***Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317*** was a case of a brutal rape and murder of a seven-year-old girl. While confirming the sentence of death, this Court referred to the nature of the crime and the extreme indignation of the community. On that basis, it leaned towards awarding the death sentence and observed in paragraph 24 of the Report as follows:-

> "When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly

> manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence."

39. A little later in paragraph 26 of the Report, this Court concluded that the convict was a menace to society and it was held as follows:

> "We are of the opinion that the appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court."

40. The judgment does not, with respect, indicate the material that led this Court to conclude what aroused the intense and extreme indignation of the community. Except the nature of the crime, it is not clear on what basis it concluded that the criminal was a menace to society and "shall continue to be so and he cannot be reformed".

41. In some other cases, aggravating circumstances pertaining to the criminal (not the crime) have been considered relevant. Reference may be made to two decisions rendered by

this Court which, incidentally, seem to have overlooked the presumption of innocence.

42. ***B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85*** was a case where the convict was found guilty of rape, murder and robbery. The crime was carried out in a depraved and merciless manner. Two days after the incident, the local public caught him while he was attempting to escape from a house where he made a similar attempt to rob and assault a lady. There was nothing in law to show that the convict was guilty of the second offence in as much as no trial was held. There were some recoveries from his house, which indicated that the convict had committed crimes in other premises also. Again, there was nothing in law to show that he was found guilty of those crimes. On these facts, despite the guilt of the criminal not having been established in any other case, the convict was found incapable of rehabilitation and the death sentence awarded to him was confirmed.

43. ***Sushil Murmu v. State of Jharkhand, (2004) 2 SCC 338*** was a case of child sacrifice. This Court confirmed the

death sentence awarded to the criminal after considering the fact that he was being tried for a similar offence. Significantly, the convict was still an under-trial and had not been found guilty of that similar offence. Nevertheless, this was found relevant for upholding the death sentence awarded to him.

44. We also have some cases where, despite the nature of the crime, some criminals have got the benefit of "mitigating circumstances" and their death penalty has been reduced to imprisonment for life or for a term without remission.

45. ***Mohd. Chaman v. State (NCT of Delhi), (2001) 2 SCC 28*** was a case where the convict had raped a one-and-a-half year old child who died as a result of the unfortunate incident. This Court found that the crime committed was serious and heinous and the criminal had a dirty and perverted mind and had no control over his carnal desires. Nevertheless, this Court found it difficult to hold that the criminal was such a dangerous person that to spare his life would endanger the community. This Court reduced the sentence to imprisonment for life since the case was one in which a "humanist approach" should be taken in the matter of awarding punishment.

46. ***Dilip Premnarayan Tiwari*** was a case in which three convicts had killed two persons and grievously injured two others, leaving them for dead. A third victim later succumbed to his injuries. While noticing that the crime was in the nature of, what is nowadays referred to as 'honour killing', this Court reduced the death sentence awarded to two of the criminals to imprisonment for life with a direction that they should not be released until they complete 25 years of actual imprisonment. The third criminal was sentenced to undergo 20 years of actual imprisonment. That these criminals were young persons who did not have criminal antecedents weighed in reducing their death sentence.

47. ***Sebastian v. State of Kerala, (2010) 1 SCC 58*** was a case in which the criminal had raped and murdered a two-year-old child. He was found to be a pedophile with "extremely violent propensities". Earlier, in 1998, he was convicted of an offence under Section 354 of the IPC, that is, assault or use of criminal force on a woman with intent to outrage her modesty, an offence carrying a maximum sentence of two years imprisonment with fine. Subsequently, he was

convicted for a more serious offence under Sections 302, 363 and 376 of the IPC but an appeal was pending against his conviction. The convict also appears to have been tried for the murder of several other children but was acquitted in 2005 with the benefit of doubt, the last event having taken place three days after he had committed the rape and murder of the two year old child.

48. Notwithstanding the nature of the offence as well as his "extremely violent propensities", the sentence of death awarded to him was reduced to imprisonment for the rest of his life.

49. ***Rajesh Kumar v. State, (2011) 13 SCC 706*** was a case in which the appellant had murdered two children. One of them was four and a half years old and the criminal had slit his throat with a piece of glass which he obtained from breaking the dressing table. The other child was an infant of eight months who was killed by holding his legs and hitting him on the floor. Despite the brutality of the crime, the death sentence awarded to this convict was reduced to that of life imprisonment. It was held that he was not a continuing threat

to society and that the State had not produced any evidence to show that he was incapable of reform and rehabilitation.

