Mithu

Vs

State of Punjab

Criminal Appeal No. 745 of 1980

(CJI Y. V. Chandrachud, Syed M. Fazal Ali, V. D. Tulzapurkar, A. Caradarajan, O. Chinnappa Reddy JJ)

07.04.1983

JUDGMENT

CHANDRACHUD, C.J. (for himself and Fazal Ali, Tulzapurkar and Vardarajan, JJ.) -

1. The question which arises for consideration in these proceedings is whether Section 303 of the Indian Penal Code infringes the guarantee contained in Article 21 of the Constitution which provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law."

2. Section 300 of the Penal Code defines 'murder', while Section 302 prescribes the punishment for murder. Section 302 reads thus :

> 302. Punishment for murder - Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.
>
> Section 302 is not the only section in the Penal Code which prescribes the sentence of life imprisonment. Literally, it is one of the 51 sections of that Code which prescribes that sentence. The difference between those sections on one hand and Section 302 on the other is that whereas, under those sections life imprisonment is the maximum penalty that can be imposed, under Section 302 life imprisonment is the minimum penalty which has to be imposed. The only option open to a court which convicts a person of murder is to impose either the sentence of life imprisonment or the sentence of death. The normal sentence for murder is life imprisonment. Section 354(3) of the Code of Criminal Procedure, 1973 provides :
>
> 354. (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence of death, the special reasons for such sentence.

While upholding the validity of the death sentence as a punishment for murder, a Constitution Bench of this Court ruled on Bachan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636) that death sentence can be imposed in a very exceptional class of cases - "the rarest of rare cases".

3. The Indian Penal Code was passed in 1860. The framers of that Code achieved a measure of

success in classifying offences according to their subject-matter, defining them with precision and in prescribing what, in the context of those times, was considered to be commensurate punishment for those offences. One of the problems which they had to deal with as to the punishment which should be prescribed for the offence of murder committed by a person who is under a sentence of life imprisonment. They solved that problem by enacting Section 303, which read thus :

> 303. Punishment for murder by life convict. Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

The reason, or at least one of the reasons, why the discretion of the court to impose a lesser sentence was taken away and the sentence of death was made mandatory in cases which are covered by Section 303 seems to have been that if, even the sentence of life imprisonment was not sufficient to act as a deterrent and the convict was hardened enough to commit a murder while serving that sentence, the only punishment which he deserved was death. The severity of this legislative judgment accorded with the deterrent and retributive theories of punishment which then held away. The reformative theory of punishment attracted the attention of criminologists later in the day. How sternly the legislature looked at the offence of murder committed by a life convict can be gauged by the fact that in the early history of the Code of Criminal Procedure, unlike as at present, if a person undergoing the sentence of transportation for life was sentenced to transportation for another offence, the latter sentence was to commence at the expiration of the sentence of transportation to which he was previously sentenced, unless the court directed that the subsequent sentence of transportation was to run concurrently with the previous sentence of transportation. It was in 1955 that Section 397 of the Criminal Procedure of 1898 was replaced by a new Section 397 by Amendment Act 26 of 1955. Under the new sub-section (2) of Section 397 which came into force on January 1, 1956, if a person already undergoing a sentence of imprisonment for life was sentenced on a subsequent conviction to imprisonment for life, the subsequent sentence had to run concurrently with the previous sentence. Section 427 (2) of the Criminal Procedure Code of 1973 is to same effect. The object of referring to this aspect of the matter is to emphasis that when Section 303 of the Penal Code was originally enacted, the legislature did not consider that even successive sentences of transportation for life were an adequate punishment for the offence of murder committed by a person who was under the sentence of life imprisonment.

4. While enacting Section 303 in terms which create an absolute liability, the framers of the Penal Code ignored several important aspects of cases which attract the application of that section and of questions which are bound to arise under it. They seem to have had only one kind of case in their mind and that it, the commission of murder of a jail official by a life convict. It may be remembered that in those days, jail officials were foreigners, mostly Englishmen and, alongside other provision which were specially designed for the members of the ruling class as, for example, the choice of jurors. Section 303 was enacted in order to prevent assaults by the indigenous breed upon the white officers. In its 42nd Report (1971), the Law Commission of India has observed in paragraph 16. 17 (page 239), that "the primary object of making the death sentence mandatory for an office under this section seems to be to give protection to the prison staff". We have no doubt that if a strictly penological view was taken of the situation dealt with by Section 303, the framers of the Code would have had a second thought on their decision to make the death sentence mandatory, even without the aid of the Constitutional constraints which operate now.

