SENTENCING PRACTICES IN DEATH PENALTY CASES

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SENTENCING PRACTICES IN CAPITAL PUNISHMENT CASES

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

202. Drawing upon the penal statutes of the States in U.S.A. framed after*Furman* v. *Georgia* [33 L Ed 2d 346 : 408 US 238 (1972)] , in general, and clauses 2 (*a*), (*b*), (*c*) and (*d*) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr Chitale has suggested these "aggravating circumstances":

> "*Aggravating circumstances*: A court may, however, in the following cases impose the penalty of death in its discretion:
>
> (*a*) if the murder has been committed after previous planning and involves extreme brutality; or
>
> (*b*) if the murder involves exceptional depravity; or
>
> (*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—
>
> (*i*) while such member or public servant was on duty; or
>
> (*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
>
> (*d*) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

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

204. In *Rajendra Prasad* [(1979) 3 SCC 646 : 1979 SCC (Cri) 749] , the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence*only* if the security of State and Society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)". Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302 of the Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its "ethos" nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302 of the Penal Code, fully apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in *BishnuDeo Shaw* v. *State of W.B.* [(1979) 3 SCC 714 : 1979 SCC (Cri) 817] which follows the dictum in *Rajendra Prasad* [(1979) 3 SCC 646 : 1979 SCC (Cri) 749] .

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

206. Dr Chitale has suggested these mitigating factors:

> "*Mitigating circumstances.*—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:
>
> (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
>
> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (6) That the accused acted under the duress or domination of another person.

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

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

208. According to some Indian decisions, the post-murder remorse, penitence or repentence by the murderer is not a factor which may induce the court to pass the lesser penalty (e.g. *MominuddiSardar* [AIR 1935 Cal 591 : *Emperor* v. *MominuddiSardar*, 39 CWN 262 : 36 Cri LJ 1254]). But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235(2) and 354(3). We have already extracted the views of A.W. Alschuler in Criminal Year-Book by Messinger and Bittner, which are in point.

209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative 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.

II. Machhi Singh v. State of Punjab, (1983) 3 SCC 470

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

I. *Manner of commission of murder*

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

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

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. *Motive for commission of murder*

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. *Anti-social or socially abhorrent nature of the crime*

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

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

IV. *Magnitude of crime*

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. *Personality of victim of murder*

37. When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in *Bachan Singh case* [Appeals by special leave from the Judgment and Order dated September 1, 1980 of the Punjab & Haryana High Court in Murder References Nos. 14, 18,16 & 19 of 1979 and 1 of 1980 and Criminal Appeals Nos. 933, 1176, 935, 977, 978, 972, 992, 979, 976, 980, 981, 991, 827 & 1105 of 1979] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case* [Appeals by special leave from the Judgment and Order dated September 1, 1980 of the Punjab & Haryana High Court in Murder References Nos. 14, 18,16 & 19 of 1979 and 1 of 1980 and Criminal Appeals Nos. 933, 1176, 935, 977, 978, 972, 992, 979, 976, 980, 981, 991, 827 & 1105 of 1979] :

> "(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

III. Ravji v. State of Rajasthan (1996) 2 SCC 175

24. In our view, in the facts of the case, it has been very clearly established that the appellant has committed one of the most heinous crimes by killing his poor wife who was in advanced stage of pregnancy and three minor children for no fault on their part. The appellant had a solemn duty to protect them and to maintain them but he has betrayed the trust reposed in him in a very cruel and calculated manner without any provocation whatsoever. The appellant did not even spare his mother who very rightly tried to prevent him from committing such unpardonable crime. The appellant also attacked his mother with the axe which he had used to kill his wife and minor children and caused injuries on her person with an intention to kill her. The brutality and cruelty with which the crimes have been perpetrated cannot but shock the conscience of the society. After killing the wife and three minor children and injuring the mother he did not become remorseful and desist from committing any further crime. But like a blood-thirsty demon, in a cool and calculated manner, he went to one of the neighbour's house and attempted to kill the wife of the neighbour while she was asleep and as such utterly helpless to give any resistance. When in his attempt to flee away from the place of occurrence, poor old Gulabji came on his way, the appellant did not hesitate to kill him in an extremely brutal manner before the eyes of his wife. All the said heinous crimes were committed without any provocation. The appellant was not even remorseful after the said incident of successive five murders and attempt to kill two others including the appellant's mother. The appellant did not go to see the ailing mother injured by him and did not also attend the funeral of his wife and even his three innocent minor children. The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal”. In our view, if for such heinous crimes the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will lose its relevance. We, therefore, do not find any justification to commute the death penalty to imprisonment for life. The appeal therefore must fail and is dismissed.

