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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 21st August, 2015**
Date of decision : 21st September, 2015

+ **Crl.A.No.249/2011**

MITHLESH KUMAR KUSHWAHA ..... Appellant
Through : Mr. Jai Bansal, Amicus Curiae.

versus

STATE .... Respondent
Through : Ms. Anita Abraham, APP.
Mr. Puneet Ahluwalia, Adv. for complainant along with complainant.
Dr. Mrinal Satish, amicus Curiae.

+ **DEATH SENTENCE REF No.3/2010**

STATE ..... Petitioner
Through : Ms. Anita Abraham, APP.
Mr. Puneet Ahluwalia, Adv. for complainant along with complainant.
Dr. Mrinal Satish, amicus Curiae.

versus

MITHLESH KUMAR KUSHWAHA .... Respondent
Through : Mr. Jai Bansal, Amicus Curiae.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

GITA MITTAL, J.

1. We hereby propose to decide the reference under Section 366 of the CrPC made by Shri S.K. Sarvaria, Additional Sessions Judge for confirmation of the judgment dated 1st July, 2010 and the order on sentence dated 8th July, 2010 whereby after finding the accused guilty of commission of offences under Section 302, 201, 394, 397, 506(ii) and 307 of the Indian Penal Code ('IPC' hereinafter), the learned Trial Judge has imposed the death sentence for commission of the offence under Section 302 of the IPC while imposing rigorous imprisonment for commission of the other offences.

2. The accused has separately assailed the judgment dated 1st July, 2010 and the order on sentence dated 8th July, 2010 by way of Crl.A.No.249/2011. The accused is represented by Mr. Prashant Jain, Advocate as well as Mr. Jai Bansal, Amicus Curiae appointed by this court in the reference as well as the appeal. The complainant is represented by Mr. Puneet Ahluwalia, Advocate. We have heard learned counsels as well as Ms. Ritu Gauba, learned APP for the State at length who have carefully taken us through the record.

3. The case of the prosecution as proved on the record is within a narrow compass. FIR No.147/07 (Exh.PW-4/A) was registered by Police Station Vasant Kunj on 2nd March, 2007. The case arising therefrom was tried as SC No.252/2009/2007 before the learned Additional Sessions Judge. Mithlesh Kumar Kushwaha was arraigned therein as an accused person. On 8th August, 2008, the following charges were framed against him :

> "That on 2.3.2007 from 9.00 a.m. to 12.30 p.m. in Flat No.D-7/7382, Vasant Kunj, New Delhi you committed the murder of Smt. Surjeet Kaur aged about 62 years and a child Karanvir Singh aged 12 years and thereby committed an offence punishable under Section 302 IPC and within my cognizance.
>
> Secondly on the above said date, time and place you committed robbery of Rs.9730/-, one KARA, two gold KARAS, one gold KARA with four JHUMKAS, one pair of gold *JHUMKA*, one gold chain which were lying in a purse of golden colour etc. by use of a deadly weapon by causing hurt to Smt. Surjeet Kaur and Karanvir Singh and thereby committed offences punishable under Section 394/397 IPC and within my cognizance.
>
> Thirdly on the above stated date, time and place you knowing that you have committed an offence punishable with death cleaned the blood from the floor of the said flat and also *cleaned* the knife used for commission of the murder and broke the mobile phone of Smt. Surjeet Kaur and concealed the dead bodies in the wooden box and a suit case and thereby committed caused this material evidence of commission of this offence of murder with intention to screening yourself from legal punishment and thereby committed an

offence punishable under Section 201 IPC and within my cognizance.

Fourthly at about 12.30 p.m. on 2.3.2007 at the above stated flat you attempted to commit murder of Ms. Mehar Legha aged about 14 years and thereby committed an offence punishable under Section 307 IPC and within my cognizance.

Fifthly at about 12.30 p.m. on 2.3.2007 at the above stated flat you also criminally intimidated Ms.Mehar Legha to kill her and thereby committed an offence punishable under Section 506 IPC and within my cognizance."

4. As Mithlesh Kumar Kushwaha pleaded not guilty, he was put to trial on the above charges. The prosecution examined 24 witnesses in support of the charges. The circumstances which had come against Mithlesh Kumar Kushwaha in the evidence were put to him in his statement recorded under Section 313 of the CrPC recorded on 5th May, 2010. After hearing arguments of both sides in the matter, by the judgment dated 1st July, 2010, the learned Trial Judge found Mithlesh Kumar Kushwaha guilty of the charges and convicted him for commission of the offences under Section 302, 201, 394/397, 506(II) and 307 IPC.

5. The matter was thereafter kept for hearing on the quantum of sentence. By the order dated 8th July, 2010, Mithlesh Kumar Kushwaha was sentenced to death for commission of the offence under Section 302 of the IPC while for commission of the offence under Section 394/397, he was sentenced to extreme penalty of

imprisonment for life with fine of Rs.2,000/- (in default, he was directed to undergo simple imprisonment for 3 months for each offence) ; for the offence under Section 307, he was sentenced to undergo life imprisonment with fine of Rs.2,000/- (in default, he was directed to undergo simple imprisonment for 3 months) ; for the offence under Section 201, he was sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.2,000/- (in default, he was directed to undergo simple imprisonment for 3 months); and for the offence under Section 506(II), he was sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.2,000/-(in default, he was directed to undergo simple imprisonment for 3 months).

6. We note the events as stand established in the evidence on record in chronological order. Lt. Col. Aman Preet Singh (PW-8), a Retired Army Officer, was living in a rented accommodation being Flat No.7382/D-7, Vasant Kunj, New Delhi. On the relevant date, his family residing with him consisted of his wife Smt. Manjeet Legha @ Nancy, their daughter Mehar Legha (aged about 14 years) and son Karanvir Singh (aged 12 years). Mithlesh Kumar Kushwaha was working as the domestic servant of the family since the last 6½ years (before the date of the incident on 2nd of March 2007). He was also known as Chhotu.

7. Smt. Manjeet Legha was a teacher while Mehar Legha (PW 5) was a student of 9th class in Loreto Convent School. Ms. Nancy's Aunt (Tai), Smt. Surjeet Kaur was visiting the family from

Punjab. On 2nd March, 2007 Lt. Col. Aman Preet Singh's wife Nancy and Mehar Legha left for the school at about 7.30 in the morning. Lt. Col. Singh also left for his place of work at 8.05 a.m. in NOIDA leaving Smt. Surjeet Kaur, Master Karanvir Singh and Mithlesh Kumar Kushwaha alone in the Vasant Kunj flat.

8. As per Lt. Col. Aman Preet Singh (Retd.) (PW-8) that day, at about 1.15 in the afternoon, he received a call from his daughter, who was crying and, informed him that Chhotu had tried to kill her; that Smt. Surjeet Kaur and Karanvir Singh were not in the house and further that Chhotu had told her that he had killed both of them and was going to kill her also. PW-8 immediately started for his residence in a company vehicle. On reaching home, he found a large number of people and police gathered both outside and inside the flat, without any trace of Smt. Surjeet Kaur and son Karanvir Singh. Efforts to trace them by calling various relatives and friends were unsuccessful. The statement of Lt. Col. Aman Preet Singh (Retd.) to the above effect was recorded in court between 29th August, 2008 and 7th February, 2009.

9. The testimony of PW-8 is corroborated in all particulars by the evidence of Mehar Legha who appeared as PW-5 who has stated that on that date, she was appearing in school examination. She got free from school by about 12 noon while her mother remained on school duty. Mehar reached their flat at around 12.20 p.m., when the offender opened the door for her from inside. As her grandmother Smt. Surjeet Kaur did not open the door, as was

usual, Mehar Legha enquired from the offender as to the whereabouts of the grand aunt (grandmother) as well as about her brother. The witness has disclosed that the offender told Mehar Legha that both of them had gone to the Gurudwara and asked if she wanted anything to eat. Mehar told him that she would await her grandmother and brother's return and eat with them. At this, the offender attacked her and started pushing her towards her room. On being asked why he was behaving in the strange manner, the offender is stated to have made an extrajudicial confession to Mehar Legha to the effect that he had killed Mehar's grandmother and brother and that he would kill her also and take away whatever jewellery and money he had collected.

10. As per PW-5 Mehar Legha, the offender thereafter attempted to strangulate her with a wire; that she escaped from the offender with difficulty and rushed down. She related the incident to Guddi (PW-11), a washerwoman who used to iron clothes on the ground floor, at which Guddi joined Mehar Legha in raising a hue and cry. As a result, persons from the neighborhood collected outside the flat. The offender who was still inside the flat, again opened the door within 2 or 3 minutes.

11. Smt. Guddi, the washerwoman as PW-11 has fully corroborated the testimony of Mehar Legha. Smt. Guddi has disclosed that on 2nd March, 2007 at about 12.45 noon, Mehar Legha had come to the place where she was ironing clothes, weeping and told her that "*Chhotu mujhe maar raha hai, mujhe*

bachao". Guddi discloses that she took Mehar Legha to Flat No.7383 of Smt. Rani Chhabra and repeated the facts narrated by Mehar to her. The three of them then went to the Legha's Flat No. 7382. On the knocking of Smt. Rani Chhabra (PW-1), the offender opened the door, pushed them aside and ran downstairs at which these persons raised an alarm due to which other people of the locality including a chowkidar gathered there and apprehended the offender.

12. PW-1, Smt. Rani Chhabra has also corroborated the testimony of Mehar Legha (PW-5). She claims to have heard the noise of cries on 2nd March, 2007 when she was present at home and had rushed towards the staircase as she lived on the second floor of the building. She accosted Mehar Legha climbing the stairs to meet her when she was told that Chhotu was trying to kill her. According to Smt. Rani Chhabra, Mehar Legha was full of blood, had abrasions or scratch marks on her face and a ligature mark on her neck. She confirms Mehar's narration of events at the flat. This witness attributes knowledge of events at the flat as having been narrated by Mehar Legha and that the offender had told her as well that Mehar's grandmother and brother had gone to the Gurudwara.

13. So far as informing the police is concerned, (PW-1) Smt. Rani Chhabra made a call to the number 100 from the mobile phone no. 9910329371.

14. There is yet another person from the locality who reached the spot at this material time of 2nd March, 2007. The prosecution has examined (PW-2) Mukesh Sehrawat, a resident of the flat No. 7380/D-7, Vasant Kunj located on the ground floor of the same building in which the Leghas resided on the first floor and Smt. Rani Chhabra on the second floor. This witness also came out of his flat after hearing the noise at about 12.30 noon when he saw that the offender (identified in court) in the grip of the guard Bhupender of the colony and that the offender was struggling to free himself from his clutches. The witness was told by PW-1 Smt. Rani Chhabra to help the guard as otherwise the offender would run away. PW-2 consequently also held that the offender, was still trying to free himself and gave him a little beating.

15. Information of this incident was given to the SHO of Police Station Vasant Kunj whereupon DD No. 28A (Exh.PW-1/A) was handed over to SI Pratap Singh (PW-14) who proceeded to the spot and called HC Rajbir. Copy of DD No. 43B (Exh.PW-1/B) was also handed over to him. Inspector Suresh Dagar (SHO); SI Shiv Singh; SI Narender Singh; HC Subhash and HC Nanak Chand also reached the spot. Shri Bhupender Singh (chowkidar) and Mukesh Sehrawat (PW-2) produced the offender before the police. The offender was identified as their servant by (PW-8) Aman Preet Singh Legha and his daughter Mehar Legha (PW-5).

16. In his testimony, (PW-14) S.I. Pratap Singh confirms that Bhupender Singh and (PW-2) Mukesh Sehrawat produced the

offender before them. He has identified the offender as the person who was handed over to the police.

17. The offender was handed over to the police who reached there after 15/20 minutes. (PW 2) – Mukesh Sehrawat as well as the police witnesses proved the arrest memo (Exh.PW-2/A) as well as the personal search memo of the offender (Exh.PW-2/B) both of which bore his signatures.

18. In court, the offender was identified by all material witnesses including Lt. Col. Aman Preet Singh (PW-8); Mehar Legha (PW-5); Smt. Rani Chhabra (PW-1); Mukesh Sehrawat (PW-2); Smt. Guddi (PW-11) as well as the police witnesses who had arrested him.

19. A search was conducted amongst the empty boxes stored in the rear balcony of the flat. It is in evidence that in a black wooden box, bearing no. 50 in white paint, which was lying on the back side balcony of the flat and appeared to be heavier than the others, a dead body of a female aged about 55/60 years was recovered which bore injury mark on the neck and finger. This body was identified as that of Smt. Surjeet Kaur by (PW-8) Lt. Col. Aman Preet Legha. The dead body of Smt. Surjeet Kaur was found with a lot of blood and salt on her body and clothes. Her 'khes' (sheet) was also inside the box with other lose pieces of cloth.

20. Upon search of other rooms of the flat, a green coloured suitcase was found under the bed of a bed room. When checked,

the dead body of a 10/11 years old male child was recovered from the suitcase. The dead body was identified by (PW-8) Lt. Col. Aman Preet Legha as that of his son Master Karanvir Legha. There were injury marks on the body of Karanvir as well.

21. Again there was a lot of blood as well as salt present on the body. There were injury marks on the neck and fingers of Smt. Surjeet Kaur as well as injury marks on the neck of Master Karanvir Singh.

22. (PW-14) S.I. Pratap Singh recorded the statement of Mehar Legha (Exh.PW-5/A), who stated that the offender had told her that he had killed her grandmother and her brother Karanvir. SI Pratap Singh (PW-14) recorded his endorsement thereon (Exh.PW-14/A) and handed over the rukka to HC Rajbir Singh (PW-12) for registration of the case. The investigation was taken over by Inspector Suresh Dagar (PW-21). HC Rajbir Singh returned to the spot and handed over the original rukka and copy of the FIR to Inspector Suresh Dagar.

23. During investigation, a rough site plan (Exh.PW-21/A) was prepared on the pointing out of Mehar Legha. The crime team reached the spot and inspected the place of occurrence, photographs were taken. After the identification of the dead bodies by Lt. Col. Aman Preet Singh and his cousin Captain R.P.S. Gill, they were sent to the mortuary of Safdarjung Hospital through HC Subhash and HC Nanak Chand. The wooden box in which the dead body of Smt. Surjeet Kaur was recovered as well as the green

colour suit case were sealed, both taken into possession and seizure memos duly recorded. Some blood lying near the green colour suit case; near the box; as well as from balcony was lifted and sealed. Blood stained concrete pieces of floor were lifted from the balcony near the box and from near the suit case. One blood stained mat lying near the bathroom was also sealed by the police. The pulandas in which these articles were sealed were taken into possession vide memo (Exh.PW-10/A).

24. The offender made a disclosure statement (Exh. PW-10/B) to the police and pursuant thereto led the police party to the recovery of several items which we shall note hereafter. On the pointing out of the offender, Mithlesh Kumar Kushwaha, one knife was recovered and seized from a place above the utility stand in the kitchen. The sketch of the knife (Exh.PW-8/A) was prepared by (PW-21) Inspector Suresh Dagar, the investigating officer. The offender also produced one orange coloured plastic container half filled with salt from the kitchen, a black coloured wire from the corner of the drawing room (seized vide memo Exh.PW-8/C). The offender also led the police party to the back side balcony and took out a floor mop (‘*pochcha*’) having blood stains from the place where he had hidden it under used items which was seized vide memo (Exh.PW-8/D).

25. Thereafter the offender then led the police party to the garage of the building at the ground floor and produced the clothes which he was wearing at the time of the incident which included a

red colour pyjama, one white full sleeve T-shirt, both covered with blood stains which were seized by the police vide Exh.PW-8/G. From the pocket of the pant of the accused, a newspaper clipping (Exh.PW-8/J), which contained an article about a non-combat attack with a knife, was recovered. The offender also produced a black coloured plastic bag which contained Rs.9730/- and a purse. This purse contained one golden kara, two designed karas, one kara having four jhumkas, two jhumkas and one gold chain. All these articles were seized vide Exh.PW-8/A.

26. (PW-8) Lt. Col. Aman Preet Singh Legha has identified these items of jewellery recovered from the offender as belonging to his wife while the money as belonging to him for the reason that it was found missing from his cupboard, along with the jewellery.

27. On 3rd March, 2007, the police again visited the flat of the offender and again at his pointing out; a mobile phone which belonged to Late Smt. Surjeet Kaur was recovered from the rear balcony of the flat, which had been concealed in some boxes. The offender also led the police to the recovery of a hammer which stood broken into three pieces hidden near the mobile (which had been allegedly utilised for breaking the mobile phone).

28. The crime scene was also inspected by the dog squad, the crime team and a photographer. The proceedings of the crime team are on record as Exh.PW-13/A.

29. Post mortems were conducted on the bodies of the two deceased persons pursuant to the police request (Exh.PW-21/B and Exh.PW-21/C). Post mortem on the body of Master Karanvir Legha was conducted by Dr. Yogesh Tyagi, Senior Resident, Safdarjung Hospital (PW-6) who in his report Exh.PW-6/A observed and noted the following injuries :-

> "1. Cut throat injuries present over front of neck, 8 cm below chin, below thyroid cartridge, cutting muscles, blood vessels, trachea and casothagoes, exposing cervical vertibra injury. (On *court* question, the witness explains that the cut was deep upto spinal vertibra), length was 15 cm and width was 4 cm, two skin tags were present over both angles of cut throat injury. Cervical vertibrae are cut at two places, one cm apart.
>
> 2. Multiple scratch marks are present front of left shoulder in an area of 5x4 cm and varying in size from 3x0.5 cm to 1x4 cm.
>
> 3. Contusion over
>
> a. Right ear lobe upper arm,
>
> b. right angle of mandible 5x5 cm"

30. The doctor opined that the injuries present on the neck were sufficient to cause death of the child in ordinary course of nature. The doctor also gave detailed information as to whether the knife (Exh.P-20) was the weapon of the offence. The doctor prepared a sketch of the knife Ex.PW-6/B and gave his report (Exh.PW-6/C) to the effect that the above injuries noted in the post-mortem report were possible with the weapon except the injuries at serial nos. 2

and 3 which were more contusions and abrasion. So far as the opinion on the possible time of death is concerned, PW-6 Dr. Yogesh Tyagi had opined that the death of the child should have taken place at about 11 a.m. on 2nd March, 2007.

31. So far as the post-mortem on the body of Smt. Surjeet Kaur was concerned, it was conducted by (PW-7) Dr. Aman Thergaonkar (Chief Medical Officer, Safdarjung Hospital, New Delhi) on 3rd March, 2007 and his detailed report was proved as Exh.PW-7/A. The doctor has observed following injuries in his examination :

> "External examination injuries
>
> 1. Incised wound on upper part of neck obliquely placed, measuring 14 cm long on front and sides of the neck x 8 cm wide x 4.5 deep.
>
> 2. Incised wound on lower part of the neck, *measuring* 10x3cmx3cm deep, located 3 cm above suprasternal notch. The upper end of the wound was merged with injury no.1
>
> 3. The index finger on left hand shows cut mark on terminal phalynx, 0.3 cm long, *obliquely* placed – defence wound.
>
> On Internal examination
>
> Scalp, skull brain – brain was congested and rest of the structures were normal.
>
> Neck and thorax. Effusion of blood was seeing in the subcutenious tissues of neck. The structures beneth the injury No. 1 were cut as follows :-

Platysmu, trachata, sternomastoid muscle, jugular vein and cerevial merous, both carotid arteries and vertebral colume at the label of second and third cervical verebru showed cut injuries. Structure below injury no. 2 is also cut like platysma, sternomastoid, vessels etc. The lungs were pale. Heart was normal.

Abdomen and pelvis.

Stomach was empty. Liver/spleen, kidneys – all were pale."

32. The doctor opined that the cause of death was haemorrhagic shock due to cut throat injury and that injury nos. 1 and 2 were sufficient in the ordinary course of nature to cause death.

33. The doctor also opined (Exh.PW-7/A) that the injuries were caused by a sharp cutting weapon like a knife. The investigating officer also sought the opinion of PW-7 as to whether the injuries were possible with the knife which had been recovered. The sealed knife was placed before (PW-7) Dr. Aman Thergaonkar who prepared a sketch thereof and also gave a detailed report (Exh.PW-7/B) opining that the above injuries described in the post-mortem report were caused by the weapon submitted for examination.

34. In answer to a court question, the doctor opined that the death of Smt. Surjeet Kaur might have occurred on 2nd March, 2007 at about 12 noon.

35. PW-7 Dr. Aman Thergaonkar also observed and commented on the fact that salt had been sprinkled on the body with the

intention of preventing putrefaction of the body. In answer to a court question, the doctor also stated that it may be done also with a view to conceal the crime so that smell does not emanate from the dead body for a long time and that, in fact, the smell from a dead body can be prevented by sprinkling salt, from few hours to few days.

36. It appears that Late Smt. Surjeet Kaur was found clutching some hair in her hand. At the time of the medical examination of the offender, at the request of the investigating officer, the blood samples and hair of the offender Mithlesh were also preserved. Both of these were sent for forensic examination along with the examination on the recovered articles.

37. The police also lifted chance prints from the spot. The investigating officer collected the finger prints of the offender which were sent for comparison with the chance prints lifted from the spot. The crime team lifted four chance finger prints from the spot and four chance prints were lifted from the wooden box. The finger print report dated 18th June, 2007 (Exh.PW-21/K) prepared after comparison of the chance prints lifted by the crime team and the finger prints of the offender supplied by the investigating officer reports that the finger prints of the offender match the chance prints lifted from the box in which Smt. Surjeet Kaur had been stored.

38. The prosecution thus had established beyond doubt on the record of the case in the evidence that the offender also known as

Chhotu had been working as a domestic servant since 6 ½ years with Lt. Col. Aman Preet Singh Legha and his family and was also living with them. On 2nd March, 2007, the deceased Smt. Surjeet Kaur and Master Karanvir Singh were last seen alive in the company of the offender after Lt. Col. Aman Preet Singh departed for his office. The offender was alone in the company of Smt. Surjeet Kaur and Master Karanvir Singh and had opened the door from inside when Mehar Legha had returned from school. The offender made an extra judicial confession to Mehar Legha when she returned from school at around 12.30 p.m. that day and also made an effort to take her life and take away whatever jewellery and money he had collected. However, she was able to escape from his clutches. It was the offender who opened the door to Smt. Rani Chhabra and Smt. Guddi as well. On his criminal actions being discovered, the offender attempted to run away from the spot but was overpowered. Pursuant to the disclosure statement made by the offender and pointing out of the offender, several articles which included one golden kara, two designed karas, one kara having four jhumkas, two jhumka and one gold chain belonging to the Leghas as well as cash belonging to Lt. Col. Aman Preet Singh and his wife were recovered.

39. The knife which was opined to be the weapon of offence was also recovered on the pointing out of the offender. The two doctors who conducted the post-mortem of Smt. Surjeet Kaur and Master Karanvir have both opined that the injuries which had been

inflicted on the bodies of the deceased could have been caused by the recovered knife. The doctors have also opined that the injuries were sufficient to cause death in the ordinary course of nature. There is no conflict in the approximate time of death as given by the doctors and in fact, this opinion corroborates the oral testimony of the other witnesses.

40. The evidence of Mehar Legha with regard to the attempt of the accused to take her life by strangulating her with the electric wire; her struggle for freedom and the bite which she inflicted on the hand of the offender have been corroborated by other material evidence. So far as the attempt to strangulate Mehar Legha is concerned, on the disclosure and pointing out of the offender the said electric wire was recovered. There was also a mark of ligature on the neck of the child which was noticed by (PW-1) Smt. Rani Chhabra. The scratch injuries on the face of the child caused by the offender during the fight were noted by (PW-1) Smt. Rani Chhabra as well as (PW-11) Smt. Guddi and they have given evidence on this aspect.

41. Mehar Legha has stated that she bit the hand of the offender and gave a leg blow to him. Mr. Puneet Ahluwalia, learned counsel appearing for the complainant has drawn our attention to the MLC dated 2nd March, 2007 wherein the doctor has noted a bite injury on his hand. It would appear that this MLC of Mithlesh Kumar Kushwaha has not been proved on record by the prosecution and therefore no exhibit number has been assigned. Be

that as it may, the testimony of Mehar Legha (PW-5) with regard to the bite has not been shaken in cross examination.

42. Apart from the above oral and documentary evidence, the finger print bureau report (Exh.PW-21/K) also establishes the chance finger prints lifted by the crime team from the wooden box from which the dead body was recovered as matching the finger prints of the offender. This is a material piece of evidence and could not be challenged or explained by the offender.

43. Mr. Ahluwalia, learned counsel for the complainant points out that when enquired by Mehar Legha, the offender falsely told her that Smt. Surjeet Kaur and Karanvir had gone to the Gurudwara. The offender had repeated the same statement to (PW-1) Smt. Rani Chhabra as well. It is suggested that the offender was trying to divert the attention of the witnesses in order to buy time. The statement was false to his knowledge and thus giving a false statement has to be read against the offender.

We note hereunder the headings in which the submissions of the parties are being considered :

I. ***Extrajudicial confession-whether reliable?*** *(paras 44 to 45)*

II. ***Evidence of last seen together*** *(paras.46 to 56)*

III. ***Motive for the crime*** *(para 57)*

IV. ***Lack of forensic evidence*** *(paras 58 to 65)*

V. ***Evidence of fingerprint expert*** *(para 66)*

XXI. ***<u>Guidelines for 'PSR'</u>*** *(para 255)*

XXII. ***<u>Result</u>*** *(paras 256 to 261)*

We now propose to discuss the above issues in seriatim :

<u>Extrajudicial confession-whether reliable?</u>

44. It is trite that an extra judicial confession is a weak piece of evidence and can be relied upon to support a conviction but only after due care and caution has been exercised to ascertain its truthfulness. Mr. Bansal has placed the pronouncement of the Supreme Court in ***(2010) 8 SCC 233 S. Arul Raja v. State of Tamilnadu*** **(para 55)** the court ruled thus :

> **"55.** xxxxx Before the court proceeds to act on the basis of an extra-judicial confession, the circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered along with the two rules of caution: first, whether the evidence of confession is reliable and second, whether it finds corroboration."

45. In the case in hand, the testimony of PW-5 with regard to the confession of the offender is clear and reliable. The effort to cast a doubt on the same based on the deposition of PW-1 is unsustainable given the testimony of PW-1 in its entirety.

Evidence of last seen together

46. Mr. Jai Bansal has urged that in the present case there is no evidence that the deceased persons were last seen alive in the company of the accused. It is urged that it is the case of the prosecution that (PW-8) Lt. Col. Legha had left the house in the morning and that (PW-5) Mehar Legha returned only at 12:30 pm. It is argued that the intervening time gap is so large that intervention of the third person cannot be ruled out.

47. The offender was a domestic servant of the family of the deceased persons. The deceased were living in the flat as part of the family of (PW-8) - Lt. Col. Aman Preet Singh. It is in the unassailed testimony of (PW-8) Lt. Col. Aman Preet Singh that he had left the deceased persons alone in the house in the company of the offender. When PW-5 returned to the house at 12.30 p.m., the murders had already taken place and the offender had attempted to injure her as well. In fact, the offender had opened the door from inside when PW-5 had returned from school. (PW-11) Smt. Guddi who ironed clothes on the ground floor of the building has also not referred to any other person in or near the flat in question.

48. The murders were not committed in an open public place accessible to all and sundry but were committed within the confines of the flat of PW-8. The bodies were stuffed in a wooden box and a suitcase and carefully concealed by the murderer. The scene of the crime was also cleaned up to remove all traces of the

commission of the offence including the blood which must have spilled in the flat when the offence was committed.

49. We note that there was no possibility of any third person intervening. The Supreme Court in this context held in ***Prabhakar Jasappa Kanguni v. State of Maharashtra, (1982) 1 SCC 426*** held that :

> *"17. The other circumstances listed above had also been firmly established. Once circumstance (a) is established, then, taken in conjunction with the other circumstances, particularly the undisputed fact that at or about the time of Malti's death,* ***no third person excepting the accused and the deceased, was present in the house, it will inescapably lead to the conclusion that within human probability, it was the accused-appellant and none else, who had murdered the deceased by strangulating her to death."***

50. The duration of the time gap between the point of time when the offender and the deceased persons were last seen alive and when the deceased persons were found dead, as well as given the actions of the offender in removal of traces of the commission of the offence and the attempt on the life of Mehar Legha certainly points towards the offender being the author of the crime.

51. In ***Ajitsingh Harnamsingh Gujral v. State of Maharashtra, (2011) 14 SCC 401*** the Supreme Court held thus :

> *27.* ***The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that the possibility***

<u>of any person other than the accused being the author of the crime becomes impossible</u>, *vide Mohd Azad v. State of W.B. (2008)15SCC 449; State v. Mahender Singh Dahiya (2011) 3 SCC 109 and Sk. Yusuf v State of W.B. (2011) 11 SCC 754.*

xxx *xxx* *xxx*

29. The victims died in the house of the accused, and he was there according to the testimony of the above witnesses. The incident took place at a time when there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night.

It is noteworthy that this is the last time that Smt. Surjeet Kaur and Master Karanvir Singh were seen alive. The two deceased persons were thus last seen alive in the company of the offender Mithlesh Kumar Kushwaha. This fact was established by the evidence of (PW-8) Aman Preet Singh Legha

52. The offender gave no explanation in his statement recorded under Section 313 CrPC as to what happened after Lt. Col. Aman Preet Singh left the house leaving his loved ones alone in the company of the offender.

