SUPREME COURT OF INDIA

Shankar Kisanrao Khade

Vs.

State of Maharashtra

Crl.A.Nos.362-363 of 2010

(Madan B.Lokur and K.S.Radhakrishnan JJ.)

25.04.2013

JUDGMENT

K.S. RADHAKRISHNAN, J.

1. We are in these appeals concerned with a gruesome murder of a minor girl with intellectual disability (moderate) after subjecting her to series of acts of rape by a middle ager, who has now been sentenced to death by the High Court of Bombay.

2. Appellant, Shankar Kisanrao Khade (Accused No.1) and his present wife Mala Shankar Khade (Accused No.2) were charge sheeted, for the offences punishable under Sections 363, 366-A, 376, 302, 201 read with Section 34 IPC, for having, in furtherance of their common intention, kidnapped a minor girl and accused No.1 had committed rape on her several times and committed the murder by strangulation. The Additional Sessions Court in Sessions Case No. 165/2006 convicted the first accused and sentenced him to death under Section 302 IPC, subject to confirmation by the High Court and was also awarded imprisonment for life and to pay a fine of Rs.1,000/- in default to suffer rigorous imprisonment (for short RI) for six months for offences under Section 376 IPC, further seven years RI and to pay a fine of Rs.500/- in default to suffer RI for three months under Section 366-A IPC and five years RI and to pay a fine of Rs.500/- in default to suffer RI for one month for offences punishable under Section 363 IPC, read with Section 304 IPC. The second accused - his wife, was convicted for the offences punishable under Section 363A read with Section 34 IPC and sentenced to suffer RI for five years and to pay a fine of Rs.500/- in default and to suffer RI for one month. The Accused No.2 had already suffered the punishment, hence did not file any appeal

against the order of the sessions judge. The accused preferred Criminal Appeal No.512 of 2007 before the High Court and the Court heard the appeal along with Confirmation Case No.1 of 2007. The High Court dismissed the appeal and the reference made by the Sessions Court was accepted and the death sentence was confirmed. Appellant has preferred these two appeals against those orders.

3. The facts giving rise to these appeals are as follows:

> The deceased, a minor girl, aged about 11 years was living with her grandmother (PW-13) at Gunwant Khandare in Gunwant Maharaj Sansthan at Lakhnwadi. On 20.7.2006, in the evening, both the accused came to Sansthan and stayed there. On seeing the minor girl the accused and his wife offered mango sweets. On the morning of 21.07.2006 also the accused offered her sweets and attracted her attention. At about 12.00 O'clock on the same day, both the accused and his wife induced her to come with them and the girl accompanied them. PW-13, the grandmother of the girl child was informed by some of the ladies residing in the neighbourhood that they saw the girl being taken away by the first accused towards the place called Puja – Dhuni. PW-13 met village Madhan and informed him that fact and also to her son, Ramesh (PW-12), but the girl could not be traced. Facts revealed that the girl was taken by the accused persons to a weekly market at Paratwada and stayed there during night and the first accused had committed the act of rape on her and which was repeated at Gayatri Mandir at Paratwada where they had stayed on 22.7.2006.

4. The accused persons then on 23.07.2006 took the girl to the house of one Ravindra Lavate (PW-8) whom they know earlier. PW8 and the son of the accused were friends. On the date of incident, they stayed there. The accused and the girl were sleeping in the verandah when PW-8 heard the cries of the minor girl and found the accused committing rape on her which was objected to by him and his wife. The accused then took the girl on a bicycle in the field bearing No.62 of Shantaram Jawarkar at about 9.00 pm. and after committing rape strangulated and murdered her. Vinod Jaswarkar (PW 14) and Sanjay (PW 9) found the dead body of the minor girl from the field. PW 9 approached the police station Asegaon and submitted Ext.48 report about the incident. The Investigating Officer A.P.I. Baviskar (PW18) went to the place of occurrence with the panchas and staff and noticed that the minor girl was raped and murdered. The spot panchnama was prepared in the presence of the staff. Articles found at the spot were seized and Ext.16 inquest panchnama was also prepared and dead body was sent for the post

mortem. Dr. Mohan Kewade (PW 3) conducted the post- mortem and submitted the report Ext. 27 dated 25.07.2006.

5. Ramesh (PW12) informed Asegaon police station that his sister's daughter was missing since 21.7.2006 and her dead body was identified by him. PW3, who conducted the post mortem, came to the conclusion that the deceased was raped and murdered and he had also opined that the deceased was subjected to carnal intercourse and the death was due to asphyxia due to strangulation. Devsingh Baviskar, API (PW18) recorded the statement of several witnesses and arrested the accused and his wife on 2.8.2006 and the charge sheet was filed before the Judge, First Class, Chandur Bazar who later committed the case to the Court of Sessions.

6. The prosecution examined 18 witnesses and relied upon several documents including the experts evidence. No witness was examined on the side of the defence. The Sessions Court found both the accused guilty and convicted the 1st accused and sentenced him with death penalty which was confirmed. We are in these appeals primarily concerned with the question whether the death sentence awarded to Shankar Kisanrao Khade is sustainable or not and whether the case falls under the category of rarest of rare cases warranting capital punishment.

7. We heard Shri. A.K. Talesera, learned counsel appearing for the accused and Ms.Aprajita Singh, learned counsel appearing for the State at length. Shri Talesera submitted that the prosecution had failed to prove beyond reasonable doubt that it was the accused who had committed the offence of rape and murder of the deceased girl. He submitted that PW 8 is not a natural witness and his evidence inspires no confidence. Further, it was pointed out that there was delay in recording the statement of PW8 by the Police and he was a planted witness. Learned counsel also pointed out that if PW 8 had witnessed the accused committing the crime, he would have informed the police at the earliest point of time. Learned counsel also pointed out that even though the wife of PW 8 was also present in the house, she was not examined as a witness. Further it was pointed out that, the test identification parade conducted also suffered from serious infirmities. Further it is also pointed out that there were material inconsistencies, contradictions and omissions which had seriously affected the prosecution version and that the important links in the chain of circumstances that it was the accused who had committed the crime were missing. Learned counsel submitted that in any view of the matter, the case would not fall under the rarest of rare category warranting capital punishment.

8. Ms. Aparjita Singh, learned counsel appearing for the respondent- State submitted that the prosecution has succeeded in proving the guilt of the accused beyond reasonable doubt. Learned counsel submitted that PW 8 is a natural witness and he had no motive or any enmity with the accused so as to rope him in the crime. On the other hand his son and accused's son were friends. Learned counsel submitted that the evidence adduced in this case proved beyond doubt that it was the accused who had kidnapped the minor girl and committed rape on her and later strangulated her to death. Learned counsel also submitted that the medical evidence clearly establishes that over and above the commission of the offence of rape, the accused had committed the offence of sodomy as well. Further it was pointed out that the accused was aged about 52 years and had committed the ghastly crime of rape on the girl aged between 11 to 12 years having moderate intellectual disability. Facts, according to the counsel, clearly indicate that the deceased was subjected to rape for more than one occasion and later strangulated her to death. Learned counsel placed reliance on an affidavit and submitted that the accused had previous history of committing various crimes. Reference was made to Crime No.18 of 2006, charged against the accused for committing the offence under Sections 457 and 380 of IPC, which was registered at Asegaon police station. Reference was also made to Criminal Case No.264 of 2006 pending before the Judicial Magistrate, First Class, Chandurbazar. Further it was also pointed that the accused was arrayed as accused in Sessions Trial No.52 of 2007 for offences punishable under Section 302 IPC for committing the murder of one lady.

9. Counsel appearing on either side placed reliance on a number of judgments of this Court to bring home their respective contentions. Learned counsel appearing for the accused placed reliance on the judgments of this Court in Bachan Singh v. State of Punjab (1980) 2 SCC 684, Mohd. Chaman vs. State (NCT of Delhi) (2001) 2 SCC 28, Surendra Pal Shivbalakpal vs. State of Gujarat (2005) 3 SCC 127, State of Maharashtra v. Mansingh (2005) 3 SCC 131 and State of Rajasthan v. Kashi Ram (2006) 12 SCC 254.

10. Learned counsel appearing for the prosecution placed reliance on the judgments of this Court inGurmukh Singh v. State of Haryana (2009) 15 SCC 635, Mohd. Farooq Abdul Gafur and others. v. State of Maharashtra (2010) 14 SCC 641, Sushil Murmu v. State of Jharkhand (2004) 2 SC 338, Shivu and another v. Registrar General, High Court of Karnataka and another (2007) 4 SCC 713, B.A. Umesh v. Registrar General, High Court of Karnataka (2011) 3 SCC 85, Mohd. Mannan Alias Abdul Mannan v. State of Bihar (2011) 5 SCC 317, Sebastian v. State of Kerala (2010) 1 SCC 58,Aloke Nath Dutta and others v. State of West

Bengal (2007) 12 SCC 230 and Swamy Shraddananda Alias Murali Manohar Mishra v. State of Karnataka (2007) 12 SCC 288.

11. I have critically and minutely gone through the evidence adduced by the prosecution as well as by the defence and examined whether the prosecution had succeeded in establishing the following circumstances to prove the charges levelled against the accused.

i) The accused went to Gunwant Maharaj Sansthan at Lakhanwadi on 20.07.2006 and stayed there for one day along with accused No.2 and on 21.7.2006 took the deceased to Dhuni.

ii) On 22.7.2006 accused took deceased to Gayatri Mandir.

iii) On 23.7.2006 the accused along with his wife and deceased went to the house of Ravindra Lavate (P.W.8) and stayed there.

iv) On 23.7.2006 at night the accused committed rape on deceased.

v) On 23.7.2006 during the night time the accused left on the bicycle with the deceased and on 24.7.2006 he came back to the house of PW8 to take his wife accused No.2.

vi) False explanation given by accused to PW8 that he had dropped the deceased at Lakhanwadi.

vii) On 24.7.2006 dead body of the deceased was found in the field of the father of Sanjay Jawarkar (P.W.9).

viii) Death of deceased was homicidal and that deceased was subjected to sexual intercourse on more than one occasion.

ix) Deceased was suffering from moderate intellectual disability.

x) Identification of the accused by the witnesses.

xi) Spot Punchanama and discovery of articles at the instance of the accused."