5. But before we proceed to point out the infirmities from which Section 303 suffers, we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that Section. The sum and substance of the argument is that the provision

contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down.

6. In Maneka Gandhi v. Union of India (1978) 2 SCR 621 :(1978) 1 SCC 248 : AIR 1978 SC 597), it was held by a seven-judge Bench that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21. The procedure prescribed by law has to the fair, just and reasonable, not fanciful oppressive or arbitrary. Bhagwati, J. observed in that case that : [SCC p. 281, para 5]

Principally, the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on that Article.

In Sunil Batra v. Delhi Administration (1979) 1 SCR 392 :(1978) 4 SCC 494: 1979 SCC (Cri) 155 : AIR 1978 SC 1675), while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement Krishna Iyer, J. said that though our Constitution did not have a "due process" clause as in the American Constitution, the same consequence ensued after the decisions in the Banks Nationalisation case (R.C. Cooper v. Union of India, (1970) 3 SCR 530 : (1970) 1 SCC 248 : AIR 1970 SC 564) and Maneka Gandhi (1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 97) [SCC para 52 p. 518 : SCC (Cri) p. 179]

For what is punitively outrageous, scandalisingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is short down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. ...

> Desai J. observed in the same case that : [SCC para 228, pp. 574-75 : SCC (Cri) pp, 235-36]

The word 'law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi case (1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 97) that the law must be right, just and fair and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary, it would be violative of Article 14. ..

> In Bachan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580: AIR 1980 SC 898 : 1980 Cri LJ 636) which upheld the Constitutional validity of the death penalty, Sarkaria J. speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon in Maneka Gandhi (1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597), it will read to say that :[SCC para 136, p. 730 : SCC (Cri) p. 626]

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it that it is for the legislature to provide the punishment and for the courts to impose it. Two instances, undoubtedly, extreme, may be taken by way if illustration for the purpose of showing

how the courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21, These are of course, extreme illustrations and we need have no fear that out legislatures will ever pass such laws. But these examples serve to illustrate that the list word on the question of justice and fairness does not rest with the legislature. Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable. The question which then arises before us is whether the sentence of death prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21.

7. Counsel for the respondents rely upon the decision in Bachan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580: AIR 1980 SC 898 : 1980 Cri LJ 636) in support of their submission that the provision contained in Section 303 does not suffer from any Constitutional infirmity. They contend that the validity of death sentence was upheld in that case and since, Section 303 does no more than prescribe death sentence for the offence of murder, the ratio of Bachan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636) would apply and the question as regards the validity of that section must be treated as concluded by that decision. These question, it is, said should not be allowed to raise their head over and over again. This argument suffers from a two-fold defect. In the first place, it betrays a certain amount of misunderstanding of what was decided in Banchan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636) and secondly, it overlooks the essential distinction between the provisions of Section 302 and Section 303. Academicians and textbook writers have the freedom to discuss legal problems in the abstract because, they do not have to decide any particular case. On the other hand, the decisions rendered by the court have to be understood in the light of the legal provisions which came up for consideration therein and in the light of the facts if facts were involved. The majority did not lay down any abstract proposition in Banchan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636) that "death sentence is Constitution to provide for the sentence of death". To be exact, the question which arose for the consideration of the Court was not whether, under the Constitution, it is permissible to provide for the sentence of death. The precise question which arose in that case was whether Section 302 of the Penal Code which provides for the sentence of death as one of the two alternative sentences is valid. It may be recalled that Section 302 provides for the sentence of death as an alternative sentence which may be imposed. The normal sentence for murder is life imprisonment; and if the death sentence has to be imposed, the Court is under a legal obligation under Section 354(3) of the Criminal Procedure Code to state the special reasons for imposing that sentence. That explains why, in Banchan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636), Sarkaria, J., who spoke for the majority, underscored the words, "alternative" and "may" in paragraph 19 [SCC p. 695] of the judgment, whilst observing that the Penal Code prescribes death as an alternative punishment to which the offender may be sentenced in cases relating to seven kinds of offences. The majority concluded that Section 302 of the Penal Code is valid for three main reasons : Firstly, that the death sentence provided for by Section 302 is an alternative to the sentence of life imprisonment; secondly, that social reasons have to be stated if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled, under Section 235(2) of the Code of Criminal Procedure, to