53. The conduct of the offender after PW-5 returned home also points to his guilt for commission of the offence. The fact that he first attacked PW-5 and thereafter when confronted by the other witnesses, made efforts to escape, also points towards his guilt.

54. PW-5 was subjected to cross examination and her testimony could not be shaken on any count on behalf of the accused. She has given a truthful account of what she experienced and her testimony cannot be doubted.

55. The challenge by Mr. Jai Bansal to the finding of the learned Trial Judge rests primarily on the submission that the circumstances set out by the prosecution witnesses were highly improbable. We have noted above that the oral testimony of the witnesses is supported by the material evidence of recoveries as well as by forensic evidence.

56. We are therefore, also unable to agree with the challenge by Mr. Jai Bansal to the finding of the learned Trial Judge that the two deceased persons were last seen alive in the company of the offender.

Motive for the crime

57. It is trite that in cases based on circumstantial evidence, motive for committing the crime assumes great importance. [**Ref:** ***(2011) 3 SCC 109 State v. Mahender Singh Dahiya*** **(para 29)].** The prosecution has established that the murders were committed with the motive of robbery. The recovery of the jewellery of the wife of PW-8 on the pointing out of the offender establishes this motive beyond any doubt.

This is an important circumstance in the chain of evidence pointing towards the guilt of the offender. It has been rightly so construed by the learned Trial Judge.

Lack of forensic evidence

58. Mr. Jai Bansal, learned amicus curiae has vehemently urged that there was no finger print evidence to establish that the knife was the weapon of the office inasmuch as his finger print was not found on the knife. In view of the other facts and circumstances which have been established beyond doubt, this aspect is of no significance inasmuch it is in the evidence that the knife had been cleaned after commission of the offence.

59. There is also no substance in the submission of learned counsel that there is contradiction in the prosecution case inasmuch as traces of blood were found on a cleaned knife. This is nothing unusual as it is possible to leave traces of blood even after cleaning a weapon.

60. Learned amicus curiae has vehemently contended that the prosecution has failed to establish that the hair samples which the deceased was clutching in her hand, belonged to the offender.

61. The impact of the failure to connect a blood sample to the deceased by identification of the group was considered by the Supreme Court in the judgment reported at ***(1999) 3 SCC 507,***

State of Rajasthan v. Teja Ram. On this failure of the serologist, the Supreme Court held as follows:

> "25. Failure of the Serologist to detect the origin of the blood, due to disintegration of the serum in the meanwhile, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and plasmatic coagulation that a Serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.
>
> 26. Learned Counsel for the accused made an effort to sustain the rejection of the above said evidence for which he cited the decisions in Prabhu Babaji v. State of Bombay and Raghav Prapanna Tripathi v. State of UP. In the former Vivian Bose J. has observed that the Chemical Examiner's duty is to indicate the number of blood stains found by him on each are too minute or too numerous to be described in detail. It was a case in which one circumstance projected by the prosecution was just one spot of blood on a dhoti. Their Lordships felt that "blood could equally have spurted on the dhoti of a wholly innocent person passing through in the circumstances described by us earlier in the judgment." In the latter decision, (Raghav, Prapanna Tripathi supra) the Court observed regarding the certificate of a chemical examiner that inasmuch as the blood stain is not proved to be of human origin, the circumstance has no evidentiary value "in the circumstances" connecting

> the accused with the murder. The further part of the circumstance in that case showed that a shirt was seized from a dry cleaning establishment and the proprietor of the said establishment had testified that when the shirt was given to him for drycleaning, it was not bloodstained.
>
> 27. We are unable to find out from the aforesaid decisions any legal ratio that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility. The observations in the aforesaid cases were made on the fact situation existed therein. They cannot be imported to a case where the facts are materially different."

62. This judicial pronouncement was followed by the Supreme Court in ***(1999) 9 SCC 581 Molai & Anr. v. State of M.P***. wherein the Supreme Court considered the issue as to whether in the absence of determination of blood group, it would be unsafe to connect the recovered knife with the crime in the instant case and attribute its use by the accused persons. Placing reliance on the principle laid down by the Supreme Court in ***Teja Ram***, it was held that it would be an incriminating circumstance if the blood was found to be of human origin. The FSL report had certified that the blood on the knife was of human origin.

63. The issue with regard to the effect of failure to match the blood on an article with the blood group of an injured/deceased person has been authoritatively considered by the Supreme Court in the judgment reported at ***2012 (8) SCALE 670, Dr.Sunil Clifford Daniel v. State of Punjab*** holding as follows:

> "28. Most of the articles recovered and sent for preparation of FSL and serological reports contained human blood. However, on the rubber mat recovered from the car of Dr. Pauli (CW.2) and one other item, there can be no positive report in relation to the same as the blood on such articles has dis-integrated. All other material objects, including the shirt of the accused, two T-shirts, two towels, a track suit, one pant, the brassier of the deceased, bangles of the deceased, the under-garments of the deceased, two tops, dumb bell, gunny bag, tie etc. were found to have dis-integrated.
>
> 29. A similar issue arose for consideration by this Court in ***Gura Singh v. State of Rajasthan AIR 2001 SC 330***, wherein the Court, relying upon earlier judgments of this Court, particularly in ***Prabhu Babaji Navie v. State of Bombay, AIR 1956 SC 51; Raghav Prapanna Tripathi v. State of U.P., AIR 1963 SC 74;*** and ***Teja Ram (supra)*** observed that a failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe would not have been human blood at all. xxx xxx."

64. A similar view has been reiterated in a recent judgment of this court in ***Criminal Appeal No. 67 of 2008, Jagroop Singh v. State of Punjab, decided on 20.7.2012***, wherein it was held that, once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group(s) loses significance.

65. We find that the forensic examination has reported that the hair was of human origin. The inability of forensic evidence in not linking the hair samples to the offender, cannot impact the finding of guilt of Mithlesh Kumar Kushwaha. This failure to forensically

link the hair to the offender does not constitute a missing link in the evidence.

Evidence of fingerprint expert

66. One material piece of evidence relied upon by the learned Trial Judge is the expert evidence on the chance print of the portion of the palm lifted from the wooden box inside the house, which matched the print of the palm of the offender. This chance print was lifted from the very wooden box in which the body of the murdered victim Smt. Surjeet Kaur was recovered. The submission of learned counsel for the offender that the reliance on this piece of evidence to connect the offender with the crime is mere conjecture and surmises, is without merit.

Reliance on disclosure statement

67. The objection that the learned Trial Judge has fastened the guilt for the crime upon the offender based on the disclosure statement is also erroneous. The learned Trial Judge has relied on the discovery of the knife which was consequent upon information received from the offender. Only such portion of the information which relates distinctly to the fact discovered has been permitted to be proved in evidence and relied upon. The reliance on the pronouncement of the Supreme Court in ***(2011) 11 SCC 754*** (**para 34) *S.K. Yusuf v. State of West Bengal*** as well as the judgment of the Supreme Court in ***(2009) 11 SCC 625 Abdulwahab***

Abdulmajid Baloch v. State of Gujarat (paras 36 and 37) is also misconceived in as much as there is other material evidence in the case which forms the unbroken chain pointing towards the guilt of the offender.

Implausibility of prosecution case and contradictions in testimony of prosecution witnesses

68. Mr. Jai Bansal, learned amicus curiae has filed written submissions before us. He has contended that in the complaint telephonically lodged by (PW-1) - Smt. Rani Chhabra, she had stated that an attempt to rape a child was being made whereas the child who appeared as PW-5 does not make any such statement. He would submit that this contradiction casts a serious doubt on the prosecution case that the offender had committed the murder of the deceased or assaulted PW-5. The above narration would show that it was not the prosecution case that Smt. Rani Chhabra was an eye witness to the commission of any of the offences.

69. Mr. Jai Bansal has urged that there was also a contradiction in the statement of PW-1 and PW-11 pointing out that PW-1 makes no reference to the presence of PW-11. Mr. Bansal would also urge that knowledge of the presence of a person who had murdered two persons and attempted to murder a third in the house, would instil fear in the minds of other persons from going to such premises. It has been argued that therefore the case of the prosecution that PW-5 accompanied by PW-1 and PW-11 went to the flat in question, despite their knowledge that the offender was

present therein, is highly improbable and ought not to be believed. Mr. Bansal has vehemently urged that the testimony of PW-1 does not inspire confidence and that it is in blatant contradiction with the testimony of (PW-5) Mehar Legha, (PW-1) Rani Chhabra, (PW-11) Guddi as well as (PW-2) Mukesh Sehrawat.

70. Even if, we were to accept the submission of Mr. Jai Bansal, learned amicus curiae that PW-1 is not a reliable witness, Mr. Bansal was unable to fault the testimony of PW-2, PW-5 and PW-11. No contradiction between their depositions has been pointed out. These witnesses have withstood cross examination and their testimony could not be shaken by the offender. The categorical statements of these witnesses with regard to the manner in which events unfolded after Mehar Legha arrived home from school, leaves no doubt at all with regard to the conduct of the offender.

71. It is not for this court to speculate as to the reasons for the offender's actions in remaining present at the site of the crime after having committed the murders and having removed the jewellery and money from the flat and hidden them in his quarter. We cannot say why he did so or whether he was still removing signs of evidence of the commission of the offence in as much as there is evidence of his cleaning the place where he had committed the murders, washing of the weapon of offence and hiding the box. This process would have certainly been time consuming.

72. Mr. Jai Bansal has attempted to persuade us to disbelieve (PW-5) Mehar Legha, a child of only 14 years on the date of the incident. Let us examine what transpired at the flat after the offender blurted the extra judicial confession to this child.

73. According to PW-5, the offender picked up an electric wire lying there, put it around her neck and tried to strangulate her. Mehar resisted his attempt and fought with him. Mehar received scratch injuries caused by the offender on her face in this fight and also received a ligature injury on her neck. She could escape from the flat only by biting the hand of the offender and giving him a leg blow. In her cross examination, Mehar has stated that she was trying to shout at the time of this incident but could not do so because the offender had strangulated her neck.

74. The condition of Mehar Legha is confirmed by Guddi (PW-11) who in her cross examination has stated that Mehar had scratches on her face and appeared to be terrified when she had approached her. PW 11's statement was recorded on 25th February, 2009.

75. Mehar Legha (PW-5) has also explained that she was so distraught and shocked from the events on that date that she refused to go for a medical examination. Furthermore, the dead bodies of her grandmother and her own young brother after they were brutally murdered were recovered in her presence. Her extreme anxiety and refusal to go for a medical examination to be conducted by strangers was to be expected and completely natural.

This conduct of the young child, who was about 14 years and had faced the attempt on her life at the hands of the offender, cannot be challenged.

76. PW-5 a young child has given an explanation for why she did not go to the doctor to get treatment of her injuries. PW-5 has no reason at all to make a false statement implicating the offender in the case. PW-5 Mehar Legha has in fact given a truthful account of what had transpired. We see no reason to disbelieve her statement merely because Mehar Legha did not agree to her own medical examination.

77. The Supreme Court had occasion to scrutinise the testimony of witnesses and evaluate the impact of contradiction between evidence of different witnesses and embellishment by them. The observation of the Supreme Court in ***(1999) 9 SCC 595 Leela Ram (Dead) through Duli Chand v. State of Haryana*** in this regard reads as follows:-

> "*9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason*

therefore should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48] .

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11. The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

12. It is indeed necessary to note that <u>one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment — sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account</u>. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."

(Emphasis supplied)

78. In its decision in ***Rammi v. State of M.P. [(1999) 8 SCC 649]*** the Supreme Court observed: (SCC p. 656, para 24)

> "*24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that* ***it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny***.
>
> *25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. xxx xxx xxx*
>
> *26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be contradicted would affect the credit of the witness. xxx xxx xxx*
>
> *27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the*

present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v.State of U.P. [AIR 1959 SC 1012 : 1959 Supp (2) SCR 875])."

79. The observations of the Supreme Court in paras 11 and 13 in the judgment reported at ***1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696 Appabhai v. State of Gujarat*** on the variation in the reactions of different people to the same occurrence and appreciation of evidence are also topical and read as follows :

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror-stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner."

80. In ***AIR 2012 SC 3539, Shyamal Ghosh v. State of West Bengal***, on this aspect, the court has laid down the principles which would guide the present adjudication thus :

> "46. …Undoubtedly, some minor discrepancies or variations are *traceable* in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the police. Their statements in the court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place."

It is thus well settled that every contradiction or discrepancy would not render unacceptable the entire evidence of a witness.

81. In the judgment reported at ***(2001) 8 SCC 86 para 3 Sukhdev Yadav v. State of Bihar***, the Supreme Court has noted that "*there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishement sometimes there would be a deliberated attempt to offer the same*

and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account".

82. These principles were reiterated by the Supreme Court in a recent judgment reprted at ***(2012) 5 SCC 777 Ramesh Harijan v. State of U.P***. The court also authoritatively ruled that the maxim "*falsus in uno, falsus in ombnibus*" is not a recognized principle in administration of criminal justice and the court is to give paramount importance to ensure that there is no miscarriage of justice. The court has also noted that witnesses cannot help embroidering a story in the witness box and that the court must appraise the evidence to assess the extent to which the testimony is creditworthy. To sum up, the evidence of a witness ought not to be discarded as a whole, but the embroidered or embellished portion only would be left out of consideration.

Several precedents find reference and we therefore are extracting the relevant portion thereof which reads thus:

> "25. Undoubtedly, there may be some exaggeration in the evidence of the *prosecution* witnesses, particularly that of Kunwar Dhruv Narain Singh (PW 1), Jata Shankar Singh (PW 7) and Shitla Prasad Verma (PW 8). ***However, it is the duty of the court to unravel the truth under all circumstances.***"
>
> (Emphasis supplied)

83. In ***Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] ,*** the court considered a similar issue, and placing reliance upon its earlier judgment in

Zwinglee Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230], held as under:

> "8. … ***the court must make an attempt to separate grain*** from the *chaff*, ***the truth from the falsehood***, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

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29. In ***Sucha Singh v. State of Punjab [(2003) 7 SCC 643 : 2003 SCC (Cri) 1697 : AIR 2003 SC 3617] (SCC pp. 113-14, para 51)*** the Court had taken note of its various *earlier* judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim 'falsus in uno, falsus' in omnibus has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. ***Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it***

does not necessarily follow as a matter of law that it must be disregarded in all respects as well."

(Emphasis by us)

84. On the aspect of effect of contradictions, inconsistencies, embellishments, improvements and omissions in evidence, the pronouncement reported at ***(2010) 13 SCC 657, Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra*** wherein the court made the following important observations:

> "30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide ***State v. Saravanan [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152]*** .)
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> xxx xxx xxx

85. In ***State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593 : AIR 1981 SC 1390]***, while dealing with this issue, this Court observed as under: (SCC p. 754, para 8)

> "8. … In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of

> time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person"

86. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (***See Syed Ibrahim v. State of A.P. [(2006) 10 SCC 601 : (2007) 1 SCC (Cri) 34 : AIR 2006 SC 2908***] and ***Arumugam v. State[(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130 : AIR 2009 SC 331***] .)

87. In ***Bihari Nath Goswami v. Shiv Kumar Singh [(2004) 9 SCC 186 : 2004 SCC (Cri) 1435]*** this Court examined the issue and held: (SCC p. 192, para 9)

> "9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."
>
> 37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the *statements* cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited."

The objections to the witnesses' testimonies have to be tested on these well settled principles.

88. Learned amicus curiae for the offender has drawn our attention to Exh.PW-1/B, a control room form filled at 12.54 - 12.56 p.m. wherein it is recorded that the information received by the police was that one boy has been held at the House No. 7382, D-7, near the Bridge, Vasant Kunj who had tried to rape one girl. Learned amicus has also drawn our attention to a second PCR call at 1.04 p.m. (Exh.PW-1/C) wherein the information received by the police was to the effect that one boy had tried to rape a girl after tying her with a wire; that the girl's grandmother (Nani) and another person were missing; when I asked where are they, the boy said that he had killed them; that the boy was being held.

89. Mr. Jai Bansal points out that (PW-1) Smt. Rani Chhabra has admitted that she had made these calls. The witness was declared hostile and was cross examined by learned APP. Mr. Jai Bansal has drawn our attention to the fact that the witness was cross examined by learned APP. In her cross-examination by the learned APP, the witness gave the examination that in fact she had slapped the offender in the flat when he was trying to escape but he was caught by the security guards. The information given by Smt. Rani Chhabra was recorded as DD No.28A and DD No.43B at 1.02 p.m. and 1.16 p.m. by the police station Vasant Kunj.

90. In her cross-examination on behalf of the offender, the witness has stated that the offender was chased by the guards and

other persons of the locality who had gathered there; the offender had tried to escape by climbing to the second floor of the flat in the back lane.

91. There is substance in the submission of learned counsel for the offender who has stated that Mehar Legha does not complain that the offender made any effort to commit rape upon her. The statement by (PW-1) Smt. Rani Chhabra to this effect appears to be an exaggeration to the police which may have been stated by her to incite anxiety in them to rush to the spot at the earliest.

92. We are herein concerned with the question as to whether the offender can be guilty of the commission of the offences. The weight which is to be attached to the statement made by PW-1 while calling for police may not be conclusive of the matter. Smt. Rani Chhabra is not an eye witness to the occurrence.

93. Learned counsel for the offender has emphasised that there are variations in the testimony of (PW-1) Smt. Rani Chhabra and the testimony of (PW-11) Smt. Guddi so far as the manner in which the events unfolded on 2nd March, 2007 is concerned. PW-11 has stated that she took Mehar Legha to the second floor to take the assistance of (PW-1) Smt. Rani Chhabra. However, PW-1 does not refer to the presence of PW-11 outside her flat and further claims knowledge of the incident as having been disclosed by Mehar Legha.

94. It is well settled that in order to be disbelieved, the testimony of a witness must be suffering from material contradictions and not in matters of detail. Our attention has been drawn by Ms. Ritu Gauba, learned APP for the state to the testimony of (PW-5) Mehar Legha who has described the manner in which she freed herself from the clutches of the offender and escaped from the flat. The natural course of events would be for a person to run away from the building which would be to come down rather than go towards the terrace where she may get cornered. PW-5 is categorical also that she first approached Guddi on the lower floors. She refers to Smt. Rani Chhabra as part of the neighbours who had collected there.

95. We may note that PW-5 had escaped from the clutches of a person who she believed had murdered her grandmother and brother and at whose hands, she also had suffered violence. She had also returned from school after completing an examination. Mehar Legha has categorically stated that she was not in a proper state of mind. As a child of mere 14 years who had been exposed to such violence and unnatural activity, would be distraught even while having to recount such an incident and cannot be expected to be coherent. In fact, in her testimony recorded on 28th August, 2008, she had categorically stated that she did not remember the full details because she was in shock at the time. However, this child corroborates (PW-1) Smt. Rani Chhabra stating that PW-1

had caught the offender and also slapped him. She confirms the presence of other neighbours at the spot as well.

96. The challenge by Mr. Jai Bansal, learned Amicus Curiae with regard to the evidence of the events which transpired after Mehar Legha reached flat No. 7382 on the afternoon of 2nd March, 2007 on the ground that there is contradiction between the testimony of PW-1, PW-5 and PW-11 is only in matters of detail. The objection of learned amicus curiae is premised on an unrealistic expectation from truthful witnesses as discussed by the Supreme Court in the host of judicial precedents noted above. Certain embellishments are to be expected and may not be treated as material contradictions. Passage of time intervenes and may impact even perfect human memory as well as ability to perfectly recollect events.

97. It is trite and accepted behaviour that while in court, people tend to improve and embellish. The same is either on account of an exaggerated sense of importance or may be the consequence of fading memory on account of passage of time. The contradictions in the testimonies brought to our notice by Mr. Bansal do not impact either the truthfulness of the witnesses or the value of their evidence.

Plea of alibi set up by the accused

98. In his statement under Section 313 of the CrPC, the offender again made a false statement. So far as his presence on the spot on

2nd March, 2007 is concerned, he has stated at one place that he was working at Byana Auto Industry and also stated that he was not working at the flat of Lt. Col. Aman Preet Singh. At other places in his explanation under Section 313 of the CrPC, the offender admits that he was working as a domestic servant in the house of Lt. Col. Aman Preet Singh, though claims that he used to work temporarily, that he had been kept on a day to day basis and that he was not a permanent servant. The offender thereafter examined, in his defence, his brother Brijesh, Prem Kumar (DW-1); Rajesh Kumar (DW-2) and Amit Kumar (DW-3) as witnesses of his plea of alibi.

99. So far as the defence witnesses are concerned, DW-1 is a brother of the offender who made a two line statement to the effect that on 2nd March, 2007, the offender was with him from 12 noon to 1.30 p.m. when the police came and took him. The evidence of this defence witness is completely unreliable. In his cross examination, DW-1 clearly stated that he could not tell the whereabouts of Mithlesh Kumar Kushwaha on any other date or time in the year 2006 or 2007. Being his brother, his conduct was most unnatural and implausible as he stated that he did not accompany Mithlesh Kumar Kushwaha to the police station and he does not even remember the date when he met Mithlesh Kumar Kushwaha again. He did not make any complaint for false implication of Mithlesh in the case and was giving his testimony

without knowing any particulars of the case as to what was the offence or who was the victim in the case or who was killed.

100. (DW-2) Rajesh Kumar claims to have known Mithlesh for only the past 1½ years. In his statement, he stated that the offender was about 21 years and that he was working as a labourer. He stated that on 2nd March, 2007, Mithlesh Kumar Kushwaha came to the factory at about 11.15 a.m. and remained there till 11.55 a.m. when one Anil left the factory alongwith Mithlesh Kumar Kushwaha telling him to reach the quarter. This witness could not give the date or time of any other visit by Mithlesh Kumar Kushwaha to the factory. In his cross examination, he states that he did not accompany Anil and the offender and therefore could not say where the offender went after visiting the factory.

101. The testimony of Anil Kumar as DW-3 is on similar lines. He claims to have gone to the quarter on 2nd March, 2007 at 11.55 a.m. with the offender and that they remained at the quarter till 1.30 p.m. when the police reached there and apprehended him. This witness has also claimed to have known the accused for the past one year. He states that there was no other person with the two of them on that date during the above period. In his cross examination, the witness also states that he did not know anything about the case or the incident involved in the case and denied the suggestion that he was deposing falsely.

102. Section 11 of the Evidence Act states that facts not otherwise relevant, are relevant if they are inconsistent with any fact in issue,

or relevant fact; or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. Hence the question of the presence of the accused at the house of the victim or at the Byana Auto Industry A-237, Shastri Nagar, Delhi at 11.15 a.m or with the witness, his brother is a relevant fact.

103. It is argued by learned counsel for Mithlesh Kumar Kushwaha that the burden of proof on defence is lesser than the burden of proof beyond reasonable doubt on the prosecution. In this regard, however, the Supreme Court has held in ***(1996) 6 SCC 112 Hari Chand & Anr. v. State of Delhi*** that the defence has to prove the same to the hilt. The Court has stated that "*that an alibi is not an exception (special or general) envisaged in Indian Penal Code or any other law. It is only rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the facts in issue are relevant.*" Therefore the accused also has to discharge burden of proof beyond reasonable doubt.

104. The Supreme Court in ***(1997) 4 SCC 496, Rajesh Kumar v. Dharamvir and Ors.,*** (para 23), held that the appellants having set up a plea of alibi were required to prove the same with absolute certainty. In this case, the defence witness claiming to be the advocate of the accused in a pending case, had stated that at the relevant time the accused was in his office. The court disbelieved the testimony of the defence witness as no contemporaneous document was produced in support of the defence statement or to

prove the plea of alibi. In these circumstances, the court held as follows: -

> "23 ...It is trite that ***a plea of alibi must be proved with absolute certainty so as to completely exclude the presence of the person concerned at the time when*** and the place ***where the incident took place***. Judged in that context we are in complete agreement with the trial Court that the testimony of D.W. 2, for what it is worth, does not substantiate the plea of alibi raised on behalf of the accused Shakti Singh."

(Emphasis by us)

105. Reference can usefully be made to the observations of the Delhi High Court in ***1997 Crl. L J 2853 Ambika Prasad and Anr. v. The State*** wherein it was held that burden of proving the plea of alibi lies on the person who raises it. The relevant paragraph is extracted below:

> "37. …Accused Rajinder was a member of the accused party. He is said to be wielding a ballam in his hands. The ***plea of alibi has been raised*** on his behalf. ***The burden of proof for such a plea lies on the person who raises it***. Accused Rajinder has not led any evidence worth the name in support of his said plea. On the other *hand*, the presence of Rajinder along with the other accused has been consistently mentioned by all the prosecution witnesses.
>
> xxx xxx xxx"

(Emphasis by us)

106. It is, therefore, well settled that the offender had to establish his plea of alibi by coherent and reliable evidence. In the present case, (DW-1) Brijesh Kumar was an interested witness. As a brother of the offender, he would be willing to mould testimony to secure his release.

107. While DW-2 claims to have known Mithlesh Kumar Kushwaha for one and a half year only, DW-3 is an acquaintance of merely one year. DW-2 was emphatic about knowledge of the presence of the offender only on the fateful day and none other at all. This lends suspicion to the truth of his testimony; DW-3 is also not a natural witness. He is not a person who was close to the offender and gives no reason for his accompanying him to the quarter. The witness makes a categorical statement that he knew nothing about the case against Mithlesh Kumar. It is thus, obvious that this person was set up to create evidence of an alibi.

108. On the other hand, the presence of Mithlesh Kumar Kushwaha at the spot is established in the testimony of (PW-1) Rani Chabra; (PW-5) Mehar Legha; (PW-8) Lt. Col. Aman Preet Legha; (PW-11) Guddi; and (PW-2) Mukesh Sehrawat. He was overpowered while attempting to flee from the spot and handed over to the police. On his disclosure, several recoveries were effected from the flat where the crimes were committed as well as the garage. Police witnesses being (PW-21) Inspector Suresh Dagar, (PW-10) Sub Inspector Narender Singh, HC Suresh & HC Kuldeep gave evidence and proved these facts.

It is noteworthy that the offender did not give suggestion to any witness regarding the plea of alibi which he has taken. He did not suggest to any of the witnesses that he was not working as a domestic help at the flat of Lt. Col. Aman Preet Singh. The testimony of the defence witnesses is not worthy of belief. The accused was thus unable to disprove his presence at the spot or to establish that he was at any place other than the flat at all material times. The alibi plea set up by Mithlesh Kumar Kushwaha has been rightly rejected by the learned Trial Judge.

109. What is the impact of such a false defence plea of alibi? In this regard, reference may be usefully made to the pronouncement of the Supreme Court reported at ***(2003) 9 SCC 86, Babudas v. State of M.P. (para 9 at pg 91)***, wherein the court held as follows:

> "4. …We agree with the learned counsel for the respondent State that in a case of circumstantial evidence, a false alibi set up by the accused would be a link in the chain of circumstances as held by this Court in the case of ***Mani Kumar Thapa v. State of U.P., (2002) 7 SCC 157 : 2002 SCC (Cri) 1637,*** but then it cannot be the sole link or the sole circumstance based on which a conviction could be passed…"

110. We may also refer to the pronouncement of the Supreme Court reported at ***(2004) 10 SCC 786, Usman Mia and Ors. v. State of Bihar*** wherein the court had ruled as follows: -

> "23. …Though falsity of the defence plea is not enough to bring home the accusations, it provides additional

> link to substantiate prosecution's accusations. In *"State of Karnataka v. Lakshmanaiah"*, *1992 Supp (2) SCC 420* conduct of accused's abscondance from the date of occurrence till his arrest was considered to be a vital circumstance."
>
> (Underlining by us)

111. We find the plea of alibi set up by Mithlesh Kumar Kushwaha as untrue. Does the creation of this false evidence impact liability for commission of offence? In this regard, we may refer to the pronouncement of the Supreme Court reported at ***(2012) 1 SCC 10, Prithipal Singh v. State of Punjab*** in para 78 of this judgment, the Supreme Court held as follows:

> "78. Most of the Appellants had taken alibi for screening themselves from the offences. However, none of them could establish the same. The courts below have considered this issue elaborately and in order to avoid repetition, we do not want to re-examine the same. However, **we would like to clarify that the conduct of accused subsequent to the commission of crime in such a case, may be very relevant. If there is sufficient evidence to show that the accused fabricated some evidence to screen/absolve himself from the offence, such circumstance may point towards his guilt**. Such a view stand fortified by judgment of this Court in "*Anant Chintaman Lagu v. The State of Bombay", AIR 1960 SC 500*."
>
> (Emphasis by us)

112. In view of the above discussion, it has to be held that the incriminating chain of circumstances, as noted above, have been proved by the prosecution coupled with the falsity of the defence plea, in order to shield himself from his culpability, provide the

additional link to conclusively establish the commission of the offences by Mithlesh Kumar.

113. In the case at hand, the prosecution has led reliable evidence of the deceased person last being seen alive in the company of the offender. The evidence of motive for the crime has been led which has been established from the recovery of the stolen goods at his instance. It was on the pointing out of the offender that the corpses were recovered; the weapon of offence identified as well as the material used by him for destroying evidence of commission of offence. We have also discussed above the attempt of Mithlesh Kumar Kushwaha to set up the plea of alibi.

