# NATIONAL JUDICIAL ACADEMY

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VERBATIM REPORT

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# Table of Contents

First Session: Sentencing in Murder Trials ..... 2
Resource Person: Justice Navin Sinha Chief Justice, Chhattisgarh High Court ..... 2
Session Number Two: Sentencing in trials of offences against women ..... 17
Resource Persons: Justice Navin Sinha and Asso. Prof. Dr. Mrinal Satish ..... 17
Session No 3: Sentencing in Trials of offences against Children ..... 34
Resource Person: C.J. Navin Sinha and Justice B. Rajendran ..... 34
Session No 4: Sentencing in Trials of offences against Children ..... 48
Resource Person: Adv. Trideep Pais, New Delhi ..... 48
Session No 5: Sentencing in Economic Offences ..... 63
Resource Person: Justice Anjana Prakash (Patna High Court) ..... 63
Session No 6: Sentencing of Woman Offender ..... 77
Resource Person: Justice R. Basant (Former Judge Kerala High Court) ..... 77
Session No 7: Sentencing for Youth Offenders ..... 91
Resource Person: Justice R. Basant and Justice Anjana Prakash ..... 91
Session No 8: Sentencing in Cheque Bouncing Cases (Fraud and Cheating) ..... 104
Resource Person: Justice Anjana Prakash ..... 104
Session No 9: Sentencing in Bribery Cases ..... 124
Resource Person: C.J. Sunil Ambwani (Former Chief Justice, Rajasthan High Court) ..... 124
Session No 10: Death Sentence: Useful or not ..... 135
Resource Person: Resource Person: C.J. Sunil Ambwani (Former Chief Justice, Rajasthan High Court) and Associate Professor. Dr. Anup Surendranath ..... 135

## First Session: Sentencing in Murder Trials

Resource Person: Justice Navin Sinha Chief Justice, Chhattisgarh High Court

Prof. Dr. Geeta Oberoi: Very good morning to all of you. Today is actually birth anniversary of father of our nation and I was just was thinking like I should also cull out some principles that our father of nation has given about sentencing because this seminar is on sentencing. Then I realized that I didn't get as basically certain writing, but I learned this he was arrested in 1922 for seditious writing in young India newspaper tried in 18th March and sentenced to 6 years imprisonment. But an operation of appendicitis brought an early release from Yarwada Prison. Also on 5th May 1930 they stole him up like a thief in the night and arrested him and released 25th June 1931. This is about sentencing an also about father of our nation Mahatma Gandhi.

Prof. Dr. Geeta Oberoi: So with this co relation between the today's seminar and our history we proceed forward to have these 3 days deliberation with all of you. You are spending all your holidays with us one is national holiday and your holidays. And Objective is actually we know that no two cases are similar or same so bringing uniformity or consistency is really very difficult and something we should not even ask for. But at the same time can there be so much variation that like from zero to 10 years is something that we all need to think through this seminar. There is so much variation that one Judge for same facts and situation gives fine of two thousand rupees whereas other judge gives10 years imprisonment. Can we all come together in this National Seminar and try to develop some conversions between our ideas, between the application of legal principles and doctrines. Of course thinking goes on our own individual thinking but apart from that what is there that we can come closer. This is what all that this seminar is all about. To conduct this seminar with us we have Hon'ble Chief Justice Navin Sinha, who is chief Justice of Chhattisgarh High Court. We also have Justice B. Rjendran from Madras High Court. We have Dr. Mrinal Satish who has done his Ph. D on sentencing, especially in trials involving offences against women from Yale Law School USA. And we have Adv. Trideep Pais with us, who will be joining us later. With this brief introduction about ourselves, I am Prof. Geeta Oberoi at NJA, and the Programme co-ordinator Milind is there who will be there to anything that you have in these three days you can talk to us we also have Registrar Mr. K. Uthirapathy of NJA. If there is any problem with respect to your stay and anything you can please tell us. Apart from this introduction we would like to have also learn about you all of you because all of you are representing India over here. So pleased just be seated and introduce little bit about yourself and what post you are holding and from how many years. Thank you so much.

Introduction of the Participants

Good Morning My Lord and the dignitaries on the dias. I am Mr. Rajanikanta Singh from Manipur High Court presently I am posted as Principal Session Judge at Chaurachandpur Manipur. Thank You

Good Morning and good morning to all also. I am posted as Additional Session Judge at Hoshiarpur, Punjab and Haryana High Court. I have joined the Judicial Service recently in the year 2013.