be heard on the question of sentence. The last of these three reasons becomes relevant, only because of the first of these reasons. In order words, it is because the court has an option to impose either of the two alternative sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence. If the law provides a mandatory sentence of death as Section 303 of the Penal Code does neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to bear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. The ratio of Banchan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR SC 898 : 1980 Cri LJ 636), therefore, is that, death sentence is, constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life.

8. It will be clear from this discussion that since there is a fundamental distinction between the provisions of Section 302 and Section 303 of the Penal Code, the ratio of Banchan Singh (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR SC 898 : 1980 Cri lj 636) will not given the question as regards the validity of Section 303. This latter question is res integra. Stated briefly, the distinction between the two sections is that whereas, Section 302 provides for the sentence of death as an alternative sentence, the only sentence which Section 303 prescribes is the sentence of death, The court has no option under Section 303, to impose any other sentence, no matter what is the motivation of the crime and the circumstances in which it was committed. Secondly Section 354(3) of the Code of Criminal Procedure applies in terms to those cases only wherein "the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or, imprisonment for a term of years". Since Section 303 does not provide for an alternative sentence, Section 354(3) has no application to cases arising under that Section. Thirdly, Section 235(2) of the Code of Criminal Procedure which confers a right upon the accused to be heard on the question of sentence, becomes, a meaningless ritual in cases arising under Section 303. If the court itself has no option to pass any sentence except the sentence of death it is an idle formality to ask the accused as to what he has to say on the question of sentence.

9. The question which we had posed for our consideration at the beginning of this judgment was somewhat broad. In the light of the aforesaid discussion, that question narrows itself to a consideration of certain specific issues. The first, and foremost issue which arises specifically for our consideration is whether there is any intelligible basis for giving differential treatment to an accused who commits the offence of murder whilst under a sentence of life imprisonment. Can he be put in a special class or category as compared with others who are found guilty of murder and be subjected to hostile treatment by making it obligatory upon the court to sentence him to death? In other words, is there a valid basis for classifying persons who commit murders whilst they are under the sentence of life imprisonment separately from who commit murders whilst they are not under the sentence of life imprisonment, for the purpose of making the sentence of death obligatory in the case of the former and optional in the case of the latter? Is there any nexus between such discrimination and the object of the impugned statute? These questions stem principally from the position that Section 303 makes the sentence of death mandatory. That position raises certain side issues which are equally important. Is a raw which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was

committed, the sentence of death shall be imposed upon the accused?

10. The first question which we would like to examine is whether there is any valid basis for classifying persons who commit murders whilst they are under the sentence of life imprisonment as distinguished from those who commit murders whilst they are not under the sentence of life imprisonment, for the purpose of making the sentence of death mandatory in the case of the former class and optional in the case of the latter class. We are unable to see any rational justification for making a distinction, in the matter of punishment, between these two classes of offenders. Murders can be motiveless in the sense that, in a given case, the motive which operates on the mind of the offender is not known or is difficult to discover. But, by and large, murders are committed for any one or more of a variety of motives which operate on the mind of the offender, whether he is under a sentence of life imprisonment or not. Such motives are too numerous and varied to enumerate but hate, lust, sex, jealousy, gain, revenge and a host of weaknesses to which human flesh is subject are common motives for the generality of murders. Those reasons can operate as a motive force of the crime whatever may be the situation in which the criminal is placed and whatever may be the environment in which he finds himself. But, as we have stated earlier, the framers of the Penal Code had only one case in mind, namely, the murder of jail officials by the life convicts. Even if we confine ourselves to that class of cases, the test of reasonableness of classification will break down inevitably. From that point of view, it will be better to consider under different heads cases in which murders are committed by life convicts within the jail precincts and murders which are committed by life convicts outside the jail, while they are on parole or bail.