50. ***Amit v. State of Uttar Pradesh, (2012) 4 SCC 107*** was a case in which a three-year-old child was subjected to rape, an unnatural offence and murder. The convict was also found guilty of causing the disappearance of evidence. The sentence of death awarded to him was reduced to imprisonment for life subject to remissions. It was held that there was nothing to suggest that he would repeat the offence. This Court proceeded on the premise that the convict might reform over a period of years since there was no evidence of any earlier offence committed by him.

51. Reference has been made to these decisions cited by learned counsel, certainly not with a view to be critical of the opinion expressed, but with a view to demonstrate the judge-centric approach to sentencing adverted to in ***Swamy Shraddananda*** and endorsed in ***Bariyar*** and the existence of the uncertainty principle in awarding life imprisonment or the death penalty.

Standardization and categorization of crimes:

52. Despite ***Bachan Singh***, the "particular crime" continues to play a more important role than the "crime and criminal" as is apparent from some of the cases mentioned above. Standardization and categorization of crimes was attempted in ***Machhi Singh*** for the practical application of the rarest of rare cases principle. This was discussed in ***Swamy Shraddananda***. It was pointed out in paragraph 33 of the Report that the Constitution Bench in ***Jagmohan Singh*** and ***Bachan Singh*** "had firmly declined to be drawn into making any standardization or categorization of cases for awarding death penalty". In fact, in ***Bachan Singh*** the Constitution Bench gave over half a dozen reasons against the argument for standardization or categorization of cases. ***Swamy Shraddananda*** observed that ***Machhi Singh*** overlooked the fact that the Constitution Bench in ***Jagmohan Singh*** and ***Bachan Singh*** had "resolutely refrained" from such an attempt. Accordingly, it was held that even though the five categories of crime (manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent

nature of the crime, magnitude of crime and personality of victim of murder) delineated in ***Machhi Singh*** provide very useful guidelines, nonetheless they could not be taken as inflexible, absolute or immutable.

53. Indeed, in ***Swamy Shraddananda*** this Court went so far as to note in paragraph 48 of the Report that in attempting to standardize and categorize crimes, ***Machhi Singh*** "considerably enlarged the scope for imposing death penalty" that was greatly restricted by ***Bachan Singh***.

54. It appears to us that the standardization and categorization of crimes in ***Machhi Singh*** has not received further importance from this Court, although it is referred to from time to time. This only demonstrates that though Phase II in the development of a sound sentencing policy is still alive, it is a little unsteady in its application, despite ***Bachan Singh***.

Issue of remission of sentence:

55. ***Swamy Shraddananda*** and some of the decisions referred to therein have taken us to Phase III in the evolution of a sound sentencing policy. The focus in this phase is on

criminal law and sentencing, and we are really concerned with this in the present case. The issue under consideration in this phase is the punishment to be given in cases where the death penalty ought not to be awarded, and a life sentence is inadequate given the power of remission available with the appropriate Government under Section 432 of the Cr.P.C. In such a situation, what is the punishment that is commensurate with the offence?

56. In ***Swamy Shraddananda*** this Court embarked on a journey to answer this question. In doing so, this Court noted the mandate of ***Bachan Singh*** that we must not only look at the crime but also give due consideration to the circumstances of the criminal. It was noted that this Court "must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed in appropriate cases as a uniform policy not only by this Court but also by the High Court, being the superior courts in their respective States." The subject of discussion in this phase, therefore, is remission

under Section 432 of the Cr.P.C. of a sentence awarded for a capital offence.

57. It is necessary, in this context, to be clear that the constitutional power under Article 72 and Article 161 of the Constitution is, as yet, not the subject matter of discussion, particularly in this case. Nor is the power of commutation under Section 433 of the Cr.P.C. under discussion. What is under limited discussion in this case is the remission power available to the appropriate Government under Section 432 of the Cr.P.C.

58. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any Court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in ***Swamy Shraddananda*** and several other cases, by giving a sentence in a capital offence of 20 years or 30 years imprisonment without

remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason.

59. It is true that a convict undergoing a sentence does not have right to get a remission of sentence, but he certainly does have a right to have his case considered for the grant of remission, as held in ***State of Haryana v. Mahender Singh, (2007) 13 SCC 606*** and ***State of Haryana v. Jagdish, (2010) 4 SCC 216***.

60. ***Swamy Shraddananda*** approached this issue from a particular perspective, namely, what could be the "good and sound legal basis" to give effect to the observations of this Court in ***Dalbir Singh v. State of Punjab, (1979) 3 SCC 745*** that:

> "..... we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large."