12. Facts in this case indicate that the deceased was aged about 11 years on the date of the incident and was studying in the 4th standard. On the age of the girl, there was some dispute. Certificate Ext.94 issued by the Handicap Board stated the age of girl was 9 years on 6.12.2005. Post- mortem report Ext.27 mentions her age as 14 years and the opinion of the Medical Officer Ext. 29 shows that the approximate age of the deceased was about 14 years. Ramesh PW 12, the maternal uncle stated that her age was between 10-12 years. PW 13 - grandmother of the deceased stated her age was about 10 years. Taking into consideration all the versions of the witnesses and the documents produced, it is safe to conclude that her age was around 11 years.

13. PW 10, PW 11, PW 12 and PW 13 stated how the girl was taken from the house of PW 13 and travelled to difference places, including the mandir. PW 10 who was present at Gunwant Maharaj Sansthan had deposed that on 20.7.2006 at about 7.00 pm accused and his wife came to mandir and stayed in the hall of the mandir and one girl aged about 11 years was also with them. PW 11, who was conducting the hotel business opposite to the mandir, stated that on 20.7.2006 at about 7.00pm one man and woman had come to his hotel and on the next day at about 1.00 pm they came with a girl aged about 10-11 years and went to the mandir and he identified both the accused persons in the court. P.W. 12, the uncle of the deceased stated that on 23.7.2006 his mother had come to his house and informed that the deceased was missing. Further, a watchman of the mandir PW 16 had also deposed that he saw a lady and a man with the girl aged about 12 years coming come to the mandir. Another clinching evidence which conclusively proved that the girl was in the company of the accused and his wife was the evidence of PW 8. PW 8 deposed that his son and Santosh, son of the accused, were friends and he used to go to the house of the accused. PW 8 deposed that, on 19.6.2006, the accused and his wife had stayed in his house stating that they had come to meet one of the relatives who had been admitted in a nearby hospital. On 23.7.2006, again the accused along with his wife came to the house of PW 8 on a bicycle along with a minor girl who was wearing a white shirt and green skirt. The accused and his wife requested that they be permitted to stay during night which PW 8 agreed. The accused was sleeping in the verandah during night along with the girl. PW 8 heard the girl weeping and became curious and when it was found that the accused was having sexual intercourse with the minor girl PW 8 asked the accused and his wife to leave the place. Accused then took away the girl on his bicycle leaving his wife in the house of PW8.

14. The above facts would clearly establish that the girl was last seen with the accused. PW8 evidence discloses that the girl and the accused were seen together at a point of time in proximity with the time and date of the commission of the offence. Last seen theory was successfully established by the prosecution beyond any reasonable doubt. This Court in State of U.P. v. Satish (2005) 3 SCC 114 has held that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found is so small that possibility of any person other than the accused being the author of the crime is impossible. This test, in my view, is fully satisfied in the instant case. Reference may also be made to the judgment of this Court in Ramreddy Rajesh Khanna Reddy and Another v. State of Andhara Pradesh (2006) 10 SCC 172, Kusuma Ankama Rao v. State of Andhra Pradesh (2008) 13 SCC 257 and Manivel and Others v. State of Tamil Nadu.

15. PW8 stated on the next day of the incident that the accused came alone to his house without the girl and left the house along with his wife. Evidence of PW 8 is very crucial and there is nothing to show that he had any enmity or grudge against the accused so as to implicate him. PW8 had no difficulty in identifying the accused since he knew them earlier.

16. Further, apart from the evidence of witnesses discussed above, another crucial evidence is the medical evidence. PW 3, Dr. Mohan Kewade, who had conducted the post-mortem on the dead body of the deceased, noticed the following external injuries:

> i) Labia Majora and Minora swelled, tear of size two inch x ½ inch over interior part of labia Majora, extending to vagina present with clots of blood.
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> ii) Anal tear of size 1 inch x ½ inch posteriorly present swelling of anal opening and dilation of anal opening about 2 inch ween.
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> iii) Bruises of size 3 cm x 2 cm over both side of neck present about three in number on each side.
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> iv) Bruise of size 2 cm x 2 cm over medial surface thigh and thigh folds present.
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> v) Perianal bruises of size 1 cm x 1cm about three in number present, probable age of injuries are about 2 to 3 days.

On internal examination he found following injuries:

i) Injuries over larynx Trachea and bronchi; Evidence of fracture of upper two tracheal rings and larynx present.

ii) Organs of generation.

iii) Tear of cervix about 3 cm interiorly present with echoymetic."

17. Medical evidence clearly indicates that the cause of the death was asphyxia due to strangulation and though there was clear evidence of carnal intercourse, the accused was not charged for that offence. On a close scrutiny of the evidence, it can safely be concluded that the deceased girl was subjected to the acts of rape for more than one occasion.

18. I have extensively, critically and minutely gone through the evidence adduced in this case and I have no doubt in mind that it was the accused who had committed the crime. The standard of proof required to convict a person on circumstantial evidence is well established by a series of judgments of this Court. The circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The Sessions Court as well as the High Court has correctly appreciated the evidence and documents adduced in this case and found that the guilt of the accused is proved beyond reasonable doubt with which we fully concur.

19. The only question that now remains to be decided is whether this case falls in the category of rarest of rare cases, justifying capital punishment. This Court in several Judgments has awarded capital punishment, where rape and murder have been committed on a minor girl, after striking a balance between the aggravating and mitigating circumstances. Several other factors like the young age of the accused, the possibility of reformation, lack of intention to murder consequent to rape etc. have also gone into the judicial mind.

20. In Bachan Singh (supra), while determining the constitutional validity of the death penalty, this Court also examined the sentencing procedure embodied in sub-section (3) of Section 354 Cr.P.C. and held as follows:

> "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."

21. In Machhi Singh and others v. State of Punjab (1983) 3 SCC 470 this Court held that case fell in the category of rarest of rare cases calling for capital punishment since the victim of murder was an innocent child who could not have or had not provided even an excuse, much less a provocation for murder or the murder was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner which arose intense and extreme indignation of the community. The motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are factors which normally weigh with the court in awarding the death sentence terming it as the rarest of the rare cases. Reference to few judgments of this Court where death penalty has been awarded for rape and murder of minor girls and judgments, where it has been commuted may be apposite.

22. DEATH PENALTY AWARDED

> 1. Nathu Garam v. State of Uttar Pradesh [(1979) 3 SCC 366] This Court in that case upheld the death sentence awarded by the trial Court, confirmed by the High Court, for causing death of a 14 year old girl by a person aged 28 years after luring her into the house for committing criminal assault. Judgment was delivered prior to Bachan Singh (supra), therefore, the mitigating circumstances concerning the criminal were not seen addressed. Stress was more on "crime test".
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> 2. Jumman Khan v. State of Uttar Pradesh [(1991) 1 SCC 752] This Court, in this case, was hearing a writ petition moved by a convict, not to extend the death sentence. Writ Petition was dismissed after referring to the order passed by this Court in S.L.P. (Criminal) No. 558 of 1986, confirming the death sentence, noticing the degree of criminality and the reprehensive and gruesome manner the crime was committed on a six year old child. "Criminal test" is not prima facie seen satisfied, but only the "crime test".

3. Dhananjoy Chatterjee v. State of West Bengal [(1994) 2 SCC 220]

This Court dealt with a case of rape and murder of a young girl of about 18 years. The Court opined that a real and abiding concern for the dignity of human life is required to be kept in mind by courts while considering the confirmation of the sentence of death but a cold-blooded and pre-planned murder without any provocation, after committing rape on an innocent and defenceless young girl of 18 years exists in a rarest of rare cases which calls for no punishment other than capital punishment. Paras 14 and 15 of the judgment would indicate that this Court was more on crime test, not on criminal test, which are extracted below: "14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

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

Prima facie, it is seen that criminal test has not been satisfied, since there was not much discussion on the mitigating circumstances to satisfy the 'criminal test'.

4. Laxman Naik v. State of Orissa [(1994) 3 SCC 381] This Court again confirmed the death sentence on an accused for the offence of rape followed by murder of 7 year old girl by her own uncle. The Court opined that the accused seems to have acted in a beastly manner. After satisfying his lust, he thought that the victim might expose him for the commission of offence on her to her family members and others, the accused with a view to screen the evidence of the crime, put an end to the life of that innocent girl. The Court noticed how diabolically the accused had conceived his plan and brutally executed it in such a calculated cold blooded and brutal murder of a very tender age girl after committing rape on her which, according to the Court, undoubtedly falls in the rarest of rare case attracting no punishment other than capital punishment. In this case aggravating circumstances, that is, "crime test" is seen fully satisfied, but on mitigating circumstances (criminal test), this Court held as follows:

"26. This brings us to the question of sentence to be imposed upon the appellant for the offences for which he has been found guilty by the two Courts below as well as by us discussed above. In this connection it may be pointed out that this Court in the case of Bachan Singh v. State of Punjab (1980) 2 SCC 684: 1980 SCC (Cri) 580 while discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well recognized principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the Legislative Policy discernible from the provision contained in Sections 253(2) and 354(3) of the CrPC. In other words, the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case. On the contrary the facts of the case disclose only aggravating circumstances against the appellant which we have to some extent discussed above and at the risk of repetition shall deal with that again briefly.

27. The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant must have believed in his bona fide also and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the pre-planned unholy designs of the appellant. The victim was totally a helpless child there being no one to protect her in the desert where she was taken by the appellant misusing his confidence to fulfill his just. It appears that the appellant had pre- planned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

Both the tests "crime test" and "criminal test", it is seen, have been satisfied against the accused for awarding capital punishment.

5. Kamta Tiwari v. State of M.P. [(1996) 6 SCC 250] This Court dealt with a case of rape followed by murder of a 7 year old girl. Evidence disclosed that the accused was close to the family of the father of the deceased and the deceased used to call him "uncle". This Court noticed the closeness to the accused and the accused encouraged her to go to the grocery shop where the girl was kidnapped by him and was subjected to rape and later strangulated to death throwing the dead body in a well. This Court described the murder as gruesome and barbaric and pointed out that a person, who was in a position of a trust, had committed the crime and the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuaded this Court to hold that case as a rarest of rare cases where death sentence was warranted. The Court was following the guidelines laid down in Machhi Singh (supra), held as follows:

"8. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances - but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him 'Tiwari uncle'. Obviously her closeness with the appellant encouraged her to

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

Court was giving thrust on crime test rather than criminal test against the accused.