11. We will first deal with cases of murders committed by life convicts within the precincts of the jail. The circumstances that a person is undergoing a sentence of life imprisonment does not minimise the importance of mitigating factors which are relevant on the question of sentence which should be imposed for the offence committed by him while he is under the sentence of life imprisonment. Indeed, a crime committed by a convict within the jail while he is under the sentence of life imprisonment may, in certain circumstances, demand and deserve greater consideration, understanding and sympathy than the original offence for which he was sentenced to life imprisonment. This can be illustrated with the help of many instances but one or two of those may suffice. A life convict may be driven to retaliate against his systematic harassment by a warden, who habitually tortures, starves and humiliates him. If the act results in the death of the warden, the crime may amount to murder because none of the Exceptions mentioned in Section 300 may apply. The question is whether it is reasonable to provide that life convict who has committed the offence of murder in these circumstances must necessarily be sentenced to death and an opportunity denied to him to explain why the death sentence should not be imposed upon him. And, how is it relevant on the question of the prescription of a mandatory sentence of death that the murder was committed by a life convict? Then again, to take another instance, there are hundreds of inmates in central jails. A life convicts may be provoked gravely but no suddenly, or suddenly but not gravely enough, by an insinuation made against his wife's chastity by another inmate of the jail. If he commits the murder of the insinuator, the only sentence which can be imposed upon him under Section 303 is the sentence of death. The question is, whether it is reasonable to deprive such a person, because he was under a sentence of life imprisonment when he committed the offence of murder, from an opportunity to satisfy the court that he acted under the pressure of a grave insult to his wife and should not therefore be sentenced to death. We are of the opinion that, even limiting oneself to murders committed by life convicts within the four walls of the jail, it is difficult to hold that the prescription of the mandatory sentence of death answers the test of reasonableness.

12. The other class of cases in which, the offence of murder is committed by a life convict while he

is on parole or on bail may now be taken up for consideration. A life convict who is released on parole or on bail may discover that taking undue advantage of his absence, a neighbour has established illicit intimacy with his wife. If he finds them in an amorous position and shoots the seducer on the spot, he may stand a fair chance of escaping from the charge of murder, since the provocation is both grave and sudden. But if, on seeing his wife in the act of adultery, he leaves the house, goes to a shop, procures a weapon and returns to kill her paramour, there would be evidence of what is called mens, rea, the intention to kill. And since, he was not acting on the spur of the moment and went away to fetch a weapon with murder in his mind, he would be guilty of murder. It is a travesty of justice not only to sentence such a person to death but to tell him that he shall not be heard why he should not be sentenced to death. And, in these circumstances, now does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death? In ordinary life, we will not say it about law, it is not reasonable to add insult to injury. But, apart from that, a provision of law which deprives the court to the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'theft', 'breach of trust' or 'murder. The gravity of the offence furnishes the guidelines for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different at of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime the criminal shall be hanged by the neck until he is dead.

13. We are also unable to appreciate how, in the matter of sentencing, any rational distinction can be made between a person who commits a murder after serving out the sentence of life imprisonment and a person who commits a murder while he is still under that sentence. A person who has been in jail, say for 14 years, and commits the offence of murder after coming out of the jail upon serving out that sentence is not entitled to any greater consideration than a person who is still serving the sentence of life imprisonment for the mere reason that the former has served out his sentence and the latter is still under the sentence imposed upon him. The classification based upon such a distinction proceeds upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death. A person who stands unreformed after a long term of incarceration is not, by any logic, entitled to preferential treatment as compared with a person who is still under the sentence of life imprisonment. We do not suggest that the latter is entitled to preferential treatment over the former. Both have to be treated alike in the matter of prescription of punishment and whatever safeguards and benefits are available to the former must be made available to the latter.

14. We have already adverted to the stresses and strains which operate on convicts who are sentenced to long terms of imprisonment like the sentence of life imprisonment. Many scholars have conducts research into this matter. It will serve our purpose to draw attention to the following

passage from a book called The Penalty of Death by Thorsten Sellin (Sage Library of Social Research, London, 1980 Edn., p. 105) :

> Anyone who has studied prisons and especially the maximum security institutions, which are the most likely abodes of murders serving sentences of life imprisonment or long terms of years, realises that the society of captives within their walls is subject to extraordinary strains and pressures, which most of those in the outside world experience in attenuated forms, if at all. The prison is an unnatural institution. In an area limited size, surrounded by secure walls, it houses from a few score to several thousand inmates and their custodians. In this unisexual agglomeration of people, separated from family and friends, prisoners are constantly thrown into association with one another and subject to a host off regulations that limit their freedom of action and are imposed partly by the prison authority and partly by the inmate code. It is not astonishing that in this artificial environment altercations occur, bred by the clash of personalities and the conflict of interests that lead to fights in free society, especially when one considers that most of the maximum-security prison inmates are fairly young and have been raised in the poorer quarters of our cities, where resort to physical violence in the settlement of disputes is common. Indeed, what surprises the student of prison violence is the relative rarity of assaultive events, everything considered.