114. In addition to the above, we find the explanation rendered by the offender in his statement under Section 313 of the Cr.PC with regard to commission of offence and thereafter as completely false. On the issue of the accused giving false answers in explanation to incriminating circumstances in his statement recorded under Section 313 of the Cr.PC, the Supreme Court in ***(2003) 1 SCC 359, Anthony D'souza v. State of Karnataka***, the court observed that *—by now it is a well established principle of law that in a case of circumstantial evidence where an accused offers false answer in his examination under Section 313 against the established facts, that can be counted as providing a missing link for completing the chain".*

115. It has also been urged before us that the offender has failed to render any reasonable explanation with regard to the

incriminating circumstances which were established in the evidence against him. In this regard, we may advert to the pronouncement of the Supreme Court reported at ***(2010) 1 SCC 199, Jayabalan v. UT of Pondicherry***, wherein the failure of the appellant to afford a reasonable explanation for the presence of several burnt match sticks in the middle of the bathroom was held to '*fortify'* the *court's conviction* that "the match stick was used for the purpose of burning the deceased".

In the light of the above noted well settled legal principles, the false defence of alibi as well as inability to render any explanation for the circumstantial evidence established by the prosecution are important circumstances which have to be taken into consideration as a linkage for evaluation of the chain of circumstances established by the prosecution.

Circumstantial Evidence

116. So far as the evaluation of the evidence in a case resting on circumstantial evidence is concerned, the principles thereof were laid down in the cited pronouncements of the Supreme Court reported at ***Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487.*** These principles were reiterated in ***S.K. Yusuf v. State of West Bengal (2011) 11 SCC 754*** and ***Wakkar & Anr. v. State of U.P (2011) 3 SCC 306.***

117. The principles of circumstantial evidence so enunciated by the Supreme Court in ***Sharad Birdhichand Sarda*** are as follows :

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793]

> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the Panchsheel of the proof of a case based on circumstantial evidence."

(Emphasis by us)

118. The principles on which circumstantial evidence and its probative value has to be tested, stand authoritatively laid down by the Supreme Court in the judgment reported at ***(2010) 8 SCC 593, G. Parshwanath v. State of Karnataka*** wherein the Supreme Court laid down as follows:-

> "22. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eyewitness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not".
>
> 23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact

leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the **sufficiency of the circumstantial** evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

(Underlining by us)

119. These very principles have been reiterated by the Supreme Court in the pronouncement ***S.K. Yusuf*** wherein it was stated thus:

> "32. Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability that the act must have been done by the accused. (Vide Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] , Krishnan v. State [(2008) 15 SCC 430 : (2009) 3 SCC (Cri) 1029] and Wakkar v. State of U.P. [(2011) 3 SCC 306 : (2011) 1 SCC (Cri) 846]"
>
> These principles guide the present consideration as well

120. In ***Jainoddin S/O Karimbabu Shaikh v. State of Maharashtra, (2012) 12 SCC 127*** the Supreme Court held thus:

> "12. This case rests squarely on circumstantial evidence. While circumstantial evidence by itself is enough to form the basis of conviction, provided there is no snap in the chain of events; the chain of events must, thus, be complete in such a way so as to point to the guilt of the accused person and none other. Law on this point is well

> settled. We need not have to labour much on that. In the present case, the trial court and the High Court, after carefully considering the entire case of the prosecution and the evidence on record, have found that the chain of events is well established and the circumstances are complete and therefore, the appellant is guilty of the offence alleged against them."

121. In addition to the aforenoticed circumstances, the learned Trial Judge has considered and relied upon the extra judicial confession made by the prisoner to Mehar Legha and found it admissible under Section 6 of the Evidence Act as applying the rule of res gestae. By the application of this principle, the learned Trial Judge has held admissible the statement made by Mithlesh Kumar to (PW-5) Mehar Legha to the effect that he had killed her grandmother and brother and had escaped with the articles. In addition, forensic evidence including the post-mortem reports and the report of the Finger Print Bureau have been discussed at length.

122. The Forensic Science Laboratory report (Exh.PW-8/B) would show that the T-shirt and Pyjama of Mithlesh Kumar Kushwaha recovered at his instance were having human blood of 'A' group. The victims blood was of the same group. The learned Trial Judge has applied the judicial pronouncement of the Supreme Court reported at ***(2008) 10 AD (SC) 502, Murugan v. State of Tamil Nadu.***

123. Yet another circumstance noted by the trial judge is the attempt of Mithlesh Kumar Kushwaha to flee from the flat and he

had to be physically restrained by Bhupinder, the guard of the colony. (PW-2) Mukesh Sehrawat has given testimony of the frantic efforts made by Mithlesh Kumar Kushwaha to free himself from the guard and run away from the spot.

124. It is well settled and needs no further elaboration that the court has to consider only the question whether the facts and circumstances stand proved beyond reasonable doubt and the cumulative result of such circumstances. The learned Trial Judge has undertaken a detailed and close scrutiny of the evidence and found Mithlesh Kumar Kushwaha guilty of the offences punishable of the charges under Sections 302; 394/397; 307; 201 and 506 (II).

125. We are satisfied that the circumstances established on record form an unbroken chain leading to the only conclusion i.e. of guilt of Mithlesh Kumar Kushwaha for commission of the offences with which he was charged before he had been found guilty by the learned trial judge. As a result, the appeal filed by Mithlesh Kumar Kushwaha is clearly devoid of any merit and has to be rejected.

126. The examination would show that the circumstances established on record lead only to the conclusion of the guilt of Mithlesh Kumar Kushwaha for commission of offences. We therefore, find no reason at all to interfere with the judgment dated 1st July, 2010 finding him guilty of several offences.

127. It is now necessary to consider the challenge to the sentences awarded by the learned Trial Judge to the offender.

Consideration of the punishment awarded in the instant case by the order dated 8th July, 2010

128. Having found the offender guilty of commission of offences under Sections 302/201/394/397/506(II) and 307 of the IPC by the judgment dated 1st July, 2010, the learned trial judge by the order dated 10th July, 2010 sentenced Mithlesh Kumar Kushwaha as follows :

(i) For the conviction under Section 302, Mithlesh Kumar Kushwaha has been awarded the death penalty by hanging till death.

(ii) For commission of offences under Section 394/397 of the IPC, Mithlesh has been sentenced to life imprisonment and fine in the sum of Rs.2,000/- and in default to undergo simple imprisonment for 3 months for each offence.

(iii) For commission of the offence under Section 307, Mithlesh Kumar Kushwaha stands sentenced to undergo life imprisonment and fine of Rs.2,000/- In default of payment of fine, Mithlesh Kumar Kushwaha has been sentenced to undergo simple imprisonment for 3 months.

(iv) For commission of the offence under Section 201 of the IPC, Mithlesh Kumar Kushwaha stands sentenced to undergo rigorous imprisonment for 7 years and fine of Rs.2,000/-, in default of payment whereof he shall undergo simple imprisonment for 3 months.

(v) For commission of the offence under Section 506(II), he stands sentenced to rigorous imprisonment for 7 years and fine of Rs.2,000/-. In default of payment of fine, he is required to undergo simple imprisonment for 3 months.

129. The substantive sentences of imprisonment have been directed to run concurrently. Mithlesh Kumar Kushwaha has been given the benefit under Section 428 CrPC for setting out the period of detention undergone during investigation and trial against the substantive sentence of imprisonment.

Defence submissions

130. It has been urged by Mr. Jai Bansal, learned amicus curiae for Mithlesh Kumar Kushwaha that at the time of the offence, Mithlesh Kumar Kushwaha was a poor and illiterate servant working in the house of the complainant.

131. In support of the appeal, it has been urged that the learned trial judge has erred in awarding the death penalty and the other sentences and that the offence in the present case did not fall under the rarest of rare categories inviting the extreme punishment of death. It is urged that the sentences awarded by the learned trial judge are not commensurate with the offences for which Mithlesh Kumar Kushwaha has been convicted.

132. Placing reliance on the pronouncement of the Supreme Court reported at ***(2011) 3 SCC 685, Ramesh & Ors. v. State of***

Rajasthan, it has been urged that the convict did not come from a wealthy background and was visibly from an impoverished background which required him to be working as a domestic servant. Learned counsel would contend that there was no eye-witness to the murder and the case was of a circumstantial evidence. It is urged that there is no material at all to show that Mithlesh Kumar Kushwaha was beyond the possibility of reformation. It is therefore, urged that even if this court was to conclude that the case falls within the "*rarest of rare*" formulation, imposition of death sentence was not warranted as it was shown that there was every possibility of reformation.

Sentencing - Statutory prescription of punishment for the offences involved

133. Before considering the challenge of Mithlesh Kumar Kushwaha to the sentences awarded to him, let us briefly examine the punishments prescribed by the statute. So far as the conviction for the offence of murder is concerned, under Section 302 IPC, a sentence of death or imprisonment for life is prescribed. The statute also mandates that the convict "*shall also be liable to fine*".

134. Section 394 of the IPC deals with the act of voluntarily causing hurt in committing robbery. It prescribes that if convict is held guilty of causing hurt in the act of committing or attempting to commit robbery, he shall be sentenced to imprisonment for life, or to rigorous imprisonment for upto 10 years. He shall also be liable to fine.

135. Section 397 of the IPC deals with the act of robbery, or dacoity, with attempt to cause death or grievous hurt. It prescribes that if the convict, at the time of committing robbery or dacoity, is held guilty of using a deadly weapon, or cases grievous hurt to any person, or attempts to cause death or grievous hurt to any person, he shall be sentenced to imprisonment for a period not less than seven years.

136. Section 201 of the IPC deals with causing disappearance of evidence of the offence or giving false information to screen an offender. If the convict is held guilty of causing evidence of commission of a capital offence to disappear with the intention of screening the offender for legal punishment, the statute prescribes that such convict shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

If evidence of commission of an offence punishable with imprisonment for life or with imprisonment which may extend to ten years has been caused to disappear, the convict shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

137. Section 506 of the IPC deals with punishment for criminal intimidation. If the convict is held to be guilty of the offence of criminal intimidation, he shall be punished either with imprisonment upto two years or with fine or with both [506(I)].

If threat was to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall either be punished with imprisonment upto seven years, or with fine, or with both [506(II)].

138. Section 307 of the IPC deals with attempt to murder. If the convict is held guilty, having done an act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty for murder, shall be punished either with imprisonment for a term upto ten years and shall also be liable to fine [307(I)].

If the convict is held guilty of such an act, and hurt is caused in the commission, he shall be punished with imprisonment for life, or to punishment as hereinbefore mentioned [307(II)].

139. If the convict, held guilty of attempting murder, is under the sentence of imprisonment for life, he may, if hurt is caused, be punished with death [307(III)].

Sentencing procedure and principles governing award of death sentences

140. Sentencing is an important function to be discharged by the court in the administration of criminal justice. However, the lack of any statutory guidance on the issue of an appropriate sentence has agitated courts for decades together. We have before us an

award of death sentence and are required to consider the propriety thereof. Therefore, before considering the adequacy of the sentences imposed by the learned trial judge, we deem it appropriate to first notice the principles on which the consideration has to be effected.

141. Concerned with the importance of the matter, by our order dated 4th December, 2012, we had appointed Dr. Mrinal Satish, Professor, National Law University, Delhi as an amicus curiae in the matter to assist us on this aspect. Dr. Mrinal Satish prepared elaborate written submissions on the question of the death sentence as well as on the aspect of appointment of a probation officer to submit a pre-sentencing report before the court. He made oral submissions as well, rendering valuable assistance to this court. We have been very ably assisted in the analysis of the death sentence jurisprudence by Dr. Mrinal Satish who has incisively analysed the entire law on this subject.

142. This Bench has had an occasion to consider a prayer for imposition of death sentence for conviction for murder in the appeals entitled ***Vikas Yadav v. State of U.P., Crl.A.No.910/2008; Vikas Yadav v. State of U.P., Crl.A.No.741/2008; State v. Vikas Yadav & Anr., Crl.A.No.958/2008; Nilam Katara v. State Govt. of NCT of Delhi & Ors., Crl.Rev.P.No.369/2008; State v. Sukhdev Yadav @ Pehalwan, Crl.A.No.1322/2011; Sukhdev Yadav v. State & Anr., Crl.A.No.145/2012***. In those matters, there were appeals for enhancement of sentence from life imprisonment awarded to

the convicts to the extreme death penalty. The present appeal was also being listed when arguments in ***Vikas Yadav*** and connected matters were underway.

143. We extract hereunder the relevant portions on the aspects of statutory regime as well as the jurisprudential guidelines in precedents as discussed in the judgment dated 6th February, 2015 rendered in ***Crl.A.910/2008, Crl.A.741/2008; Crl.A.958/2008; Crl.Rev.P. 369/2008; Crl.A.1322/2011; Crl.A.145/2012*** on the essential aspects of the sentencing procedure on the death sentence jurisprudence in paras 36 to 53 of ***Vikas Yadav*** which read as follows :

> "36. It is also essential to consider the statutory requirements as well as the jurisprudence on the subject which has to guide our consideration. Section 367 (5) of the Code of Criminal Procedure, 1898 (as it stood prior to the Amending Act of 26 of 1955) enjoined upon the trial court not inflicting upon a person guilty of a capital offence, to give reasons why imprisonment of life instead of the death sentence was being awarded. Thus, if a person was found guilty of murder, the sentence of death was the rule and the sentence of imprisonment for life was an exception. By the Amending Act 26 of 1955, Section 235(2) was incorporated while Section 367(5) of the Cr.P.C., 1898 was deleted from the law. As a result, discretion was conferred upon the trial court to impose either the death sentence or a sentence of life imprisonment upon conviction of a person for murder. The requirement of recording reasons for ***not*** imposing the death sentence was thus obviated.
>
> 37. Another amendment of the Code of Criminal Procedure came into effect on the 1st of April, 1974 (what

came to be known as Code of Criminal Procedure, 1973) whereby Section 354(3) was incorporated into the law. After this amendment, the following statutory provision came to be added into the enactment:

> "354 (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the ***special reasons*** for such sentence."
>
> (Emphasis by us)

38. Thus, upon conviction for murder, imprisonment for life became a rule while death sentence was an exception. More importantly for imposing a death sentence, "special reasons had to be recorded".

39. Before embarking on a factual analysis, it is necessary to briefly examine the jurisprudence on award of death penalty of the Supreme Court of India.

40. Prior to the coming into force of Section 354(3) of the Cr.P.C., a question of lack of principled approach in imposing the death penalty was raised in ***(1973) 1 SCC 20, Jagmohan Singh v. The State of U.P.*** It was contended that there was excessive delegation of legislative function as the legislature had failed to lay down standards or policy to guide the judiciary in imposing its discretion. Rejecting this contention, the Supreme Court had held that :

(i) The Penal Code provided a frame work which prescribes the maximum punishment and provides a wide discretion to the judge in deciding on the sentence for the individual offender.

(ii) It was impossible to lay down the standards which led to the conferment of the wide discretion.

(iii) An adequate safeguard with respect to the exercise of sentencing discretion existed as the Cr.P.C. provided the right to appeal and, therefore, if an error was committed by the court in exercise of the such discretion, the appellate court would correct the error.

(iv) The exercise of judicial discretion on "***well recognized principles*** *is in the final analysis, the safest possible safeguard for the accused*". (Para - 27)

41. Another notable challenge to the death penalty was considered by the Supreme Court in the judgment reported at ***(1979) 3 SCC 646, Rajendra Prasad v. State of Uttar Pradesh***. Writing for the Bench, Justice Krishna Iyer in para 7 cautioned that "*Guided missiles, with lethal potential, in unguided hands, even judicial, is a grave risk where peril is mortal though tempered by the appellate process*".

42. The court was of the view that the meaning of "*well recognized principles"* as articulated in ***Jagmohan Singh*** was unclear. In para 15, the Supreme Court noted that unless principles are expressly articulated, judicial discretion in sentencing is '*dangerous*'.

The two considerations by the Supreme Court in ***Jagmohan Singh*** and ***Rajendra Prasad*** provided the framework for the change in law and the amendments to the Cr.P.C. (known as the Criminal Procedure Code, 1973) noted by us.

43. In the judgment of the Constitution Bench in **(*1980) 2 SCC 684, Bachan Singh v. State of Punjab***, the challenge to the constitutionality of the death penalty was rejected. The court held that sentencing discretion in the context of the death penalty is not unguided. The court expanded the meaning of the expression '*well recognized principles*' (noted in ***Jagmohan Singh***) to mean '*aggravated and mitigating circumstances'* identified by

the court in its previous decisions. The court recast the propositions (iv)(a) and (v)(b) in ***Jagmohan*** stating thus:

> **"164.** xxx xxx xxx
>
> "(*a*) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (*b*) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

44. In ***Bachan Singh,*** the court observed that by virtue of Section 354(3), the courts were required to provide '*special reasons*' for imposing the death penalty and that through the enactment of Section 235(2) and 345(3), the legislature had laid the following two principles:-

> (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'.

45. Disagreeing with the ruling in ***Rajendra Prasad***, as well as ***Jagmohan Singh***, the Constitution Bench in ***Bachan Singh*** held that the court must give equal emphasis to both the crime and the criminal. It was noted that often the circumstance with relation to the crime are intertwined with the circumstances relating to the criminal.

The Constitution Bench also refused to be drawn into the standardization or categorization of cases for awarding the death penalty observing in para 201 that "*it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water tight compartments"*.

46. In ***Bachan Singh,*** the following circumstances referred to by counsel were noted as may be considered aggravating (para 202):

(a) If the murder is pre-planned, and involves extreme brutality;

(b) If the murder involves extreme depravity;

(c) If the murder is of a member of the police or the armed forces, and is committed when the person was on duty, or in consequence of the public servant actions in the course of his/her duty;

(d) If the murder is of a person who acted lawfully under sections 37 and / or 43 of the Cr.P.C.

47. Possible mitigating circumstances noted by the Supreme Court (in para 206) are :

a) That the offence was committed under the influence of extreme emotion or mental disturbance;

b) The young/or old age of the accused;

c) That the accused would not commit violent acts in the future and would not be a continuing threat to society;

d) That the accused can be reformed and rehabilitated;

e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;

f) That the accused acted under duress or the dominance or another person;

g) That the accused was mentally defective and that defect impaired his capacity to appreciate the criminality of his conduct.

48. Of course a clarification had been given by the Bench in ***Bachan Singh*** that the above lists are not exhaustive but were relevant and that it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water tight compartments. The need for principled sentencing based on special reasons has been strongly emphasized.

In this pronouncement, while reiterating that the court must give equal emphasis to both the crime and the criminal, the court did not suggest a '*balance sheet*' approach which was suggested in later jurisprudence. The constitutionality of the death penalty was upheld as a framework for principled sentencing, based on providing special reasons, was already in place.

49. The exercise of identifying the guidelines (from which the court refrained in ***Bachan Singh***) was undertaken by the Supreme Court in the judgment reported at ***(1983) 3 SCC 470, Machhi Singh and Ors. v. State of Punjab (paras 32 – 39)*** which was decided by a three judge bench of the Supreme Court. Reference was made to this formulation as the "*rarest of rare case*"

principle holding that if certain factors were present in a particular case, the court would have to impose the death penalty since the collective conscience of the community would be shocked. Thus, we see the evolution of the "*balance sheet*" approach. The five factors (extracted from paras 32 to 37 of the pronouncement) would include:

> (i) If the crime is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner;
>
> (ii) When the murder is committed with a motive that evinces total depravity and meanness;
>
> (iii) When the crime is of an anti-social or socially abhorrent nature;
>
> (iv) When the crime is enormous in proportion
>
> (v) When the victim is a child, a helpless woman or an old/infirm person, when the victim a person vis-a-vis whom the murderer is in a position of trust or authority, when the victim is a public figure who has been murdered because of political or similar reasons.

50. The Supreme Court also culled out the following principles and guidelines:

> (i) The death sentence should be imposed only in the gravest cases;
>
> (ii) The circumstances of the offender also need to be taken into consideration, and not only the circumstances of the crime;
>
> (iii) Life imprisonment is the rule, and death sentence the exception. The death sentence should be imposed if the court finds that life imprisonment is an altogether inadequate punishment in the light of the nature and circumstances of the crime;

(iv) A balance-sheet of aggravating and mitigating circumstances should be drawn up and equal importance should be given to both aggravating and mitigating circumstances.

51. Further attempts to get the capital punishment declared unconstitutional and a reconsideration of the view taken in ***Bachan Singh*** was rejected by the Supreme Court in ***(1992) 1 SCC 96; (1992) SC 395, Shashi Nayar v. Union of India.*** In ***AIR 1989 SC 1335 : (1989) 1 SCC 678 Triveniben v. State of Gujarat (paras 10 and 11),*** the Supreme Court referred to the balance sheet theory propounded in ***Machhi Singh*** and again observed that there can be no enumeration of circumstances in which the extreme penalty should be inflicted given the complex situation, society and possibilities in which the offence could be committed. The Supreme Court again approved the discretion left by the Legislature to the judicial decision as to what should be the appropriate sentence in the particular circumstances of the case.

52. The Supreme Court has expressed grave concern with the manner in which question of sentence is dealt with by the courts in the judgment reported at ***(1994) 4 SCC 381, Anshad & Ors. v. State of Karnataka (para 17),*** the court criticized the cryptic manner in which the trial court dealt with the question of sentence as, after pronouncing the order of conviction, on the same day itself it passed a one paragraph order dealing with the question of sentence. In para 17, the Supreme Court observed that this exposed the lack of sensitiveness on the part of the Sessions Judge while dealing with the question of sentence. In para 14, the court also faulted the reasons given by the High Court for awarding the death sentence and observed that for determining the proper sentence in a case like the one under consideration, the court while taking into account the aggravating circumstances should not overlook or ignore the mitigating circumstances.

53. The Supreme Court observed that principles of deterrence and retribution are the cornerstones of sentencing in ***(1994) 2 SCC 220, Dhananjoy Chatterjee Vs. State of West Bengal*** and ***(1996) 6 SCC 241, Gentela Vijayavandhan Rao v. State of Andhara Pradesh.*** It was also observed that these principles also cannot be categorised as right or wrong as much depends upon the belief of the judges. The court extracted the following portion of the decision of the Supreme Court in ***(2006) 2 SCC 359, Shailash Jasvantbhai v. State of Gujarat*** :

> "7. xxx xxx Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. xxx xxx Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."
>
> (Underlining by us)

Death sentence jurisprudence – Variations in judicial response & wide divergence in views

144. A very significant facet of imposition of death sentence, noted by the Supreme Court as well, is the variations in judicial response to similar fact situations. This is a factor which renders

imposition of death sentence a very difficult exercise on the courts. Before consideration of the justification and validity of the sentence imposed on Mithlesh Kumar Kushwaha, it is necessary to consider the wide divergence in death sentence jurisprudence. This is noted and emphasized in paras 54 to 80 of ***Vikas Yadav*** which read thus :

> ***"Death sentence jurisprudence - divergence in views***
>
> The discussion on this subject is being considered under the following sub-headings:
>
> *(i) Consideration of aggravating and mitigating circumstances*
>
> *I. Cases where the Supreme Court imposed the death penalty*
> *II. Cases where the Supreme Court did not impose the death penalty"*
>
> 54. Unfortunately, the Indian judicial system has not been able to develop legal principles as regards sentencing and superior courts have repeatedly made observations with regard to the purport, object for and manner in which punishment is imposed on an offender.
>
> 55. In the judgment reported at (***2007) 12 SCC 288, Swamy Shraddananda v. State of Karnataka,*** the two Judges Bench of the Supreme Court differed on whether the appellant should be given the death sentence or sentenced to imprisonment for life. As a result, a Bench of three Judges of the Supreme Court was constituted to decide the issue of sentence. In para 42 of the judgment reported at ***(2008) 13 SCC 767, Swamy Shraddhananda v. State of Karnataka,*** it was again observed that the two earlier Constitution Benches had resolutely refrained from the standardization and classification of the

circumstances in which death sentence could be imposed. However, in ***Machhi Singh***, the court had grafted some categories in which the community should demand the death sentence. Noting the variations on account of the passage of time since 20th July, 1983 when ***Machhi Singh*** was decided, the Court held that though the categories framed in ***Machhi Singh*** are useful, they cannot be taken as "*inflexible, absolute or immutable*" (para 28). It further ruled that the "rarest of rare case" formulation is a relative theory which requires comparison with other cases of murder; ***Machhi Singh*** translated this relative category into absolute terms by framing five categories. In ***Swamy Shraddananda***, the court observed that in interpreting ***Bachan Singh***, ***Machhi Singh*** had actually enlarged the scope of cases by which the death penalty should be imposed beyond what the Constitution Bench in ***Bachan Singh*** had envisaged. ***Machhi Singh*** laid down the rarest of rare criteria (para 27).

The court reviewed its previous decisions observing the inconsistency in the death sentencing decisions; noting that the imposition of this penalty was not free from the subjective element and the confirmation of death sentence or its commutation depends a good deal on the personal predilection of the Judges constituting the Bench (para 33).

56. In the judgment reported at ***(2007) 12 SCC 230, Aloke Nath Dutta v. State of West Bengal,*** the Supreme Court reviewed a series of cases where the option to impose the death sentence was available to the Supreme Court. It was noted that in cases with similar facts, while death sentence was imposed in some of the cases, in other cases with similar facts, life imprisonment was imposed. The court listed various cases where the murder is committed in a brutal manner. In some of these cases, the Supreme Court had imposed death penalty whereas in others, life imprisonment was imposed on the convicted

person. Similarly in cases involving rape and murder, while death sentence was imposed in some cases, the offenders were sentenced to life imprisonment in others.

57. In ***Aloke Nath Dutta***, even though the murder had been committed in a brutal manner, the court did not uphold the death sentence imposed by the Trial Court and confirmed by the High Court. One of the factors that weighed with the court was that the case had been proved on the basis of circumstantial evidence and it was required that in cases where offence is proved on the basis of circumstantial evidence, the death penalty ought not to be imposed.

58. In the judgment reported at ***(2008) 7 SCC 550, State of Punjab v. Prem Sagar & Ors***., the Supreme Court expressed serious concern in this behalf pointing out the recommendations of committees as the Madhava Menon Committee & the Malimath Committee for framing of sentencing guidelines. It was, however, observed that while awarding a sentence, whether the court would take recourse to the principles of deterrence or reform, or invoke the doctrine of proportionality, would depend upon the facts and circumstances of each case. While the nature of the offence committed by the accused plays an important role, the sociological background and the age of the convicts, the circumstances in which the crime has been committed, his mental state are also relevant factors in awarding the sentences.

In ***Prem Sagar***, the Supreme Court emphasised that while imposing the death sentence, the courts must take into consideration the principles applicable thereto, the purpose of imposition of sentence and impose a death sentence after application of mind.

59. Strong articulation for the essentiality of a proper pre-sentencing hearing is to be found in the pronouncement of the Supreme Court reported at ***(2009)***

6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra. The Supreme Court has been deeply concerned about emphasizing three broad points on death penalty i.e. the difficulty on account of judge centric sentencing (**paras 46 to 52**); the importance of the "rarest of rare case" (**paras 53 to 59**) formulation which placed "extreme burden" on a court and the requirement of the court to conform to the highest standards of judicial rigor and thoroughness to ensure pre-sentencing (**paras 90 to 93**). The court held that an effective compliance of sentencing procedure under Section 354(3) and Section 235(2) Cr.P.C and existence of sufficient judicial discretion is a pre-condition. A scrupulous compliance with these statutory provisions is essential so that an informed selection of an adequate sentence could be based on information collected at the pre-sentencing stage.

60. In ***Santosh Kumar Satish Bhushan Bariyar***, the court also declared as *per incuriam* the decision of the Supreme Court in ***(1996) 2 SCC 175, AIR 1996 SC 787 Ravji v. State of Rajasthan*** and the decisions which followed it for the reason that while considering the sentence they took notice of only the characteristics relating to the crime, to the exclusion of the ones relating to the criminal being contrary to the rule enunciated by the Constitutional Bench in ***Bachan Singh*** that equal weight must be given to both crime and the criminal.

The Supreme Court clearly declared that equal weight should be given to both the aggravating and mitigating circumstances and reiterated the principle that the principled approach of sentencing applies equally to heinous crimes as well as to 'relatively less brutal murders'.

61. At this stage, it is necessary to refer to the two Judge Bench pronouncement of the Supreme Court reported at ***(2013) 2 SCC 452 : (2012) 11 SCALE 140, Sangeet & Anr. v. State of Haryana*** wherein the court

held that the considerations for mitigating and aggravating circumstances are distinct and unrelated elements and cannot be compared with each other. In para 29 of the report, it was clearly stated by the Bench that a "*balance sheet cannot be drawn up of two distinct and different constituents of an incident*". The judgment further notes that there was lack of evenness in the sentencing process; that the rarest of rare principle as well as the balance sheet approach has been followed on a case by case basis which has not worked sufficiently well. In para 33, the court also observed that even though ***Bachan Singh*** intended "*principled sentencing"*, the sentencing had become judge-centric as had also been highlighted in ***Swamy Shraddananda (2)*** and ***Santosh Kumar Satishbhushan Bariyar.***

62. In ***Sangeet,*** it was noted that *'rarest of rare case'* doctrine had been inconsistently applied by the High Courts as well as the Supreme Court, thereby implying that the aggravating and mitigating circumstances approach had not been effectively interpreted. It was observed that ***Bachan Singh*** did not endorse the aggravating and mitigating circumstances approach. In this judgment, the Supreme Court therefore, emphasized the necessity of a fresh look at the approach as well as the necessity of adopting the same.