My name is R. J. Sathish Singh from Karnataka. I am holding Principal District Judge Hassan from last six years.

Good Morning sir I am Ashutosh Pandey from Tripura High Court I have just joined this year in May 11th as Grade I Trainee.

Good Morning Sir I am R. C. S. Samant, District and Session Judge Raipur, Chhattisgarh High Court. As a District Jude this is my 5th Year of Service though not at the same place but at 3 different places of posting.

Good Morning Sir I am Noordeen Tigala District and Session Judge Raipur, Chhattisgarh High Court.

Myself Om Prakash Pandey District and Session Judge at Sahebgang, Jharkhand High Court.

I am Ashok Kumar District and Session Judge Kasganj, Allahabad High Court Uttar Pradesh.

Good Morning Sir I am P. K. Bora District and Session Judge Kokrajhar, Gauhati High Court Assam.

Good Morning all I am S.M. Gavhane District and Session Judge Satara, Bombay High Court.

Good Morning Sir I am N.R. Borkar District and Session Judge Nandurbar, Bombay High Court Maharashtra.

Good Morning My Lord I am S. Sarma Roy Additional District and Session Judge, Tripura High Court. I am holding the post from last seven months.

Respected dignitaries on the dais and my dear participants Myself M. R. Das, from Orissa High Court. Holding the post of Principal District and Session Judge from more than last two years. Thank You.

I am from Andhra Pradesh from the High Court Hyderabad. I am holding the post of Principal District and Session Judge at Medak from last four months back. Thank you.

Good morning My Lords and all the Participants here. I am K. Durga Rao Principal District and Session Judge, Nellore Andhra Pradesh. Thank You my Lord.

I am Alok Kumar Varma District and Session Judge Chamoli, Uttarakhand State. Thank You my Lord.

Good Morning Sir Myself R. K. Shrivastva District and Session Judge, Rewa, Madhya Pradesh from last three years.

Namaskar Your Lordship I am Prem Pal Ranta Kullu, H. P. holding this post for last three months.

Good Morning my Lord and all participants I am Rajeev Dubey, District and session Judge from Bhopal. I am holding post of District and Session Judge from last five Years.

Good morning Lordship I am Nazima Banu presently holding the post of Principal District Judge at Perambalur State of Tamil Nadu.

Good Morning I am Shubhra Ghosh from West Bengal, I have joined as Chief Judge City sessions Court Calcutta in the month of June this year.

Good Morning Sir I am Shircy District and Session Judge Thiruanantpuram Kerala working from last one year I am posted as District and session Judge in the year of 2012.

Good Morning Lordship I am Subadevi holding a post of Principal District Judge, Dharmapuri Tamil Nadu from 15 days ago.

Good Morning Lordship I am R.K. Desai from Gujrat I am posted as principal District and Session Judge at Bhavnagar since Nov 2014

A very Good Morning to all I am Pankaj Bhandari Principal District and Session Judge, Udaipur, Rajasthan I am a direct Recruit from 2001, thank You.

Prof. Dr. Geeta Oberoi: Now I request Justice Navin Sinha, Chief Justice of Chhattisgarh High Court to begin with the first session.

Justice Navin Sinha: As told you I just give a quotation from Justice Krishna Iyer in AIR 1977 SC 1926 on Gandhian Philosophy of criminology Progressive Criminologists across the world will agree that the Gandhian diagnosis of offender as patients and his conception of Prisons as Hospitals mental and moral is a key to the pathology of delinquency and therapeutic role of Punishment. I now many of you will disagree immediately to the kind of crime which is taking place when Mahatma Gandhi had this thought and the crime that is taking place today, I don't know leave that. I can see that we have people who have just been appointed up to people with 13 years of experience. Now look get one thing very clear that we all here are judges it is just a different matter that you are sitting in what is described as subordinate there on the judiciary and I am from higher Judiciary I can upset your orders and my orders can be upset by the Supreme Court. So we are here as judges to discuss. This is my personal belief that