This is some good reason why convicts who are under the sentence of life imprisonment should not be discriminated against as compared with others, including those who have served out their long terms of imprisonment. There is another passage in the same book which shows with the help of statistics that the frequency of murders committed by life convicts while they are on parole is not so high as to justify a harsher treatment being accorded to them when they are found guilty of having committed a murder while on parole, as compared with other persons who are guilty of murder. The author says :(Ibid., p. 113)

In the United States, convicts whose death sentences have been commuted or who have been sentenced to life imprisonment for murder may regain their freedom by being paroled after spending a decade or two in prison. Some are deprived of this opportunity, because they die a natural or violent death while in the institution. Some may be serving time in states that have laws barring the release of first-degree murderers or lifers, but even there the exercise of executive clemency may remove the barrier in individual cases. There is no need to discuss here the various aspects of the parole process when murderers are involved because we are concerned only with how such parolees behave once they have been set free. Do they, indeed, abuse their freedom and are they especially likely to prove a menace to the lives of their fellow citizens? It is fear of that menace that makes some people favor capital punishment as a sure means of preventing a murderer from killing again after his return to freedom in the community. As we shall see, paroled murderers do sometimes repeat their crime, but a look at some facts will show that among parolees who commit homicides, they rank very low.

15. According to the statistics tabulated at page 115 of the book, out of 6835 life convicts who were released on parole, 310 were returned to prison for new crimes committed by them while on parole. Out of these 310, 21 paroles were returned to the prison on the charge of willful homicide that is murder. There is no comparable statistical data in our country in regard to the behaviour reason to assume that the incidence of murders committed by such persons is unduly high. Indeed if there is no scientific investigation on this point in our country, there is no basis for treating such persons

differently from others who commit murders.

16. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside of the prison by a person who is under the sentence of life imprisonment. A standardised mandatory sentence and that too in the form of a sentence to death, fails to take into account the facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case."The infinitive variety of cases and facets to each would make general standards either meaningless boiler plate or a statement of the obvious... " (Dennis Councle Mc Gautha v. State of California, 28 L Ed 2d 711) As observed by Palekar J. who spoke for a Constitution Bench in Jugmohan Singh v. State of U. P. (1973) 2 SCR 541, 559 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947 : 1973 Cri LJ 370) : [SCC para 26, p. 35 : SCC (Cri) p. 184]

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 punishment... The exercise of judicial discretion on well-recognised principles is in the final analysis the safest possible safeguard for the accused.

17. The self-confidence which is manifested in the legislative prescription of a computerised sentence of death is not supported by scientific data. There appears to be no reason why in the case of a person whose case falls under Section 303. factors like the age and sex of the offender, the provocation received by the offender and the motive of the crime should be excluded from consideration on the question of sentence. The task performed by the legislature while enacting Section 303 is beyond even the present human ability which has greater scientific and sophisticated resources available for compiling data, than those which were available in 1860 when Section 303 was enacted as a part of the Indian Penal Code.

18. It is because the death sentence has been made mandatory by section 303 in regard to a particular class of person that, as a necessary consequences, they are deprived of the opportunity under Section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the court is relieved from its obligation under Section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result injustice is harsh, arbitrary and unjust.