63. In this evaluation of the jurisprudence, it is essential to note the pronouncement of the Supreme Court reported at ***(2013) 5 SCC 546, Shankar Kisanrao Khade v. State of Maharashtra*** in which the appellant, a man of 52 years, had been convicted for murder and strangulation of an 11 year old minor girl with intellectual disability after repeated rape and sodomy. Despite the satisfaction of the crime test, the criminal test and the rarest of rare case test, the court was of the view that the extreme sentence of death penalty was not warranted. The court therefore, directed the life sentence awarded for rape and murder to run consecutively. It was noted in the

judgment of Radhakrishnan, J. that in similar circumstances of rape and murder of minor girls, there had been inconsistency in the award of death penalty. While in 10 cases, death penalty had been awarded, in eight others, it had been commuted. In the concurring judgment of Madan B. Lokur, J. an exhaustive list of cases was set out in para 106 where the death penalty stood commuted to life imprisonment. In para 49, the Bench reiterated the aggravating circumstances (crime test) and the mitigating circumstances (criminal test) as illustrations. It was pointed out in ***Bachan Singh*** that for the fourth mitigating circumstance enumerated therein i.e. the "*chance of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated*", the State ought to produce evidence.

64. Before us, Mr. Sumeet Verma has staunchly emphasized para 52 of ***Shankar Kisanrao Khade*** which reads thus:

> **"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."
>
> (Emphasis supplied)

Mr. Sumeet Verma emphasises the 100% crime test and 0% criminal test evaluation as pointed out in para 52 above urging that even if there was a single mitigating circumstance (young age or probability of reformation, etc.), the convict would not be sentenced to death.

65. Mr. Sumeet Verma would submit that post ***Shinde*** (D.O.D. 27th February, 2014), para 52 of ***Shankar Kisanrao Khade*** has been followed in ***(2014) 8 SCALE 365, Santosh Kumar Singh v. State of Madhya Pradesh*** (D.O.D. 3rd July, 2014); ***(2014) 11 SCC 129, Lalit Kumar Yadav @ Kuri v. State of Uttar Pradesh*** (D.O.D. 25th April, 2014); ***(2014) 5 SCC 509, Dharam Deo Yadav v. State of Uttar Pradesh*** (D.O.D. 11th April, 2014) and**;** ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura (***D.O.D. 4th March, 2014).

66. It has been pointed out that though ***Dharam Deo Yadav*** refers to the crime test, criminal test as well as

R.R. test but the 0% criminal and 100% crime theory concept has not been followed. It is noteworthy that in ***Dharam Deo Yadav,*** the Supreme Court awarded rigorous imprisonment of 20 years over and above the period already undergone by the accused without any remission. So far as ***Lalit Kumar Yadav @ Kuri*** is concerned, in para 46, the Supreme Court has discussed the balancing of the circumstances. If the absolute test of 0% and 100% had to be applied, obviously there would not be any question of the balancing exercise which stands undertaken. In ***Santosh Kumar Singh***, though reference has been made to para 52 of ***Shankar Kisanrao Khade*** but it does not appear as if the 0% criminal test and 100% crime test was actually applied.

67. Mr. Mahajan has drawn our attention to a consideration of this very argument in ***Death Ref.No.1/2014, State v. Ravi Kumar*** before a co-ordinate Bench of this court. The argument was rejected holding that ***Mahesh Dhanaji Shinde*** furnished the complete answer to the question canvassed by the defence. In fact, death sentence was awarded in this case.

68. Countering these submissions of Mr. Verma, Mr. P.K. Dey, learned counsel for the complainant has placed the decision of the three Judge Bench of the Supreme Court reported at ***(2014) 4 SCC 292, Mahesh Dhanaji Shinde v. State of Maharashtra*** wherein in para 31, it was held thus:

> **"31.** A reference to several other pronouncements made by this Court at different points of time with regard to what could be considered as mitigating and aggravating circumstances and how they are to be reconciled has already been detailed hereinabove. All that would be necessary to say is that the Constitution Bench in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] had sounded a note of caution against treating the aggravating

and mitigating circumstances in separate watertight compartments as in many situations it may be impossible to isolate them and both sets of circumstances will have to be considered to cull out the cumulative effect thereof. ***Viewed in the aforesaid context the observations contained in para 52 of Shankar Kisanrao Khade*** **[*Shankar Kisanrao Khade* v. *State of Maharashtra*, (2013) 5 SCC 546** : (2013) 3 SCC (Cri) 402] ***noted above, namely, 100% Crime Test and 0% Criminal Test may create situations which may well go beyond what was laid down in Bachan Singh*** [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580]."

(Emphasis by us)

69. At the same time, Mr. Rajesh Mahajan, learned APP for the State and Mr. P.K. Dey, learned counsel for the complainant have drawn our attention to the pronouncements in ***(2013) 10 SCC 421, Deepak Rai v. State of Bihar; AIR 2011 SC 3690, Ajitsingh Harnamsingh Gujral v. State of Maharashtra; (2010) 9 SCC 1, Atbir v. Government (N.C.T. of Delhi)*** as well as; ***2014 SCC OnLine SC 844, Mofil Khan & Anr. v. State of Jharkhand*** wherein the view which was taken in ***Mahesh Dhanaji Shinde*** has been followed.

70. In a recent pronouncement dated 26th November, 2014 of a three Judge Bench of the Supreme Court in Criminal Appeal Nos.2486-2487 of 2014 (Arising out of SLP(Crl.)No.330-331 of 2013), ***Vasant Sampat Dupare v. State of Maharashtra,*** the court has noted with approval the two Judge Bench judgment reported at ***(2011) 12 SCC 56, Haresh Mohandas Rajput v. State of Maharashtra*** dealing with a situation where the death sentence was warranted. We may usefully extract the relevant portion culling out the principles in ***Haresh***

Mohandas Rajput (which have been quoted in para 45 of ***Vasant Sampat Dupare*** as well) which read thus:

> "In ***Machhi Singh v. State of Punjab*** this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the ***Bench in this case underlined*** that ***full weightage must be accorded to the mitigating circumstances in a case and a <u>just balance</u> had to be struck between the aggravating and the mitigating circumstances.***"
>
> (Emphasis supplied)

The Supreme Court thereafter reiterated the considerations which go into the "rarest of rare" formulation also considered in ***(2010) 9 SCC 567, C. Muniappan v. State of T.N.; (2011) 2 SCC 490, Dara Singh v. Republic of India; (2011) 4 SCC 80, Surendra Koli v. State of U.P.; (2011) 5 SCC 317, Md. Mannan v. State of Bihar; (2011) 7 SCC 125, Sudam v. State of Maharashtra.***

71. It is the law laid down by the Constitution Bench in ***Bachan Singh,*** followed in three Judge Bench pronouncement in ***Mahesh Dhanaji Shinde*** which has to bind this court. It is therefore, unnecessary to advert in detail to the judgments wherein para 52 of ***Shankar Kisanrao Khade*** has been followed. We have however, extracted all the judgments hereafter while listing the based on consideration of relevant circumstances in the several precedents.

72. We hereafter set down in extenso the words of the Supreme Court in ***(2014) 4 SCC 317 Sushil Sharma v. State (NCT of Delhi)*** after noticing the several pronouncements placed on either side before it on the manner in which circumstances in the cases would deserve to be evaluated to arrive at a conclusion as to whether death penalty was warranted in the case or not:

> **"100.** In light of the above judgments, we would now ascertain what factors which we need to take into consideration while deciding the question of sentence. Undoubtedly, we must locate the aggravating and mitigating circumstances in this case and strike the right balance. We must also consider whether there is anything uncommon in this case which renders the sentence to life imprisonment inadequate and calls for death sentence. It is also necessary to see whether 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 which speak in favour of the offender.
>
> **101.** We notice from the above judgments that mere brutality of the murder or the number of persons killed or the manner in which the body is disposed of has not always persuaded this Court to impose death penalty. Similarly, at times, in the peculiar factual matrix, this Court has not thought it fit to award death penalty in cases, which rested on circumstantial evidence or solely on approver's evidence. Where murder, though brutal, is committed driven by extreme emotional disturbance and it does not have enormous proportion, the option of life imprisonment has been exercised in certain cases. Extreme poverty and social status has also been taken into account amongst other circumstances for not awarding

death sentence. In few cases, time spent by the accused in death cell has been taken into consideration along with other circumstances, to commute death sentence into life imprisonment. Where the accused had no criminal antecedents; where the State had not led any evidence to show that the accused is beyond reformation and rehabilitation or that he would revert to similar crimes in future, this Court has leaned in favour of life imprisonment. In such cases, doctrine of proportionality and the theory of deterrence have taken a back seat. The theory of reformation and rehabilitation has prevailed over the idea of retribution.

102. On the other hand, rape followed by a cold-blooded murder of a minor girl and further followed by disrespect to the body of the victim has been often held to be an offence attracting death penalty. At times, cases exhibiting premeditation and meticulous execution of the plan to murder by levelling a calculated attack on the victim to annihilate him, have been held to be fit cases for imposing death penalty. Where innocent minor children, unarmed persons, hapless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a confirmed criminal and has committed murder in a diabolical manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder, exhibiting depravity and sick mind, this Court has

acknowledged the need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal murders, society's cry for justice has been taken note of by this Court, amongst other relevant factors. But, one thing is certain that while deciding whether death penalty should be awarded or not, this Court has in each case realising the irreversible nature of the sentence, pondered over the issue many times over. This Court has always kept in mind the caution sounded by the Constitution Bench in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] that Judges should never be bloodthirsty but has wherever necessary in the interest of society located the rarest of the rare case and exercised the tougher option of death penalty.

103. In the nature of things, there can be no hard-and-fast rules which the court can follow while considering whether an accused should be awarded death sentence or not. The core of a criminal case is its facts and, the facts differ from case to case. Therefore, the various factors like the age of the criminal, his social status, his background, whether he is a confirmed criminal or not, whether he had any antecedents, whether there is any possibility of his reformation and rehabilitation or whether it is a case where the reformation is impossible and the accused is likely to revert to such crimes in future and become a threat to the society are factors which the criminal court will have to examine independently in each case. Decision whether to impose death penalty or not must be taken in the light of guiding principles laid down in several authoritative pronouncements of this Court in the facts and attendant circumstances of each case."

The consideration by this court has to abide by the above principles.

(i) *Consideration of aggravating and mitigating circumstances*

"73. For the purposes of convenience and consideration, the Supreme Court's approach to death sentencing may thus be divided into phases. The decision of the Supreme Court's three Judge Bench in May, 2008 in ***Swamy Shraddananda (2)*** marks the commencement of one such phase. Taking this as the focal point, we propose to consider cases decided by the Supreme Court post May, 2008 where factors similar to the ones identified by the learned Additional Sessions Judges in the instant case as well as the parties were present. This would assist this court in assessing an appropriate sentence to be imposed on the defendants. Mr. Rajesh Mahajan, Mr. Sumeet Verma and Mr. P.K. Dey, Advocates have painstakingly taken us through the jurisprudence on these issues. We first propose to list circumstances and some of the cases wherein existence thereof led to the court imposing death penalty and thereafter where the court imposed life imprisonment.

I. *Cases where the Supreme Court imposed the death penalty.*

(A) *BRUTAL NATURE OF THE CRIME :* Brutality of the offence was the primary reason for the court to conclude that the case fitted the "rarest of rare" category.

74. In the following cases death penalty has been imposed for this reason:

(i) *Burning the victims alive*

(a) ***AIR 2011 SC 3690, Ajitsingh Harnamsingh Gujral v. State of Maharashtra*** : The appellant doused his wife, son and two daughters in petrol and set them afire. The court noted that life imprisonment should be

given for "ordinary murders" and death sentence for gruesome, ghastly and horrendous murders. Death sentence was imposed on the appellant.

(b) ***(2010) 10 SCC 611, Sunder Singh v. State of Uttaranchal :*** Six people were locked in their house, which was doused with petrol and set on fire. Four of them (including a 16 year old girl) were burnt alive. One managed to escape from the burning house but was attacked with a sword and killed by a blow which nearly decapitated him. Brutality of the murder was considered the aggravating factor.

(c) ***(2010) 9 SCC 567, C. Muniappan v. State of Tamil Nadu :*** The victims were young female university students whose bus was stopped by political workers organizing a 'rasta roko'. The appellant and accomplices threw petrol into the bus and set it on fire leading to the death of three girls. It was held that since the murder of three unarmed women was brutal, grotesque, unprovoked and pre-planned, the appellant should be sentenced to death.

(ii) *Multiple stab injuries*

(a) ***(2010) 9 SCC 1, Atbir v. Government (N.C.T. of Delhi) :*** The appellant with accomplices murdered his step mother and her two young children by stabbing them repeatedly. The brutality of the attack with the "breach of trust" were considered aggravating factors. The court rejected the appellant's young age (28 years) factor.

(b) ***(2009) 12 SCC 580, Jagdish v. State of M.P. :*** The appellant murdered his wife, four daughters and one son (who were between one to twelve years of age) by stabbing. Death sentence was imposed on the ground that he had breached the trust of his family; committed the murder in a brutal manner and that there were multiple victims.

(c) ***(2009) 6 SCC 67, Ankush Maruti Shinde v. State of Maharashtra :*** Six people were killed in an act of dacoity and murder. One of them, a fifteen year old girl, was also raped before being murdered. Death sentence was imposed since the murders were committed in a cruel and diabolic manner, using multiple weapons.

(d) ***(2008) 4 SCC 434, Prajeet Kumar Singh v. State of Bihar :*** Three sleeping children, aged 8, 15 and 16, were murdered by multiple stabbing by the appellant who was a tenant in their house for nearly four years and was considered part of the family. The attack by the appellant was unprovoked and brutal which were considered aggravating factors for imposition of the death penalty.

(iii) *Rape and murder*

(a) ***(2012) 4 SCC 37, Rajendra Prahladrao Wasnik v. State of Maharashtra :*** The appellant, a 31 year old man, was convicted for raping and murdering a three year old girl. Bite marks on the chest of the child and various injuries to her private parts were found. Her naked body was left in the open fields. The appellant belied the human relationship of trust and confidence and worthiness leaving the deceased in a badly injured condition in open fields without even clothes reflective of most unfortunate abusive facet of human conduct. The brutal manner of commission of the offences and the above circumstances led the court to conclude that the appellant deserved to be sentenced to death.

(b) ***(2011) 5 SCC 317, Md. Mannan v. State of Bihar:*** The appellant, a 43 year old man, was convicted of raping and murdering an eight year old girl. He was working as a mason in the victim's uncle's house and therefore, when asked to do so, she willingly accompanied the appellant. "Breach of trust" was considered an aggravating factor.

The victim also had multiple injuries on her face which indicated the brutality of the crime. The vulnerability of the victim who was of a small built was also factored by the court and it was held that the appellant was a "menace to the society" and could not be reformed. Hence death sentence was imposed.

(c) ***(2008) 11 SCC 113, Bantu v. State of Uttar Pradesh :*** The appellant inserted a stick into the vagina of a six year old girl causing her death. Placing reliance on the judgment in *Ravji,* death sentence was imposed. In ***(2008) 7 SCC 561, Mohan Anna Chavan v. State of Maharashtra*** and ***(2008) 15 SCC 269, Shivaji v. State of Maharashtra*** also reliance was place on *Ravji* which the Supreme Court has held to be per incuriam. *Mohan Anna Chavan* was convicted for raping and murdering two girls aged 5 and 10. He had two prior convictions for raping under age girls. *Shivaji* was convicted for raping and murdering a nine year old girl. Death penalty was imposed in both these cases because of the depraved nature of the crime.

(d) ***(1994) 3 SCC 381, Laxman Naik v. State of Orissa :*** The appellant brutally sexually assaulted and mercilessly murdered a girl of barely 7 years. The death sentence awarded by the trial court was affirmed by the High Court. The same was upheld by the Supreme Court which noted that the appellant had diabolically conceived a plan, brutally executed it in a calculated, cold-blooded and brutal manner after rape bringing it within the rarest of the rare category.

(e) ***(1996) 6 SCC 250, Kamta Tiwari v. State of M.P. :*** An innocent hapless girl of 7 years was lured by biscuits as a prelude to his sinister design of brutal rape and gruesome murder as testified by the numerous injuries on her dead body which was dumped in a well. The sentence of death by the trial judge for commission of offences under Sections 363, 376, 302 and 201 IPC was affirmed by the High Court as well as Supreme Court

holding that the "*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*". The motivation of a perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuaded the court to hold that this was the 'rarest of rare case'.

(iv) *Gun shot injuries*

(a) ***(2009) 4 SCC 736, State of Uttar Pradesh v. Sattan @ Satyendra :*** The court found the act of the respondent in murdering six people of a family by gunning them down to be brutal and diabolic, especially since women and children had also been shot. Death sentence was therefore, imposed.

(B) *PRIOR CRIMINAL HISTORY*

(a) ***(2011) 3 SCC 85, B.A. Umesh v. Registrar General, High Court of Karnataka :*** The appellant had a prior conviction for robbery, dacoity and rape which was the primary factor that led to the court imposing death sentence on the appellant. Extreme depravity, the manner in which the crime was committed and the fact that the appellant had raped and murdered a helpless woman also influenced the court decision. The court also considered the unproven fact that the appellant had attempted to rape another woman subsequent to the incident and that he had committed various other robberies.

(C) PRE-MEDITATED ACTS

(a) ***MANU/SC/0105/2013, Sunder v. State (by Inspector of Police) :*** The appellant kidnapped a seven year old boy with whom he was acquainted and murdered him as a result of failure of his parents to pay the demanded ransom. Death sentence was imposed on the ground that this was a pre-meditated crime and that the actions of the appellant exhibited utter disregard for human life.

(b) ***(2010) 3 SCC 56, Vikram Singh v. State of Punjab :*** The appellant murdered the victim, a 16 year old boy, known to him for failure of his relatives to pay ransom. Death sentence was imposed.

(c) ***(2012) 4 SCC 97, Sonu Sardar v. State of Chhattisgarh :*** The appellant murdered five members of a family including two children, aged 7 and 9, using an axe and iron rod. The court held that though the appellant was young, he was beyond reform and therefore, sentenced him to death.

(D) CASES BASED ON CIRCUMSTANTIAL EVIDENCE

(a) ***(2008) 15 SCC 269, Shivaji v. State of Maharashtra :*** In para 27 of this judgment, the Supreme Court held that:

> "27. 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. In fact in most of the cases where death sentences are awarded for rape and murder and the like, there is practically no scope for having an eyewitness. They are not committed in the public view. But the very nature of things in such cases, the available evidence is ***circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect.*** The plea of the learned amicus curiae that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable."

After considering the evidence on record, the Supreme Court awarded the death sentence to the appellant for his conviction for rape and murder of a nine year old child.

(b) ***(2011) 5 SCC 317, Mohd. Mannan @ Abdul Mannan v. State of Bihar :*** The appellant, a matured man aged 43 years, while working as a mason in the house of the victim, was convicted on the basis of circumstantial evidence for kidnapping, raping and killing a minor girl and causing disappearance of evidence of the offence. The court upheld the findings of the High Court that the case fell in the category of "rarest of rare" cases

and confirmed the death sentence awarded to the appellant.

(c) ***(2011) 7 SCC 125, Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra :*** The appellant was convicted for murder by strangulation of four children and a woman with whom he lived as husband and wife based on circumstantial evidence. The death sentence handed out by the trial court and the High Court were upheld by the Supreme Court.

(E) TERRORIST ATTACKS

(a) ***(2012) 9 SCC 234, Mohammed Ajmal Mohammed Amir Kasab v. State of Maharashtra :*** The fact that there were multiple victims and that the appellant did not repent for his actions was considered an aggravating circumstance. The court refused to consider the young age of the appellant as the mitigating circumstance as it was completely offset by absence of any remorse on his part and sentenced the appellant to death.

(b) ***(2011) 13 SCC 621, Mohd. Arif @ Ashfaq v. State of N.C.T. of Delhi :*** The appellant was involved in an attack on the Red Fort in Delhi which was held to be an attack on India. The act of the appellant posed a challenge to the unity, integrity and the sovereignty of the country and the soldiers were killed in this attack. He was therefore, sentenced to death.

(F) REJECTION OF YOUNG AGE AS A MITIGATING FACTOR

Some cases where the court had rejected the argument that the convict was of young age which should be treated as a mitigating factor and therefore, death sentence should not be imposed are to be found prior and subsequent to 2008. The following cases have been placed before us:

(a) ***AIR 1983 SC 594, Javed Ahmed Abdulhamid v. State of Maharashtra*** wherein the appellant was aged 22 years and the case rested on circumstantial evidence. Death sentence was confirmed.

(b) So far as the argument of learned counsels for the convicts that they were all young persons with families are concerned, we propose to refer to the observations in ***(1991) 3 SCC 471, Sevaka Perumal & Anr. v. State of Tamil Nadu*** reflecting a similar plea in the following terms:

> "12. xxx xxx xxx It is further contended that the appellants are young men. They are the bread winners of their family each consisting of a young wife, minor child and aged parents and that, therefore, the death sentence may be converted into life. We find no force. These ***compassionate grounds would always be present in most cases and are not relevant for interference***. Thus we find no infirmity in the sentence awarded by the Sessions Court and confirmed by the High Court warranting interference. The appeals are accordingly dismissed."
>
> (Emphasis supplied)

(c) ***(1994) 2 SCC 220, Dhananjoy Chatterjee v. State of West Bengal (para 12)*** : The appellant was a married man of 27 years posted as a guard of the building where

the victim, aged 18 years, who was raped and murdered was living. Death sentence was awarded to him.

(d) ***AIR 1994 SC 2582, Amrutlal Someshwar Joshi v. State of Maharashtra :*** Though the convict claimed to be a juvenile, he was held to be aged around 20 years. Capital sentence on him was confirmed.

(e) ***(1999) 5 SCC 1, Jai Kumar v. State of M.P.*** : The court held that the compassionate ground of the convict being 22 years of age could not in the facts of the case be termed at all relevant**.**

(f) ***(2007) 4 SCC 713 : 2007 (3) SCALE 157, Shivu & Anr. v. Registrar General, High Court of Karnataka & Anr.*** : Capital punishment was awarded to the convicts though aged 20 and 22 years.

(g) ***(2000) 7 SCC 455, Ramdeo Chauhan v. State of Assam*** : It was held that awarding of the lesser sentence only on the ground of the appellant being a youth at the time of the offence cannot be considered as a mitigating circumstance in view of the findings that the murders committed by him were most cruel, heinous and dastardly. The court affirmed the death penalty imposed by the trial court as confirmed by the High Court.

(h) ***(2010) 9 SCC 1, Atbir v. State (N.C.T. of Delhi)*** : The age of the appellant, being 25 years, was not considered a mitigating circumstance.

(i) ***AIR 2010 SC 1007, Vikram Singh v. State of Punjab*** : The court rejected the arguments that the convicts were young, being only 26, 24 and 29 years old; the possibility that they could be reformed during their incarceration and that the prosecution case rested on circumstantial evidence. Death sentence was confirmed.

Single blow

(j) ***AIR 1931 Lahore 749, Sultan v. Emperor :*** This judgment was rendered prior to the amendment to Section 354 of Cr.P.C. The Bench did not agree with the appellant that because a single blow was dealt, a capital sentence was not called for.

II. Cases where the Supreme Court did not impose the death penalty.

Before going any further, it is necessary to examine some cases where instead of imposing the death sentence, the Supreme Court has sentenced the convict to imprisonment for life. In some of the cases, the court has instructed the Executive not to release the convict before he had served out a certain number of years in prison. We propose to examine factors on the basis of which the Supreme Court has concluded that a particular case did not fall in the "rarest of rare" category.

(A) YOUNG AGE AS A MITIGATING FACTOR

(a) ***(2014) SCC OnLine SC 538 : (2014) 8 SCALE 365, Santosh Kumar Singh v. State of Madhya Pradesh*** : The appellant was held guilty for offences under Sections 302, 307, 394, 397 and 450 of the IPC and sentenced to death by the trial court and the High Court. The Supreme Court considered that the appellant was an educated person, about 26 years of age, at the time of committing the offence and was a tutor in the family of the deceased who was acquainted with the deceased as well as her family members. It was not the case of the prosecution that the appellant could not be reformed or that he was a social menace. The appellant had no criminal antecedents. Though he had committed a heinous crime but it could not be held with certainty that the case fell in the "rarest of rare" category. The death sentence was therefore, commuted to life.

(b) ***(2014) 4 SCC 292, Mahesh Dhanaji Shinde v. State of Maharashtra :*** In this case, nine persons were brutally murdered. It was held by the Supreme Court that the four convicts were young in age (i.e. 23 - 29 years) at the time of commission of the offence; belong to the economically, socially and educationally deprived section of the population. They were living in acute poverty which possibly led to a yearning for quick money and these circumstances had led to commission of the crimes. The court also noted their conduct in the jail when they had enrolled themselves for further education and were on the verge of acquiring the B.A. degree. Three of the appellants had participated in different programmes of Gandhi and thoughts and had been awarded certificates of such participation. One of the convicts in association with another appellant had written a book. The court noted that there was ***no material or information to show any condemnable or reprehensible conduct on the part of the appellants during their period of custody.*** It was noted that these ***circumstances pointed to the possibility of the appellants being reformed and living a meaningful and constructive life*** if they were given a second chance. It was therefore, held that the ***option of life sentence "was not unquestionably foreclosed"*** and the sentence of death was commuted to life imprisonment, the custody of the appellants for the rest of their lives would be subject to remissions, if any, strictly subject to provisions to Sections 432 and 433A of the Cr.P.C.

(c) ***(2013) 2 SCC 479, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra :*** The Supreme Court commuted the death sentence imposed on the appellant upon conviction for rape and murder because of possibility of the accused being reformed, he being young (aged 27 years) and having no criminal involvement in similar crimes, even though the appellant had been convicted of a heinous and brutal crime.

(d) ***(2013) 10 SCC 631 : (2013) 10 SCALE 671, Gurvail Singh @ Gala v. State of Punjab*** : Despite the presence of aggravating factors as the murder being brutal in nature, multiple victims (four including two children), the Supreme Court held that the appellant's age being only 34 years and the fact that he did not have a criminal record were mitigating factors. Consequently, the court decided not to uphold the death sentence awarded by the trial court confirmed by the High Court. It was ruled that the appellant **should not be released until he serves a 30 year prison term**.

(e) ***(2013) 14 SCC 214, Maheboobkhan Azamkhan Pathan v. State of Maharashtra*** : The appellant with others had entered the house of the deceased (a 20 year old girl) with the motive of committing theft and robbery which led the appellant outraging the modesty of the deceased. Upon her resistance to his removing her gold earrings, he brutally successively stabbed her causing her death. The trial court convicted him for offences under Sections 302, 460, 397 and 354 IPC and awarded the death sentence which findings and sentence were confirmed by the High Court. The court observed that the circumstances indicated that the appellant had entered the house with the motive to commit robbery and therefore, it was not possible to conclude that the death penalty was the only punishment which would serve the ends of justice. The court held that there was possibility of the convict being rehabilitated and reformed and commuted the death sentence to life imprisonment which was directed to continue for a life term but subject to orders of remission granted by the State government by passing appropriate speaking orders.

(f) ***(2012) 4 SCC 257, Ramnaresh v. State of Chhattisgarh :*** In this case, the appellant (with his friends) had committed gang rape of his sister-in-law and murdered her. The court held that this was not a "rarest of rare" case since there was possibility of the convicts

being reformed; since they were young (being between 21 to 30 years old); did not have a prior criminal record; and that they could not be considered a menace to society. They were therefore, sentenced to imprisonment for life.

(g) ***(2012) Crl.LJ 615 (SC), Purna Chandra Kusal v. State of Orissa :*** The appellant, a 30 year old man, raped and murdered a five year old girl, who was his neighbour. The court recognized that the crime was heinous yet decided against imposing the death penalty. One of the cited reasons was the young age of the convict.

(h) ***(2011) 2 SCC 764, Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*** : In this case, the appellant aged about 27 years was the watchman of the building where the deceased, a Class IV student was residing. The appellant was found guilty of commission of offences under Sections 363, 366, 376, 302 and 397 IPC and sentenced to death by the trial court which was affirmed by the High Court. A two judge bench of the Supreme Court upheld the conviction but differed on the sentence to be awarded by the judgments dated 25th February, 2009. The matter was heard by a bench of three judges wherein the court held that as the appellant was a young man of 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 the society*** in case he was given a chance to do so. ***Such finding had not been returned.*** The court also considered the ***uncertainty due to nature of the circumstantial evidence.*** It was also held that "*the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored*". Relying on two prior pronouncements, the court substituted the death penalty with life penalty directing that "***the life sentence must extend to the full life of the appellant but subject to any remission or***

commutation at the instance of the government for good and sufficient reasons".

(i) ***(2011) 3 SCC 685, Ramesh v. State of Rajasthan :*** The appellant committed a double murder for gain of a married couple who were moneylenders while committing robbery. Though the murder was brutal in nature, the court held the young age of the appellant as the mitigating factor and that there was nothing to indicate that he could not be reformed. The appellant was sentenced to life imprisonment.