there is no presumption that the High Court alone knows the Law and the best example which I can give you as I met my brother Justice B. Rjendran last night for the first time, I didn't know that he is elevated from service. I told him a story that, I learnt criminal Law sitting on the Bench. I had no practice of Criminal Law, but I learnt criminal Law sitting on the Bench from a brother Judge who was elevated from a service. Therefore I am trying to tell you that we are all here to discuss. And this discussion mean more of working out new solutions to old situations. Working out solutions according to the requirements of the society the victim, the offender all there. It basically calls for a complete rethinking by us. As the In charge Director told you that if no two persons can think alike how two judges think alike. Judges are human beings. They are asked to perform duties of a godly nature, they don't become God, and they remain human beings. And all of you have an experience invariably on a matter comes before you, your reaction is this is all right, but another view was possible also. Now merely because another view was possible also doesn't mean the view taken was wrong. I was talking to the personnel from the Academy yesterday night when I arrived I said that Crime is getting very complex crime is are getting very intelligent, technology is being used without tigressing too much I will come back to the topic immediately.

I think sentencing is the most difficult part. It is the most difficult part. It is much easier to decide a case, whether to convict or to acquit? Then do decide what the appropriate Sentence is? Because we all come across cases. I have a case with me. A beautiful case of 2000 where the Trial Judge gave the appropriate sentence for death. The High Court got swayed and it is very apparent, with all due respect it's a very old judgment, with all due respect, that the personal thinking of a Judge came in. There is a book written by American judge everything is same about how Judges think. It is just the same everywhere in the world. He says that a Judge we think how a judge will think is controlled by the kind of family background in which he was born, the kind of education which he had, the kind of schooling he get, the kind of friends he had, the kind of social circle that he had, but at the same time the Judge is constantly struggling to come out of it while deciding a case. So this is where the most difficult part of the sentencing comes in. And sentencing has different theories of retribution, rehabilitation. Now we are laying emphasis on the rights of the victim. And a new thinking is coming in. I don't know how many of you have done it. I have not seen a Judgment till now. Most of the time, the compensation awarded is very meagre, and I am just quoting as an example, compensation awarded is more of a ritual and very meagre. Now I will give a positive example, I have already decided that case, I have no hesitation discussing it. I will request all of you don't discuss a case where you are deciding it, where you are hearing it, it may affect your thinking, subconsciously without you realizing it. It was a fight between a families. Two brothers and their wives, children and everybody fought. And one side was stronger so they beat up nice and proper. But no assault was made on the head, upper part of the body, nothing. All the assault was made very intelligently below the knee. So obviously there was a lot of fracture. And very rightly the Trial Judge didn't convicted under 307. He convicted, if I remember

correctly he convicted them under 325. So the lawyer can be insisting, being very technical, look there was a fracture and the Doctor said that, if they are not got treatment immediately, they could have died etc… now any one of you can tell what question I have asked, I have partly disclosed my mind. By telling you the story I have partly disclosed my mind. In an acquittal of appeal which came I have been asked to interfere in the sentence. As I said being Judges we have to keep thinking. You should let your mind run and riot your thinking. To decide every case everything and start setting it out. Can anybody tell me? Just use your imagination.

One of the participant: whether the injuries in all probabilities would have cause death?

C.J. Navin Sinha: Perhaps I didn't explain my question. No, no perhaps I didn't explain my question All the injuries were below the knee. The Trial judge convicted under 325. He awarded compensation also. The lawyer was arguing that look it is case of 307 these fellows should have been convicted and sentence under Section 307. Look at the number of fractures they had caused and to the number of people. I wanted you to react on it, I will not tell you beyond this, the one line that I had picked it up from that. The lawyer said one line beyond that.

Please sit down

Justice Navin Sinha: One of the participant said, I think there was no mens rea of committing a murder, because it was cleverly planned to cause injuries on the lower part of the limb. So I think 307 culpable homicide not amounting to murder is made out.

Anybody else.

Another participant replied: the injuries caused to the person is not sufficient to cause the death of the person and therefore 307 would not be attracted

Anybody else.

Justice Navin Sinha: I think the Judge here gave the right answer. The lawyer said one line after that, look they couldn't go to work, they couldn't attend their fields, and they were hospitalized. They required so much of treatment. So I said, look, your brothers and brother's children and wives were fighting. You want this acrimony to continue or want it to settle number one.