6. Molai and another v. State of M.P. [(1999) 9 SCC 581] A three-Judge Bench of this Court justified death sentence in a case where a 16 year old girl, preparing for her Tenth Standard Examination was raped and strangulated to death. The Court noticed the gruesome manner in which rape was committed and the way in which she was strangulated to death and the dead body was immersed in the septic tank. On sentence, the Court held as follows:

36. We have very carefully considered the contentions raised on behalf of the parties. We have also gone through various decisions of this Court relied upon by the parties in the courts below as well as before us and in our opinion the present case squarely falls in the category of one of the rarest of rare cases, and if this be so, the courts below have committed no error in awarding capital punishment to each of the accused. It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under-garment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they

exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

The three-Judge Bench, it is seen, has applied both the tests Crime test as well as the Criminal test and found that the case falls in the category of rarest of rare cases.

7. Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113] This Court confirmed death sentence in a case where a minor girl of 5 years was raped and murdered. This Court, following the principles laid down in Bachan Singh, pointed out that when the victim of the murder is an innocent child or a helpless woman or old or infirm person or a person vis- à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community, it is a vital factor justifying award of capital punishment. In this judgment also, this Court stressed on drawing of a balance sheet of mitigating and aggravating circumstances, following the judgment in Devender Pal Singh v. Government of NCT of Delhi (2002) 5 SCC 234. Court was applying the "balancing test", to award capital sentence.

8. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra [(2008) 15 SCC 269]

This was a case where the accused, a married man having three children, was known to the family of the deceased. The Court noticed the horrendous manner in which the girl aged 9 years was done to death after ravishing her. The Court awarded capital punishment. The Court, in this case, took the view that mitigating and aggravating circumstances have to be balanced. Here also the test applied was the "balancing test" to award capital punishment.

9. Mohd. Mannan @ Abdul Mannan v. State of Bihar [(2011) 5 SCC 317]

This was a case where a minor girl aged 7 years was kidnapped, raped and murdered. Court noticed how the accused had won the trust of that innocent girl and the gruesome manner in which she was subjected to rape and then strangulated her to death. The accused was aged 42-43 years. The Court held that he would be a menace to society and would continue to be so and could not be reformed. The Court awarded death sentence. The Court, in this case, held that a balance sheet is to be prepared while considering the imposition of death sentence. Here also the test applied was "balancing test" to award capital punishment.

10. Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37

This was a case of rape and murder of a 3 years old child by a married man of 31 years. Court noticed the brutal manner in which the crime was committed and the pain and agony undergone by the minor girl. The Court confirmed the death sentence awarded. The Court elaborately discussed when the aggravating and mitigating circumstances to be taken note of before awarding sentence and what are the principles to be followed, while awarding death sentence. The Court then held as follows: "37. When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust-belief' and 'confidence', in which capacity he took the child from the house of PW2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness."

Court in this case also applied the "balancing test" to award capital punishment.

23. CASES IN WHICH DEATH PENALTY COMMUTED

1. Kumudi Lal v. State of U.P. [(1994) 4 SCC 108] It was a case where a 14 year girl was raped and killed by strangulation. The Court accepted the brutality of the crime, however commuted death penalty to life

imprisonment. The Court noticed that the evidence did not indicate the girl was absolutely unwilling but rather showed that she initially permitted the accused to take some liberties with her but later expressed her unwillingness. Treating the same as a mitigating factor, death sentence was commuted to that of life imprisonment. 'Criminal test' was applied and was found not fully satisfied since some mitigating circumstances were found to be in favour of the accused so as to avoid death sentence.

2. Raju v. State of Haryana [(2001) 9 SCC 50]

This Court commuted death sentence to life imprisonment in a case where a girl of 11 years was raped and murdered. Court noticed that the accused had no intention to murder her, but on the spur of the moment, without any premeditation, he gave two brick blows which caused the death. Further, it was also found that the accused had no previous criminal record or would be a threat to the society. 'Criminal test' was applied and found not fully satisfied some mitigating circumstances were found to be in favour of the accused so as to avoid death sentence.

3. Bantu alias Naresh Giri v. State of M.P. [(2001) 9 SCC 615] This Court commuted death sentence to that of life imprisonment in a case where a girl of 6 years was raped and murdered by a boy of less than 22 years. Though, this Court found that the act was heinous and required to be condemned, but it could not be said to be one of the rarest of rare category. The accused did not require to be eliminated from the society. 'Criminal test' was applied and found some circumstances favouring the accused so as to avoid death sentence.

4. State of Maharashtra v. Suresh [(2000) 1 SCC 471] This Court in that case commuted the death sentence to life imprisonment where a girl of 4 years old was raped and murdered. Though this Court felt that the case was perilously near the region of rarest of the rare cases, but refrained from imposing extreme penalty. "Criminal test" was applied and narrowly escaped death sentence.

5. Amrit Singh v. State of Punjab [AIR 2007 SC 132] This Court commuted death sentence to that of life imprisonment in a case, where a 7-8 years old girl was raped and murdered by the accused aged 31 years. The Court noticed the manner in which the deceased was raped, it was brutal, but held

it could have been a momentary lapse on the part of the accused, seeing a lonely girl at a secluded place and there was no pre- meditation for commission of the crime. "Criminal test" it is seen, has been applied in favour of the accused to avoid death sentence.

6. Rameshbhai Chandubhai Rathod v. The State of Gujarat [(2011) 2 SCC 764]

This Court commuted death sentence to life imprisonment of the accused committing rape and murder of a girl of 8 years. It was noticed that the accused at the time of the commission of crime was 27 years and possibility of reformation could not be ruled out. "Criminal test" was applied considering the age of the accused and possibility of reformation saved the accused from death penalty.

7. Surendra Pal Shivbalak v. State of Gujarat [(2005) 3 SCC 127] This Court commuted death sentence to that of life imprisonment in a case where the accused aged 36 years had committed rape and murder of a minor girl. This Court noticed at the time of occurrence, the accused had no previous criminal record and held would not be a menace to the society in future. "Criminal test" was applied and absence of previous record was considered as a circumstance to avoid death sentence.

8. Amit v. State of Maharashtra [(2003) 8 SCC 93] This Court commuted death sentence to life imprisonment in a case where the accused aged 28 years had raped and murdered a girl of 11-12 years. This Court noticed that the accused had no previous criminal track record and also there was no evidence that he would be a danger to the society in future. "Criminal test" was applied, absence of previous track record and danger to the society were considered to avoid death sentence.

24. The list of cases mentioned above, wherein this Court had awarded death sentence and cases where this Court had commuted death sentence, is not exhaustive but only illustrative. This bench in Sangeeta & Ors v. State of Haryana (2013) 2 SCC 452 noticed that the circumstances of the criminal referred to in Bachan Singh appeared to have taken a bit of back seat in the sentencing process and held despite Bachan Singh, the 'particular crime' continues to play a more important role than the 'crime and criminal'. In conclusion, we have said, inter alia, as follows:

"1. The application of aggravating and mitigating circumstances needs a fresh look. This Court has not endorsed that approach in Bachan Singh. 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."

25. In Bachan Singh and Machhi Singh cases, this Court laid down various principles for awarding sentence:

"Aggravating circumstances – (Crime test)

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.

9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances: (Criminal test)

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

26. In Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra (2009) 6 SCC 498, this Court held the nature, motive, and impact of crime, culpability, quality of evidence, socio economic circumstances, impossibility of rehabilitation and some of the factors, the Court may take into consideration while dealing with such cases.

27. In Sangeeta's case this Bench has held that there is no question of balancing the above mentioned circumstances to determine the question whether the case falls into the rarest of rare cases category because the consideration for both are distinct and unrelated. In other words the "balancing test" is not the correct test in deciding whether capital punishment be awarded or not.

28. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test"

has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.

29. We have to apply the above tests in the present case and decide whether the courts below were justified in awarding the death sentence.

Enormity of the Crime and execution thereof (Crime Test)

30. Victim was aged 11 years, on the date of the incident, a school going child totally innocent, defenceless and having moderate intellectual disability. Ex. P-4 was a certificate issued by the President of the Handicap Board General Hospital, Amravati which disclosed that the girl was physically handicapped and was having moderate mental retardation. Evidence of PW 10, PW 12 and PW13 also corroborates the fact that she was a minor girl with moderate intellectual disability, an aggravating circumstance which goes against the accused. Vulnerability of the victim with moderate intellectual disability is an aggravating circumstance. The accused was a fatherly figure aged 52 years.

31. Dr. Kewade – PW3, who conducted the post mortem, had deposed as well as stated in the report the ghastly manner in which the crime was executed. Rape was committed on more than one occasion and the manner in which rape as well as murder was executed had been elaborately discussed in the oral evidence as well as in report which we do not want to reiterate. The action of accused, in my view, not only was inhuman but barbaric. Ruthless crime of repeated actions of rape

followed by murder of a young minor girl who was having moderate intellectual disability, shocks not only the judicial conscience, but the conscience of the society.

32. In my view, in this case the crime test has been satisfied fully against the accused.

Criminal Test

33. Let us now examine whether "Criminal Test' has been satisfied. The accused was aged 52 years at the time of incident, a fatherly figure for the minor child. The accused is an able bodied person has seen the world and is the father of two children. The accused repeatedly raped the girl for few days, ultimately strangulated her to death. Intellectually challenged minor girls will not be safe in our society if the accused is not given adequate punishment. Considering the age of the accused, a middle ager of 52 years, reformation or rehabilitation is practically ruled out. In the facts and circumstances of the case, in my view, criminal test has been fully satisfied against the accused and I do not find any mitigating factor favouring the accused. The only mitigating circumstance stated was that the accused is having two sons aged 26 and 27 years and are dependent on him, which in my view, is not a mitigating circumstance and the "criminal test" is fully satisfied against the accused. Both the crime test and criminal test are, therefore, independently satisfied against the accused.

34. Let us now apply the R-R Test. I have critically and minutely gone through the entire evidence and I am of the view that any other punishment other than life imprisonment would be completely inadequate and would not meet the ends of justice.

35. Remember, the victim was a minor girl aged 11 years, intellectually challenged and elders like the accused have an obligation and duty to take care of such children, but the accused has used her as a tool to satisfy his lust. Society abhors such crimes which shocks the conscience of the society and always attracts intense and extreme indignation of the community. R-R Test is fully satisfied against the accused, so also the Crime Test and the Criminal Test". Even though all the above mentioned tests have been satisfied in this case, I am of the view that the extreme sentence of Death penalty is not warranted since one of the factors which influenced the High Court to award death sentence was the previous track record of the accused.