(j) ***(2010) 1 SCC 775, Dilip Premnarayan Tiwari v. State of Maharashtra :*** In this case, the motive for murder was the ***inter-caste marriage of the sister of one of the appellants*** despite resentment and disapproval by the girl's family. Three men including the girl's brother attacked the girl's husband and his family, killing four people including the husband. The Supreme Court considered the young age of the brother as a mitigating circumstance observing that the brother must have been upset because of his sister's decision to marry outside her caste. ***It sentenced the appellants to imprisonment for 25 years***.

(k) ***(2009) 6 SCC 498, Santoshkumar Bariyar v. State of Maharashtra :*** In this case, the deceased was a friend of the appellants who was kidnapped for ransom and murdered by them after planning. Despite these factors, the court held that the death penalty was not an appropriate sentence. The young age of the appellants, the fact that they had no prior criminal history, and that they were unemployed were considered mitigating factors.

(B) *POSSIBILITY OF REFORM*

The consideration that young age may be considered as a mitigating factor rests on the theory of rehabilitation of the criminal and that if he/she is

younger, the possibility of reforming is higher. It has been repeatedly held that the possibility of reformation is a mitigating factor. In ***Bachan Singh***, it was laid down that death penalty should only be imposed if the court reaches a conclusion that a person is beyond reform. This was a primary reason which weighed with the court in not imposing the death penalty on offenders despite brutality in commission of the crimes in the following cases:

(a) ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura :*** The court observed that the appellant was a tribal, stated to be a member of an extremist group raging war against the minority settlers, apprehending perhaps they might snatch away their livelihood and encroach upon their property, possibly such frustration and neglect might have led them to take arms, thinking they are being marginalized and ignored by the society. Viewed from this perspective, it was held that this was not a "rarest of rare" case for awarding the death sentence. The death sentence was altered to that of imprisonment of life for a fixed term of imprisonment for 20 years without remission, over and above the period of imprisonment already undergone.

(b) ***(2014) 4 SCC 292, Mahesh Dhanaji Shinde v. State of Maharashtra.***

(c) ***(2013) 2 SCC 479, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra.***

These two cases (***Mahesh Dhanaji Shinde*** and ***Sandesh @ Sainath Kailash Abhang***) have been discussed in detail already above.

(d) ***(2012) 8 SCC 537, State of U.P. v. Sanjay Kumar:***

(e) ***(2011) 13 SCC 706, Rajesh Kumar v. State (N.C.T. of Delhi) :*** The appellant was convicted for murder of two children aged 4½ years and 8 months, who were related to him, who offered no provocation or resistance to the appellant's brutal act in a brutal and

barbaric manner. Motivation for the crime was the refusal by their father to lend more money to the appellant. The court held that the brutal and inhuman manner of committing the murder alone could not justify the death sentence and that the court's consideration should not be confined to principally or mere circumstances connected with a particular crime but should also considered the circumstances of the criminal. In the absence of any evidence to show that the appellant was a continuing threat to society and was beyond reform and rehabilitation, the death sentence imposed by the Sessions Judge, affirmed by the High Court, could not be sustained.

(f) ***MANU/SC/1173/2011, Surendra Mahto v. State of Bihar :*** The Supreme Court ***sentenced the appellant to imprisonment for his entire life*** subject to remission. The primary mitigating factor considered was that he was only 30 years old and hence could be reformed.

(g) ***(2011) 2 SCC 764, Rameshbhai Chandubhai Rathod v. State of Gujarat :*** Discussed earlier

(h) ***(2010) 9 SCC 747, Santosh Kumar Singh v. State (through CBI) :*** The appellant was around 25 years of age when the offence took place; after acquittal by the trial court had got married and had a child. Though murder was committed in a gruesome manner, there was no evidence to indicate that the appellant could not be reformed. Hence sentenced to imprisonment for life.

(i) ***AIR 2010 SC 832, Sushil Kumar v. State of Punjab :*** The appellant had been convicted for murdering his wife, six year old son and four year old daughter by stabbing them. The court identified several mitigating factors including the unemployment of the appellant; indebted and socio economic status, his own attempt to commit suicide after murder and the motive to eliminate the family to rid them of misery. Noting that he did not have prior history of crime; and was 35 years of age, the

court believed that he could be reformed and sentenced to imprisonment for life.

(j) ***(2010) 3 SCC 508, Mulla v. State of Uttar Pradesh :*** The old age of one of the appellants (65 years at the time of sentencing) as well as the socio-economic status of the man and ruled that there was no reason why they would not reform. They were sentenced to imprisonment for their entire life subject to remissions.

(C) CASE OF CIRCUMSTANTIAL EVIDENCE

(a) ***(1994) 4 SCC 381, Anshad & Ors. v. State of Karnataka :*** Case of circumstantial evidence including recovery of belongings of the deceased from possession of the accused persons on disclosure statements made by them. Amongst other mitigating circumstances, the Supreme Court noted that there was ***nothing on record to show as to which out of the three appellants strangulated which of the two deceased***. The court proceeded with the exercise of balancing the aggravating and mitigating circumstances and imposed a sentence of imprisonment on the appellants.

(b) ***(2007) 11 SCC 467, Bishnu Prasad Sinha v. State of Assam:*** The appellants were charged and convicted for rape and murder of a 7 - 8 year old girl. The court held that it must be borne in mind that the appellants had been convicted only on the basis of circumstantial evidence and that there were authorities for the proposition that ***if the evidence is proved by circumstantial evidence, ordinarily death penalty would not be awarded***. The court also noted the circumstance that the appellant no.1 had shown his remorse and repentance even in his statement under Section 313 of the Cr.P.C. and that he had accepted his guilt before the Judicial Magistrate. The appellants were sentenced to undergo imprisonment for life.

(c) ***(2014) 5 SCC 509, Dharam Deo Yadav v. State of Uttar Pradesh :*** The appellant, a tourist guide, was convicted of murder by strangulation of a young tourist of a foreign country. In para 36 of the pronouncement, reliance was placed on the precedent in ***Shankar Kisanrao Khade.*** It was pressed on behalf of the convict that though both the crime and criminal test were against the accused, however, he had no previous criminal record and that apart from the circumstantial evidence, there was no eye-witness and consequently the manner in which the crime was committed was not in evidence. The court accepted the submission that therefore, it would not be possible for the court to come to the conclusion that the crime was committed in a barbaric manner. It was therefore, held that it would not fall under the category of "rarest of rare". ***The death sentence of the appellant was commuted to life and the court awarded 20 years of rigorous imprisonment over and above the period already undergone by the accused without any remission to meet the ends of justice***.

(D) <u>OTHER MITIGATING FACTORS</u>

(a) ***(2013) 3 SCC 294, Mohinder Singh v. State of Punjab :*** When the appellant was out on payroll in a prior conviction for raping his daughter, he murdered his wife and the daughter. The court ruled that revenge being the motive for the murder, rendered it insufficient to bring it within the "rarest of rare" case. It was further held that the appellant was not a dangerous man and sparing his life would not cause danger to the community. The fact that the appellant had spared the life of one of his other daughters who was at home at the time of the incident, was considered a mitigating factor.

(b) ***AIR 2012 SC 968, Absar Alam v. State of Bihar :*** The Supreme Court noted that the appellant was an illiterate, rustic man who cut off his mother's head as he

believed that she was responsible for his wife's desertion. The mental condition of the appellant was held to be a relevant factor for not imposing a death sentence.

(c) ***(2012) 4 SCC 289, Brajender Singh v. State of Madhya Pradesh :*** The appellant had murdered his wife and three children by cutting their throats and setting them on fire using petrol for the reason that his wife had an extra-marital relationship with a neighbour. The Supreme Court did not sentence him to death holding that the appellant appeared repentant and was suffering because he had lost his entire family; and had committed the crime at the spur of the moment. It was further held that merely because the crime is committed in a heinous matter, is not reason enough to sentence a person to death. Other factors and circumstances need to be considered.

(d) ***(2011) 10 SCC 389, Sham v. State of Maharashtra :*** The appellant was convicted of a triple murder of his brother, brother's wife and son because of a property dispute. Upon conviction, the trial court sentenced him to imprisonment for life. The High Court dismissed the appellant's appeal; allowed the State appeal and enhanced the sentence of life imprisonment to death. The Supreme Court noted that the appellant was 38 years of age; no weapon much less dangerous was used in the commission of the offence; he was 38 years of age; his antecedents were unblemished; it could not be said that the appellant would be a menace to society or that he could not be reformed or rehabilitated or would constitute a continued threat to society. It was further noted that the appellant was unemployed and that he had spent 10 years in prison, out of which five were in the death cell. The court also noted that while enhancing the sentence, the High Court had not assigned adequate and acceptable reasons while the trial court had opportunity of noting the demeanour of witnesses as well as the accused. The court

therefore, restored the sentence imposed by the trial court.

(e) ***(1999) 6 SCC 60, Akhtar v. State of U.P. :*** The appellant was found guilty of murder of a young girl after raping and sentenced to death by the Sessions Judge which was confirmed by the High Court. The two Judge Bench of the Supreme Court (***Laxman Naik*** and ***Kamta Tiwari)*** was of the view that the appellant did ***not intentionally*** commit the murder of the girl and that there was no ***premeditation***. On the other hand, he found her alone in a lonely place and picked her up for committing rape. While committing rape, by way of gagging, she had died on account of asphyxia. It was held that this was not one of the "rarest of rare" cases inviting death penalty.

(E) AGGRAVATING FACTORS NEGATIVED

Several precedents have been placed before us wherein though aggravating factors were present, the court did not sentence the offender to death. Instead the court opted to impose imprisonment for life. We enumerate some of these cases hereafter:

(a) ***(2013) 2 SCC 452 : (2012) 11 SCALE 140, Sangeet & Anr. v. State of Haryana :*** Despite the murder of four people (including two women and a four year old child), the court did not impose the death penalty on the ground that there was uncertainty created by the court's own jurisprudence as to whether the death penalty should be imposed or whether a person convicted for murder should be sentenced to imprisonment for life.

(b) ***(2009) 14 SCC 31, State of Punjab v. Manjit Singh :*** Although the Supreme Court held that the ***murder of four people*** while they were sleeping by the appellant had been committed in a cruel and barbaric manner, other circumstances could not be lost sight of and the appellant was sentenced to imprisonment for life.

(c) ***(2009)15 SCC 51, Haru Ghosh v. State of West Bengal :*** The offence of ***murder of two people*** (a woman aged and her 12 year old son) as well as an attempt to murder of a sixty year old man was committed by the appellant when he was in fact serving out a sentence in another case and had been released on bail. It was held by the Supreme Court that this was not a "rarest of rare" case and that although the murder had been committed in a brutal manner, that was not sufficient to impose the death penalty. The court noted that the appellant had not come prepared with a weapon to commit the murder and that the reason for the offence was bitterness towards the woman and her husband. ***The appellant was sentenced to imprisonment for 30 years***.

(d) ***(2008) 16 SCC 372, Aqeel Ahmad v. State of Uttar Pradesh:*** It was held by the Supreme Court that the ***number of victims is not the determinative factor*** in imposing the death penalty. Though two persons had been shot to death, it was held that this was not a "rarest of rare" case and the appellant was sentenced to imprisonment for life.

(e) ***(2012) 6 SCC 107, Sandeep v. State of Uttar Pradesh :*** The Supreme Court held that the "rarest of rare" case formulation applies when the accused is a menace to society, and would threaten its peaceful and harmonious coexistence. It rules that a crime may be heinous or brutal, but that in itself is not sufficient to make the case a "rarest of rare" one. Although the court imposed a life sentence, it held that the death sentence may be justified in cases where murder is committed in a grotesque, diabolical and revolting manner.

(f) ***(2011) 7 SCC 437, State of Maharashtra v. Goraksha Ambajai Adsul :*** The Supreme Court opined that lust for property had driven the respondent to committing the offence. It was held that although crime was committed in a brutal manner, other circumstances need to be considered as well and that constant nagging

by the deceased persons (his father, step mother and step sister) was a mitigating factor.

(g) ***AIR 1998 SC 2726, Panchhi v. State of U.P.* :** It was held that brutality of the manner in which a murder was perpetrated may be a ground but not the sole criteria for judging whether the case is one of the "rarest of rare" cases as indicated in ***Bachan Singh's*** case that in a way every murder is brutal and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder. In this case, four persons including a child were murdered due to rivalry between families.

(h) We now note two cases of ***rape and murder*** that came up before the Supreme Court where the court sentenced the offender to imprisonment for life. In ***(2012) 5 SCC 766, Neel Kumar v. State of Haryana,*** the appellant was convicted for the rape and murder of his ***four year old daughter***. Holding that this was not a "rarest of rare" case, the Supreme Court sentenced the appellant to ***imprisonment for a period of 30 years, instructing the State not to provide the option of remission till that time.***

(i) The second case is reported at ***(2010) 1 SCC 58, Sebastian @ Chevithiyan v. State of Kerala*** wherein the appellant had raped and murdered a two year old child after kidnapping her from her house. The appellant was 24 years old at that time. It was again held that this was not a "rarest of rare" case and the appellant was sentenced to ***imprisonment for the rest of his life***.

(j) ***(2002) 1 SCC 622, State of Maharashtra v. Bharat Fakira Dhiwar :*** A three year old girl was raped and murdered by the accused who was convicted and awarded the death sentence. The High Court set aside the conviction. On scrutiny, the Supreme Court illustrated the conviction observing that "*we would have concurred with the Sessions Court's view that the extreme penalty of*

death can be chosen for such a crime". It was further held that in spite of the fact that the case was "*perilously near the region of rarest of the rare cases*", the Supreme Court was refraining from imposing the extreme penalty once the accused was stood acquitted by the High Court. Placing reliance on ***Bachan Singh,*** it was observed that the lesser option was not unquestionably foreclosed and so the sentence was "*altere*d" in regard to the offence under Section 302 to imprisonment for life.

(k) ***(1998) 2 SCC 372, State of Tamil Nadu v. Suresh and Anr.*:** The accused was guilty of rape and murder of a helpless young pregnant housewife who was sleeping in her own apartment with her little baby by her side during the absence of her husband. The High Court upset the conviction and death sentence awarded by the trial court. The Supreme Court was of the view that the High Court had erred, restored the conviction but "***at this distance of time***" was not inclined to restore the sentence of death.

(F) PRIOR CRIMINAL HISTORY

In ***(2014) 3 SCC 421 : 2014 (2) SCALE 293, Birju v. State of M.P.***, the court held that the accused had only been ***charge-sheeted in earlier cases*** but ***not convicted***. Hence, that factor is not a relevant factor to be taken note of while applying the R-R test so as to award capital punishment. Maybe, in a given case, the pendency of large number of criminal cases against the accused person might be ***a factor which could be taken note of in awarding a sentence*** but, in any case, ***not a relevant factor for awarding capital punishment***. It was further observed that there were more than two dozen cases, of which three relate to the offence of murder, the usual plea of false implication by the defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused could be a

continuing threat to the society and hence calls for longer period of incarceration.

75. The various decisions bring out one or the other circumstances, listing out the same to be an aggravating or mitigating. The task thus for a judge to balance mitigating and aggravating circumstances and thereafter to award an appropriate sentence, is rendered difficult. We find an illuminating exercise undertaken by the Division Bench of this court in the judgment reported at ***(2009) 164 DLT 713, State v. Raj Kumar Khandelwal*** authored by our learned brother Pradeep Nandrajog, J. An effort has been made to enumerate the circumstances under six different illustrative heads for guidance. The enumeration by the Bench is best extracted in extenso and reads as follows:

"80. The circumstances can be listed under six different heals:

(i) Circumstances personal to the offender.

(ii) Pre-offence conduct of the offender and in particular the motive.

(iii) Contemporaneous conduct of the offender while committing the offence.

(iv) Post offence conduct of the offender.

(v) Role of the victim in commission of the crime.

(vi) Nature of evidence.

81. Put in a tabular form, a bird's eye view of various judicial decisions, reveal as under:

1. CIRCUMSTANCES PERSONAL TO THE OFFENDER—

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
1.	Lack of prior criminal record. *Re Butters.* [2006] EWHC 1555 (QB), [2006] All ER (D) 128 (Jul) *Williams* v. *Ozmint*, 494 F.3d 478, 2007 U.S. App. LEXIS 17934	Previous convictions. *Re Miller*, [2008] EWHC 719 (QB), [2008] All ER (D) 357 (Apr)
2.	Character of the offender as perceived in the society by men of social standing. *Reyes* v. *The Queen*, [2002] UKPC 11, [2002] 2 AC	Future danger/threat of accused, menace to the society considering aspects like criminal tendencies, drug abuse, lifestyle,

	235; *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24;	etc. *Renuka Bai @ Rinku @ Ratan* v. *State of Maharashtra*;, (2006) 7 SCC 442 : AIR 2006 SC 3056; *Re Miller*, [2008] EWHC 719 (QB), [2008] All ER (D) 357 (Apr)
3.	The age of the offender *i.e.* too young or old. *Ediga Anamma* v.*State of Andhra Pradesh*, (1974) 4 SCC 443 : AIR 1974 SC 799;*Roper* v. *Simmons*, 543 U.S. 551 (2005)	Abuse of a position of trust; offender in a dominating position to the victim. *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470
4.	Mental condition of accused: Anxiety, depressive state, emotional disturbance which lower the degree of culpability. *Ediga Anamma* v. *State of Andhra Pradesh*, (1974) 4 SCC 443 : AIR 1974 SC 799; *R.* v. *Chambers*, 5 Cr App R (S) 190, [1983] Crim LR 688; *Atkins* v. *Virginia*, 536 U.S. 304 (2002)	Anti-social or socially abhorrent nature of the crime; When offence is committed in circumstances which arouse social wrath. Offence is of such a nature so as to shake the confidence of people. *Bheru Singh S/o Kalyan Singh* v. *State of Rajasthan;*, (1994) 2 SCC 467, [1994] 1 SCR 559; *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470
5.	Probability of the offender's rehabilitation, reformation and readaptation in society. Re *Miller*, [2008] E XWHC 719 (QB), [2008] All ER (D) 357 (Apr)	

2. PRE-OFFENCE CONDUCT OF THE OFFENDER IN PARTICULAR THE MOTIVE OF THE OFFENCE

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
1.	A belief by the offender that the murder was an act of mercy. *Janki Dass* v. *State (Delhi Administration)*, 1994 Supp (3) SCC 143	When the murder is committed for a motive which evince total depravity and meanness for instance. Motive of the crime being financial gain. *Machhi singh* v.*State of Punjab*, (1983) 3 SCC 470;*Williams* v. *Ozmint*, 494 F.3d 478,; 2007 U.S. App. LEXIS 17934
2.	That the accused believed	Significant degree of planning or

	that he was morally justified in committing the offence. *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24	premeditation. *Holiram Bordoloi* v.*State of Assam*, (2005) 3 SCC 793 : AIR 2005 SC 2059. *In Re Rock*, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb)
3.	Offence at the spur of the moment/lack of premeditation.	A. *Devendran* v. *State of Tamil Nadu*, (1997) 11 SCC 720 : AIR 1998 SC 2821 Re Rahman, [2008] EWHC 36 (QB), [2008] All ER (D) 50 (Jan)
4.	The offender was provoked (for example by prolonged stress) in a way not amounting to a defence of provocation.	Re *Rahman*, [2008] EWHC 36 (QB), [2008] All ER (D) 50 (Jan)
5.	That the accused acted under the duress of domination of another person.	

3. CONTEMPORANEOUS CONDUCT OF THE OFFENDER WHILE COMMITTING THE OFFENCE

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
1.	Intention to cause serious bodily harm rather than to kill.	Magnitude of the crime-number of victims. *Machhi singh* v. *State of Punjab*, (1983) 3 SCC 470;*Williams* v. *Ozmint*, 494 F.3d 478,; 2007 U.S. App. LEXIS 17934
2.	The fact that the offender acted to any extent in self-defence. Brutal Manner of killing in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.	*Holiram Bordoloi* v. *State of Assam*, (2005) 3 SCC 793 : AIR 2005 SC 2059; *Bheru Singh S/o Kalyan Singh* v. *State of Rajasthan*, (1994) 2 SCC 467; *State of Maharashtra* v. *Haresh Mohandas Rajput*, (2008) 110 BOMLR 373;*Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470; Re Miller, [2008] EWHC 719 (QB), [2008] All ER (D) 357 (Apr)
3.	Mental or physical suffering inflicted on the victim before death.	*In Re Rock*, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb)
4.	The use of duress or threats against another person to	

facilitate the commission of the offence.

4. POST OFFENCE CONDUCT OF THE OFFENDER

	CONDUCT OF OFFENDER	CONDUCT OF OFFENDER
1.	Guilty Plea/Voluntary surrender.	Concealment, destruction or dismemberment of the body. In Re Rock, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb); *State of Maharashtra* v. *Haresh Mohandas Rajput*, (2008) 110 BOMLR 373;
2.	Genuinely remorseful. In *Re Butters*, [2006] EWHC 1555 (QB), [2006] All ER (D) 128 (Jul)	Lack of any actual remorse. *Holiram Bordoloi* v. *State of Assam*, (2005) 3 SCC 793 : AIR 2005 SC 2059 In *Re Rock*, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb)

5. ROLE OF THE VICTIM IN COMMISSION OF THE CRIME

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
1.	That the victim provoked or contributed to the crime. *Kumudi Lal* v. *State of U.P.*, (1999) 4 SCC 108 : AIR 1999 SC 1699;	*Bheru Singh* v. *State of Rajasthan*, (1994) 2 SCC 467 : (1994) 1 SCR 559, *State of Maharashtra* v.*Haresh Mohandas Rajput;*, (2008) 110 BOMLR 373; *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470
	That the victim was particularly vulnerable because of age or disability (victim is an innocent child, helpless woman or old or infirm person).	
2.	Victim was a peace officer/The fact that the victim was providing a public service or performing a public duty.	*Roberts* v. *Louisiana*, (1977) 431 US 633.
3.	The attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperilling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is a terrorist act of gravest severity.	*Navjot Sandhu @ Afsan Guru* v.*State*, (2003) 6 SCC 641

6. NATURE OF THE EVIDENCE

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
	In cases of circumstantial evidence the guilt, not being established beyond reasonable doubts, a lenient view should be taken; Conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder."	

"76. In ***Swamy Shraddananda (2)***, the Supreme Court had pointed out that there was a small band of cases where the convicted person is sentenced to death by the Supreme Court, However, there was a wide range of cases where the offender was sentenced to imprisonment for life where the facts were similar or more revolting, relative to the cases where the death sentence was imposed.

77. The Supreme Court has therefore, noted and highlighted the inconsistency and arbitrariness in the death penalty jurisprudence. It was observed that different criteria had been utilized by different Benches of the court in determining whether the case before them fell within the "rarest of rare" category and that a consistent and clear sentencing policy had not been evolved by it. Thus the inconsistency in sentencing received a recognition in the judicial pronouncements.

78. The precedents of the Supreme Court indicate the change in the trend for evaluation of circumstances pointed out in ***Bachan Singh***. While the Supreme Court has observed the lack of evenness in the sentencing policy and its application in ***Swamy Shraddananda (2)***, in ***Bariyar,*** the court expressed "unease and sense of

disquiet" with regard to the varied and inconsistent application of the rarest of rare case threshold.

79. In the judgment reported at ***(2012) 8 SCC 537, State of U.P. v. Sanjay Kumar***, so far as balancing the aggravating and mitigating factors and circumstances are concerned, the Supreme Court has applied the "*doctrine of proportionality*" directing as follows:

> "23. The survival of an orderly society ***demands the extinction of the life of a person who is proved to be a menace to social order and security.*** Thus, the courts for the purpose of deciding just and appropriate sentence to be awarded for an offence, have to ***delicately balance the aggravating and mitigating factors and circumstances in*** which a crime has been committed, in a dispassionate manner. In the absence of any ***foolproof formula*** which may provide a basis for reasonable criteria to correctly assess various circumstances germane for the consideration of the gravity of the crime, discretionary judgment, in relation to the facts of each case, is the only way in which such judgment may be equitably distinguished. The Court has primarily dissected the principles into two different compartments—one being the "***aggravating circumstances***" and, the other being the "***mitigating circumstance***". ***To balance the two is the primary duty of the court.*** The principle of proportionality between the crime and the punishment is the principle of "*just deserts*" that serves as the foundation of every criminal sentence that is justifiable. In other words, ***the "doctrine of proportionality" has valuable application to the sentencing policy under the Indian criminal jurisprudence.*** While determining the quantum of punishment the court always records sufficient reasons. (Vide *Sevaka Perumal* v. *State of T.N.* [(1991) 3 SCC 471 : 1991 SCC (Cri) 724 :

AIR 1991 SC 1463] , *Ravji* v. *State of Rajasthan* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225 : AIR 1996 SC 787], *State of M.P.* v. *Ghanshyam Singh* [(2003) 8 SCC 13 : 2003 SCC (Cri) 1935] , *Dhananjoy Chatterjee* v. *State of W.B.* [(2004) 9 SCC 751 : 2004 SCC (Cri) 1484 : AIR 2004 SC 3454], *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* [(2012) 4 SCC 37 : (2012) 2 SCC (Cri) 30] and *Brajendrasingh* v. *State of M.P.* [(2012) 4 SCC 289 : (2012) 2 SCC (Cri) 409 : AIR 2012 SC 1552])"

(Emphasis by us)

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(xvii) *Variations in judicial response to similar fact situations*

824. So far as imposition of a death sentence is concerned, it is argued before us that one guard who rapes and murders a young girl residing in the building over which he stands as a guard got a death sentence (***Dhananjoy Chatterjee***) whereas a similarly aged guard who commits a similar, if not identical crime, gets life imprisonment (***Rameshbhai Chandubhai Rathod***). The submission is that use of a particular weapon for commission of the crime of murder makes it more heinous in one case while the same may be treated as less heinous in another. It leads to variation in the sentence imposed from the capital punishment in one case to the life imprisonment in another. Learned counsels submit that the education or the economic status of one defendant has been considered a mitigating circumstance while considering imposition of a punishment. It is urged that on the other hand, higher education, better economic status should in fact be an aggravating circumstance as such persons would be expected to know both the correct conduct as well as the consequences of their actions; why should the act of cutting up a dead body after murdering a

in one case lead to imposition of a death sentence whereas for a similar offence, in another case, it may not be deemed relevant. It is submitted that this dichotomy ought to weigh in favour of the defendants.

825. We may usefully refer to ***Sangeet, Rameshbhai Chandubhai Rathod (2), Swamy Shraddananda (2) and Ashok Debbarma @ Achak Debbarma*** wherein the court has expressed distress and discomfort with imposition of death sentences for other reasons.

826. In ***Swamy Shraddananda (2),*** the court reviewed the application of the sentencing court relating to the death sentence through aggravating and mitigating circumstances and concluded that there was lack of evenness in the sentencing process. In para 48 of the judgment, the court held thus:

> "**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.***"
>
> (Emphasis by us)

827. The Supreme Court's discomfort that the working of the balance sheet approach had not worked sufficiently well was reiterated in ***(2009) 6 SCC 498, Santosh Kumar***

Satish Bhushan Bariyar v. State of Maharashtra in the following terms:

> **"109.** xxx xxx xxx ***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***.
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> **129.** xxx xxx xxx
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> > *49*. In ***Aloke Nath Dutta* v. *State of W.B.*** [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] Sinha, J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict (see SCC pp. 279-87, paras 151-78: Scale pp. 504-10, paras 154-82). He finally observed (SCC para 158) that '***courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar***' and further '***it is evident that different Benches had taken different view in the matter***' (SCC para 168). Katju, J. in his order passed in this appeal said that he did not agree with the decision in *Aloke Nath Dutta* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju, J. may be right that there cannot be an absolute rule excluding death

sentence in all cases of circumstantial evidence (though in*Aloke Nath Dutta* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] it is said 'normally' and not as an absolute rule). But there is no denying the illustrations cited by Sinha, J. which are a matter of fact.

50. The same point is made in far greater detail in a report called, 'Lethal Lottery, The Death Penalty in India' compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of the Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see Chapters 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

51. The truth of the matter is that the ***question of death penalty is not free from the subjective element*** and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench.

52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a ***small band of cases in which the murder convict is sent to the gallows*** on confirmation of his death penalty by this Court and on the other hand there is a ***much wider area of cases in which the offender committing murder of a***

similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied.

53. ***These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant.***"

130. Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage. ***We share the Court's unease and sense of disquiet in Swamy Shraddananda (2) case [(2008) 13 SCC 767 : (2008) 10 Scale 669] and agree that a capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21***. Therefore, an equal protection analysis of this problem is appropriate. In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect sentencing system. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary. We have to be, thus, mindful that the true import of *rarest of rare* doctrine speaks of an extraordinary and exceptional case."

(Emphasis by us)

828. The above discomfort was noted by the two Judge Bench in ***(2013) 2 SCC 452, Sangeet & Anr. v. State of Haryana*** in the following terms:

> **"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.
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> **51.** It appears to us that the standardisation and categorisation of crimes in*Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] has not received further importance from this Court, although it is referred to from time to time. This only demonstrates that though Phase II in the development of a sound sentencing policy is still alive, it is a little unsteady in its application, despite *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580]."

829. Given the uncertainty from the judgecentric sentencing, the Supreme Court in ***Sangeet*** also ruled that the imposition of life imprisonment instead of death penalty in such cases was not "*unquestionably foreclosed*".