Number two, that you said you have lost your income, but he didn't assault you on sensitive part of the body. Because if he wanted to kill you he could have done so. All of them had lathis and beaten on head, one strong blow on the head, he would have possibly died. One strong blow in the stomach and fist you know fixed and followed with death. They did nothing, so I said you would have spent lot of money on medical treatment. The lawyer said yes, yes that it what I am trying to say. I said very good,

we will enhance the compensation. This is what sentencing all about. It is very difficult to put in a very strait jacket formula. My brother will give you a better example. Then I want you people to come out with your views on sentencing. I will give another example and will leave and ask my brother to address you. 354 when Lord Macaulay drafted it, the whole society was very different. The status given to women was different. Today it has been made non-bailable offence. So the sentence. So the interpretation was given to 354 earlier in time if today I as a judge apply that same principle to 354 with changing mores of society, the changing structure of the society, I would be insensitive as a judge. Therefore sentencing will always boiled up from to the facts of a case a lot of things will happen and come in to play. Now the thinking is coming I think of well life imprisonment doesn't mean imprisonment for 14 years. It came in Swami Shraddhanand, but then when you want to do that against special reasons will be required. You can't just say that life imprisonment will not be of 14 years in this case. Something more has to be satisfied. Therefore we will come back to it. And in the mean time I would expect rest will be for a day. Better part of the day. I would expect more answers, with your thinking to go on riot. Don't think in the traditional court. Let me tell you one more thing and my brother. All of you are very experienced Judges. I have always telling this to the younger Judicial Officers that, when a soldier goes to the battle front and he does not wear his bullet proof vest, and he very bravely walks in front of the enemy and first shot he is over. First thing is he is to blame himself, therefore what I am trying to say is that, when you are talking about sentencing, you see most of the Judgments my brother will also agree with me, I have seen it at Bihar, I am seeing it at Chhattisgarh, not much attention is devoted to the sentencing part. There are cases, there are cases, where Session Judges have analyzed the whole situation, and then passed the sentence. I am not saying that it doesn't happen. But those are exceptions. All that is required is that my honesty should be perfect. In Patna once told a Judge, he came ADJ, He said three of my Judgments have been affirmed by the High Court and still not promoted. I said look a Jude like me, I will promote a Judge whose three Judgments are upsets. When I have to clash my brain with his, right I wanted you to think in those terms and then decided what sentencing means. Give your reasons disclose your mind anybody wants to interfere let him know what your sense of Justice is. That is missing that part is greatly missing. Am I right or not? (Justice B. Rjendran replied absolutely right, please Sir.)

Justice B. Rjendran: - Good Moring to all of you. It is a pleasure to meet Chief Justice (Navin Sinha) I am sorry I couldn't meet him earlier. Yesterday half an hour discussion casually in the corridor after he left form his car, at 09:30. Between 09:30 and10:00 it could change me a lot even though I was working as Public Prosecutor, a practicing Lawyer for 20 years, thereafter becoming a Judge, what a phenomenal work he had done. That you will realize when you are at the end of the session. Such is a wonderful work he has done. For sentencing that what more appropriately he said that is to be done at the trial Court level. Trial Court Level is a basic concept, because I as trial Lawyer, started my practice in the Trial Court, and I tried as a Public Prosecutor also. That is the place where the District Judge, or the

any sentencing Judge sees the parties, the evidence analyses it, and theater comes to a conclusion. He also analyses, the victim's possible loss, as he rightly stated in that particular case. What is to be born in to mind, is how far his is affected as the lady also pointed out that well the intention was not murder, but the real intention was totally different, it is more than killing, but here is a person who is going to live long with this difficulty and will not be able to work, and in that context what should be in the mind of the Judge, as he rightly pointed out, that retribution of reformation all these things does not appear. Where the victim's responsibility, victim's family's up gradation, should be in consultative in the mind of a Judge. In this context I am quoting a Supreme Court's judgment. I quote, *2013 (7) SCC p. 545 Gopal Singh v. State of Uttarakhand* just punishment is a collective pride of the society, with a collective pride has to be kept most in the mind, simultaneously the principle of proportionality between the crime and the punishment cannot be totally brushed aside. What a wonderful words the principle of just punishment is a bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. It should not be found to be 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 respectable life, the effects the possibilities to become a social threat or sometimes laps of time in the commission of the crime and this is more important, his conduct in interregnum bearing in mind the nature of the offence, the relationship between the parties, and attractability of the doctrine for bringing the convict to the values based social main stream maybe the guiding factors, stopping there for a moment. They analyses three different categories one gravity of the punishment, number the hate the victim to be note of another important thing is whether this person will come back to the social main stream? Could it be available to that? Then needless to emphasis on these are the illustrative aspects put forward in a conducive manner. We may reason to have there can neither be a strait jacket formula or a solvable theory in mathematical terms. It will be dependent on the fact of the case and rationalized judicial discretion, may be the personal perception of a Judge, nor self-moralistic vision, nor hypothetical apprehension, should be allowed to have any play. For every offence a drastic equation cannot be applied on. So that's all they see. I know to quote another example, yesterday I have passed a judgment that's a case of 304 A, the driver of a vehicle is transport corporation driver, he was at the time of the accident 44 years. He has been convicted by the Lower Court originally by two years, thereafter the Appellate Court reduces it by taking in to consideration, that he is a transport's driver, he automatically loses his job, totally gone. Therefore he says he reduces it to three months, because discretion is total either or fine or both. Then the decision came before me, one argument which was made was, yes been removed from service originally, but if he is given a chance, he will have another three years only, now he is more than 53 years of age of retirement is 58, therefore they will contend an argument was also raised by the Advocate concerned unfortunately the MCOP was being filed was dismissed, because they have not gone through the vehicle number, and some other mistake, now I am ready to compensate