Previous Criminal Record of the Accused

36. The Investigating Officer, during the course of hearing of the criminal appeal by the High Court, filed an affidavit dated 11.4.2008 stating that the accused was also figured as an accused in Crime No. 165/92 registered at Police Station Borgaon Manju, District Akola for the offence under Section 302 IPC on the allegation that he caused murder of his wife Chanda by assaulting her with stick on 4.10.1993 and that Sessions Trial No. 52/07 was pending before the Sessions Court, Akola. Further, it was also stated that another Crime No. 80/06 was also registered against the accused at Chandur Bazar Police Station for an offence under Sections 457 and 380 IPC. The High Court was of the view that the accused had not disclosed those facts before the Court and held as follows: "….However, fact remains that the accused has not disputed the pendency of these proceedings against him. Moreover, they cannot be said to be irrelevant for the purpose of deciding the appropriate sentence which deserves to be imposed on the appellant. We, therefore, deem it appropriate to consider the pendency of these cases as a circumstance against the accused….."

37. I find it difficult to endorse this view of the High Court. In my view, the mere pendency of criminal cases as such cannot be an aggravating factor to be taken note of while granting appropriate sentence. In Gurmukh Singh v. State of Haryana (2009) 15 SCC 635, this Court opined that criminal background and adverse history of the accused is a relevant factor. But, in my view, mere pendency of cases, as such, is not a relevant factor. This Court in Mohd. Farooq Abdul Gafur v. State of Maharashtra (2010) 14 SCC 641 dealt with a similar contention and Justice S. B. Sinha, while supplementing the leading judgment, stated as follows:

> "178. In our opinion the trial court had wrongly rejected the fact that even though the accused had a criminal history, but there had been no criminal conviction against the said three accused. It had rejected the said argument on the ground that a conviction might not be possible in each and every criminal trial……."

38. Therefore, the mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. High Court was, therefore, in error in holding that those are relevant factors to be considered in awarding appropriate sentence.

39. But what disturbed me the most is that the police after booking the accused for offence under Section 377 IPC failed to charge sheet him, in spite of the fact the medical evidence had clearly established the commission of carnal intercourse on a minor girl with moderate intellectual disability. Dr. Kewade - PW3, who conducted the post mortem, had clearly spelt out the facts of sodomy in his report as well as in his deposition. Prosecuting agency has also failed in his duty to point out the same to the court that a case had been made out under Section 377 IPC.

Non-reporting the offence of sexual assault

40. Let me now refer to another disturbing trend in our society that is non-reporting of sexual assault on minor children, which has happened in this case as well. Ravindra Lavate (PW8), in his deposition, has stated as follows:

> "I heard that the girl was weeping. I, therefore, come in Verandah and observed that Accused No.1 was lying on the body of the said girl. I observed it in the electric light. I also observed that Accused No.1 was committing sexual intercourse with the girl. I and my wife asked Accused No.1 as to what he was doing. I asked Accused No.1 Shankar to take out the said girl. Accused No.1 thereafter took away the said girl on cycle."

41. PW8 has admitted in his cross-examination that he had not reported the said fact to the police, possibly due to the reason that there was no clear cut legislative provision casting an obligation on him to report to the J.J. Board or to the S.J.P.U. dealing with sexual offences towards children after having witnessed the incident. Is there not a duty cast on every citizen of this country if they witness or come to know any act of sexual assault or abuse on a minor child to report the same to the police or to the J.J. Board or can they keep mum so as to screen the culprit from legal punishment?

42. Article 15 (3) of the Constitution of India confers upon the State powers to make special provision for children. Article 39 inter alia provides that the State shall, in particular, direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

43. The United Nations Convention on the Rights of Children, rectified by India on 11th December 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices etc. Articles 3(2) and 34 of the Convention have placed a specific duty on the State to protect the child from all forms of sexual exploitation and abuse. National Crime Records Bureau (NCRB) 2011 report specifically deals with the statistics of rape victims which is as follows:

Rape Victims

44. There were 24,270 victims of Rape out of 24,206 reported Rape cases in the country. 10.6% (2,582) of the total victims of Rape were girls under 14 years of age, while 19.0% (4,646 victims) were teenaged girls (14- 18 years). 54.7% (13,264 victims) were women in the age-group 18-30 years. However, 15.0% (3,637 victims) were in the age group of 30-50 years while 0.6% (141 victims) was over 50 years of age.

45. Offenders were known to the victims in as many as in 22,549 (94.2%) cases. Parents / close family members were involved in 1.2% (267 out of 22,549 cases) of these cases, neighbours were involved in 34.7% cases (7,835 out of 22,549 cases) and relatives were involved in 6.9% (1,560 out of 22,549 cases) cases.

46. A total of 7,112 cases of child rape were reported in the country during 2011 as compared to 5,484 in 2010 accounting for an increase of 29.7% during the year 2011. Madhya Pradesh has reported the highest number of cases (1,262) followed by Uttar Pradesh (1088) and Maharashtra (818). These three States altogether accounted for 44.5% of the total child rape cases reported in the country.

> Crimes against Children in the country and % variation in 2011 over 2010 |Sl. No.|Crime Head |YEAR |% Variation in| | | | |2011 over 2010| |(1) |(2) |(3) |(4) |(5) |(6) | |3. |Rape |5,368 |5,484 |7112 |30 |

47. The Department of Women and Child Development conducted a study and prepared a Draft of the Offences against Children Bill, 2005 which was further discussed with the National Commission for Protection of Child Rights (NCPCR).

48. Parliament later passed the Act titled "The Protection of Children from Sexual Offences Act, 2012. (Act 32 of 2012) which received the assent of the President on 19th June, 2012. The Act provides for reporting of sexual offences and the punishment for failure to report or record punishment for filing false complaint and/or false information. The Act also provides for a Justice Delivery System for child victims and few other provisions to safeguard the interest of children.

49. Chapter V of the Act deals with the Procedure of reporting of cases. Sec. 19(1) deals with the manner in which the case has to be reported to the Special Juvenile Police Unit or local police. Section 20 deals with the obligation of media, studio and photographic facilities to report cases and the same reads as follows:

> "20. Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.
>
> Section 21 prescribes punishment for failure to report or record a case, which reads as follows:
>
> "21. (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.
>
> (2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine."

50. I may also point out that, in large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal Courts in this country are galore with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord etc. Preventive aspects have seldom

been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

51. In my view, whenever we deal with an issue of child abuse, we must apply the best interest child standard, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

52. The conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the J.J. Board compel us to give certain directions for compliance in future which, in my view, are necessary to protect our children from such sexual abuses. This Court as parens patriae has a duty to do so because Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability.

53. President of India on 3rd February, 2013 promulgated an ordinance titled "The Criminal Law (Amendment) Ordinance, 2013, further to amend the Code of Criminal Procedure Code, 1973, Indian Evidence Act, 1872 and the Indian Penal Code, 1860. By the ordinance Sections 375, 376, 376-A, 376-B, 376-C and 376-D of the Code have been substituted by new Sections. The word "rape" has been replaced by the word "sexual assault". Section 375 has also clarified that lack of physical resistance is immaterial for constituting an offence. A new Section 376-A has been added which reads as follows:

> 376A. Whoever, commits an offence punishable under sub-section (I) or sub-section (2) of Section 376 and in the course of such commission inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years=, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death".
>
> Therefore a person, who commits an offence punishable under sub-section (1) and sub-section (2) of Section 376 and causes death shall be punishable with rigorous imprisonment for a term which shall not be less than twelve years but which my extend to imprisonment for life, which shall be mean the remainder of that periods natural life or with death.

54. Considering the entire facts and circumstances of the case, I am inclined to convert death sentence awarded to the accused to rigorous imprisonment for life and that all the sentences awarded will run consecutively.

55. I my opinion, the case in hand calls for issuing the following directions to various stake-holders for due compliance:

> 1) The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest S.J.P.U. or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.

2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities have to duly comply with the provision of Section 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with Section 23 of the Act as well.

(3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.

(4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

(5) Hospitals, whether Government or privately owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child. (6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

(7) Complaints, if any, received by NCPCR, S.C.P.C.R. Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organizations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law. (8) The Central Government and the State Governments are directed to constitute SJPUs in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J. J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime. (9) The Central Government and every State Government should take

all measures as provided under Section 43 of the Act 32/2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

56. Criminal appeals stand dismissed and the death sentence awarded to the accused is converted to that of rigorous imprisonment for life and that all the sentences awarded will run consecutively.

JUDGMENT

MADAN B. LOKUR, J.

57. While entirely agreeing with my learned Brother Justice Radhakrishnan that the conviction of the appellant must be upheld and that all sentences awarded to him must run consecutively, I feel it necessary to draw attention to the views expressed by this Court on awarding death penalty or converting it to imprisonment for life in cases concerning rape and murder.

Element of subjectivity:

58. In Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 this Court noted in paragraph 44 of the Report that the expression "the rarest of rare cases" in Bachan Singh v. State of Punjab, (1980) 2 SCC 684 indicates a relative category based on a comparison with other cases. In paragraph 45 of the Report, this Court considered the expression as requiring a comparison between (i) cases of murder with other cases of murder of the same or of a similar kind or even of a graver nature and (ii) the punishment awarded to the convicts in those cases. This Court also expressed the view that there is hardly any field available for comparison. In other words, this Court highlighted the difficulty in the practical application of the "rarest of rare" principle since there is a lack of empirical data for making the two-fold comparison.

59. The question therefore is: how does one determine that a case is rare as compared to another case? If such a comparison were possible, then on a relative basis could a particular case be described as rarer than an identified rare case? It is this inability to make a comparative evaluation and clarity on the issue due to a lack of information and any detailed study that the application of the rarest of rare

principle becomes extremely delicate thereby making the awarding of a death sentence subjective as mentioned in Swamy Shraddananda or judge-centric as mentioned in Sangeet v. State of Haryana, 2013 (2) SCC 452.

Corridor of uncertainty:

60. My learned Brother Justice Radhakrishnan has put in great efforts in analyzing a species of cases (of which I am sure there would be many more) in which the victim was raped and murdered. These cases fall in two categories, namely, those in which the death penalty has been confirmed by this Court and those in which it has been converted to life imprisonment. In my view, there is a third category consisting of cases (which cannot be overlooked in the overall context of a sentencing policy) in which this Court has, while awarding a sentence of imprisonment for life, arrived at what is described as a via media and in which a fixed term of imprisonment exceeding 14 or 20 years (with or without remissions) has been awarded instead of a death penalty, or in which the sentence awarded has been consecutive and not concurrent.