830. In ***(2011) 2 SCC 764, Rameshbhai Chandubhai Rathod (2) v. State of Gujarat,*** the case involved rape and murder of a class IV girl child by the appellant who was a watchman in the residential complex where she was residing. On account of disagreement between the judgment of a two Judge Bench on the question of sentence, the matter was placed before three Judge Bench. On consideration of the reference, in para 8, the Bench observed as follows:

> "**8.** As already mentioned above, ***both the Hon'ble Judges have relied on a number of cases which are on almost identical facts in support of their respective points of view. We notice that there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out***. It is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases."
>
> (Emphasis by us)

831. It was noted that the learned judge who had differed and awarded life sentence was persuaded to do so inter alia on account of there being some uncertainty that the nature of circumstantial evidence; mitigating circumstances particularly the young age of the appellant; the possibility that he could be rehabilitated and would not commit any offence later on could not be ruled out

and the finding that the statutory obligation cast on the court under Section 235(2) read with 354(3) Cr.P.C. had been violated. Inasmuch as the accused had not been given adequate opportunity to plead on the question of sentence. The larger Bench had agreed with these observations and had consequently commuted the death sentence awarded to the appellant to life but directed that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the government for good and sufficient reasons.

832. While altering the death sentence to imprisonment for life and fixing the term of imprisonment as 20 years without remission over and above the period of sentence already undergone, in the case reported at ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura,*** Radha Krishnan, J. had noted the profound right of the accused not to be convicted of an offence which is not established by the evidential standard of proof "*beyond reasonable doubt*". In para 29, the court discussed '*residual doubt*' as a mitigating circumstance which was sometimes used and urged in the United States of America dealing with the death sentence. Refering to the fact situation of the case, the observations of the court in para 31 deserve to be extracted in extenso and read as thus:

> **"31.** In *Commonwealth* v. *Webster* [(1850) 5 Cush 295 : 52 Am Dec 711 (Mass Sup Ct)] at p. 320, Massachusetts Court, as early as in 1850, has explained the expression "reasonable doubt" as follows:
>
> > "Reasonable doubt … is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in

that condition that they cannot say they feel an abiding conviction."

In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the courts are convinced of the accused persons' guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as firearms, *dao*, *lathi*, etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only eleven persons were charge-sheeted and, out of which, charges were framed only against five accused persons. Even out of those five persons, three were acquitted, leaving the appellant and another, who is absconding. The court, in such circumstances, could have entertained a "residual doubt" as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of the rare category."

833. The court also considered the counsel's ineffectiveness which may have prejudiced the defence as a mitigating factor in para 36 of the judgment which reads as follows:

"36. Right to get proper and competent assistance is the facet of fair trial. This Court in *M.H. Hoskot* v. *State of Maharashtra* [(1978) 3 SCC 544 : 1978 SCC (Cri) 468], *State of Haryana* v. *Darshana Devi* [(1979) 2 SCC

236], *Hussainara Khatoon (4)* v. *State of Bihar* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] and *Ranjan Dwivedi* v.*Union of India* [(1983) 3 SCC 307 : 1983 SCC (Cri) 581], pointed out that if the accused is unable to engage a counsel, owing to poverty or similar circumstances, trial would be vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose engagement, the accused does not object. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in *Hussainara Khatoon (4) case* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] , this Court has held that: (SCC p. 105, para 7)

> "*7.* … This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation…."

834. In para 37, the court noted a submission on behalf of the appellant that ineffective legal assistance caused prejudiced to him and hence the same be treated as a mitigating circumstance while awarding sentence. The Supreme Court noted in para 38 that the "*right to get proper legal assistance plays a crucial role in adversarial system, since excess to counsel's skill and knowledge is necessary to accord the accused an ample opportunity to meet the case of the prosecution*".

835. So far as to whether such ineffectiveness of counsel has to be treated as a mitigating circumstance, in para 39, the court held as follows:

> "**39.** The court, ***in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the***

evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is ***whether there is a reasonable probability that, absent the errors, the court independently reweighing the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence***.

(Emphasis supplied)

Thus the Supreme Court has considered residual doubt nurtured by the court and counsel's ineffectiveness as relevant circumstances for not awarding the death sentence.

836. Yet another factor which is unique to the imposition of the death penalty is that, once executed, a death sentence is irreversible in nature. Once the life of the convict is extinguished, he cannot be brought back. The discussion in the preceding paras of this judgment would show that even judicially trained minds can apply the same circumstance as aggravating or mitigating differently to conclude that the circumstances do not warrant a death penalty whereas another may feel it to be a fit case justifying the death penalty.

837. The Supreme Court was called upon to consider the question as to whether the hearing of review petitions by the Supreme Court in death sentence cases should not be by circulation but should be in open court only. The anxiety of the Constitution Bench of the Supreme Court to ensure that no injustice results, was emphasised in the judgment dated 2nd September, 2014 in ***W.P.(Crl.)No.77/2014, Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Ors.,*** when it was held that "*even a remote chance of deviating from such a decision while exercising the review jurisdiction, would justify oral hearing in a review petition".* The Supreme Court emphasised the fact that "*when on the same set of facts, one judicial mind can come to the conclusion that*

the circumstances do not warrant a death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of "reasonable procedure"." It is keeping in view the above two realities which impact the fundamental right to life under Article 21 of the Constitution of India of a person, it has been held in ***Mohd. Arif*** that to be just fair and reasonable, any procedure impacting the right, has to take into account these two factors.

838. For this reason, keeping in view the rights of the convict under Article 21; irreversibility of the death sentence and the possibility of any Judge on the Bench taking a different view, persuaded the Constitution Bench of the Supreme Court to grant an open court hearing in a death sentence review petition in ***Mohd. Arif***.

839. An intercaste marriage of a person of general caste perceived to be belonging to a scheduled caste as a husband resulted in the murder of five members of the bride by the appellants who belonged to his caste in the judgment reported at ***(1987) 3 SCC 80, Mahesh v. State of M.P.*** The High Court confirmed the sentence of death imposed on the two appellants observing that the act of the appellant "*was extremely brutal, revolting and gruesome which shocks the judicial conscience*". It was further observed that "*in such shocking nature of crime as the one before us which is so cruel, barbaric and revolting, it is necessary to impose such maximum punishment under the law as a measure of social necessity which work as a deterrent to other potential offenders*".

The Supreme Court shared the concern of the High Court and observed that it would be a mockery of justice to permit the appellants to escape the extreme penalty of law when faced with such offence and such cruel acts. The death sentence was accordingly confirmed.

> 840. Another precedent in which the motive of murder was the intercaste marriage of the sister of one of the appellant despite resentment and disapproval by the girl's family, has been brought to our notice. The judgment of the Supreme Court is reported at ***(2010) 1 SCC 775, Dilip Premnarayan Tiwari v. State of Maharashtra*****.** The appellant stood convicted of the offence of murder and sentenced to 25 years of imprisonment.
> 841. This very factor that on the same, that on very similar facts, variable sentences are possible also dissuades us from invoking our jurisdiction in imposing the death sentence in the present case."

The learned counsels for Mithlesh Kumar Kushwaha have pressed the jurisprudence wherein for similar, or even more brutal crimes, death sentence has not been imposed rendering sentencing difficult.

145. This brings us to the question – what would be the appropriate sentence which ought to be imposed on this convict?

146. We have had occasion to consider the options available to sentencing court in similar circumstances when life imprisonment simplicitor would not be adequate punishment. Our discussion on this issue in ***Vikas Yadav*** is pertinent and reads thus :

> "80. The aforesaid enumeration of cases would show that ***apart from death sentence, while imposing life sentence the Supreme Court, has been directing mandatory minimum term of sentence before which the executive would exercise the power of remission of sentences.*** Several instances in cases involving convictions for multiple offences have been noted above wherein the Supreme Court has directed that the

sentences for different offences would run consecutively. In view of the challenge to the permissibility of such an option being available to this court, in the present case, we propose to take these three options in *seriatum* hereafter.

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XX. <u>If not death penalty, what would be an adequate sentence in the present case?</u>

842. In the present case, the manner in which the offence was committed; the impunity with which effort was made to remove traces of the offence by removing clothes, jewellery, phone, etc. and burning the body; the abscondance after the commission of the offence and the stage managing of the arrest; the conduct of the defendants during investigation and after conviction, especially, misuse and abuse of the facility of outside hospital visits and hospitalisation despite the passage of a decade after the offence, establishes the fact the that the long incarceration has had little impact on the defendants who have neither remorse nor repentance for their actions. With impunity, Vikas Yadav and Vishal Yadav even in jail believe that they can manipulate all systems. These two defendants have displayed that they have no respect for the criminal dispensation system nor any fear of the law.

843. So far as the present order is concerned, it is not disputed before us that substance has been found in the apprehensions expressed by Nilam Katara (mother of the deceased) and Ajay Katara and they have been afforded police protection which continued even on date, more than twelve years after the crime. Would this not be a material fact while evaluating a just and appropriate sentence to the convict? It is certainly material as well as relevant fact. **[Ref. : *2009 VIII AD (Delhi) 262, State v. Shree Gopal @ Mani Gopal (para 35)*]**

844. From paras 1925 to 1927 in the judgment dated 2nd April, 2014, we have noted the traumatisation and the pressure put on Ajay Katara to prevent him from deposing in the present case. Prior to the case in hand, Ajay Katara seems to have been living an ordinary existence. The only litigation he seemed to be embroiled in was with his wife with regard to their matrimonial ties. Post the murder of Nitish Katara and his deposition as a witness in the case, he is facing multiple cases at the instance of relatives of the defendant, Ajay Katara. It would seem as if deposition in a case has suddenly transformed a person from somebody of ordinary sensibilities and temperament into a habitual criminal.

845. The absolute propositions pressed by the defendants, emphasising individual circumstance and as held thereon by the learned trial judges are clearly untenable. This is to be found from a reading of the principles culled out in ***Mofil Khan*** above. Each circumstance cannot be treated as by itself enabling the court to arrive at a conclusion as to what would be a punishment adequate for and befitting the crime. The reference to the balance sheet by the Supreme Court was never of the nature of *'one plus one would necessarily make two'* but required a consideration of the varied facts and circumstances which lead to and go into a crime cumulatively, especially heinous crimes.

846. In this background, the consideration by the learned trial judges of each of the established circumstances individually without examining the same cumulatively or in totality is clearly contrary to the well settled principles of law on which sentencing is to be effected. The learned trial judges have completely failed to consider material circumstances including the pre-meditation which went into the offence as well as manner of its execution; antecedents of the defendants; the impact of the crime on society; the conduct of the defendants; amongst others, which have been held by the Supreme Court to be an aggravating circumstance and an essential

consideration for imposing an appropriate sentence. The assessment of the mitigating and aggravating circumstances by the trial courts was therefore, incomplete and cannot be the basis for evaluation of an adequate sentence on the defendants.

847. Mr. Rajesh Mahajan has pressed that there are several precedents wherein, on a consideration of the relevant factors, the court held that the **possibility** of reformation and rehabilitation is not ruled out and therefore, death penalty was not imposed. However, instead of awarding life sentences simplicitor, term sentences or consecutive running sentences were imposed upon the convicts. In this regard, reference is made to the pronouncements in ***(2012) 4 SCC 257, Ramnaresh v. State of Chhattisgarh*** (21 years sentence)***; (2002) 2 SCC 35, Prakash Dhawal Khairnar (Patil) v. State of Maharashtra*** (20 years sentence)***; 2014 (8) SCALE 113, Amar Singh Yadav v. State of U.P.*** (30 years sentence) and***; (2013) 2 SCC 479, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra*** (consecutive running of sentences)**.** It is submitted that if this court is not inclined to impose the death penalty, certainly life sentence simplicitor is not an adequate sentence and the court must consider this other option. We shall examine this submission hereafter.

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848. The offence involving burning of the body in order to cover the acts of the defendants was also brutal, cruel and heartless. It left an indelible negative impact on the family and horrified the society. This act of burning was committed as part of the same premeditation but it was committed after the commission of the offence of murder. This therefore, justifies a consecutive sentence.

849. After the brutal crime was committed, the clarity of the defendants is evident in the care that they took in removing all articles of identification from his body; concealing his clothes, mobile, gold chain as well as the hammer which was the weapon of the offence. The

defendants thereafter with utmost clarity proceeded to the next stage when they absconded from the scene of the crime and could not be traced by the police. The brutal murder of young Nitish Katara had no impact on the emotions of the three defendants who executed the crimes with precision and clarity. The depravity in the mindset and planning of the crimes, brutality in its execution, post crime conduct during investigation and trial detailed above point to one essential fact that a life sentence which means only 14 years of imprisonment is grossly inadequate in the present cases and that these defendants do not deserve to remission of the life sentence imposed on them by application of Section 433A of the CrPC.

850. Even the conviction for such heinous offences and their incarceration had no impact on two of the defendants. We have also noted the conduct of the two defendants Vikas Yadav and Vishal Yadav in jail in their unwarranted hospital visits and admissions clearly manifesting their basic temperament and the sense that they are above the law and all institutions which points at difficulty in their reformation or rehabilitation, pointing also to the imperative need for a longer stay in jail.

851. The nominal rolls from the jail have shown that only since 2013, all the defendants have been careful and their conduct in jail has been satisfactory. This only suggests that the possibility of their reformation and rehabilitation cannot be ruled out. In fact, this factor has weighed with us while rejecting the prayer for enhancement of the sentence to imposition of the death penalty upon the defendants. There is nothing to show that the defendants stand reformed. This conduct supports the view that these defendants do not deserve to be set at liberty on completion of the 14 years of imprisonment mandated under Section 433A of the Cr.P.C. and that remission of the sentence at that stage would be complete travesty of justice.

852. There is another very important aspect of the present case. It has been urged by Mr. P.K. Dey that

there is grave and imminent threat to the life of the complainant Nilam Katara and also Ajay Katara, the witness on behalf of the prosecution at the hands of the defendants who are powerful and wielded influence. For this reason, they have been granted police protection even on date. It is submitted that if not awarded death sentence, the defendants were likely to eliminate the remaining family members of the deceased Nilam Katara as is evident from their conduct and behaviour. As noted in our judgment of 2nd April, 2014, these apprehensions are not without substance.

853. A similar contention was argued on behalf of the prosecution witness in the judgment reported at ***(2001) 4 SCC 458, Subhash Chandra v. Krishan Lal.*** The court had taken on record the statement made by one of the convicts to the effect that imprisonment for life shall be the imprisonment in prison for the rest of life. Keeping in view the circumstances of the case specially the apprehension of the imminent danger expressed by the witness, the court ordered that for this appellant, imprisonment for life shall be the imprisonment in prison for the rest of his life, that he shall not be entitled to any commutation or premature release under the Cr.P.C., Prisoners Act, Jail Manual or any other statute and rules made for the purposes of grant of commutation and remissions.

854. It is therefore, manifest that the concerns, safety and security of witnesses remain an abiding concern for imposing a sentence as well as at the stage of consideration of a prayer for remission of the sentence under Section 432 of the Cr.P.C.

855. These aggravating aspects become relevant when setting the period of imprisonment should be required to serve before remission should be considered. It would also be permissible and fair to impose a consecutive sentence whereupon a sentence for commission of one offence would commence on completion of the sentence of imprisonment for another offence or upon remission of

the sentence to these persons was being examined and granted.

Therefore, looked at from any angle, certainly a ***prolonged stay in a controlled environment as the prison with its discipline and community activities, especially those relating to the mind, is essential to ensure the reformation of the two defendants***, namely, Vikas Yadav and Vishal Yadav."

147. Mithlesh Kumar Kushwaha was about 20 years of age when the offences were committed. He is presently aged about 28 years.

148. The record reflects that the appeal being Crl.A.No 249/2011, seeking a judicial inquiry was filed by the offender through his brother Mr. Brijesh Kumar, who has sworn the affidavit in support. It would therefore, appear that his family has not abandoned him.

149. In ***Vikas Yadav***, the learned Additional Standing Counsel for the State had drawn our attention to a hard reality in the criminal justice system. We extract hereunder para 790 of ***Vikas Yadav*** :

"790. Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State has pointed out the practical reality that education and social eminence is unfortunately inversely proportionate to severity of the sentencing. He has drawn our attention to the following observations in the pronouncement of the Supreme Court reported at ***(2010) 14 SCC 641 (para 169), Mohd. Farooq Abdul Gafur & Anr. v. State of Maharashtra:***

"Swinging fortunes"

169. Swinging fortunes of the accused on the issue of determination of guilt and sentence at the hand of criminal justice system is something which is perplexing for us when we speak of fair

> trial. The situation is accentuated due to the inherent imperfections of the system in terms of delays, mounting cost of litigation in High Courts and Apex Court, legal aid and access to courts and inarticulate information on socio-economic and criminological context of crimes. In ***such a context, some of the leading commentators on death penalty hold the view that it is invariably the marginalised and the destitute who suffer the extreme penalty ultimately.***"
>
> (Emphasis supplied)"

150. The record also reflects that his family in his home village Hariharpur, Distt. Sitamarhi, Bihar is of impoverished means. According to Lt. Col. Amanpreet Singh, Mithlesh Kumar Kushwaha Kushwaha had already been a servant in the house for the last 6½ years before the crime in March, 2007 (when he was about 20 years) i.e. from 2000/2001 when he would have been barely about 13/14 years of age.

151. Mithlesh Kumar Kushwaha had no formal education and that he had been working as a domestic servant. These facts would show that Mithlesh Kumar Kushwaha was economically deprived.

152. In view of the above material, it is therefore, not possible to hold that Mithlesh Kumar Kushwaha is incapable of reform and rehabilitation. For this reason, imposition of death sentence upon Mithlesh Kumar Kushwaha would not be in accordance with law.

153. Amongst the sentencing options available to the court, if death penalty is not imposed, there is an option of imposing term

sentence or consecutively running sentences. In this regard, reference may be made to the pronouncement in ***Vikas Yadav.*** The relevant portion whereof extracted hereunder :

> "847. Mr. Rajesh Mahajan has pressed that there are several precedents wherein, on a consideration of the relevant factors, the court held that the **possibility** of reformation and rehabilitation is not ruled out and therefore, death penalty was not imposed. However, instead of awarding life sentences simplicitor, term sentences or consecutive running sentences were imposed upon the convicts. In this regard, reference is made to the pronouncements in ***(2012) 4 SCC 257, Ramnaresh v. State of Chhattisgarh*** (21 years sentence)***; (2002) 2 SCC 35, Prakash Dhawal Khairnar (Patil) v. State of Maharashtra*** (20 years sentence)***; 2014 (8) SCALE 113, Amar Singh Yadav v. State of U.P.*** (30 years sentence) and***; (2013) 2 SCC 479, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra*** (consecutive running of sentences)**.** It is submitted that if this court is not inclined to impose the death penalty, certainly life sentence simplicitor is not an adequate sentence and the court must consider this other option. We shall examine this submission hereafter."

154. In the present case, Mithlesh Kumar Kushwaha has been found guilty of commission of several serious offences of the Indian Penal Code. The crime was brutally committed. Mithlesh Kumar Kushwaha executed the same with clarity; sealed the bodies confidently; used salt to mask the odour and to avoid putrefaction; cleaned the scene of offence and hid the valuables and cash which he stole from the house. A life sentence subject to remission as

mandated under Section 433A of the Cr.P.C. which could mean only 14 years of rigorous imprisonment, would be grossly inadequate in the present case. The convict certainly does not deserve to be set at liberty on completion of 14 years of imprisonment upon remission of sentence at this stage, would a complete travesty of justice. The complainant expresses grave and imminent threat to his family. It is vehemently contended that the release of the convict from jail would have an extremely adverse affect on PW-5 who has suffered violence at the hands of Mithlesh Kumar Kushwaha.

155. It needs no elaboration that concerns, safety and security of the witnesses would remain an abiding concern for imposing the sentence as well as postponing the stage of consideration of a prayer for remission of sentence under Section 432 of the Cr.P.C.

156. The manner in which the crime was committed reflects several relevant aggravating aspects for passing directions in this behalf.

157. The report from the jail show that the prolonged stay in such a controlled environment as the prison; pre-occupation with the discipline therein as well as the community activities are having a salubatory affect on Mithlesh Kumar Kushwaha who appears to be settling down.

158. We may also consider the aspect of imposition of fine. There is no material before this court that the convict has the means

to pay fine. Given the fact that we are inclined to impose a fix term sentence of imprisonment, we are desisting from imposing a sentence of fine.

159. The reports of the jail establish that Mithlesh Kumar Kushwaha has attended several Vipasana meditation courses organized in the jail and continues with his meditation. He has not only imbibed embroidery skills but is imparting basic training in embroidery to other prisoners. The courses, training which Mithlesh Kumar Kushwaha has gone in jail and the activities with which he is occupying himself during the incarceration would suggest something beyond mere participation. The engagement in sharing his learning and skills with other jail inmates, would indicate actual involvement in the skills which Mithlesh Kumar Kushwaha has imbibed while in jail. These facts establish that Mithlesh Kumar Kushwaha has inculcated social skills and stands empowered to even impart training to other people.

160. Furthermore, he has been working in the jute bag making as well as shoe manufacturing unit. Mithlesh has thus acquired multiple skills to undertake employment in case he is released from jail.

161. Mithlesh Kumar Kushwaha has no prior history of implication in any offence. Neither Lt. Col. Amanpreet Singh nor PW-5 disclosed any propensity to violence of the criminal or any other criminal activity in their house. Therefore, there is no

evidence that Mithlesh Kumar Kushwaha had the propensity to become a social threat or nuisance.

162. Seven years have passed since the crime was committed. The conduct of Mithlesh Kumar Kushwaha in the interregnum period would reflect that the discipline of the jail has inculcated some discipline in the accused brining him into a value based social mainstream. Mithlesh Kumar Kushwaha has imbibed several skills which would enable him to have livelihood options, when released.

163. We have extracted taken guidance from the judgment of ***Mahesh Dhanaji Shinde*** wherein four convicts between the age of 23 to 29 years brutally murdered nine persons. The fact that they belonged to economically, socially and educationally deprived section of the population; acute poverty possibly leading to the commission of the crimes; their acquisition of education in the jail were some of the factors which the Supreme Court held as binding to the possibility of their being reformed and living a meaningful and constructive life, if given a second chance. Consequently, the option of life sentence was exercised by the court.

164. In ***Rameshbhai Chandubhai Rathod (2)***, a 27 year old convict was a watchman of the building where the deceased, a Class IV student was residing. He was found guilty of commission of several heinous offences including rape and murder. Rathod's young age and the failure to discharge the obligations of the trial court to return the finding as to the possibility of reformation and

rehabilitation as well as the uncertainty due to nature of the circumstantial evidence led the Supreme Court to impose the life sentence extending to full life of the respondent subject to any remissions or commutations at the instance of the government. In ***Dhananjoy Chatterjee,*** for a similar offence, death sentence was imposed upon the accused.

165. In ***Rajesh Kumar***, the appellant brutally murdered two children aged four and a half years and eight months who were related to him motivated by their father's refusal to lend more money to him. Consideration of the circumstances of the criminal and absence of evidence to show that the convict was a continuing threat to society and beyond reform and rehabilitation, the court set aside the death sentence.

166. In ***Sushil Kumar,*** the appellant had been convicted for murdering his wife, six year old son and four year old daughter by stabbing them. Unemployment, indebtedness and socio economic status; attempt to commit suicide after murder and the motive to eliminate the family to rid them of misery; no prior history of crime and; 35 years of age of the convict led the court to believe that he could be reformed and was sentenced to imprisonment for life.

167. In ***Mohinder Singh,*** the appellant was out of prison on parole in a prior conviction for raping his daughter when he murdered his wife and the daughter. It was held by the Supreme Court that revenge being the motive for the murder, rendered it insufficient to bring it within the "*rarest of rare*" case; that he was

not a dangerous man and that sparing his life would not cause danger to the community.

168. In ***Brajender Singh,*** the appellant had murdered his wife and three children by cutting their throats and setting them on fire using petrol for the reason that his wife had an extra-marital relationship with a neighbour. He was not sentenced to death on the ground that the appellant appeared repentant and was suffering because he had lost his entire family; and that he had committed the crime at the spur of the moment.

169. In ***Sham,*** the appellant was convicted of a triple murder of his brother, brother's wife and son because of a property dispute. The Supreme Court noted that he was 38 years of age; no dangerous weapon was used in the commission of the offence; antecedents were unblemished; unemployed and had 10 years in prison and that it could not be said that he would be menace to society or that he could not be reformed or rehabilitated. The life sentenced was imposed by the court.

170. In ***Sangeet,*** despite the murder of four people (including two women and a four year old child), the appellant was sentenced to life imprisonment.

171. In ***Haru Ghosh,*** the appellant was convicted of murder of a woman and her 12 year old son as well as an attempt to murder of a sixty year old man. This was similar on facts to the facts of the present case. The Supreme Court held that this was not a "*rarest of*

rare" case, though the murder had been committed in a brutal manner. The appellant was sentenced to imprisonment for 30 years.

172. In ***Aqeel Ahmad,*** despite multiple murders, the convicts were sentenced to imprisonment for life.

173. In ***Sandeep and Panchhi***, it has been held that the brutality was not the sole criteria.

174. The aforesaid elaborate discussion by us with the meticulous assistance of Professor Mrinal Satish has also noticed the precedents cited by Mr. Jai Bansal, Advocate, Mr. Puneet Ahluwalia as well as Ms. Ritu Gauba, learned APP before us. It is unnecessary to further expound thereon.

Essential considerations and procedural compliance before imposing a death sentence

175. What would be the factors and tests while imposing a sentence which ought to be considered by the court? The discussion in paras 270 to 274 of ***Vikas Yadav*** wherein authoritative and binding judicial precedents of the Supreme Court with regard to sentencing procedure for convictions where death sentences may be imposed stand considered. The discussion is not only relevant but important for the present case as well and reads thus :

> "270. ***Exercise of judicial discretion for examining a just punishment cannot be unguided. The question as to what material should be examined by the Judge***

while exercising such discretion has come up for consideration in the judicial pronouncement reported at ***(2013) 7 SCC 545 Gopal Singh vs. State of Uttarakhand*** which has been placed by Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State. In para 18, the court set out the issues which must be examined while the duty of the court was spelt out in para 19 in the following terms:

> "18.Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. ***In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal*** *in future,* ***capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect-propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crim****e* and ***his conduct in the interregnum*** bearing in mind the nature of the offence, the ***relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors***. Needless to emphasize, these are certain ***illustrative aspects*** put forth in a condensed manner. We may hasten to add that there ***can neither be a strait-jacket formula nor a solvable theory in mathematical exactitude***. It would be dependant on the ***facts of the case and rationalized judicial discretion***.

Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to ***weigh the circumstances in which the crime has been committed and other concomitant factors*** which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A Court, ***while imposing sentence, has to keep*** in view the ***various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of***. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. ***In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstance****s*. Hence, ***the duty of Court*** in such situations becomes a complex one. The same has to be performed with due reverence for Rule of Law and the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical

rationality sans any kind of personal philosophy or individual experience or any a-priori notion."

(Emphasis supplied)

(i) Sentencing procedure for convictions where death sentence may be imposed

271.So far as awarding of death sentence is concerned, the statute mandates and the Supreme Court has held that in accordance with Section 235(2), the sentencing court must record special reasons for awarding the death sentence. In serious offences for which a death sentence can be handed out, one of the tests advocated is the criminal test which requires consideration of the circumstances of the criminal. How is this to be effected?

272.It is necessary to note the importance of the pre-sentence hearing; recording of special reasons and the role of the courts in awarding the death sentence, as stands emphasized by the Supreme Court in ***(2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra.*** We may usefully borrow the words of the Supreme Court in paras 55 and 56 of this pronouncement which read as follows:

"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] , *Allauddin Mian* 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."

(Emphasis by us)

xxx xxx

274.Mr. Rajesh Mahajan, learned Additional Standing Counsel has placed reliance on the recent pronouncement of the Supreme Court reported at ***(2014) 3 SCC 421 : 2014 (2) SCALE 293, Birju v. State of M.P.*** wherein the court has considered the impact of previous criminal record of the accused on sentencing. In this case, Birju was involved in 24 criminal cases of which three were filed for the offence of murder. The court awarded sentence of 20 years rigorous imprisonment without remission over the period he had already undergone. It was observed that the motive for committing the murder in the case was for getting money to consume liquor for which a child of one year became casualty. The trial court had imposed death sentence upon the appellant which was confirmed by the High Court holding that there was no probability that the accused would not commit the act of violence in future and his presence would be a continuing threat to the society. The High Court had

also taken a view that there was no possibility of reformation or rehabilitation of the accused (**para 4**). So far as prior record of implication in criminal cases is concerned, in para 15, the court observed as follows:

> "15....May be, in a given case, the ***pendency of large number of criminal cases*** against the accused person might be a ***factor which could be taken note of in awarding a sentence*** but, in any case, ***not a relevant factor for awarding capital punishment.*** True, when there are more than two dozen cases, of which three relate to the offence of murder, the usual plea of false implication by the defence has to be put on the back ***seat, and may have an impact on the sentencing policy, since the presence of the accused could be a continuing threat to the society and hence calls for longer period of incarceration***."
>
> (Emphasis supplied)

176. The effect of previous implications and convictions on appropriate sentence which requires to be awarded have been considered in para 275 of the pronouncement in ***Vikas Yadav*** which reads as follows:

> "275. In para 17 of ***Birju***, the court has emphasized that prior record of conviction in heinous crimes like murder, rape, armed docoity etc. will be a relevant factor but that conviction should have attained finality so as to treat it as aggravating circumstance for awarding death sentence. Paras 17, 18 and 19 of the judgment shed light on the issue under consideration and read as follows:

"17. We have in Shankar Kisanrao Khade case [Shankar Kisanrao Khade v.State of Maharashtra, (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402] dealt with the question as to whether the ***previous criminal record*** of the accused would be an ***aggravating circumstance*** to be taken note of while awarding death sentence and held that the ***mere pendency of few criminal cases, as such, is not an aggravating circumstance*** to be taken note of while awarding death sentence, since the accused is not found guilty and convicted in those cases. In the instant case, it was stated, that the accused was involved in 24 criminal cases, out of which three were registered against the accused for murder and two cases of attempting to commit murder and, in all those cases, the accused was charge-sheeted for trial before the court of law. No materials have been produced before us to show that the accused stood convicted in any of those cases. The ***accused has only been charge-sheeted and not convicted***, hence, that factor ***is not a relevant factor*** to be taken note of while applying the R-R test so as to award capital punishment. ***Maybe, in a given case, the pendency of large number of criminal cases against the accused person might be a factor which could be taken note of in awarding a sentence but, in any case, not a relevant factor for awarding capital punishment. True, when there are more than two dozen cases, of which three relate to the offence of murder, the usual plea of false implication by the defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused***

could be a continuing threat to the society and hence calls for longer period of incarceration.