IV. Swamy Shradhananda (2) v. State of Karnataka (2008) 13 SCC 767

43. In *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the*Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] , therefore, we respectfully wish to say that even though the categories framed in*Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] itself.

44. The matter can be looked at from another angle. In *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] it was held that the expression "special reasons" in the context of the provision of Section 354(3) obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. It was further said that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. In conclusion it was said that the death penalty ought not to be imposed save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Now, all these expressions "special reasons", "exceptional reasons", "founded on the exceptional grave circumstances", "extreme cases" and "the rarest of rare cases" unquestionably indicate a *relative category*based on comparison with other cases of murder. *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , for the purpose of practical application sought to translate this relative category into absolute terms by framing the five categories. (In doing so, it is held by some, *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] considerably enlarged the scope for imposing death penalty that was greatly restricted by *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898])

45. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was

awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether, it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The Court is in a position to judge "the rarest of rare cases" or an "exceptional case" or an "extreme case" only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison.

46. More important are the cases of murder of the worst kind, and their number is by no means small, in which the culprits, though identifiable, manage to escape any punishment or are let off very lightly. Those cases never come up for comparison with the cases this Court might be dealing with for confirmation of death sentence. To say this is because our criminal justice system, of which the Court is only a part, does not work with a hundred per cent efficiency or anywhere near it, is not to say something remarkably new or original. But the point is, this Court, being the highest court of the land, presiding over a criminal justice system that allows culprits of the most dangerous and revolting kinds of murders to slip away should be extremely wary in dealing with death sentence and should resort to it, in the words of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] , only when the other alternative is unquestionably foreclosed.

47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence.

48. That is not the end of the matter. Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] laid down the principle of the rarest of rare cases. *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] categories were followed uniformly and consistently.

V. Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498

Pre-sentence hearing and "special reasons"

55. Under Sections 235(2) and 354(3) of the Criminal Procedure Code, there is a mandate as to a full-fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance with both the provisions. A scrupulous compliance with both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage. Please see *Santa Singh* v. *State of Punjab* [AIR 1956 SC 256], *Malkiat Singh* v. *State of Punjab* [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] ,*AllauddinMian* v. *State of Bihar* [(1989) 3 SCC 5 : 1989 SCC (Cri) 490 : AIR 1989 SC 1456] , *Muniappan* v. *State of T.N.* [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , *Jumman Khan* v. *State of U.P.* [(1991) 1 SCC 752 : 1991 SCC (Cri) 283] and *Anshad* v. *State of Karnataka* [(1994) 4 SCC 381 : 1994 SCC (Cri) 1204] on this.

Nature of information to be collated at pre-sentence hearing

56. At this stage, *Bachan Singh* [(1980) 2 SCC 684: 1980 SCC (Cri) 580] informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission.

57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this context, Guideline 4 in the list of mitigating circumstances as borne out by *Bachan Singh* [(1980) 2 SCC 684: 1980 SCC (Cri) 580] is relevant. The Court held: (SCC p. 750, para 206)

"*206*. (*4*) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (*3*) and (*4*) above."