61. We look at the issue from a slightly different perspective. Section 45 of the IPC defines life as denoting the life of a human being, unless the contrary appears from the context. Therefore, when a punishment for murder is awarded under Section 302 of the IPC, it might be imprisonment for life, where life denotes the life of the convict or death. The term of sentence spanning the life of the convict, can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers under Section 432 of the Cr.P.C. Broadly, this Section statutorily empowers the appropriate Government to suspend the execution of a sentence or to remit the whole or any part of the punishment of a convict [sub-section (1)]. But, the statute provides some inherent

procedural and substantive checks on the arbitrary exercise of this power.

Procedural check on arbitrary remissions:

62. There does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 of the Cr.P.C. But it does appear to us that sub-section (2) to sub-section (5) of Section 432 of the Cr.P.C. lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in ***Samjuben Gordhanbhai Koli v. State of Gujarat, (2010) 13 SCC 466*** when it was observed that since remission can only be granted by the executive authorities, the appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 of the Cr.P.C.

Section 432 of the Cr.P.C. reads as follows:-

> **432. Power to suspend or remit sentences** — (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the

person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person

sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means, —

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

63. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Cr.P.C. cannot be *suo motu* for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfillment of certain conditions. Those

conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 of the Cr.P.C. cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this Section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the presiding judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable in as much as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or *en masse* release of convicts on "festive"

occasions since each release requires a case-by-case basis scrutiny.

64. It must be remembered in this context that it was held in ***State of Haryana v. Mohinder Singh, (2000) 3 SCC 394*** that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Cr.P.C. does provide this check on the possible misuse of power by the appropriate Government.

Substantive check on arbitrary remissions:

65. For exercising the power of remission to a life convict, the Cr.P.C. places not only a procedural check as mentioned above, but also a substantive check. This check is through Section 433-A of the Cr.P.C. which provides that when the remission of a sentence is granted in a capital offence, the convict must serve at least fourteen years of imprisonment. Of course, the requirement of a minimum of fourteen years incarceration may perhaps be relaxed in exercising power

under Article 72 and Article 161 of the Constitution and Section 433 of the Cr.P.C. but, as mentioned above, we are presently not concerned with these provisions and say nothing in this regard, one way or the other.

66. Section 433-A of the Cr.P.C. reads as follows:-

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

67. In this context, it is necessary to refer to the decisions of the Constitution Bench in ***Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600*** and ***Maru Ram v. Union of India, (1981) 1 SCC 107***. Both these decisions were considered in ***Ashok Kumar v. Union of India, (1991) 3 SCC 498***.

68. In ***Godse*** the Constitution Bench dealt with the plea of premature release and held that life imprisonment means that the prisoner will remain in prison for the rest of his life. Credit

for remissions given or awarded has a meaning only if the imprisonment is for a definite period. Since life imprisonment is for an indefinite period, remissions earned or awarded are really theoretical. This is what this Court had to say:-

> "Briefly stated the legal position is this: Before Act 26 of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions – ordinary, special and State – and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable an appropriate government to remit the sentence under Section 401 [now Section 432] of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned."

69. ***Maru Ram*** affirmed the view taken in ***Godse*** that in matters of life imprisonment, remissions earned or awarded are unreal and become relevant only if there is a fictional quantification of the period of imprisonment. More importantly, it was held that remissions earned or awarded cannot be the basis for the determination of the fictional period of imprisonment. It was held (in paragraph 25 of the Report):-

> "Ordinarily where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at that point where the subtraction result is zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of sentence which has been highlighted in ***Godse*** case. Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration."

70. It was then held in the same paragraph:-

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

71. On the basis of the above decisions, the conclusion drawn in ***Ashok Kumar*** was that remissions have a limited scope. They have no significance till the exercise of power under Section 432 of the Cr.P.C. It was held, in the following words:-

> "It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or constitutional power has been exercised under Article 72/161 of the Constitution."

72. On this issue, it was questioned in ***Godse*** whether there is any provision of law where under a sentence for life imprisonment, without any formal remission by the appropriate Government, can be automatically treated as one for a definite period. It was observed that no such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. It was noted that though the Government of India stated before the Judicial Committee of the Privy Council

in ***Kishori Lal v. Emperor, AIR 1945 PC 64*** that, having regard to Section 57 of the IPC, twenty years imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. However, in ***Godse*** the Constitution Bench addressed this in the light of the Bombay Rules governing the remission system and concluded that orders of the appropriate Government under Section 401 of the Criminal Procedure Code [now Section 432 of the Cr.P.C] are a pre-requisite for release. It was held that a prisoner sentenced to transportation for life has no indefeasible right to an unconditional release on the expiry of a particular term including remissions. "The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life."