18. We also notice, while laying down various criteria for determining the aggravating circumstances, two aspects, often seen referred to in Bachan Singh v.State of Punjab [(1980) 2 SCC 684 : 1980 SCC (Cri) 580], Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] and Rajendra Pralhadrao Wasnikv. State of Maharashtra [(2012) 4 SCC 37 : (2012) 2 SCC (Cri) 30] , are (1) the offences relating to the commission of heinous crime 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 conviction; and (2) the offence was committed while the offender was engaged in the commission of another serious offence.*** The first criterion may be a relevant factor while applying the R-R test, provided the ***offences*** relating to heinous crimes like murder, rape, dacoity, etc. ***have ended in conviction.***

19. We may first examine ***whether "substantial history of serious assaults and criminal conviction" is an aggravating circumstance*** when the court is dealing with the offences relating to the heinous crimes like murder, rape, armed dacoity, etc. ***Prior record of the conviction, in our view, will be a relevant factor, but that conviction should have attained finality so as to treat it as aggravating circumstance for awarding death sentence.*** The second aspect deals with a situation where an offence was committed,

> while the offender was engaged in the commission of another serious offence. This is a situation where the accused is engaged in the commission of another serious offence which has not ended in conviction and attained finality."
> (Emphasis by us)

> Therefore, pendency of other criminal cases against a convict is a relevant factor for sentencing but not for awarding the death sentence. It is conviction in serious offences which has attained finality which would be treated as an aggravating circumstance for awarding capital punishment."

The importance of following this procedure and taking the factors (elaborately dealt with above) into consideration, needs no further discussion.

Administration of sentencing procedure - role and responsibility of courts

177. What is the role and responsibility of courts so far as imposition of a death sentence is concerned?

178. In para 53 of ***Bariyar,*** the Supreme Court observed that sentencing procedure deserves an "*articulate in judicial administration"*. It was observed that "*all courts are equally responsible"*. The consideration by the Supreme Court in paras 53, 55, 56 and 57 of the report sheds valuable light on the matters under consideration before us and read as follows :

"53. The analytical tangle relating to sentencing procedure deserves some attention here. ***Sentencing procedure deserves an articulate and judicial administration. In this regard, all courts are equally responsible. Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty***. The selection of penalty must not require a judge to reflect on his/her personal perception of crime.

54. In *Swamy Shraddananda (2)* v. *State of Karnataka* [(2008) 13 SCC 767 : (2008) 10 Scale 669] (SCC p. 790, para 51), the Court notes that the awarding of sentence of death "depends a good deal on the personal predilection of the Judges constituting the Bench". This is a serious admission on the part of this Court. Insofar as this aspect is considered, there is inconsistency in how *Bachan Singh*[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] has been implemented, as ***Bachan Singh***[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] ***mandated principled sentencing and not judge-centric sentencing***. There are two sides of the debate. It is accepted that the *rarest of the rare* case is to be determined in the facts and circumstance of a given case and there is no hard-and-fast rule for that purpose. There are ***no strict guidelines***. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of the *rarest of rare* dictum. ***Therefore, it is to be read with Articles 21 and 14***.*"*

(Emphasis supplied)

179. The discussion on this issue has been undertaken in paras 276 and 277 of ***Vikas Yadav*** wherein we have noted thus :-

"276.So far as the role and responsibility of the courts i.e. the trial court or the High Court are concerned, the following enunciation in para 69 of the pronouncement in ***(2009) 6***

SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra by the Supreme Court sheds valuable light and reads thus:-

> ***"2(D) Role and responsibility of courts***
> 69. *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] ***while enunciating*** *the rarest of rare doctrine,* ***did not deal with the role and responsibility of sentencing court and the appellate court separately.*** For that matter, this Court did not specify any review standards for the High Court and the Supreme Court. In that event, ***all courts, be it the trial court, the High Court or this Court, are duty-bound to ensure that the ratio laid down therein is scrupulously followed. Same standard of rigour and fairness are to be followed by the courts.*** If anything, ***inverse pyramid of responsibility is applicable in death penalty cases.***
> 70. In *State of Maharashtra* v. *Sindhi* [(1975) 1 SCC 647 : 1975 SCC (Cri) 283] this Court reiterated, with emphasis, that ***while dealing with a reference for*** confirmation of a sentence of death, the ***High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge."***
> (Emphasis supplied)

277.After an elaborate discussion, the court provided the following framework for pre-sentencing in ***Bariyar*** :

> (i) The trial court; high court as well as the Supreme Court have the same powers and responsibilities. (**para 69**)

(ii) Aggravating and mitigating circumstances in the case before the sentencing court should first be identified.

(iii) The second step would be to compare the aggravating and mitigating circumstances in the case before the court with a pool of comparable cases. This would ensure that the court considers similarly placed cases together. In this exercise, similarity with respect to gravity of the crime, nature of the crime, and the motive of the offender might be considered. On this basis, the sentencing court might be able to identify how a similar case has been dealt with by the Supreme Court in a previous instance.

(iv) The court further held that the weight that the sentencing court gives to each individual aggravating or mitigating factor might vary from case to case. However, it is imperative that the sentencing court provide ***legal reasons for the weight that it has accorded to each such aggravating or mitigating factor. The court opined that this exercise may point out excessiveness***, and at the same time reduce arbitrariness in sentencing. The court further noted that this exercise should definitely be undertaken in cases where the sentencing court opts to impose the death sentence on the convicted person.

(v) Though ***Bariyar*** involves a death sentence, however, the principles laid down (or reiterated) by the court with regard to nature of the pre-sentencing hearing, the considerations which must weigh as well as the responsibility of the trial courts and high courts would apply to pre-sentencing hearing in other offences and sentences as well."

180. It is thus manifest that before proceeding to determining an appropriate sentence upon the convicts in accordance with law, it is essential to undertake the foregoing exercise especially if serious sentences are contemplated. The law permits no exception at all and more so if the case involves a death penalty. Proper and adequate hearing and consideration of all relevant factors are a must for every court, be it the trial court or the high court, seized of an appeal.

It is therefore, well settled that the responsibility of the courts is equally onerous while considering the imposition of a death sentence. The same standards of rigour and fairness must be followed.

181. In accordance with the procedure prescribed in Section 235(2) of the CrPC, once a person stands convicted for the commission of an offence, it is mandatory upon the trial judge to hear the convict on the question of sentence before proceeding to do so. In the instant case, after convicting Mithlesh Kumar Kushwaha on 1st July, 2010, the learned trial judge postponed hearing on the sentence to 8th July, 2010 and thereafter pronounced the aforenoted sentence. There is no objection so far as the procedure which was followed before us. Given the mandate upon us however, it is necessary to scrutinize the records and the material on the essential aspects (relating to the crime as well as criminal) before the trial court as well as in these proceedings, before concluding on the property of the death sentence.

<u>Important facts regarding imposition of death sentence in the present case</u>

182. Let us examine what has weighed with the learned Trial Judge while imposing the death sentence on Mithlesh Kumar Kushwaha in the present case.

183. We find that the learned trial judge has held that Mithlesh Kumar Kushwaha should be sentenced to death because of the following reasons :

(i) The victims were "*an innocent child*" and a "*helpless woman or a person rendered helpless by old age*".

(ii) He betrayed the trust of the complainant who had left the victims in his safe custody.

(iii) Before committing the offence of murder, he had broken a phone of deceased Mrs. Surjeet Kaur to prevent her from contacting anyone.

(iv) He concealed the bodies of the victims and put salt on them.

(v) He cleaned the floor and tried to destroy evidence.

(vi) He told Mehar Legha (daughter of the complainant) that the deceased persons had gone to the Gurdwara, and also offered her food.

(vii) He criminally intimidated Mehar Legha and also attempted to murder her.

(viii) Mithlesh Kumar Kushwaha filed a "*false and frivolous*" application pleading juvenility.

(ix) He gave a false defence and took a false plea of alibi.

184. In order to decide as to whether the death sentence has been rightly imposed in this death sentence reference, we are required to adjudicate as to whether the case falls within the "*rarest of rare*" case formulation and to draw the balance sheet between the mitigating and the aggravating circumstances. Upon concluding that the case fell in the "*rarest of rare*" category, it is necessary to examine the record on the aspect of whether it was possible to reform and rehabilitate the convict or whether he would be a menace to society.

185. The learned trial judge rested is decision on the adjudication of the Supreme Court reported at ***AIR 1983 SC 957, Machhi Singh v. State of Punjab*** to decide as to whether the facts of the case made out a "*rarest of rare*" case. The jurisprudence noticed above on the death penalty of the Supreme Court which provides the framework for determination of whether the death sentence ought to be imposed on a person convicted of a murder or not has not been considered.

186. Unfortunately, recent judicial pronouncements which were relevant for the determination of the propriety of the death sentence were also not placed or brought to the attention of the trial court.

The precedents cited by the defence stand simply rejected as irrelevant by the trial court.

187. We have extracted hereinabove the consideration by the Supreme Court in ***Shankar Kisanrao Khade*** wherein the court has summarized the application of threefold test i.e. "*crime test*", "*criminal test*" and "*rarest of rare (R-R) test*". There can be no manner of doubt that the crime was committed in an extremely brutal and dastardly manner. It was enormous in proportion. The victims were helpless woman and a child. The offender was working as a domestic servant in the house. Consequently, so far as crime test, it has to be held that it would stand satisfied.

188. There can be no manner of doubt that it falls in the "*rarest of rare*" category. On consideration of this aspect, to impose a death sentence may seem to be the only option available to the judge. But this is where judicious sentencing discretion creeps in.

189. Unfortunately, the Trial Court has not discussed at all as to whether any mitigating circumstances were present. The Trial Court has also not examined any material with regard to the status of Mithlesh Kumar Kushwaha. It had also not cared to collect any information as to whether Mithlesh Kumar Kushwaha had any prior criminal case against him. Thus, information of the background or antecedents of the criminal were neither called for nor placed by the prosecution before the court.

190. The record reflects that originally, a wrong address had been disclosed by Mithlesh Kumar Kushwaha. However, he subsequently provided his actual address. No effort was made by the court to verify if the address provided on the second occasion was the right address. Thus, at the time of sentencing, the learned trial judge had no information at all with regard to the background, antecedents or criminal history of the convict.

191. The learned trial judge had also not cared to conduct a background check or call for a pre-sentencing report from a probation officer or the jail or another expert in the field.

192. Without considering as to whether any mitigating factors were available, the learned trial judge has concluded that Mithlesh Kumar Kushwaha was a menace to society and it was not possible to reform him. After such reasoning, it was held that extreme penalty of death would be the appropriate punishment for the convict.

193. By our order dated 8th August, 2012, we had directed a report to be sent by the Tihar Jail about the conduct of the convict in jail. We were told by the jail authorities that Mithlesh Kumar Kushwaha had also been referred to the Institute of Human Behaviour and Allied Sciences (IHBAS) for psychological assessment to provide assistance to this court.

194. Pursuant to our orders dated 8th August, 2012, Tihar Jail had submitted a report dated 14th September, 2012 with respect to the

conduct of the prisoner, the relevant portion of which is extracted hereunder :

> "As per records, Mithlesh has attended several Vipassana Courses organized at CJ-4 and continues with his meditation till date. The ***inmate is a skilled embroiderer and has worked in the embroidery units*** at CJ-4, CJ-5 and CJ-7 and also ***imparted basic training in embroidery to other prisoners.*** He has also been ***assigned labour in jute bag making*** unit started by NGO, Scope Plus and is presently working in the shoe manufacturing unit at CJ-5. His ***conduct in the jail has been good.*** As per records, there are no punishments recorded against him during his entire period of incarceration in Tihar Jail. The inmate during his entire period of incarceration has had no serious medical complaints and in totality has maintained good health in jail. ***The inmate has been assessed by psychiatrist and on detailed mental status examinations found to be normal*** however on commenting on the criminal mind ***set the detailed psychological assessment*** has to be done for which he has been ***referred to IHBAS (Institute of Human Behaviours and Allied Sciences***). It will require 6 to 8 weeks for submission of report by IHBAS."
>
> (Underlining by us)

195. In the letter dated 3rd December, 2012 from the office of the Director General (Prison), we were informed that the convict was examined by Dr. Sandeep Govil, J/S Psychiatry, Central Jail Hospital, Tihar who had made the following observations :

> "1. No abnormal behaviour reported and patient is behaviourally stable.

2. No abnormal psychopathology on MSE.

3. No delusion/No Hallucination

4. Impression :- patient is of sound mind."

By the letter dated 9th January, 2013, the doctor has also informed that the convict was "*kept in a psychiatry ward of the Central Jail and the* ***findings were supported on a detailed assessment and ward observation***. *No anger or cruelty in the behaviour has been identified. Patient has been send to IHBAS for detailed psychological assessment and as per the records assessment has been completed, however the report is still awaited. Patient is* ***clinically and behaviourally is mentally stable.***"

These are conclusions drawn by a psychiatric expert on a close observation in the psychiatry ward.

196. By a letter dated 31st December, 2012, the Institute of Human Behaviour and Allied Sciences had sought a clarification as to the parameters on which the opinion of the medical board was sought. We had clarified on 16th January, 2013 that the opinion on the current mental status of the convict was required.

197. A report dated 9th January, 2013 from the Institute of Human Behaviour and Allied Sciences was placed before this court wherein it was stated that Mithlesh Kumar Kushwaha was "*clinically, behaviourally and mentally stable*".

198. IHBAS has submitted its report dated 20th February, 2013 by a Standing Medical Board of four members of experts in the field which is extracted hereunder :

> "*The patient Mithlesh was examined by the Standing Medical Board of IHBAS on 20.02.2013. The Board opined that patient is not having any diagnosable psychiatric illness.*"

199. We have our record another report dated 22nd November, 2013 of the office of the Director General (Prisons) wherein it is reported as follows :

> "... convict Mithlesh has attended several 'Vipassana' ***meditation*** courses organized at CJ-4 and continues with his meditation till date. The inmate is a ***skilled embroiderer*** and has worked in the embroidery units at CJ-4, CJ-5 and CJ-7 and ***has also imparted basic training in embroidery to other prisoners.*** He was assigned labour ***in jute bag making*** unit started by NGO Scope Plus. He has also worked in the ***shoe manufacturing*** unit at CJ-5 in recent past. His ***conduct*** in the jail his noticed ***satisfactory and good.*** As per jail records there is ***no punishment recorded against convict Mithlesh, during his entire period of incarceration*** in Tihar Jail. The inmate during his entire period of incarceration has had no serious medical complaints and in totality has ***maintained good health*** in the Jail. As per jail record the death sentence convict Mithlesh has undergone ***06 years, 08 months and 18 days*** in judicial custody including under-trial period."
>
> (Emphasis by us)

200. The record still does not contain any material regarding the antecedents of Mithlesh Kumar Kushwaha. No information at all with regard to his socio-economic background was found on the record. Therefore, on the 27th of February 2015 also, we directed the State to appoint a probation officer to interact with the family of Lt. Col. Amanpreet Singh as well as the prisoner and submit a report to this court. We had directed the probation officer to also submit a report about the assets and paying capacity of the prisoner. It appears that the case was assigned to Ms. Priyanka Yadav, Probation Officer, posted with the Prison Welfare Services, Prison Headquarters, Tihar Jail, who had submitted a report dated 26th March, 2015.

201. In her report, Ms. Yadav has reported information under various heads pursuant to Form III of the Delhi Probation of Offenders Rules, 1960, such as: personal history of the offender, his behaviour and habits, family relations, physical and mental history, school and employment history. Unfortunately, the family and friends, past employers and teachers, and neighbours of the convict could not be interviewed by the PO. Only the jail personnel and inmates were questioned apart from the victims' family.

202. Thus, information under other heads such as 'home surroundings and general outlook,' 'employment history,' 'economic condition of family,' 'associates' and 'whether poverty or unsettled life was the cause of the crime' is either unavailable,

woefully inadequate, or based upon conjecture of the PO, or on the sole uncorroborated statement of the convict.

203. Based on statement of co-inmates, Ms. Yadav concludes that the convict "*washes his hands and legs very frequently*" and hence a psychiatric assessment may be necessary. Also, she observes that "*there is no feeling of guilt or repentance*" since the accused denies ever having any contact with the victims' family. She also notes "*high level of confidence that there is no evidence against him*" as a sign of lack of guilt, and taking into consideration the apprehension expressed by the family of the victims that the convict is a threat to them if released, recommends that if life imprisonment is the sentence imposed, parole not be granted to him.

204. Ms. Yadav reports that the convict "*lives alone most of the time and don't interact even with the co-inmates. He has very frequent complaining tendency to the staff*". This statement is contrary to the report of the prison which shows that in fact, the prisoner was involved in training other inmates in embroidery skills.

205. We have attempted to address another extremely important facet of sentencing jurisdiction. We are conscious of the responsibility to ensure physical and mental security of the family of the victims. Therefore, concerned with the anxiety of the family members of the victims, we have also permitted them to place their concerns before us.

206. In the present case, Lt. Col. Amanpreet Singh has himself pressed before us that his daughter Mehar Legha is still traumatized because of the violence which she not only visualized but also experienced at the hands of the offender. Seeing the child's young age at the time, it would have been this child's first brush with death. Irreversibility of the demise of her grandparent as well as her only brother has to have left indelible marks on her personality. The impact thereof would be exacerbated by the fact that the acts were extremely barbaric.

207. This experience coupled with the fact that she was herself subjected to a brutal attempt on her life, has to be also kept in mind so far as the impact of the acts of the convict on the child is concerned. However, seven long years have passed since the occurrence. We are sure that guided by her mature and learned parents, who would have taken all appropriate measures for reassuring the child and restoring some semblance of normalcy into her existence.

208. So far as the difficult task of imposing an appropriate sentence on the convict, it is settled law that our consideration can be neither subjective nor emotive, premised solely on the gruesome nature of the offence or guided by sensibilities and concerns of the family of the victims alone. As a court, we have to undertake an objective analysis of all the relevant factors. In discharging our solemn duty, while ensuring safety and security of the victims and witnesses, it is essential for us also to apply the well settled

principles governing evaluation of the evolution of the criminal as well.

209. The social impact report submitted by Ms. Priyanka Yadav, P.O. was furnished to Mr. Sunil Gupta, Law Officer of the Central Jail, Tihar on the 15th April, 2015 with the direction to submit a report upon the conduct of the convict.

210. Faced with this kind of subjectivity in the report and having noticed that reports from the jail are normally objective, and in any case factual, while reserving orders on 29th May, 2015 in the present matter, we had called for the latest conduct report of Mithlesh Kumar Kushwaha in the jail. A report dated 25th August, 2015 has been submitted by the Superintendent, Jail No.5, Tihar Jail, New Delhi in this regard. The material portion whereof reads as follows:

> "As per records, Mithlesh has attended several Vipassana courses organized at CJ-4 and continues with his meditation till date. The inmate is a skilled embroiderer and has ***worked in the embroidery units*** at CJ-4, CJ-5 and CJ-7 and ***has also imparted basic training in embroidery to other prisoners***. He was assigned ***labour in jute bag making unit***. He worked in the ***shoe manufacturing unit*** at CJ-5. His ***conduct in the jail has been good***. As per records there are ***no punishments recorded against convict*** Mithlesh, ***during his entire period of incarceration*** in Tihar Jail. The inmate during his ***entire period of incarceration*** has had ***no serious medical complaints*** and ***in totality has maintained good health in Jail***."
>
> (Emphasis by us)

211. The reports from the jail are clearly consistent about the conduct of Mithlesh Kumar Kushwaha, spread not over a year or any shorter period of time, but over seven years, the last being barely a few weeks before this judgment.

212. It needs no elaboration that a pre-sentencing report by a professionally trained probation officer is an extremely valuable tool for the court for assessing the possibility of reform and rehabilitation of a person accused of a capital offence. The report of the probationary officer in the present case would show that valuable inputs including the personal history of the offender, his behaviour and habits, family relations, physical and mental history, school and employment history are missing.

213. Additionally, in the instant case, the probation officer has visibly been influenced by her interaction with the complainant and his family, which is not expected. Influenced by the submission of the family of the victims that the convict was a threat to them if released, the probation officer has gone to the extent of observing that "*the family is in fear of safety*". The probation officer in the present case also seems to have got prejudiced by the information relating to the crime and has made deductions from the responses the convict may have given to her in respect of the merits of the case against him. This is clearly impermissible.

214. It is evident from the above that the report of the probation officer is clearly not impartial and has not been prepared professionally. The probation officer is required to sit back from

the contentions of both sides and make factual observations. A probation officer is expected to place facts before a court and not deductions. Furthermore, no sociological or psychological advice by any expert or specialized body was undertaken before submitting the report.

215. But, our closest scrutiny of the matter (discussed later), would show that the probation officer cannot be blamed. We have found that Probation Officer's appointed in this city have neither the necessary qualifications nor the training to render the requisite assistance to the courts. This is not for any fault attributable to them but because of the requirement of The Probation of Offender Rules, 1960 and no effort appears to have been made by concerned authorities to impart the necessary training or equip the Probation Officer's with tools and technological developments as are available today.

216. The latest nominal roll of the prisoner shows that the inmate was maintaining a proper behaviour, his conduct is satisfactory, nothing adverse has been reported against him regarding involvement in any illegal and anti human activities.

217. His jail conduct from the time of his incarceration since 4th March, 2007 till date is good without any punishments for jail offences being recorded for the period of around seven years already spent by him in jail. These facts would suggest that the possibility of reformation and rehabilitation of Mithlesh Kumar Kushwaha "*cannot be unforceably foreclosed*" and consequently

the present case would not invite the imposition of death penalty on him.

218. It has been stated that on the 2nd of March 2007, the date of the incident, Mithlesh Kumar Kushwaha also known as "*chhotu*" has been working as their domestic servant and living with the Legha family "*since the last 6½ years*". This would take his association with the Leghas to the year 2000.

A plea of juvenility, as on the date of crime, was pressed by Mithlesh Kumar by way of Crl.M.A.No.9916/2011. A bone ossification test was directed by this court and this application was decided by an order dated 5th December, 2011 concluding that Mithlesh Kumar's year of birth would be sometime in 1986 or early 1987. It can be safely deduced therefrom that Mithlesh joined the Legha's service when he was barely about 13 - 13½ years of age. At that age, children should be in school, playing with contemporaries. Certainly not compelled to serve in strange households hundreds (even thousands) of kilometres from parents siblings and friends.

219. Mithlesh Kumar Kushwaha was aged only about 20 years on the date of the offence and that there was no prior history of even implication in an offence. This is confirmed by the statement of the prisoner to Ms. Priyanka Yadav, Probation Officer. Ms. Priyanka Yadav, the Probation Officer also noted that Mithlesh Kumar Kushwaha has never visited any school. His only learning was in the jail under the "*Padho aur Padhao*" programme.

According to Ms. Priyanka Yadav, jail officials had informed that he is attempting the Bachelor Preparatory Programme under IGNOU.

220. The prisoner therefore, had never gone to any formal school when he commenced working as a domestic servant with the family of Col. Amanpreet Singh.

221. The above narration would show that the entire learning of Mithlesh Kumar Kushwaha was with the family of the Leghas. Life gave him no opportunity to imbibe social skills which are necessarily inculcated in any individual by the association and proximity with the love and affection of his or her own family. Not only was he uprooted from his family but also came was forced to move from his village in Bihar to places where Col. Legha was posted. These important factors have to be kept in mind while drawing a conclusion about the psychological development of Mithlesh Kumar who was obviously starved of any close contact with his near and dear ones.

222. It is trite that none of the circumstances, for instance, age of the victim; circumstantial evidence alone; brutality with which crime was committed etc. would by itself be sufficient for arriving at a conclusion as to the appropriate sentence. All the relevant circumstances have to be considered as a whole. We have noted above that the consideration by the trial court was incomplete as it completely fails to take into consideration the circumstances of the criminal.

223. The facts brought on record however, show that a prolonged stay in a disciplined environment is necessary for disciplining and reforming the offender. The nature of the offence and the circumstances brought on record would show that the offender ought not to be set at liberty or his sentence remitted after 14 years of imprisonment in terms of the Cr.P.C. While commuting the death sentence imposed upon him by the order dated 8th July, 2010, we are of the view that the same deserves to be commuted to life sentence whether fixed tenure of imprisonment to be mandatorily gone into before his case can be considered for remission.

Recidivism and the possibility of reform and rehabilitation – determination how?

224. The above narration would show that having found an accused guilty of an office which is punishable with death, one of the most important considerations for awarding (or not) the death penalty thus is the answer to the questions as to possibility of recidivism and also whether it was possible to rehabilitate or reform a convict. In case after case, the Supreme Court has held that it is obligatory on the court to gather material on these aspects before ruling on a death sentence.

225. In several judicial precedents, courts have considered the effect of the death penalty especially from the perspective of possibility of recidivism. This was discussed by us in paras 278 of ***Vikas Yadav*** which reads as follows :-

"278. An essential requirement laid down in all the judgments considering imposition of the death penalty is the requirement of being satisfied about the probability that the accused would not commit criminal acts of violence and the probability that the accused could not be reformed and rehabilitated. A difference of opinion arose between the two learned judges on the award of death penalty in the consideration which was reported at ***(2009) 5 SCC 740, Rameshbhai Chandubhai Rathod (1) v. State of Gujarat.*** The matter was thereafter taken up for consideration by a three Judge Bench which decision was reported at ***(2011) 2 SCC 764, Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*** wherein the court favoured the commutation. ***Most important*** is the observation that ***it was obligatory on the trial court to have given a finding as to a possible rehabilitation of the accused and the probability that the accused can become a useful member of the society in case the accused is given a chance to do so.*** The relevant portion of the judgment is as follows:

> **"9.** Both the Hon'ble Judges have relied extensively on *Dhananjoy Chatterjee case* [(1994) 2 SCC 220 : 1994 SCC (Cri) 358]. 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."

(Underlining by us)

226. We found that the answer to this issue cannot be predicated only on the evidence led by the prosecution or the defence during the trial. It is necessary for a court to have adequate material on other facets especially an independent inquiry by a trained mind into facts relating to the backgrounds of the convict as well as expert evaluation of his personality.

Pre-Sentencing Reports ('PSR') – a valuable sentencing tool

227. The importance of pre-sentencing reports before imposing death sentences cannot be emphasized enough.

228. Unfortunately, the Code of Criminal Procedure, 1973 does not provide a legal framework enabling courts to undertake the essential exercise of gathering relevant material to "*enable just sentencing. There is no statutory provision in relation to courts requesting and obtaining pre-sentencing reports*" ('PSR' hereafter). Section 235(2) of the CrPC in the context of sessions trial merely states that "*if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to the law.*"

229. Section 360 of the CrPC deals with releasing a person on probation of good conduct or after admonition. Though Section

360(1) states that a court may release a convicted prisoner on probation of good conduct taking on record the age, character, antecedents of the offender and also the circumstances in which the office was committed, it does not specify that a probationary officer ('PO' for brevity) be appointed to collect relevant sentencing factors.

230. In this regard, we may also advert to the ***Probation of Offenders Act, 1958*** ('the PO Act' hereafter) which enactment provides "*for the release of offenders on probation or after due admonition and for matters connected therewith*". Section 4 states that a person found guilty of having committed an offence ***not*** punishable with death or imprisonment for life, may be released on probation of good conduct. Sub-section 2 of Section 4 mandates that "*the court **shall** take into consideration the report, if any, of the **probationary officer** concerned in relation to the case*". Section 6(2) of the Act deals with treatment of persons under the age of twenty one. It says that in order to satisfy itself whether Section 3 or 4 of the Act should be used, "*the court **shall call for a report** from the probation officer and consider the report, if any, and any other information available to it relating to the character and **physical and mental condition of the offender.***" Section 7 of the Act mandates that the report of a PO shall be confidential. However, the proviso states that the court, may communicate the substance of such report to the offender and "*may give him an*

opportunity of producing such evidence *as may be relevant to the matter stated in the report.*"

It is relevant to note that the Probation of Offenders Act does not apply to situations where the offence is punishable with death or imprisonment for life.