61. For the present purposes, I will first refer to those somewhat recent cases (say over the last about 15 years) where the death penalty was converted to imprisonment for life and cull out the main reasons for commuting it. However, it is necessary to enter two caveats: Firstly, the Constitution Bench in Bachan Singh has concluded in paragraph 164 of the Report that normally the punishment for murder is life imprisonment and a death penalty may be imposed only if there are special reasons for doing so. In other words, special reasons are required to be recorded not for awarding life imprisonment but for awarding death sentence. This is what the Constitution Bench held:

> "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."

62. It was further held in paragraph 209 of the Report that the normal rule is of awarding life sentence but death sentence may be awarded only if the alternative of life sentence is unquestionably foreclosed. The Constitution Bench held:

> "It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

63. Strictly speaking, therefore, this Court is not required to record reasons for commuting the death sentence to one of life imprisonment – it is only required to record reasons for either confirming the death sentence or awarding it.

64. Secondly, though a sentence awarded by this Court relates to a specific case, nevertheless an exercise needs to be undertaken to identify some jurisprudential principle for awarding the death penalty. It is in this context that the present exercise has been undertaken. It is possible that the cases discussed are not exhaustive of the "rape and murder" category and perhaps some may have been left out of the discussion but the general principles or guidelines would be discernible from this exercise of finding a way through the existing corridor of uncertainty in sentencing.

Cases where the death penalty has been converted to imprisonment for life:

65. State of Tamil Nadu v. Suresh, (1998) 2 SCC 372 was a case of the rape and murder of a pregnant housewife. This Court took the view that though the crime was dastardly and the victim was a young pregnant housewife, it would not be appropriate to award the death penalty since the High Court had not upheld the conviction and also due to the passage of time. This is what was observed:

> "The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A-2 and A-3,

though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on those two accused."

66. Nirmal Singh v. State of Haryana, (1999) 3 SCC 670 was a case in which Dharampal had raped P and was convicted for the offence. Pending an appeal the convict was granted bail. While on bail, Dharampal along with Nirmal Singh murdered five members of P's family. Death penalty was awarded to Dharampal and Nirmal Singh by the Trial Court and confirmed by the High Court. This Court converted the death sentence in the case of Nirmal Singh to imprisonment for life since he had no criminal antecedents; there was no possibility of his committing criminal acts of violence; he would not continue being a threat to society; and he was not the main perpetrator of the crime. It was held:

> "There is nothing on record to suggest that Nirmal was having any past criminal antecedents or that there is a possibility that the accused would commit criminal acts of violence and would constitute a continuing threat to the society. The only aggravating circumstance is that he had come with his brother and had given 3 blows on deceased Krishna only after Dharampal chased Krishna and gave kulhari blows hitting on the neck while Krishna was running and on sustaining that blow, she fell down and then Dharampal gave two to three blows to Krishna and only thereafter Nirmal gave burchi blows on the said Krishna. It is no doubt true that the presence of Nirmal at the scene of the occurrence with a burchi in his hand had emboldened Dharampal to take the drastic action of causing murder of 5 persons of Tale's family as a result of which Tale's family was totally wiped off. But because of the fact that Nirmal has not assaulted any other person and assaulted Krishna only after Dharampal had given her 3 or 4 blows, the case of Nirmal cannot be said to be the rarest of rare case attracting the extreme penalty of death. While, therefore, we uphold his conviction under Sections 302/34, we commute his sentence of death into imprisonment for life."

67. Kumudi Lal v. State of Uttar Pradesh, (1999) 4 SCC 108 was a case of rape and murder of a 14 year old. This Court was of the view that the applicability of the rarest of rare principle did not arise in this case apparently because the crime had no 'exceptional' feature. This Court noted as follows:

> "The circumstances indicate that probably she (the victim) was not unwilling initially to allow the appellant to have some liberty with her. The appellant not being able to resist his urge for sex went ahead in spite of her

> unwillingness for a sexual intercourse who offered some resistance and started raising shouts at that stage. In order to prevent her from raising shouts the appellant tied the salwar around her neck which resulted in strangulation and her death. We, therefore, do not consider this to be a fit case in which the extreme penalty of death deserves to be imposed upon the appellant."

68. Akhtar v. State of Uttar Pradesh, (1999) 6 SCC 60 was a case of rape and murder of a young girl. The sentence of death awarded to the accused was converted to one of life imprisonment since he took advantage of finding the victim alone in a lonely place and her murder was not premeditated. It was observed:

> "But in the case in hand on examining the evidence of the three witnesses it appears to us that the accused-appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death."

69. In State of Maharashtra v. Suresh, (2000) 1 SCC 471 death penalty was not awarded to the accused since he had been acquitted by the High Court, even though the case was said to be "perilously near" to falling within the category of rarest of rare cases. The test of whether the lesser option was "unquestionably foreclosed" was adopted by this Court, which held:

> "We, therefore, set aside the impugned judgment and restore the conviction passed by the trial court. Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases" envisaged by the Constitution Bench inBachan Singh v. State of Punjab. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life."

70. In Mohd. Chaman v. State (NCT of Delhi), (2001) 2 SCC 28 the accused, a 30 year old man, had raped and killed a one and a half year old child. Despite concluding that the crime was serious and heinous and that the accused had a dirty and perverted mind, this Court converted the death penalty to one of imprisonment for life since he was not such a dangerous person who would endanger the community and because it was not a case where there was no alternative but to impose the death penalty. It was also held that a humanist approach should be taken in the matter of awarding punishment. It was held:

> "Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, Machhi Singh [(1983) 3 SCC 470] and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."

71. Raju v. State of Haryana, (2001) 9 SCC 50 was a case in which this Court took into account three factors for converting the death sentence of the accused to imprisonment for life for the rape and murder of an eleven year old child. Firstly, the murder was committed without any premeditation (however, there is no mention about the rape being not premeditated); secondly, the absence of any criminal record of the accused; and thirdly, there being nothing to show that the accused could be a grave danger to society. This is what was said:

> "[T]he evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two

brick-blows which caused her death. There is nothing on record to indicate that the appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty."

72. In Bantu v. State of Madhya Pradesh, (2001) 9 SCC 615 this Court converted the death sentence awarded to the accused to imprisonment for life. The accused was a 22 year old man who had raped and murdered a 6 year old child. It was acknowledged that the rape and murder was heinous, but this Court took into account that the accused had no previous criminal record and that he would not be a grave danger to society at large. On this basis, the death penalty was converted to life imprisonment. This is what was said:

"In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence."

73. In State of Maharashtra v. Bharat Fakira Dhiwar, (2002) 1 SCC 622 this Court converted the death sentence to imprisonment for life since the accused was acquitted by the High Court and imprisonment for life was not unquestionably foreclosed. This is what this Court held:

"Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench inBachan Singh v. State of Punjab. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life."

74. In Amit v. State of Maharashtra, (2003) 8 SCC 93 the death penalty awarded to the accused for the rape and murder of an eleven year old child was converted to imprisonment for life for the reason that he was a young man of 20 years when the

incident occurred; he had no prior record of any heinous crime; and there was no evidence that he would be a danger to society. This Court held:

> "The next question is of the sentence. Considering that the appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death penalty is not awarded. Though the offence committed by the appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases. We hope that the appellant will learn a lesson and have an opportunity to ponder over what he did during the period he undergoes the life sentence."

75. Surendra Pal Shivbalakpal v. State of Gujarat, (2005) 3 SCC 127 was a case in which the death penalty awarded to the accused who had raped a minor child, was converted to life imprisonment considering the fact that he was 36 years old and there was no evidence of the accused being involved in any other case and there was no material to show that he would be a menace to society. It was held:

> "The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case."

76. In State of Maharashtra v. Mansingh, (2005) 3 SCC 131 the accused was acquitted by the High Court of the offence of rape and murder of the victim. In a brief order, this Court noted this fact as well as the fact that this was a case of circumstantial evidence and, therefore, the death sentence was converted to imprisonment for life to meet the ends of justice. It was observed:

> "Now the question which arises is as to whether the present case would come within the ambit of rarest of the rare case. In the facts and circumstances of the case, we are of the view that the trial court was not

justified in imposing extreme penalty of death against the respondent and ends of justice would be met in case the sentence of life imprisonment is awarded against the respondent."

77. Rahul v. State of Maharashtra, (2005) 10 SCC 322 was a case of the rape and murder of a four and a half year old child by the accused. The death sentence awarded to him was converted by this Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred; apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society. It was held:

> "We have considered all the relevant aspects of the case. It is true that the appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27-11-1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him."

78. In Amrit Singh v. State of Punjab, (2006) 12 SCC 79 a 6 or 7 year old child was raped and murdered by a 31 year old. This Court took the view that though the rape may be brutal and the offence heinous, "it could have been a momentary lapse" on the part of the accused and was not premeditated. The victim died "as a consequence of and not because of any overt act" by the accused. Consequently, the case did not fall in the category of rarest of rare cases. It was held:

> "The opinion of the learned trial Judge as also the High Court that the appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr Agarwal, however, that the appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr. Reshamchand Singh, PW 1 did not state that injury on the neck could have

contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the appellant.

"Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of the appellant, seeing a lonely girl at a secluded place. He had no premeditation for commission of the offence. The offence may look heinous, but under no circumstances, can it be said to be a rarest of rare cases."

79. Bishnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467 was a case concerning the rape and murder of a child aged about 7 or 8 years by two accused persons. The death penalty awarded to them was converted to life imprisonment since the conviction was based on circumstantial evidence and appellant No.1 had expressed remorse in his statement under Section 313 of the Code of Criminal Procedure and admitted his guilt. It appears that the second accused either did not admit his guilt or express any remorse. This Court held:

"The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, Appellant No.1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt."

80. Santosh Kumar Singh v. State, (2010) 9 SCC 747 was a case in which the sentence of death was converted to life imprisonment by this Court since the accused had been acquitted by the Trial Court and the High Court had reversed the acquittal on circumstantial evidence. The accused was young man of 24 years when the incident occurred; he had got married in the meanwhile and had a daughter; his father had died a year after his conviction; his family faced a dismal future; and there was nothing to suggest that he was not capable of reform. It was held:

"Furthermore, we see that the mitigating circumstances need to be taken into account, more particularly that the High Court has reversed a judgment of acquittal based on circumstantial evidence. The appellant was a young man of 24 at the time of the incident and, after acquittal, had got married and was the father of a girl child. Undoubtedly also, the appellant would have had time for reflection over the events of the last fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family. On the contrary, there is nothing to suggest that he would not be capable of reform.