19. We have stated at the beginning of this judgment that there are as many as 51 Sections of the Penal Code which provide for the sentence of life imprisonment. Those Sections are : 121, 121-A, 122, 124-A, 125, 128, 130, 131, 132, 194, 222, 225, 232, 238, 255, 302, 304 Part I, 305, 307, 311, 313, 314, 326, 329, 363-A, 364, 371, 376, 388, 389, 394, 395, 396, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 477, 489-A, 489-B, 489-D and Section 511 (attempt to commit offence punishable with imprisonment for life). A person who is sentenced to life imprisonment for any of these offences incurs the mandatory penalty of death under Section 303, if he commits a murder while he is under the sentence of life imprisonment. It is impossible to see the rationale of this aspect of Section 303. There might have been the semblance of some logic to explain if not to sustain such a provision if murder was the only offence for which life imprisonment was prescribed as a punishment. It could then be argued that the intention of the legislature was to provided for enhanced sentence for the second offence of murder. But, under the section as it stands, a person who is sentenced to life imprisonment for breach of trust (though, such a sentence is rarely imposed) or for sedition under Section 124-A or for counterfeiting a coin under Section 232 or for forgery under Section 467 will have to be sentenced to death if he commits a murder while he is under

sentence of life imprisonment. There is nothing in common between such offences previously committed and the subsequent offence of murder. Indeed, it defies all logic to understand why such a provision was made and what social purpose can be served sentencing a forgerer to a compulsory punishment of death for the mere reason that he was undergoing the sentence of life imprisonment for forgery when he committed the offence of murder. The motivation of the two offences is different the circumstances in which they are committed would be different and indeed the two offences are basically of a different genre. To prescribe a mandatory sentence of death for the second of such offences for the reason that the offence was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bound of all reason. Assuming that Section 235(2) of the Criminal Procedure Code were applicable to the case and the court was under an obligation to hear the accused on the question of sentence it would have to put some such question to the accused :

> "You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death ?"

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

20. In its Thirty-fifth Report of 'Capital Punishment' published in 1967, the Law Commission of India considered in paragraphs 587 to 591 the question of prescribing a lesser sentences for the offences under Section 302 and 303 of the Penal Code. It observed in paragraph 587 that :

For the offence under section 303, Indian Penal Code, the sentence of death is mandatory. The reason for this is that in the case of an offence committed by a person who is already under sentence of imprisonment for life, the lesser sentence of imprisonment for life would be a formality. It has however been suggested that even for this offence the sentence of death should not be mandatory. We have considered the arguments that can be advanced in support to the suggested change. It is true that, ordinarily speaking, leaving the court no discretion in the matter of sentence is an approach which is not in conformity with modern trends.

After dealing with the question whether the sentence of death ought not to be mandatory and after considering whether Section 303 should be amended so as to limit its application to cases in which a person sentenced to life imprisonment for the offences of murder commits again a murder while he is under the sentence of life imprisonment the Law Commission concluded in paragraph 591 of its Report that "it is not necessary to make any change" It felt that :

> Acute cases of hardship, where the extenuating circumstances are overwhelming in their intensity, can be dealt with under section 401, Code of Penal Procedure, 1898, and that seems to be sufficient.

21. In its Forty-second Report on the Indian Penal Code, published in June 1971, the Law Commission considered again the question of amending Section 303. It found it anomalous that a person whose sentence of imprisonment for life was remitted unconditionally by the Government could be held not to be under the sentence of life imprisonment, but if Person was released conditionally, he could still be held to be under that sentence. It therefore suggested that Section 303 should be amended so as to restrict its application to life convicts who are actually in prison. The Commission did not, however, recommend any change since, Section 303 was "very rarely applied.

It felt that if there was an exceptionally hard case it could be easily dealt with by the President or the Governor under the prerogative of mercy.

22. On December 11, 1972 A Bill was introduced in the Rajya Sabha to amend the penal Code, one of the amendments suggested being that Section 303 of the code should be deleted. On a motion made by the then Minister of State in the Ministry of Home Affairs, the Bill was referred to the Joint Committee of the Rajya Sabha and the Lok Sabha. The Committee held 97 sittings and made various recommendations, one of which was that the punishment for murder which was prescribed separately by Section 302 and 303 of the Penal Code should be brought under one section of the Code. The Committee further recommended that it should not be obligatory to impose the sentence of death on a person who commits a murder while under the sentence of life imprisonment and the question whether, in such a case, the sentence of death or the sentence of life imprisonment should be awarded should be left to the discretion of the court. The Committee accordingly suggested the addition of a new Clause 125 in the Bill for omitting Section 303 of the Penal Code. The Report of the Joint Committee was presented to the Rajya Sabha, on January 29, 1976 whereupon the Indian Penal Code (Amendment) Bill, XLII-B of 1972, was tabled before the Rajya Sabha. But, what was proposed by the Parliament was disposed of by the ballot box. A mid-term Parliamentary poll was held while the Bill was pending and there was a change of government. The Bill lapsed and that was that. It is to be deeply regretted that the attention of an overworked Parliament has not yet been drawn to urgent reforms suggested in the Penal Code Amendment Bill XLII-B of 1972. In all probability, the amendment suggested by Clause 125 (new) for the deletion of Section 303 of the Penal Code would have passed muster without any opposition. The only snag in the passing of the Bill has been that it was not revived an d put to vote. Section 303 was destined to die at the hands of the court. Our only regret is that during the last six years since 1977, some obscure forger sentenced to life imprisonment, who may have committed murder while under the sentence of life imprisonment, may have been sentenced top the mandatory sentence of death, unwept and unasked why he should not be hanged by the neck until he is dead.