In fine, *Bachan Singh* [(1980) 2 SCC 684: 1980 SCC (Cri) 580] mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

2(B) Nature of content of the rarest of rare dictum

58. The *rarest of rare* dictum breathes life in "special reasons" under Section 354(3). In this context, *Bachan Singh* [(1980) 2 SCC 684: 1980 SCC (Cri) 580] laid down a fundamental threshold in the following terms: (SCC p. 751, para 209)

"*209*. ... 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." (emphasis supplied)

An analytical reading of this formulation would reveal it to be an authoritative negative precept. The "*rarest of rare* cases" is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in the form of "when the alternative option is unquestionably foreclosed".

59. Thus, in essence, the *rarest of rare* dictum imposes a wide-ranging embargo on award of death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification enumerated below:

1. that the case belongs to the *rarest of rare* category,

2. and the alternative option of life imprisonment will just not suffice in the facts of the case.

60. The *rarest of rare* dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the *rarest of rare* dictum places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the *rarest of rare* dictum.

61. The background analysis leading to the conclusion that the case belongs to the *rarest of rare* category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the *rarest of rare* aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted: (*Bachan Singh case* [(1980) 2 SCC 684: 1980 SCC (Cri) 580] , SCC p. 738, para 161)

"*161*. ... The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case *relating to the crime as well as the criminal*."

(emphasis supplied)

62. Curiously, in *Ravji* v. *State of Rajasthan* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] this Court held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, stating: (SCC p. 187, para 24)

> "*24*. ... The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'."

63. We are not oblivious that *Ravji case* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has been followed in at least six decisions of this Court in which death punishment has been awarded in last nine years, but, in our opinion, it was rendered per incuriam.*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] specifically noted the following on this point: (SCC p. 739, para 163)

"*163*. ... The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration 'principally' or *merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal*."

(emphasis partly in original and partly supplied)

Shivaji v. *State of Maharashtra* [(2008) 15 SCC 269 : AIR 2009 SC 56] , *Mohan Anna Chavan* v. *State of Maharashtra* [(2008) 7 SCC 561 : (2008) 3 SCC (Cri) 193] , *Bantu*v. *State of U.P.* [(2008) 11 SCC 113 : (2009) 1 SCC (Cri) 353 : (2008) 10 Scale 336] ,*Surja Ram* v. *State of Rajasthan* [(1996) 6 SCC 271 : 1996 SCC (Cri) 1314] ,*DayanidhiBisoi* v. *State of Orissa* [(2003) 9 SCC 310 : 2003 SCC (Cri) 1798] and*State of U.P.* v. *Sattan* [(2009) 4 SCC 736 : (2009) 3 Scale 394] are the decisions where *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has been followed. It does not appear that this Court has considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that*Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent.

2(C) Alternative option is foreclosed

64. Another aspect of the *rarest of rare* doctrine which needs serious consideration is interpretation of latter part of the dictum (SCC p. 751, para 209) — "[t]hat ought not to be done save in the *rarest of rare* cases when the *alternative option is unquestionably foreclosed* (emphasis supplied)". *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

65. Death punishment, as will be discussed in detail a little later, qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability. Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution—all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end to anything to do with the life. This is the big difference between the two punishments. Before imposing death penalty, therefore, it is imperative to consider the same.

66. The *rarest of rare* dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be *completely futile*, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the *rarest of rare* doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an

easy conclusion to be deciphered, but *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] sets the bar very high by introduction of the *rarest of rare*doctrine.

2(E) Sentencing justifications in heinous crimes

71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.

72. We must also point out, in this context, that there is no consensus in the Court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigour and fairness are given primacy over sentiments and emotions.

79. Whether primacy should be accorded to aggravating circumstances or mitigating circumstances is not the question. Court is duty-bound by virtue of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] to equally consider both and then to arrive at a conclusion as to respective weights to be accorded. We are also bound by the spirit of Article 14 and Article 21 which forces us to adopt a principled approach to sentencing. This overarching policy flowing from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] applies to heinous crimes as much as it applies to relatively less brutal murders. The Court in this regard held: (SCC p. 751, para 209)

> "*209*. ... Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency—a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception."

2(F) Public opinion in capital sentencing

80. It is also to be pointed out that public opinion is difficult to fit in the *rarest of rare* matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of *BachanSingh*[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] .