"There are extremely aggravating circumstances as well. In particular we notice the tendency of parents to be overindulgent to their progeny often resulting in the most horrendous of situations. These situations are exacerbated when an accused belongs to a category with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two. The reality that such a class does exist is for all to see and is evidenced by regular and alarming incidents such as the present one.

"Nevertheless, to our mind, the balance sheet tilts marginally in favour of the appellant, and the ends of justice would be met if the sentence awarded to him is commuted from death to life imprisonment under Section 302 of the Penal Code; the other part of the sentence being retained as it is."

81. Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764 was an unusual case in as much as the two learned Judges hearing the case had differed on the sentence to be awarded. Accordingly the matter was referred to a larger Bench which noted that the accused was about 28 years of age and had raped and killed a child studying in a school in Class IV. The accused was awarded a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons. It was held as follows:

"Both the Hon'ble Judges have relied extensively on Dhananjoy Chatterjee case [(1994) 2 SCC 220]. In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a

finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.

"We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the appellant…."

82. Incidentally, Dhananjoy Chatterjee was also 27 years of age when he committed the offence of rape and murder, while Rameshbhai Chandubhai Rathod was 28 years of age when he committed the offence.

83. In Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56 the Trial Court had awarded life sentence to the accused for the rape and murder of a 10 year old child but the High Court enhanced it to a sentence of death. Taking into account the view of the Trial Court, this Court converted the death sentence to one of life imprisonment. It was observed:

"So far as the sentence part is concerned, in view of the law referred to hereinabove, we are of the considered opinion that the case does not fall within the "rarest of rare cases". The High Court was not justified in enhancing the punishment. Thus, in the facts and circumstances of the case, we set aside the punishment of death sentence awarded by the High Court and restore the sentence of life imprisonment awarded by the trial court. With this modification, the appeals stand disposed of."

84. In Amit v. State of Uttar Pradesh, (2012) 4 SCC 107 the death penalty awarded to the accused for the rape and murder of a 3 year old child was converted to imprisonment for life since the accused was a young man of 28 years when he committed the offence; he had no prior history of any heinous offence; there was

nothing to suggest that he would repeat such a crime in future; and given a chance, he may reform. This Court sentenced him to life imprisonment subject to remissions or commutation. This Court held:

"In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons."

Broad analysis:

85. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include (1) the young age of the accused (Amit v. State of Maharashtra aged 20 years, Rahul aged 24 years, Santosh Kumar Singh aged 24 years, Rameshbhai Chandubhai Rathod (2) aged 28 years and Amit v. State of Uttar Pradesh aged 28 years); (2) the possibility of reforming and rehabilitating the accused (Santosh Kumar Singh and Amit v. State of Uttar Pradesh the accused, incidentally, were young when they committed the crime); (3) the accused had no prior criminal record (Nirmal Singh, Raju, Bantu, Amit v. State of Maharashtra, Surendra Pal Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh); (4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh, Mohd. Chaman, Raju, Bantu, Surendra Pal Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh). A few other reasons need to be mentioned such as the accused having been acquitted by one the Courts (State of Tamil Nadu v. Suresh, State of Maharashtra v. Suresh, Bharat Fakira Dhiwar, Mansingh and Santosh Kumar Singh); the crime was not premeditated (Kumudi Lal, Akhtar, Raju and Amrit Singh); the case was one of circumstantial evidence (Mansingh and Bishnu Prasad Sinha). In one case, commutation was ordered since there was apparently no 'exceptional' feature warranting a death penalty (Kumudi Lal) and in another case because the Trial Court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput).

Cases where the death penalty has been confirmed:

86. Jumman Khan v. State of Uttar Pradesh, (1991) 1 SCC 752 was a case in which the death penalty was confirmed by this Court for the rape and murder of a 6 year old child on the basis of the brutality of the crime and on circumstantial evidence. This Court quoted the order dismissing the special leave petition of the accused against his conviction, in which it was said:

"Although the conviction of the petitioner under Section 302 of the Indian Penal Code, 1860 rests on circumstantial evidence, the circumstantial evidence against the petitioner leads to no other inference except that of his guilt and excludes every hypothesis of his innocence……...

Failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders. The sentence of death is confirmed."

87. In Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220 this Court confirmed the death sentence of the 27 year old married accused taking into consideration the rising crime graph, particularly violent crime against women; society's cry for justice against criminals; and the fact that the rape and murder of an 18 year old was premeditated and committed in a brutal manner by a security guard against a young defenceless person to satisfy his lust and in retaliation for a complaint made by her against him. This is what this Court had to say:

"In recent years, the rising crime rate — particularly violent crime against women has made the criminal sentencing by the courts a subject of concern…….

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the

criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

"The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years……."

88. In Laxman Naik v. State of Orissa, (1994) 3 SCC 381 this Court was of the opinion that since the accused was the guardian of the helpless victim, his 7 year old niece, and since the crime was pre-planned, cold blooded, brutal and diabolical, the appropriate punishment would be a sentence of death. This Court held:

"The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

89. Kamta Tiwari v. State of Madhya Pradesh, (1996) 6 SCC 250 was a case where the accused was close to the family of the victim, a 7 year old child. In fact, she would address him as 'Uncle Tiwari'. He was, therefore, in the nature of a person of trust, while the victim was in a hapless condition and was brutally raped and murdered in a premeditated manner. This Court held:

"Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances — but found aggravating circumstances aplenty. …… When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

90. Nirmal Singh v. State of Haryana, (1999) 3 SCC 670 has already been referred to above. One of the accused Dharampal, had been convicted for rape and had filed an appeal. Pending the appeal, he applied for and was granted bail. While on bail, he killed five members of the family who had given evidence against him in the case for which he was convicted of rape, thereby carrying out the threat he had earlier given. The crime was pre- planned and executed in a brutal manner. Confirming the death penalty awarded to him, this Court held:

"…… Coming to the question of sentence, however, we find that the High Court has not considered the individual role played by each of the appellants. So far as accused Dharampal is concerned, it is he who had given the threat on the previous occasion that if anybody gives evidence in the rape case, the whole family will be wiped off. It is he who after being convicted in the said rape case preferred an appeal and obtained a bail from the High Court and has totally misutilised that privilege of bail by killing 5 persons who were all the members of the family of P whose deposition was responsible for his conviction in the rape case. It is he who has assaulted each of the 5 deceased persons by means of a kulhari and the nature of the injuries as found by the doctor would indicate that the act is an act of a depraved mind and is most brutal and heinous in nature. It is he who had consecrated the plan to put into action his earlier threat but he has taken the help of his brother Nirmal."

91. Jai Kumar v. State of Madhya Pradesh, (1999) 5 SCC 1 was a case in which the death penalty was confirmed since this Court accepted the view of the High Court that the accused was a "living danger" and incapable of rehabilitation. The crime was that of an attempted rape of a 30 year old pregnant woman followed by her

murder and the murder of her 8 year old child. This Court held that the crime was brutal and committed in a gruesome and depraved manner. The fact that the accused was a young man of 22 years was held not to be a relevant factor, given the nature of the crime. The judicial conscience of this Court was shocked by the facts of the case. It was held:

"….. [W]e are unable to record our concurrence with the submissions of Mr Muralidhar that there are some mitigating circumstances and there is likelihood of the accused being reformed or rehabilitated. Incidentally, the High Court has described the accused as "a living danger" and we cannot agree more therewith in view of the gruesome act as noticed above.

"The facts establish the depravity and criminality of the accused in no uncertain terms. No regard being had for the precious life of the young child also. The compassionate ground of the accused being 22 years of age cannot in the facts of the matter be termed to be at all relevant……

"In the present case, the savage nature of the crime has shocked our judicial conscience. The murder was cold-blooded and brutal without any provocation. It certainly makes it a rarest of the rare cases in which there are no extenuating or mitigating circumstances.

92. In Molai & Anr. v. State of M.P., (1999) 9 SCC 581 death penalty awarded to both the accused for the rape and murder of a 16 year old was confirmed. Molai was a guard in a Central Jail and Santosh was undergoing a sentence in that jail. The victim was the daughter of the Assistant Jailor. Taking into account the manner of commission of the offence and the fact that they took advantage of the victim being alone in a house, the death penalty was confirmed by this Court although the case was one of circumstantial evidence. This Court held:

"…… It cannot be overlooked that N, a 16-year-old girl, was preparing for her Class 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her undergarment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp- edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused

(appellants) could not point any mitigating circumstance from the record of the case to justify the reduction of sentence of either of the accused."

93. State of Uttar Pradesh v. Satish, (2005) 3 SCC 114 is a remarkable case for the reason that the accused was acquitted by the High Court and yet the death penalty awarded by the Trial Court was upheld by this Court for the rape and murder of a school going child. The case was also one of circumstantial evidence. The special reasons for awarding the death penalty were the diabolic and inhuman nature of the crime. It was held:

"Considering the view expressed by this Court in Bachan Singh case and Machhi Singh case we have no hesitation in holding that the case at hand falls in the rarest of rare category and death sentence awarded by the trial court was appropriate. The acquittal of the respondent- accused is clearly unsustainable and is set aside. In the ultimate result, the judgment of the High Court is set aside and that of the trial court is restored. The appeals are allowed."

94. Shivu & Anr. v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713 was a case in which the special reasons for confirming the death penalty given to both the accused who were aged about 20 and 22 years old respectively were the heinous rape and murder of an 18 year old. It was noted that the accused had twice earlier attempted to commit rape but were not successful. Though no case was lodged against them, they were admonished by the village elders and the Panchayat and asked to mend their ways. It was held:

"Considering the view expressed by this Court in Bachan Singh case and Machhi Singh case we have no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial court and confirmed by the High Court was appropriate."

95. In Bantu v. State of Uttar Pradesh, (2008) 11 SCC 113 the death sentence was confirmed for the special reason of the depraved and heinous act of rape and murder of a 5 year old child, which included the insertion of a wooden stick in her vagina to the extent of 33 cms. to masquerade the crime as an accident. This Court held:

"The case at hand falls in the rarest of the rare category. The depraved acts of the accused call for only one sentence, that is, death sentence."

96. In Shivaji v. State of Maharashtra, (2008) 15 SCC 269 this Court categorically rejected the view that death sentence cannot be awarded in a case where the evidence is circumstantial. The death sentence was upheld also because of the depraved acts of the accused in raping and murdering a 9 year old child. This Court held:

"The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play.....

"The case at hand falls in the rarest of the rare category. The circumstances highlighted above establish the depraved acts of the accused, and they call for only one sentence, that is, death sentence."