that family, would that be a consideration for reducing a sentence, or setting aside. Setting aside the sentence cannot be there, because there was a death, I thought this for a moment, whether this three months sentence or sentenced already undergone, would be a better one and weighed the amount of compensation. He was prepared to pay 2.5 lakhs therefore yesterday we passed a judgment, 2.5 lakhs fine would be given as a compensation and the sentence already undergone which is nearly about two months, less than three months above two months. This was an aids judgment in so far as the victim's family is concerned. They are also taken care of, so this is one aspect. At the same time I cite one more case, well it is case of whether it is 376 or 417. The age of the victim is exactly eighteen. But there was a dispute whether it is three months less or not, then they came for a compromise, as per the Supreme Court's earlier Judgments such matter cannot be compromised. Can it be allowed to be compromised by a mediator, at that time, even if he agree, that he will marry was a question. The girl was not agree to marry. That cannot be a reason for taking into consideration. So ultimately the net result is, sentencing is with you, sentencing is rightly to be stated. You will have to analyses on all these three aspects. Come to a conclusion what is just sentencing. As pointed out conviction is one aspect, which easily can be done, but thereafter the sentencing is coming in to picture. You will have to analyze more. Your thinking capacity should raise in a different angle. Where do not, of course you have to found like within the framework of Law. At the same time you can have a different thinking, within the four corners of law that cannot be stopped at all it is your vision you cannot be branded some as yesterday as she was pointing out some judges clients think that he is a convicting Judge, he is an acquittal Judge, he is a landlord Judge, a tenant Judge, why personal perception, that should not be our endeavor in bringing a sentence, now as rightly said, it will not be a one way traffic, we are not to bore you, just our prepared speeches, we have closed our prepared speeches, nothing is of it. Every discussion you make it here, will make everyone think in a different angle that's what the Chief Justice has said. I will give one example, before we proceed to this paper (Hypothetical Case) which is given to you, let me tell you we will discuss more examples, we will create hypothetical situation and then decide what sentence to be given in each case, let's keep one thing in mind as I said in the beginning, it is very difficult to be precise, and same absolute pin pointed, what are the issues to be kept in mind while deciding sentencing. When sentencing comes in the sweep is going to be from the start that is the person who committed the offence, if I go before that, the background of the commencement of the offence, down till the consequences of the offence. Now I can't put it better than this. I just read out one paragraph, this is a case about, more than four persons involved in the kidnapping, now two of them were given death sentence, and rest were given life imprisonment. This is not a Supreme Court judgment, this is a High Court judgment, and the High Court brought down the death sentence to life imprisonment, and took life imprisonment for 14 years to 20 years for all of them in the facts of the case. Now this course, the death sentence of the appellants is founded on their antecedents only, the facts and evidence of the case has discussed. I am sorry I am breaking up and reading the full sentences. Facts and evidence discussed does not create any distinction in the acts of the appellants and the others, who indict them with a higher