81. The *rarest of rare* policy and legislative policy on death punishment may not be essentially tuned to public opinion. Even if we presume that the general populace favours a liberal death punishment policy, although there is no evidence to this effect, we cannot take note of it. We are governed by the dictum of *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] according to which life imprisonment is the rule and death punishment is an exception.

82. We are also governed by the Constitution of India. Articles 14 and 21 are constitutional safeguards and define the framework for State in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the State in its dealings with people in various capacities, including as a convict. The position is, if the State is precariously placed to administer a policy within the confines of Articles 21 and 14, it should be applied most sparingly. This view flows from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and in this light, we are afraid that the Constitution does not permit us to take a re-look on the capital punishment policy and meet the society's cry for justice through this instrument.

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

84. An inherent problem with consideration of public opinion is its inarticulate state.*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] noted that judges are ill equipped to capture public opinion: (SCC pp. 726 & 741-42, paras 126 & 175)

> "*126*. Incidentally, the rejection by the people of the approach adopted by the two learned Judges in *Furman* [33 L Ed 2d 346 : 408 US 238 (1971)] , furnishes proof of the fact that judicial opinion does not necessarily reflect the moral attitudes of the people. At the same time, it is a reminder that Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.
>
> ***
>
> *175*. ... 'The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits.' As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted judicial 'made-to-order' standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge."

87. Public opinion may also run counter to the rule of law and constitutionalism.*Bhagalpur Blinding case* [**Ed.**: The reference seems to be to *Khatri*

(II) v. *State of Bihar*, (1981) 1 SCC 627 : 1981 SCC (Cri) 228] or the recent spate of attacks on right to trial of the accused in *Bombay Bomb Blast case* [**Ed.**: The reference seems to be to*Sanjay Dutt* v. *State (II)*, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] are recent examples. We are also not oblivious to the danger of capital sentencing becoming a spectacle in media. If media trial is a possibility, sentencing by media cannot be ruled out.

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

VI. Sangeet v. State of Haryana (2013) 2 SCC 452

Issue of aggravating and mitigating circumstances

27. In making the shift from the crime to the crime and the criminal, the Constitution Bench in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] looked at the suggestions given by the learned counsel appearing in the case. These suggestions, if examined, indicate that insofar as aggravating circumstances are concerned, they refer to the crime. They are: (SCC p. 749, para 202)

> "(*a*) if the murder has been committed after previous planning and involves extreme brutality; or
>
> (*b*) if the murder involves exceptional depravity; or
>
> (*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—
>
> (*i*) while such member or public servant was on duty; or
>
> (*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
>
> (*d*) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

Insofar as mitigating circumstances are concerned, they refer to the criminal. They are: (*Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , SCC p. 750, para 206)

> "(*1*) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (*2*) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
>
> (*3*) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (*4*) The probability that the accused can be reformed and rehabilitated.
>
> The State shall by evidence prove that the accused does not satisfy Conditions (*3*) and (*4*) above.
>
> (*5*) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (*6*) That the accused acted under duress or domination of another person.
>
> (*7*) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

28. The Constitution Bench in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] made it absolutely clear that the suggestions given by the learned counsel were only indicators and not an attempt to make an exhaustive enumeration of the circumstances either pertaining to the crime or the criminal. The Constitution Bench hoped and held that in view of the "broad illustrative guidelines" laid down, the courts

"*209.* ... will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) [of CrPC] viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception." (*Bachan Singh case*[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , SCC p. 751, para 209)

29. Despite the legislative change and *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] discarding Proposition (*iv*)(*a*) of *Jagmohan Singh* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169] , this Court in *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. A balance sheet cannot be drawn up of two distinct and different constituents of an incident. Nevertheless, the balance sheet theory held the field post *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] .

30. The application of the sentencing policy through aggravating and mitigating circumstances came up for consideration in *Swamy Shraddananda (2)* v. *State of Karnataka* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] . On a review, it was concluded in para 48 of the Report that there is a lack of evenness in the sentencing process. The rarest of rare principle has not been followed uniformly or consistently. Reference in this context was made to *Aloke Nath Dutta* v. *State of W.B.* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264] which in turn referred to several earlier decisions to bring home the point.