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by /Article 21 of the Constitution that no person shall be deprived of his life or personal liberty originally conceived to discourage assaults by life convicts on the prison staff. but the legislature chose language which far exceeded its intention. The Section also assumes that life convicts are a dangerous breed of humanity as a class at assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on "Capital Punishment" : (1949-1953, paragraph 517)

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

In Dilip Kumar Sharma V. State of M. P. (1976) 2 SCR 289 : (1976) 1 SCC 560 : 1976 SCC (Cri) 85 : AIR 1976 SC 133), this Court was not concerned with the question of the vires of Section 303, but Sarkaria, J., in his concurring judgment, described the vast sweep of that Section by saying that "the section is Draconian in severity, relentless and inexorable in operation" [SCC para 22, p. 567 : SCC (Cri) p. 92]. We strike down Section 303 of the Penal Code as unconstitutional and declare it void. It is needless to add that all cases of murder will now fall under Section 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder.

CHINNAPPA REDDY, J. (concurring) ◆

Section 303, Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune with the rising tide of human consciousness. It is out of tune with philosophy of an enlightened Constitution like ours. If particularly offends Article 21 and the new jurisprudence which has sprung around it ever since the Banks Nationalisation case (R.C. Cooper v. Union of India, (1970) 3 SCR 530 :(1970) 1 SCC 248 : AIR 1970 SC 564) freed it from the confines of Gopalan (A.K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 : 1950 SCJ 174 : 51 Cri LJ 1383). After the Banks Nationalisation case (R.C. Cooper v. Union of India, (1970) 3 SCR 530:(1970) 1 SCC 248 : AIR 1970 SC 564) no Article of the Constitution guaranteeing a fundamental right was to lead an isolated existence. Added nourishment was to be sought and added vigour was to be achieved by companionship. Beg, C. J., said it beautifully in Maneka Gandhi 2 (1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597) : [SCC PP. 394-95, para 202]

Articles dealing with different fundamental right contained in Part III of the Constitution do not represent entirely separate streams of right which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (if status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.

Maneka Gandhi (1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597) carried Article 21 to nobler rights and made it the focal point round which must now revolve to advantage all claims to rights touching life and liberty. If article 21 declared, "no person shall be deprived of his life or liberty except according to procedure established by law", the Court declared, without frill or flourish, in simple and absolute terms : [SCC p. 323, para 48]

The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. (Per Chandrachud, J., as he then was)

The question whether Section 302 which provides for a sentence of death as an alternative penalty was constitutionally valid was raised in Bachan Singh (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636). Bachan Singh (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636).

validity of Section 302 because the sentence of imprisonment for life and not death was the normal punishment for murder, and the sentence of death was an alternative penalty to be resorted to in the most exceptional of cases and the discretion to impose or not to impose the sentence of death was given to the Judge. The ruthless rigour of the sentence of death, even as an alternative penalty was thought to be tempered by the wide discretion given to the judge. Judicial discretion was what prevented the outlawing of the sentence of death even as an alternative penalty for murder. Even so the court took care to declare that it could only be imposed in the 'rarest of rare' cases.

25. Judged in the light shed by Maneka Gandhi 2 (Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 97) and Bachan Singh (Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636),it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable [sic irresuscitable] is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code. must be struck down as unconstitutional.

ORDER OF THE COURT

The various cases in this batch of appeals and writ petitions may now be placed before a Division Bench for disposal on merits in the light of these judgments.

</html