97. In Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667 of the six accused, three were awarded life sentence by the High Court while for the remaining three, the death sentence was confirmed. The accused were found to have committed five murders and had raped a lady (who survived) and a child of 15 years of age (who died). This Court awarded the death penalty to all the six accused. This Court found the crime to be cruel and diabolic; the collective conscience of the community was shocked; the victims were of a tender age and defenceless; the victims had no animosity towards the accused and the attack against them was unprovoked. Considering these factors, this Court awarded the death penalty to all the accused and held:

"The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1, 2 and 4; but held that in the case of others it was to be altered to life sentence.

"The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenceless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged to the open field, gang-raped and done to death.

"Above being the position, the appeals filed by the accused persons deserve dismissal, which we direct and the State's appeals deserve to be allowed. A-2, A-3 and A-5 are also awarded death sentence. In essence all the six accused persons deserve death sentence."

98. B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85 was a case of the rape and murder of a lady, a mother of a 7 year old child. In the High Court, there was a difference of opinion on the sentence to be awarded – one of the learned judges confirmed the death penalty while the other learned judge was of the view that imprisonment for life should be awarded. The matter was referred to a third learned judge who agreed with the award of a death penalty. This Court confirmed the death penalty since the crime was unprovoked and committed in a depraved and merciless manner; the accused was alleged to have been earlier and subsequently involved in criminal activity; he was a menace to society and incapable of rehabilitation; the accused did not feel any remorse for what he had done. It was held:

"On the question of sentence we are satisfied that the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of the rarest of rare cases which merits the death penalty, as awarded by the trial court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in Bachan Singh case or in Machhi Singh case are present in the facts of the instant case. The appellant even made up a story as to his presence in the house on seeing PW 2 Suresh, who had come there in the meantime. Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and assault her and in the process causing injuries to her.

“As has been indicated by the courts below, the antecedents of the appellant and his subsequent conduct indicates that he is a menace to the society and is incapable of rehabilitation. The offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim. He did not feel any remorse in regard to his actions, inasmuch as, within two days of the incident he was caught by the local public while committing an offence of a similar type in the house of one Seeba."

99. Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317 was a case which a 42 year old man had raped and killed a 7 year old child. This Court looked at the factors for awarding death sentence both in the negative as well as in the positive sense. It was held that the number of persons killed by the accused is not a decisive factor; nor is the mere brutality of the crime decisive. However if the brutality of the crime shocks the collective conscience of the community, one has to lean towards the death penalty. Additionally, it is to be seen if the accused is a menace to society and can be reformed or not. Applying these broad parameters, this Court held that the accused was a mature man of 43 years; that he held a position of trust in relation to the victim; that the crime was pre-planned; and that the crime was, pre-planned, unprovoked and gruesome against a defenceless child. It was held:

“……. The appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and pre-planned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 ft of height and such a child was incapable of arousing lust in normal situation. The appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and the innocent child was made prey of the appellant's lust.

“The post-mortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate is to inflict the death sentence which is natural and logical. 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."

100. In Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37 the accused, a 31 year old, had raped and murdered a 3 year old child. This Court considered the brutality of the crime and the conduct of the accused prior to, during and after the crime. Prior to the incident, the accused had worked under a false name and had gained the trust and confidence of the victim. The accused had, after committing a brutal crime, left the injured victim in the open field without any clothes, thereby exhibiting his unfortunate and abusive conduct. It was held:

"This Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime. Prior thereto, the accused had been serving with PW 5 and PW 6 under a false name and took advantage of his familiarity with the family of the deceased. He committed the crime in the most brutal manner and, thereafter, he opted not to explain any circumstances and just took up the plea of false implication, which is unbelievable and unsustainable.

"Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

Broad analysis:

101. The principal reasons for confirming the death penalty in the above cases include (1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan, Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari, Nirmal Singh, Jai Kumar, Satish, Bantu, Ankush Maruti Shinde, B.A. Umesh, Mohd. Mannan and Rajendra Pralhadrao Wasnik); (2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee, Jai Kumar, Ankush Maruti Shinde and Mohd. Mannan); (3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar, B.A. Umesh and Mohd. Mannan); (4) the victims were defenceless (Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari,

Ankush Maruti Shinde, Mohd. Mannan and Rajendra Pralhadrao Wasnik); (5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari, Nirmal Singh, Jai Kumar, Ankush Maruti Shinde, B.A. Umesh and Mohd. Mannan) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu, B.A. Umesh and Rajendra Pralhadrao Wasnik).

102. However, what is more significant is that there are cases where the factors taken into consideration for commuting the death penalty were given a go-bye in cases where the death penalty was confirmed. The young age of the accused was not taken into consideration or held irrelevant in Dhananjoy Chatterjee aged about 27 years, Jai Kumar aged about 22 years and Shivu & another aged about 20 and 22 years while it was given importance in Amit v. State of Maharashtra, Rahul, Santosh Kumar Singh, Rameshbhai Chandubhai Rathod (2) and Amit v. State of Uttar Pradesh. The possibility of reformation or rehabilitation was ruled out, without any expert evidence, in Jai Kumar, B.A. Umesh and Mohd. Mannan in much the same manner, without any expert evidence, as the benefit thereof was given in Nirmal Singh, Mohd. Chaman, Raju, Bantu, Surendra Pal Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh. Acquittal or life sentence awarded by the High Court was considered not good enough reason to convert the death sentence in Satish, Ankush Maruti Shinde and B.A. Umesh but it was good enough in State of Tamil Nadu v. Suresh, State of Maharashtra v. Suresh, Bharat Fakira Dhiwar and Santosh Kumar Singh. Even though the crime was not premeditated, the death penalty was confirmed in Molai notwithstanding the view expressed in Akhtar, Raju and Amrit Singh. Circumstantial evidence was held not to be a 'mitigating' factor in Jumman Khan, Kamta Tewari, Molai and Shivaji but it was so held in Bishnu Prasad Sinha.

103. Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498) and even in some of the cases referred to above. It is this individualized sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below.

Minimum fixed term sentences:

104. There have been several cases where life sentence has been awarded by this Court with a minimum fixed term of incarceration. Many of them have been discussed in Swamy Shraddananda and so it is not necessary to refer to them individually. Swamy Shraddananda refers to Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230 which in turn refers to five different cases. I propose to refer to them at this stage.

105. In Subhash Chander v. Krishan Lal, (2001) 4 SCC 458 it was held that the convict shall remain in prison "for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the rules made for the purposes of grant of commutation and remissions."

106. In Shri Bhagwan v. State of Rajasthan, (2001) 6 SCC 296, Prakash Dhawal Khairnar (Patil) v. State of Maharashtra, (2002) 2 SCC 35 and Ram Anup Singh v. State of Bihar, (2002) 6 SCC 686 the convict was directed to serve out at least 20 years of imprisonment.

107. In Mohd. Munna v. Union of India, (2005) 7 SCC 417 the convict had undergone 21 years of incarceration. This Court held that he was not entitled to release as a matter of course but was required to serve out his sentence till the remainder of his life subject to remissions by the appropriate authority or State Government.

108. Swamy Shraddananda also refers to Jayawant Dattatraya Suryarao v. State of Maharashtra,(2001) 10 SCC 109 in which it was directed that the convict "will not be entitled to any commutation or premature release under Section 433-A of the Criminal Procedure Code, Prisoners Act, Jail Manual or any other statute and the Rules made for the purpose of commutation and remissions." Similarly, in Nazir Khan v. State of Delhi, (2003) 8 SCC 461 while sentencing the convicts to imprisonment for 20 years it was held that they would not be entitled to any remission from this period.

109. The death sentence to the convict in Swamy Shraddananda was converted to imprisonment for life with a further direction that he shall not be released till the rest of his life.

110. Sebastian v. State of Kerala, (2010) 1 SCC 58 was a case of a 24 year old extremely violent pedophile accused of raping a two-year old child and then murdering her. While commuting the death sentence, this Court held that he should remain in jail for the rest of his life in terms of Swamy Shraddananda. It was observed:

> "The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Section 354 in the year 1998 and later for the offences punishable under Sections 363, 376, 379, 302 and 201 IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Section 302, and several other terms of imprisonment with respect to the other sections, though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant had, in addition, been tried for the murders of several other children but had been acquitted on 28-7-2005 with the benefit of doubt. The present incident happened three days later.
>
> "We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in Shraddananda case."

111. In Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257 this Court converted the death sentence of the accused to imprisonment for life though the crime of rape and murder was heinous, since the accused persons were young at the time of commission of the offence (between 21 and 31 years of age); the possibility of the death of the victim being accidental; and the accused not being a social menace with possibility of reforming themselves. It was held, while modifying the sentence that the accused serve a term of imprisonment of 21 years:

> "While we cumulatively examine the various principles and apply them to the facts of the present case, it appears to us that the age of the accused, possibility of the death of the deceased occurring accidently and the possibility of the accused reforming themselves, they cannot be termed as "social menace". It is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust, but it cannot be held with certainty that this case falls in the "rarest of rare" cases. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are unable to hold that any other sentence but death would be inadequate.

> "Accordingly, while commuting the sentence of death to that of life imprisonment (21 years), we partially allow their appeals only with regard to the quantum of sentence."

112. In Neel Kumar v. State of Haryana, (2012) 5 SCC 766 this Court modified the death penalty awarded to the accused for the rape and murder of his 4 year old daughter to one of 30 years imprisonment without remissions. It was held:

> "A three-Judge Bench of this Court in Swamy Shraddananda (2) v. State of Karnataka, considering the facts of the case, set aside the sentence of death penalty and awarded the life imprisonment but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.
>
> "Similarly, in Ramraj v. State of Chhattisgarh [(2010) 1 SCC 573] this Court while setting aside the death sentence made a direction that the appellant therein would serve minimum period of 20 years including remissions earned and would not be released on completion of 14 years' imprisonment.
>
> "Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for premature release."

113. In Sandeep v. State of U.P., (2012) 6 SCC 107 the death sentence awarded to the convict for the murder of his pregnant friend and pouring acid on her head was converted to sentence of life for a minimum period of 30 years without any remission before his case could be considered for premature release.

114. In Brajendrasingh v. State of Madhya Pradesh, (2012) 4 SCC 289 the accused had murdered his wife and three children since he suspected his wife's fidelity. The death penalty awarded to him was converted to imprisonment for life by this Court with a minimum imprisonment of 21 years. This is what was said by this Court:

> "Considering the above aspects, we are of the considered view that it is not a case which falls in the category of the "rarest of rare" cases where imposition of death sentence is imperative. It is also not a case where

imposing any other sentence would not serve the ends of justice or would be entirely inadequate.