31. The critique in *Swamy Shraddananda* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] was mentioned (with approval) in *Santosh Kumar Satishbhushan Bariyar*v. *State of Maharashtra* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] while sharing this Court's "unease and sense of disquiet" in paras 109, 129 and 130 of the Report. In fact, in para 109 of the Report, it was observed that: (*Bariyar case*[(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] , SCC p. 543)

"*109.* ... the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] threshold of 'the *rarest of rare* cases' has been most variedly and inconsistently applied by the various High Courts as also this Court."

(emphasis in original)

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

33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh*[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] . It appears to us that even though*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in*Swamy Shraddananda* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] and *Bariyar*[(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] . This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench

in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] seems to have been lost in transition.

Issue of crime and the criminal

34. Despite *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] appear to have taken a bit of a back seat in the sentencing process. This was noticed in*Bariyar* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] with reference to *Ravji* v.*State of Rajasthan* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] . It was observed that "curiously" only characteristics relating to the crime, to the exclusion of the criminal were found relevant to sentencing. It was noted that *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has been followed in several decisions of this Court where primacy has been given to the crime and circumstances concerning the criminal have not been considered. In para 63 of the Report it is noted that *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] was rendered per incuriam and then it was observed that: (*Bariyar case* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] , SCC p. 529)

> "*63.* ... It is apparent that *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to the criminal are not pertinent."

35. It is now generally accepted that *Ravji* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] was rendered per incuriam (*see*, for example, *Dilip Premnarayan Tiwari* v.*State of Maharashtra* [(2010) 1 SCC 775 : (2010) 1 SCC (Cri) 925]). Unfortunately, however, it seems that in some cases cited by the learned counsel the circumstances pertaining to the criminal are still not given the importance they deserve.

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

77.1. This Court has not endorsed the approach of aggravating and mitigating circumstances in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] . However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

77.2. 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.

77.3. 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.

77.4. The Constitution Bench of this Court has not encouraged standardisation and categorisation of crimes and even otherwise it is not possible to standardise and categorise all crimes.

VII. Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546

52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "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 the 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 intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The 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.

53. 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)

54. The victim was aged 11 years on the date of the incident, a school-going child totally innocent, defenceless and having moderate intellectual disability. Ext. 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 PW 13 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.

55. Dr Kewade, PW 3, 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 were executed had been elaborately discussed in the oral evidence as well as in the report which we do not want to reiterate. The action of the 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.

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

Criminal test

57. 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 and 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.

58. 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.

59. 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 shock the conscience of the society and always attract 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 abovementioned 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

60. 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 also figured as an accused in Crime No. 165 of 1992 registered at Police Station BorgaonManju, District Akola for the offence under Section 302 IPC on the allegation that he caused murder of his wife, Chanda by assaulting her with a stick on 4-10-1993 and that Sessions Trial No. 52 of 2007 was pending before the Sessions Court, Akola. Further, it was also stated that another Crime No. 80 of 2006 was also registered against the accused at Chandur Bazaar Police Station for an offence under Sections 457 and 380 IPC. The High Court [*State of Maharashtra* v. *Shankar*, (2008) 6 AIR Bom R 43] was of the view that the accused had not disclosed those facts before the Court and held as follows:

> "... However, the 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...."

61. 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 : (2010) 2 SCC (Cri) 711] , 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 : (2011) 3 SCC (Cri) 867] dealt with a similar

contention and S.B. Sinha, J. while supplementing the leading judgment, stated as follows: (SCC p. 698, para 178)

> "*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."

62. 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. The High Court was, therefore, in error in holding that those are relevant factors to be considered in awarding appropriate sentence.

63. 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 that the medical evidence had clearly established the commission of carnal intercourse on a minor girl with moderate intellectual disability. Dr Kewade, PW 3, who conducted the post-mortem, had clearly spelt out the facts of sodomy in his report as well as in his deposition. The 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.