231. Section 2(d) of the PO Act defines a probation officer as either an officer who is appointed as a probation officer or recognised as such under Section 13 of the Act. This provision (Section 13) states that a probation officer may be appointed by the State government or recognised by it; or may be provided for this purpose by a society recognised in this behalf by the state government; or in exceptional circumstances, the court may appoint any other person who the court opines is fit to act as a PO in the special circumstances of the case. Section 14(1) of the Act deals with circumstances and surroundings of an accused.

232. While interpreting Section 4 of the PO Act, 1958, the Supreme Court in a judgment reported at ***M.C.D. v. State of Delhi, (2005) 4 SCC 605***,held that if a court decides to exercise its powers under Section 4, it is ***bound*** to call for a report of the PO, in light of the use of the word 'shall' in the section. It further held that although the conclusions and suggestions of the PO are not binding on the court, exercise of powers under Section 4 would be illegal if done without calling for such a report.

We have referred to this enactment as it sheds light not only on the existing statutory regime, but also to some aspects about the importance of the reports from designated persons which are in the nature of "pre-sentencing reports" ('PSR' hereafter). The PSRs by Pos have also been recognized as one of the tools for sentencing in cases involving life imprisonment or death sentences. We hereafter consider this aspect.

Death penalty cases - requirement of pre-sentence reports

233. We have noted above the statutory exception of cases involving imposition of the life or death sentence from the applicability of the ***Probation of Offenders Act ('PO Act' as aforestated)***. However, the framework for seeking reports from POs in cases where death is one of the possible punishments has been created under judgments of the Supreme Court and this court. Two recent judgments of the Supreme Court, ***Birju v. State of Madhya Pradesh (2014) 3 SCC 421*** and ***Anil @ Anthony Arikswamy Joseph v. State of Maharashtra (2014) 4 SCC 69***, reasoned that when hearing the convict on the *question of sentence* under Section *235(2), Cr.P.C.*, the sentencing court may in *appropriate cases call for a report from a PO*. This report may be of assistance to the court in deciding whether there is any probability of recidivism and whether the convict can be ***reformed and rehabilitated***.

234. Placing reliance on the above pronouncements of the Supreme Court, this issue also stands discussed in ***Vikas Yadav*** and is extracted hereunder :

> "280. It is therefore, an important part of the sentencing function of the State in the trial as well as the court to ensure that the State places materials before the trial court regarding the probability that the convict could be reformed and rehabilitated and that he would not commit criminal acts. However, the State may, as in most cases, fail to do so. What is the court required to do? This issue has been deliberated upon by the Supreme Court in ***Birju*** wherein guidance on the manner in which the court may obtain additional material relevant for sentencing is given. In this case, the Supreme Court has made it mandatory for the courts to call for a report from the probationary officer in the following terms wherein the court observed as follows:
>
> > **"20.** In the instant case, the High Court took the view that there was no probability that the accused ***would*** not commit criminal acts of violence and would constitute a continuing threat to the society and there would be no probability that the accused could be reformed or rehabilitated. xxx xxx xxx We find, in several cases, the trial court while applying the Criminal Test, without any material on hand, either will hold that there would be no possibility of the accused indulging in commission of crime or that he would indulge in such offences in future and, therefore, it would not be possible to reform or rehabilitate him. Courts used to apply reformative theory in certain minor offences and while convicting persons, the courts sometimes release the accused on probation in terms of Section 360 CrPC and Sections 3 and 4 of the Probation of Offenders Act, 1958. Sections 13 and 14 of the

Act provide for appointment of Probation Officers and the nature of duties to be performed. Courts also, while exercising power under Section 4, call for a report from the Probation Officer. In our view, ***while awarding sentence, in appropriate cases, while hearing the accused under Section 235(2) CrPC, courts can also call for a report from the Probation Officer,*** while applying the Criminal Test Guideline 3. Courts can ***then examine whether the accused is likely to indulge in commission of any crime*** or there is any probability of the accused being reformed and rehabilitated.

(Emphasis by us)

281. On the aspect of failure by the State instrumentalities to place materials regarding the possibility of reformation, the court unequivocally declared the manner in which criminal courts must proceed in the judgment of the Supreme Court reported at ***(2014) 4 SCC 69, Anil @ Anthony Arikswamy Joseph v. State of Maharashtra***. It was held as under:

> **"33.** In *Bachan Singh* [***Bachan*** *Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] this Court has categorically stated, ―the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society‖, is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in *Santosh Kumar Satishbhushan Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150]. Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and

> rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. ***The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials.*** We, therefore, ***direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.***"
>
> (Emphasis supplied)

Clearly, the trial record is insufficient for enabling a court to pass a just sentence. An extremely onerous responsibility is thus cast on the probation officer who has to submit a report with regard to the circumstances and personality of the convict.

235. Following the advice of the Supreme Court, the Delhi High Court in ***State v. Bharat Singh Death Sentence Reference No.1 of 2013, judgment dated 17th April, 2014*** had directed the Secretary, Home Department, Government of NCT of Delhi to assign a PO in that case to prepare a report answering two questions: ***First***, whether there is a probability that the convict may ***reoffend*** and constitute a continuing threat to society; and ***secondly***, whether there is a probability that the convict may be reformed and rehabilitated. The Court further noted that the decisions of the Supreme Court i.e., ***Birju***, and ***Anil*** should provide sufficient

guidance for preparing the report. Towards the same, in para 69 it directed the PO to do the following :

- ***First***, to seek information from the jail authorities about the conduct of the convict;
- ***Second***, to meet and interview the family of the convict and local people of the area where the convict hailed from, in order to ascertain behavioural traits of the convict with particular reference to likelihood of recidivism, and potential for reform; and ;
- ***Thirdly***, to seek inputs from two professionals with not less than ten years' experience in the fields of Clinical Psychology and Sociology.

236. It also directed the attention of the PO to a handbook titled "Prevention of Recidivism and Social Integration of Offenders" brought out by the ***United Nations Office on Drugs and Crimes in 2012, Id., at 69*** as well as other documents which would be useful in ascertaining the recent trend in assessment of an offender's risk of re-offending and the "*risk-needs-responsivity framework*" which helps such evaluation.

237. Addressing the confidentiality concerns, in ***Bharat Singh***, the Court directed that the report be submitted to the Court in a sealed envelope. It directed the Registrar General to make four copies of the report on receipt, two of which would be placed in the envelope and re-sealed. The other two copies would be provided to

the counsels of the parties, who were directed to maintain complete confidentiality regarding the contents of the report. The Court further ruled that the counsel for the convict could take instructions from him regarding the report before making submissions at the next hearing.

238. As per the decision of the Hon'ble Supreme Court in ***Shankar Kisanrao Khade***, **only prior *convictions* should be considered** in assessing prior criminal conduct, and not any other unproved criminal conduct or other interactions with the criminal justice system. Further the Cr.P.C. in Section 211(7) clearly states that if a prior conviction exists and enhanced punishment is being sought on that ground, the fact, date and place of previous conviction shall be stated in the charge. Hence, it appears that it is unnecessary to seek details of prior criminal record in the PSR.

239. In ***Vikas Yadav***, this court also considered another decision in ***State v. Om Prakash*** rendered (by the same Bench as ***Bharat Singh***) on 17th April, 2014**.** The relevant extract of ***Vikas Yadav*** based on the consideration of this aspect in ***Om Prakash*** may also be usefully extracted hereafter:-

> "284. In ***Death Sentence Ref.5/2012, State v. Om Prakash***, decided on 17th April, 2014, the Division Bench of this court has observed that though there were aggravating circumstances in terms of the Supreme Court pronouncements, no material had been placed on record by the State to show that the convicts were persons who cannot be reformed or are a menace to the society. In para 56, the Division Bench of this court has

observed that indubitably even if no such material had been placed during the trial the same could have been placed in the present proceedings (the death reference as well as the appeals against the conviction and sentence by the convicts). The Division Bench has observed as follows:

> "56. Indubitably, even ***if no such material had been placed during the trial the same could have been placed in the present proceedings***. In ***Deepak Rai v. State of Bihar*** the Supreme Court expressly held that it cannot be accepted that the failure on the part of the Court which has convicted an accused and heard on the question of sentence but failed to express the ―special reasons‖ in so many words must necessarily entail remand to that Court for elaboration upon its conclusion in awarding the death sentence for the reason that while exercising appellate jurisdiction, the superior Court could have dealt into such reasons. ***Further the proceedings before this Court are a continuation of the trial as the death sentence can be awarded only if this Court answers the reference positively and confirms the death sentence. Thus, even at this stage, the State or the accused is at liberty to place on record material to show if any of the aggravating or mitigating factor has been ignored***. However, we find that there is no additional material on record placed by the State in the present proceedings. ***In case the State fails to produce any material, the Court could ascertain from the material on record if there are any mitigating factors favouring the accused***. xxx xxx xxx
>
> (Emphasis supplied)

In ***Om Prakash***, this court also looked at the nominal roll on record and noted that their overall conduct in jail was satisfactory and that there were no complaints against them.

285. In ***State v. Om Prakash***, the Division Bench noted that "*for the purposes of reference proceedings for confirmation of the death sentence under Section 366 Cr.P.C., the criminal court would include the High Courts as well*". The criminal court has to necessarily include the High Courts exercising appellate jurisdiction under Section 386 and revisional jurisdiction considering issues of enhancement of sentences to death sentences or challenges to death sentences.

286. Therefore, Section 235(2) confers a valuable right on the convict upon conviction, of a meaningful hearing and grant of an opportunity to place necessary material even by leading evidence to enable the sentencing court to impose an appropriate sentence on him, keeping not only the nature of offence but all relevant circumstances in mind. Upon pronouncing the judgment of conviction, the sentencing court is required to adjourn the matter for this purpose. Care is required to be taken to ensure that the opportunity of hearing Section 235(2) is not abused by the convict and the hearing is not unduly protracted.

In addition, so far as cases where the sentencing court is examining whether death penalty should be imposed, while hearing the accused under Section 235(2) the courts may require a report from a competent probationary officer to make an independent evaluation regarding the possibility of reform and rehabilitation of the convict. This report could be utilized to assist the court in examining whether the convict is likely to indulge in criminal activity or whether there is possibility of his reformation and arriving at its own conclusions taking all relevant factors in mind."

240. It is essential to note that the law provides little, if any, guidance to the probation officers who submit reports to sentencing courts. The matter assumes even more importance if the sentence

which could be awarded to the convict is punishable with the death penalty.

241. This aspect had troubled us when we pronounced the judgment in ***Vikas Yadav.*** Consequently, from the above consideration, the following guidelines were collated by us :

> "291.In addition to the above, we would like to reiterate the points emphasised by the Division Bench of this court in the decision dated 17th April, 2014 in ***Death Ref.No.1/2013, State v. Bharat Singh*** in the decision authored by our learned brother, Dr. S. Muralidhar, J. Adding our suggestions to these points, it is directed that the trial courts deliberating on the question of sentence to be awarded to a convict for commission of an offence which is punishable with the death penalty, after pronouncing the judgment of conviction, before the sentencing hearing, shall undertake the following :
>
> (i)To call upon the concerned authority to assign a probation officer (PO) to the case to submit a report on the following two aspects:
>
> (a) Is there a probability that, in the future, the accused would commit criminal acts of violence as would constitute a continuing threat to society?
>
> (b) Is there a probability that the accused can be reformed and rehabilitated?
>
> (ii)To inter alia make the following enquiries in his proceedings:
>
> (a) enquire from the jail administration and seek a report as to the conduct of the accused in the entire period spent in jail. The jail authorities will extend their full co-operation to the PO in this regard.

(b) meet the family of the accused and the local people even if it requires travelling to the place from where the accused hails. He will seek their inputs on the behavioural traits of the accused with particular reference to the two issues highlighted.

(c) The PO shall consult and seek specific inputs from two professionals with not less than ten years' experience from the fields of Clinical Psychology and Sociology.

(d)meet the victim/complainant and seek his/her/their inputs in the matter. In case, the complainant/victim is not in a position to assist the probation officer, inputs may be obtained from the guardianship/caregiver/friend who is giving the requisite care.

(e)The State, through the Secretary, Home Department, GNCTD will make appropriate arrangements and reimburse the expenses incurred for the PO to comply with the directions issued in this judgment.

(iii)The probation officer may examine available material as noted in para 70 of ***State v. Bharat Singh***.

(iv)After ***a fair and independent consideration of the material*** obtained during the inquiry, the probation officer ***shall submit a report*** on the two issues noted at Sr.No.(i) above to the trial court within the period stipulated by the court in a sealed cover.

(v)The copy of the report shall be given by the trial court to the convict as well as counsel for the prosecution who shall maintain confidentiality of the document.

(vi)The counsel for the accused/convict shall be ***permitted to make submissions on this report.***

> It is after complying with the above, that the trial court should proceed with pronouncing the order on the sentence."
>
> (Emphasis by us)

242. But these guidelines are also completely insufficient and have not enabled the probation officers to discharge the burden upon them as is manifested from the report received in the present case by us. To our chagrin, we find the very probation officer who submitted the report in ***Bharat Singh,*** was assigned the present case. Despite the mandate in the exercise undertaken in ***Bharat Singh,*** the report submitted before us is not sufficient.

Therefore, the matter cannot end with the exercise undertaken in ***Bharat Singh*** and ***Vikas Yadav***.

243. Keeping in view the importance of the matter, we have undertaken a further examination of the manner in which probation officers are appointed in this city, their knowledge and training.

We undertook this exercise of examining the Probation of Offenders Act, 1958, the international norms and experience in this regard, carefully assisted by Professor Mrinal Satish, learned amicus curiae.

244. As noted above, the Code of Criminal Procedure makes a reference to probation without dealing with the issue of appointment of probation officers, their eligibility, entitlements and training.

245. Section 2(b) of the 'PO Act' defines the expression "*Probation Officer*" as an officer appointed to be a probation officer or recognized as such under Section 13. The substantive provision defining who can be a probation officer is to be found in Section 13. Clause (a) of Sub-section 1 thereof defines a "*probation officer*" under the enactment as being "*a person appointed in such capacity by the State Government or recognized as such by the State Government*". Clause (b) thereof, includes a person provided for this purpose by a society recognized in this behalf by the State Government. Clause (c) empowers the court to appoint any other person who, in its opinion, "*in any exceptional case*" is fit to act as a probation officer in the special circumstances of the case.

246. The duties of probation officers are stipulated under Section 14 of the enactment which, under Clause (a), includes making an inquiry in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him and submit reports to the court.

247. Concerned about the ability of the probation officers so appointed, we delved further into the matter and came across with ***The Delhi Probation of Offenders Rules, 1960*** (the 'PO Rules' hereafter) which were enacted by the Chief Commissioner, Delhi in exercise of powers conferred under Section 17 of the Probation of

Offenders Act, 1958 read with the Government of India, Ministry of Home Affairs Notification no.7/1/58-PIV dated 20th September, 1958 and with the approval of the Central Government. The probation officers under Section 13(a) of the Act are referred to as "*salaried probation officers*" by virtue of Rule 2(h) while the probation officers appointed by the court under Section 13(1)(c) of the Act are referred to as "*special probation officer*" under Rule 2(i).

248. We may usefully refer to Rules 8 to 13 of Chapter III of ***The Delhi Probation of Offender Rules, 1960*** which are extracted hereunder :

> "*8.* ***General attributes of probation officers.*** *– While appointing probation officers, due regard shall be had to the following* ***general attributes*** *of a probation officer:*
>
> *(a) Adequate educational attainments;*
>
> *(b) good character and personality suitable for influencing persons placed under his supervision in two essential respects. Viz. (i) conforming to law during the period of probation, and (ii) reformation of character and attitude to social behaviour as so not to revert to crime;*
>
> *(c) maturity of age and experience; a probation officer in order to have independent charge of a probationer should not be less than 30 years of age; and*
>
> *(d) aptitude, zeal and a "calling" for probation work.*

9. ***Qualifications of salaried probation officers.*** *– (1) A salaried probation officer shall be –*

(a) a graduate of a recognized University;

(b) (i) not less than 25 years and more than 40 years of age at the time of first appointment (exclusive of period of training) in the case of probation officer grade II; and

(ii) not less than 30 years and more than 40 years of age at the time of first appointment in the case of probation officers grade I.

(2) A salaried probation officer appointed by the Chief Commissioner shall possess ***other qualifications*** *prescribed by the Chief Commissioner* ***for posts of similar status and responsibility****.*

(3) Every salaried probation officer, before being entrusted with supervision of a probationer, shall have received adequate training.

10. ***Qualifications of part-time probation officers.*** *– A part-time probation officer appointed in a district shall be –*

(a) not less than 30 years of age;

(b) a resident of the Union Territory of Delhi;

(c) in a position to devote adequate time to supervision of probationers;

(d) ***a person having sufficient practical experience in social welfare work or in teaching or in moulding of character; and***

(e) fully conversant with the Act and these rules.

*11. **Appointment and registration of probation officers.** – (1) The procedure relating to the appointment of probation officers by the Chief Commissioner, shall be in accordance with general rules relating to recruitment of officers to posts of similar status and responsibility.*

(2) Names of individuals in different localities for recognition as part-time probation officers submitted by a society or by the District Magistrate or the Chief Probation Officer may be considered by the Chief Commissioner.

(3)(a) The names of all probation officers recognized by the Chief Commissioner with their addresses shall be entered in a register kept by the Chief Probation Officer.

(b) Lists containing the names of (i) probation officers appointed by the Chief Commissioner, (ii) salaried probation officers provided by societies, and (iii) part-time probation officers, for service in the district or in specified areas of the district or allocated to specified courts in the district, shall be kept by the District Probation Officer and made available to the courts whenever necessary.

***12. Special Probation Officer.**-(1) The Court may appoint a Special Probation Officer under Section 13(1)(c) of the Act in view of the special circumstances of a particular case, when no probation officer on the lists referred to in Rule 11(3)(b) is available, or is considered suitable enough to attend to the case. A court or a District Magistrate may also appoint a Special Probation Officer under Section 13(2) of the Act.*

*(2) **In deciding whether a person in suitable or not** for appointment as a probation officer in a particular case, under Section 13(1)(c) or Section 13(2) of the Act,*

the Court or the District Magistrate ***may take into consideration (a) the general attributes specified in Rule 7 and the provisions of Rule 13, (b) his age, position, character and attainments and relationship to the offender, and (c) his liability to follow these rules and to discharge of duties imposed on probation officers****.*

13. Choice of probation officer – Precautions.-*(1) Female probationers should not ordinarily be placed under the supervision or control of male probation officers.*

(2) Religious persuasions of the probationer and the probation officer should be taken into consideration.

(3) While choosing a probation officer for supervision in a particular case, the Court may, where necessary, consult the District Probation Officer."

(Emphasis supplied)

249. These Rules were framed in the year 1960. There have not only been huge knowledge developments in the ensuing fifty five years but tremendous technological advances also. The nature of crimes and personality of criminals have also changed in the preceding 55 years. Micro level specializations and expertise in every field including psychology are available today and are institutionally recognized.

Comparison with other jurisdictions in respect of educational qualifications of a Probation Officer

250. Dr. Mrinal Satish, learned amicus curiae placed before us the essential qualifications of Pos in other jurisdictions. We propose to briefly note them as under :

United Kingdom: In the UK, a Probation Officer is to start of as a Probation Services Officer (PSO), and would qualify as a PO only after qualifying training which would typically involve; an Honours Degree in Community Justice and the Level 5 Diploma in Probation Practice OR the Graduate Diploma in Community Justice and Level 5 Diploma in Probation Practice (if one has a degree in Criminology, Police Studies, Community Justice, or Criminal Justice).

United States of America: In the US, to qualify as a Probation Officer, one must hold a Bachelor's Degree and take the state-mandated training program.

Canada: In Canada, the educational pre-requisites to becoming a Probation Officer are that one must hold a degree in Social Work, Criminology, Psychology or Sociology; an experience, greater than five years, in a social services or correctional organization in a role that involves assessment of human behaviour & supporting the changing of such behaviour.

The above narration can provide valuable guidance to the authorities in making appropriate provisions to assist courts in Delhi.

Therefore, there is an urgent need to introspect the educational requirements as well as remuneration of a Probation Officer in our country. Unless the same are rationalized, objective assessments of the convict's temperament may not be possible.

251. Rule 9, which prescribes the essential qualifications of salaried probation officers, renders eligible a *graduate in any subject* of a recognized university for appointment of the probation officer. Apart from the knowledge of psychology, knowledge in several related fields such as sociology and criminology would be essential to equip a person for serving as a probation officer. The probation officers who are required to submit pre-sentencing reports must be the persons who have expertise in dealing with the unique challenges posed by cases involving the death penalty as a sentencing option.

252. Our experience, as is manifested from the report in the present case, clearly establishes that the prescription contained in Chapter 3 of ***The Delhi Probation of Offenders Rules, 1960*** requires to be revisited by the competent authorities and appropriate steps taken. This matter cannot be delayed inasmuch as the working of sentencing discretion in the city in serious cases is imperilled by non-availability of adequate and proper assistance to sentencing courts.

253. Another aspect of empowering probation officers in undertaking the onerous task of preparing PSRs, requires the State to impart adequate and proper training and issue guidelines so that they are equipped to collect only relevant information and are able to exclude extraneous information. They must also be equipped with ideas for the manner in which the collected information should be dealt with.

We have no information about training methods adopted. However, the above narration amply illustrate that if in place, the training is hopelessly inadequate.

254. We may note that Clause (c) of sub-section 1 of Section 13 enables a court to appoint a person other than the salaried probation officer as a person for undertaking the inquiry. However, this brings in several issues relating to the independence of the person appointed; emoluments which have to be paid to that person and may raise allegations of bias and impropriety.

Guidelines for 'PSR'

255. In addition to the aforementioned guidelines culled out in para 291 of ***Vikas Yadav***, certain additional aspects have been placed by Professor Mrinal Satish, learned amicus curiae before us. On a consideration of the entirety of the material placed before us, we collate hereafter the procedure and all guidelines to be mandatorily adopted by courts before the sentencing hearing, upon

conviction for commission of offence which is punishable with death penalty as follows :

I. <u>Appointment of Probation Officer</u>

(i)To call upon the concerned authority to assign a probation officer (PO) to the case to submit a report on the following two aspects:

(a) Is there a probability that, in the future, the accused would commit criminal acts of violence as would constitute a continuing threat to society?

(b) Is there a probability that the accused can be reformed and rehabilitated?

(ii) Adequate time frame should necessarily be provided to the Probation Officer to conduct the investigation.

(iii) The concerned authority should ensure that the PO has no relationship or connection to the accused, complainant, witness or subject matter of the case.

(iv) In case of the offender being a female, assignment may preferably be made to a female PO in a female only environment.

(v) *<u>Expenses of the PO</u>* : The State, through the Secretary, Home Department, GNCTD will make appropriate arrangements and reimburse the expenses incurred for the PO to comply with the directions issued in this judgment.

(vi) Expenses of the PO appointed by the court under Section 13(c) of the PO Act or any other provision shall be determined by the court and shall be paid by the State upon details being directed by the court.

II. Procedure of inquiry by the Probation Officer

(i) All PSRs must be ***factual, independent and free from bias*** as far as possible.

(ii) enquire from the jail administration and seek a report as to the conduct of the accused in the entire period spent in jail. The jail authorities will extend their full co-operation to the PO in this regard.

(iii) shall mandatorily hold a ***private interview with the convict***.

(iv) In light of the fundamental ***right against self-incrimination*** in Article 20(3) of the Constitution, the ***offender must be informed of his/her right to silence***. As a result, ***in no circumstance can any adverse inference be drawn*** if the offender refuses to give an interview to the PO. Further, it is advisable to allow the counsel to be present during the interviews with the accused.

(v) shall mandatorily conduct a home investigation, meet the family of the accused and the local people even if it requires travelling to the place from where the accused hails. PO shall gather information from family, friends, relatives and associates of offender. He will seek their inputs on the behavioural traits of the accused with particular reference to the two issues highlighted. The PO shall verify the inputs given by the convict during the home visit.

(vi) The PO shall consult and seek specific inputs from two professionals with not less than ten years' experience from the fields of Clinical Psychology and Sociology.

(vii) meet the victim/complainant and seek his/her/their inputs in the matter. In case, the complainant/victim is not in a position to assist the probation officer, inputs may be obtained from the guardianship/caregiver/friend who is giving the requisite care.

(viii) The PO should not give undue weight to the information and ignore the presence of other aggravating or mitigating factors.

(ix) If ***information received from other sources is contradictory to or inconsistent*** with the ***information received from the offender*** in his interview, the ***offender should be interviewed a second time with the contradictory information*** put to him; he ***should be given a chance to respond*** to the same and his answers should be recorded in the PSR.

(x) All information in the PSR should be classified as verified/corroborated or unverified/alleged.

(xi) If any statement is an opinion of the PO and not based on facts, it should be so stated clearly.

(xii) More information than necessary for the purposes of making the sentencing decision should not be collected.

(xiii) The probation officer, if directed, may collect all the information on the ability of the offender and his family to pay monetary penalties/compensation.

(xiv) The PO may ascertain convictions, if any, during the trial and mention them in the PSR.

(xv) The utmost standards of ***confidentiality*** of PSR should be maintained. As held by this Hon'ble Court in *Bharat Singh*, PSRs must always be given in ***sealed envelopes*** to the Court, and copies made must also be put in sealed envelopes before being given to the parties. The parties must be directed to maintain complete confidentiality regarding the contents of the report.

(xvi) The copy of the report shall be given by the trial court to the convict as well as counsel for the prosecution who shall maintain confidentiality of the document.

(xvii) The ***accused or his counsel must be provided with a copy of the PSR***, preferably prior to the hearing, so as to be

able to formulate objections and respond to the facts, inferences and/or recommendations made in the PSR.

(xviii) The counsel for the accused/convict shall be ***permitted to make submissions on this report.***

III. Ensuring Quality in PSRs

(i) There is a dire need for the creation of a ***training and supervision body for*** POs; this to not only ensure they are given adequate training, much needed in delicate cases such as these, but also to ensure accountability, monitoring and supervision of the final report and its quality.

(ii) Until such legal framework is put in place, it is essential that the court exercise discretion in deciding who shall be the PO in any particular case, with regard to the need for skill and expertise. Towards the same, the court has the power to appoint ***any person*** as a PO under Section 13 of the Probation of Offenders Act, 1958, and ***need not only select from pre-existing and designated POs***.

IV. Ensuring Non-Discrimination in PSRs

It has been noted in other jurisdictions that Pre-Sentence Investigations and Reports often have a discriminatory and unequal impact on certain groups. To reduce or eliminate such biases in the preparation of PSRs, the court must always exercise its discretion and review the Reports carefully to exclude unverified information and opinion-based conclusions of the PO.

V. Weightage to be attached to the report

> It is important that the sentencing court give weight to the PSR as it deems fit, without considering itself to be bound by it. The sentencing discretion ultimately vests with the court and the PSR is only a helpful tool/supporting document.

Compliance of the above is essential in order to ensure an objective pre-sentencing report to enable a sentencing court to arrive at a just sentence on a convict.

Result

256. As a result, the conviction of Mithlesh Kumar Kushwaha by the judgment dated 1st July, 2010 is sustained. In view of the above discussion, so far as the sentence for commission of offence under Section 302 IPC is concerned, we commute the death penalty awarded by the learned Trial Judge to rigorous imprisonment for life which shall be for twenty five years actual without consideration of remission of the sentence. So far as the sentences imposed for commission of other offences are concerned, we are not inclined to vary the same and uphold the other sentences imposed by the learned Trial Judge by the order dated 8th July, 2010.

All sentences of imprisonment shall run concurrently. Mithlesh Kumar Kushwaha shall also be entitled to the benefit under Section 428 of the Cr.P.C.

257. The death reference is thus declined while modifying his sentence in terms of para 256 above. Cr.A.No.249/2011 would stand disposed of in these terms as well.

258. A direction is issued to the jail authorities to keep Lt. Col. Amanpreet Singh Legha informed about the release of the offender from jail.

259. A direction is issued to the Secretary (Home), Delhi Government forthwith to examine the issues flagged from paras 212 to 255 above as well as ***The Delhi Probation of Offenders Rules, 1960***. A report shall be submitted to this court on the several aspects noted above within four weeks.

A copy of this order shall be given to Mr. Rahul Mehra, learned Standing Counsel for the Government of NCT of Delhi to ensure compliance.

260. Before parting with the case, we wish to place on record our deep appreciation of the valuable assistance rendered by Professor Mrinal Satish, Associate Professor, National Law University who was appointed as amicus curiae. He not only placed extensive research on several issues considered by us but also very kindly made written submissions which enabled us to appreciate the importance thereof. We also appreciate the assistance given by Mr. Jai Bansal, Advocate who was appointed as amicus curiae on behalf of Mithlesh Kumar Kushwaha as well as Ms. Ritu Gauba, learned APP for the State and Mr. Puneet Ahluwalia, learned

counsel for the complainant who enabled us to make a comprehensive examination of the factual matrix and the applicable law on the subject.

261. List before us on 18th December, 2015 for a report from the state in terms of the above.

A copy of the judgment be made available today itself to the offender – Mithlesh Kumar Kushwaha who is lodged in Tihar Jail.

GITA MITTAL, J

J.R. MIDHA, J

SEPTEMBER 21, 2015
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