level of conduct in the abduction and confinement for the purpose of the sentence. No evidence has transpired with regard to any act on the part of the two appellants of having to threaten to cause death or hurt to the victims or conduct of nature giving rise to reasonable apprehension, in the mind of the victim of death or hurt, much less, there is no justification to distinguish their case from that of the other Appellants for award of different sentence. As by no stretch of reasoning classification can be sustained in law on antecedents only as a rarest of rare case warranting extreme penalty of death. Then of course there was reliance on the Supreme Court judgment dealing with similar reasoning. That no distinctive feature has been indicated to impose, two different sets of sentences. Now certain features of the case are too striking not to be noticed. The crime was not committed spontaneously, it was committed in a well-planned, pre-meditated manner with full logistics. The players were many. The smoothness and flawless nature of the offence shows that the appellants were not the novices. It was an organized criminal anti-social activity. It was sheer lust for money to the Appellants or otherwise were not paupers or beggars, to acquire easy money, to fuel only materialistic desires. So blindly they were driven by their selfish lust. That the impact of the crime not only upon the victims but on their relatives, and the society in general was aspect with which they were least concern. While a person who is murderously assaulted suffers the agony once the life is snuffed out. The victim here underwent the agony of uncertainty for their lives every day at the hand of the abductors for 52 days unsure what would happen to them ultimately. The fear pain and hurt undergone by them for 52 days, is far worse than assault snuffing out life immediately. The tenacity and greed with which the accused steadfastly stuck to their goal of ransom notwithstanding the efficiency shown by the Police, etc… is concrete evidence of the heartlessness and manic desire of the accused to succeed in their endeavors. Such persons cannot be held amenable to reaffirmation sorry it should be rehabilitation and constitute a danger to the society. Then the punishment should be commensurate to the criminal and not to the crime alone. Oder in society rest in the enforcement of rule of Law and then the whole discussion would come what is the consequence of a light punishment and what is the consequences of excessive punishment, now let us come to what has been given. This is a, we will not read the whole thing, the (Hypothetical) case is very simple and very nice. It basically is that in the fields people were crossing one person's dog suddenly started barking at them. The person beat up the dog the dog owner intervene pipe blow on the head of the dog owner was given, he was taken to the hospital two three days later he dies. Now let us have your responses. Forget about medical evidence and all of you are too experienced. The facts are telling by itself. Let's have quick responses. What would be the most appropriate sentence?

One of the Participant said, "My Lord Compensation would be more appropriate".

No, no you didn't follow it. A man in his field with his dog, somebody here walking by the dog started barking at the man who was walking by. That man assaults the dog, the dog owner says don't do it, he says I will kill you like your dog, I will beat you up like your dog, right. Then follows a scuffle, fists

and kicks are used and then the person who is having hot exchange he has an iron pipe in his hand, with which he had beat the dog earlier, he hits the dog owner on the head with that iron pipe. Three days later the injured died, now you have this picture here we are all here judges. We are experienced Judges.

One of the Participant: My Lord we are talking about the sentencing part, 304 (2) would apply here culpable homicide not amounting to murder is made out, because it was a sudden provocation between the parties without any intention mens rea so the best sentence, yes 304 is well established along with that the compensation part will be enhanced will be more appropriate.

Justice Navin Sinha: Let me complicated for you,

The Participant: Yes my Lord,

Justice Navin Sinha: He could have hit with the iron pipe anywhere on the body except on the head.

The Participant: However my Lord….

Justice Navin Sinha: Allow me to finish. Even if we take it out 302 please distinguish it between 304 (1) and 304 (2), because he did not hit on the leg, hand anywhere, he hits on the head

Another participant: My Lord it could be under 304 part one because the intention has to be inferred from the blow was given on the head.

Justice Navin Sinha: Very possible. Good. Very possible view, that is the first discussion we are having, in this case the Supreme Court gave 304 part two. But what you are saying is another reasoning. He could have hit him anywhere else why on the head that also with an iron pipe.

One of the Participant: My Lord in the moment ….

Justice Navin Sinha: Can we, can we…When a fight is going how to expect to which part of the body is to be hit or not. One at a time. Intention can be gathered by the act of the person. A person knowingly well that he is holding an iron pipe, if he hit on the head with a force then in all probability that a person will die. With this intention he hit on the head. It directly go to Section 302 of the I P C My Lord.

Then what happen about the grave and sudden provocation? Exception. You are leaving out the exception completely.

Intention can be gathered by the act of the person, it could be sudden and grave provocation why he didn't hit on other body or leg or back.

Then you fall in the category of a convicting Judge. (Laugh)

One of the Participant: I would like to add sir.

Justice Navin Sinha: Yes.