73. This view was followed in ***State of Madhya Pradesh v. Ratan Singh, (1976) 3 SCC 470*** in the following words:-

> "It is, therefore, manifest from the decision of this Court [in ***Godse***] that the Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various

remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Indian Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Indian Penal Code. In other words, this Court has clearly held that a sentence for life would enure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death and remissions given under the Rules could not be regarded as a substitute [of a lesser sentence] for a sentence of transportation for life. In these circumstances, therefore, it is clear that the High Court was in error in thinking that the respondent was entitled to be released as of right on completing the term of 20 years including the remissions."

74. Under the circumstances, it appears to us there is a misconception that a prisoner serving a life sentence has an indefeasible right to release on completion of either fourteen years or twenty years imprisonment. The prisoner has no such right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Cr.P.C. which in turn is subject to the procedural checks in that Section and the substantive check in Section 433-A of the Cr.P.C.

75. In a sense, therefore, the application of Section 432 of the Cr.P.C. to a convict is limited. A convict serving a definite term of imprisonment is entitled to earn a period of remission or even be awarded a period of remission under a statutory rule framed by the appropriate Government or under the Jail Manual. This period is then offset against the term of punishment given to him. In such an event, if he has undergone the requisite period of incarceration, his release is automatic and Section 432 of the Cr.P.C. will not even come into play. This Section will come into play only if the convict is to be given an "additional" period of remission for his release, that is, a period in addition to what he has earned or has been awarded under the Jail Manual or the statutory rules.

76. In the case of a convict undergoing life imprisonment, he will be in custody for an indeterminate period. Therefore, remissions earned by or awarded to such a life convict are only notional. In his case, to reduce the period of incarceration, a specific order under Section 432 of the Cr.P.C. will have to be passed by the appropriate Government. However, the reduced

period cannot be less than 14 years as per Section 433-A of the Cr.P.C.

77. Therefore, Section 432 of the Cr.P.C. has application only in two situations: (1) Where a convict is to be given "additional" remission or remission for a period over and above the period that he is entitled to or he is awarded under a statutory rule framed by the appropriate Government or under the Jail Manual. (2) Where a convict is sentenced to life imprisonment, which is for an indefinite period, subject to procedural and substantive checks.

78. What Section 302 of the IPC provides for is only two punishments – life imprisonment and death penalty. In several cases, this Court has proceeded on the postulate that life imprisonment means fourteen years of incarceration, after remissions. The calculation of fourteen years of incarceration is based on another postulate, articulated in ***Swamy Shraddananda***, namely that a sentence of life imprisonment is first commuted (or deemed converted) to a fixed term of twenty years on the basis of the Karnataka Prison Rules, 1974 and a similar letter issued by the Government of Bihar.

Apparently, rules of this nature exist in other States as well. Thereafter, remissions earned or awarded to a convict are applied to the commuted sentence to work out the period of incarceration to fourteen years.

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

Conclusion:

80. The broad result of our discussion is that a relook is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court. To be more specific, we conclude:

1. This Court has not endorsed the approach of aggravating and mitigating circumstances in ***Bachan Singh.*** However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.

4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.

5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

6. Remission can be granted under Section 432 of the Cr.P.C. in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory

rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 of the Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

7. Before actually exercising the power of remission under Section 432 of the Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

81. Given these conclusions, we are of the opinion that in cases such as the present, there is considerable uncertainty on the punishment to be awarded in capital offences – whether it should be life imprisonment or death sentence. In our opinion, due to this uncertainty, awarding a sentence of life imprisonment, in cases such as the present is not unquestionably foreclosed. More so when, in this case, there is no evidence (contrary to the conclusion of the High Court) that Seema's body was burnt by Sandeep from below the waist with

a view to destroy evidence of her having been subjected to sexual harassment and rape. There is also no evidence (again contrary to the conclusion of the High Court) that Narender was a professional killer.

82. Therefore, we allow these appeals to the extent that the death penalty awarded to the appellants is converted into a sentence of life imprisonment, subject to what we have said above.

83. We place on record our appreciation for the efforts put in by both learned counsel for the assistance rendered in this case.

.....J.
(K.S. Radhakrishnan)

.....J.
(Madan B. Lokur)

New Delhi;
November 20, 2012