"Once we draw the balance sheet of aggravating and mitigating circumstances and examine them in the light of the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that this is not a case where this Court ought to impose the extreme penalty of death upon the accused. Therefore, while partially accepting the appeals only with regard to quantum of sentence, we commute the death sentence awarded to the accused to one of life imprisonment (21 years)."

115. In State of Uttar Pradesh v. Sanjay Kumar, (2012) 8 SCC 537 this Court converted the death penalty awarded to the accused for the rape and murder of an 18 year old into one of life imprisonment with a further direction that he would not be granted premature release under the guidelines framed for that purpose, that is, the Jail Manual or even under Section 433-A of the Cr. P.C. It was said:

"In view of the above, we reach the inescapable conclusion that the submissions advanced by the learned counsel for the State are unfounded. The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of

any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A CrPC."

116. In Gurvail Singh v. State of Punjab, (2013) 2 SCC 713 the death sentence was converted to imprisonment for life with the requirement that the convict spends a minimum of thirty years in jail without remission. It was held:

> "We are of the view, so far as this case is concerned, that the extreme sentence of capital punishment is not warranted. Due to the fact that the appellants are instrumental for the death of four persons and nature of injuries they have inflicted, in front of PW 1, whose son, daughter-in-law and two grandchildren were murdered, we are of the view that the appellants deserve no sympathy. Considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the appellants was not warranted but while awarding life imprisonment to the appellants, we hold that they must serve a minimum of thirty years in jail without remission. The sentence awarded by the trial court and confirmed by the High Court is modified as above. Under such circumstances, we modify the sentence from death to life imprisonment. Applying the principle laid down by this Court in Sandeep we are of the view that the minimum sentence of thirty years would be an adequate punishment, so far as the facts of this case are concerned."

Consecutive sentence cases:

117. Ravindra Trimbak Chouthmal v. State of Maharashtra, (1996) 4 SCC 148 is perhaps among the earliest cases where consecutive sentences were awarded. This was not a case of rape and murder but one of causing a dowry death of his pregnant wife. It was held that it was not the "rarest of rare" cases "because dowry death has ceased to belong to that species of killing." The death sentence was, therefore, not upheld. Since the accused had attempted to cause disappearance of the evidence by severing the head and cutting the body into nine pieces, this Court directed that he should undergo the sentence for that crime after serving out his life sentence. It was held:

"We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the "rarest of the rare" type. This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore, commute the sentence of death to one of RI for life imprisonment.

"But then, it is a fit case, according to us, where, for the offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder — the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body. To these sentences, we do not, however, desire to add those awarded for offences under Sections 316 and 498-A/34, as killing of the child in the womb was not separately intended, and Section 498-A offence ceases to be of significance and importance in view of the murder of Vijaya.

"The result is that the appeal stands allowed to the extent that the sentence of death is converted to one of imprisonment for life. But then, the sentence of seven years' RI for the offence under Sections 201/34 IPC would start running after the life imprisonment has run its course as per law."

Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what this decision mandates is that if the convict is to be earlier released by the competent authority for any reason, in accordance with procedure established by law, then the second sentence will commence immediately thereafter.

118. Ronny v. State of Maharashtra, (1998) 3 SCC 625 is also among the earliest cases in the recent past where consecutive sentences were awarded. The three accused, aged about 35 years (two of them) and 25/27 years had committed three

murders and a gang rape. This Court converted the death sentence of all three to imprisonment for life since it was not possible to identify whose case would fall in the category of "rarest of rare" cases. However, after awarding a sentence of life imprisonment, this Court directed that they would all undergo punishment for the offence punishable under Section 376(2)(g) of the IPC consecutively, after serving the sentences for other offences. It was held:

> "Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre- planned way; having regard to the nature of offences and circumstances in which they were committed, it is not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years' old, A-2 is 35 years' old and A-3 is 25 (sic 27) years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the "rarest of the rare" cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment. Accordingly, we modify the sentence awarded by the courts below under Section 302 read with Section 34 from death to life imprisonment. The sentences for the offences for which the appellants are convicted, except under Section 376(2)(g) IPC, shall run concurrently; they shall serve sentence under Section 376(2)(g) IPC consecutively, after serving sentence for the other offences."

119. In Sandesh v. State of Maharashtra, (2013) 2 SCC 479 this Court converted the death penalty awarded to the accused to imprisonment for life, inter alia, for the rape of a pregnant lady, attempted murder and the murder of her mother in law to imprisonment for life with a further direction that all the sentences were to run consecutively.

120. In Sanaullah Khan v. State of Bihar, MANU/SC/0165/2013 the death sentence awarded to the accused for the murder of three persons was converted by this Court to imprisonment for life for each of the three murders and further the sentences were directed to run consecutively.

121. These decisions clearly suggest that this Court has been seriously reconsidering, though not in a systemic manner, awarding life sentence as an alternative to death penalty by applying (though not necessarily mentioning) the "unquestionably foreclosed" formula laid down in Bachan Singh.

122. Off and on, the issue has been the interpretation of "life sentence" – does it mean imprisonment for only 14 years or 20 years or does it mean for the life of the convict. This doubt has been laid to rest in several cases, more recently in Sangeet where it has been unequivocally laid down that a sentence of imprisonment for life means imprisonment for the rest of the normal life of the convict. The convict is not entitled to any remission in a case of sentence of life imprisonment, as is commonly believed. However, if the convict is sought to be released before the expiry of his life, it can only be by following the procedure laid down in Section 432 of the Code of Criminal Procedure or by the Governor exercising power under Article 161 of the Constitution or by the President exercising power under Article 72 of the Constitution. There is no other method or procedure. Whether the statutory procedure under Section 432 of the Code of Criminal Procedure can be stultified for a period of 20 years or 30 years needs further discussion as observed in Sangeet, which did not deal with the constitutional power. This side issue does not arise in the present case also, and is therefore, not being discussed.

Information from the National Crime Records Bureau:

123. Quite apart from the above discussion, assuming a case can be identified as the rarest of rare, the chapter does not end with awarding the death sentence. From the information available in the annual reports published by the National Crime Records Bureau (NCRB) and which is freely available on the internet, it appears that between 2001 and 2011 (both years included) death sentence has been awarded to as many as 1455 persons and one person (Dhananjoy Chatterjee) was executed in 2004. However, death sentence has been converted to life imprisonment during the same period in respect of 4321 persons. The figures (of death sentence awarded and commuted) obviously do not match. It is unlikely that all the commutations were by the Executive. Perhaps (it is not at all clear) the NCRB has also taken into account cases where the death sentence awarded by the Trial Court has not been confirmed by the High Court and those cases where the High Court has confirmed the sentence, but it has been modified by this Court or cases where a plea of not guilty has been accepted by this Court for want of conclusive evidence. Whatever the reason, there is an obvious and glaring mismatch.

124. There are also an extraordinarily high number of "commutations" granted in Delhi. In 2005 Delhi granted 919 commutations; in 2006 Delhi granted 806 commutations; and in 2007 Delhi granted 726 commutations. A correspondingly high number of death sentences were not awarded in Delhi in the relevant years, but it is difficult to say whether there were such a large number of pending death sentences awaiting execution. There appears to be an inexplicable error in this regard also but even if the commutations granted in Delhi are taken out of calculation, there would still be a baffling mismatch in figures. The commutation figures given by the NCRB may not be entirely reliable, but in any case there is no reason to doubt the correctness of the number of death sentences awarded, which too is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases.

125. The details mentioned above, as obtained from a study of the publications of the NCRB, are compiled in the following chart:

DETAILS OF DEATH SENTENCE DURING 2001 TO 2011

|STATE/U.T. |CONVICTS |CONVICTS WHOSE |EXECUTED | |
|SENTENCED TO |SENTENCE COMMUTED TO | | | |DEATH |LIFE IMPRISONMENT | | |Andhra Pradesh|8 |3 |0 | |Assam |21 |97 |0 | |Bihar |132 |343 |0 | |Chhattisgarh |18 |24 |0 | |Goa |1 |0 |0 | |Gujarat |57 |3 |0 | |Haryana |31 |23 |0 | |Himachal |3 |2 |0 | |Pradesh | | | | |Jharkhand |81 |300 |0 | |Jammu & |20 |18 |0 | |Kashmir | | | | |Karnataka |95 |2 |0 | |Kerala |34 |23 |0 | |Madhya Pradesh|87 |62 |0 | |Maharashtra |125 |175 |0 | |Manipur |3 |1 |0 | |Meghalaya |6 |2 |0 | |Mizoram |0 |0 |0 | |Nagaland |0 |15 |0 | |Orissa |33 |68 |0 | |Punjab |19 |24 |0 | |Rajasthan |38 |33 |0 | |Sikkim |0 |0 |0 | |Tamil Nadu |95 |24 |0 | |Tripura |2 |9 |0 | |Uttar Pradesh |370 |458 |0 | |Uttarakhand |16 |46 |0 | |West Bengal |79 |98 |1 | |Total |1374 |1853 |1 | |Chandigarh |4 |3 |0 | |Dadra & Nagar |0 |0 |0 | |Haveli | | | | |Daman & Diu |4 |0 |0 | |Delhi |71 |2462 |0 | |Lakshadweep |0 |2 |0 | |Pondicherry |2 |1 |0 | |Total |81 |2468 |0 | |Grand Total |1455 |4321 |1 |

126. The significance of these figures is that even though the Courts have awarded death penalty in appropriate cases applying the rarest of rare principle, the death sentence has been commuted in many of them. The reasons for commuting the death sentence by the Executive are not in the public domain and therefore it is not possible to know what weighed with the Executive in commuting the death

sentence of each convict. Was the reason for commutation that the crime and the criminal did not fall in the category of rarest of rare and if so what was the basis for coming to this conclusion when the competent Court has come to a different conclusion?

127. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.

128. It does prima facie appear that two important organs of the State that is the Judiciary and the Executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the Judiciary is that of the rarest of rare principle (however subjective or judge-centric it may be in its application) the standard applied by the Executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the Executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India.

Conclusion:

129. While agreeing with my learned Brother Justice Radhakrishnan that the conviction of the appellant should be upheld, but keeping the above discussion in mind, I endorse the direction that all the sentences awarded to the appellant should run consecutively.

130. The appeals are disposed of accordingly.