One of the Participant: In this case there was no intention. Actually he hit on the head of the victim but he didn't hit twice, to confirm that the death is caused. It was in the hit of the moment. And he did it and left it.

Justice Navin Sinha: Let's complicate it more. What if it was a lathi instead of an iron pipe?

The Participant: Lathi and iron pipe are similar except the iron rod is much heavier

Another Participant: My Lord…….How it is similar? That makes all the difference. The purpose of lathi….Lathi doesn't make the difference because it is the manner in which it is used, with intention, with force that is used. Lathi is used or iron rod is used……

Justice Navin Sinha: So now you understand. Force shall he looked in to. The intention and knowledge that has to be taken in to consideration. So now you understand how difficult the sentencing is? How it is difficult that is where……..

(Meanwhile laugh)

Justice Navin Sinha: In matter of dog bite, how a person can hit on the head of the human being? It can also be think here. That which kind of person he is, on such type of petty matter he can hit on the head. In this situation we can think that this case comes under the provocation. Allow me to speak in Hindi. I can't put it better. In English massage will not go. If I say. What you are saying is not wrong. But if you think as a criminal law is common sense 98 percent of the time. If you think if it as a common human being, that also from the countryside. Isko Hindi main bolte hai "Khoon sar pe chadkar bolta hai". Us waqt aap golden taraju main pakadkar boliyega usne aise kyon behave nahi kiya, aise kyon behave kiya, right.

Let's complicate it more.

One of the Participant: Sir hindi toda thoda malum hai sir. (Laugh)

Justice Navin Sinha: I could understand even if it is a golden scale tilt little bit. Let's complicate it little more. There is no iron rod, there is no iron rod, it just the most powerful weapon that God given you human being is his fist. Right. Beaten him with fists, no external injuries, he dies three days later. Let's complicate it further. He had an iron pipe in his hand, he put the iron pipe down and used his legs and fists. Fellow fell down, kept punching him, kicking him, no external injuries, and the fellow dies five days later. What will happen? What will be the appropriate sentence? Same situation he had the iron

pipe in his hand, but when the fight started he put the iron pipe on the ground, and started assaulting that fellow with his fists and his legs. Poor fellow fell down, he didn't stopped, kept kicking him, five days later he died.

Here we gather the intention. We are not talking about the intention. We are talking about sentencing. Sentence to hoga hi usko. Conviction to hoga hi. We are not talking about conviction. Whether It is a sudden provocation or not? Wo niche girgaya, he kept on beating him, how he can count abhi jyada marunga to mar jayega. (Laugh) Very debatable. There are…

There are more than one kind of Supreme Court judgment on this. I used one of them generally to give very lesser punishment. Right there are two kind of Supreme Court judgments on this where no weapons has been used nothing just good all fists and the kicks. Let's complicate it further. He gave him a blow one blow on the chest only, rib fractured, the rib punctured the lung right. Just one blow rib, one rib fractured and punctured the lung, he died because of that.

It was not with intention. Yes yes…….

If a person had an intention to kill him, the circumstance are like that, knowledge will be gathered then we have to convict him under 304

No no….you are not getting the question. We are talking about sentencing. Conviction toh honahi hai, sentencing is coming after conviction. Conviction is presumed, he has killed a man. There was a fight (Laugh) Can I ask one question? How many of you have dogs (Laugh……..)

Look what she said is so relevant. There was …….this change things lightly. Sentencing is against the application of the mind by the Judge. Now the same Judge……. Who did what I am going to ask you, same problem would have been in sentencing also. In a matrimonial matter, where the husband and wife were fighting the husband was saying that wife should leave her job, both of them were employed and posted at different places. And they both tried they couldn't come back together and the situation reached the flash point. So the husband was saying that she should come to my place and the wife said look I am earning more than you why can't you take a transfer and come to my place. So the session Judge said that she was the wife her duty to leave her job and (Laugh……..) so this is what we are talking about sentencing. I was just telling him…uhm….. I can't remember the citation. It's a recent judgment by Justice Ranjana Desai before she elevated in the office of Supreme Court. It's about tribals there was a murder. The cause of the murder was chicken. Right chicken intruded in the neighbor's yard and the neighbor caught the chicken and killed it and ate it. (Laugh……..) Owner of the chicken came back and instead of killed chicken he killed his neighbor. Right…. Now it is beautifully discussed their on sentencing part, conviction was maintained. For sentencing there was complete discussion with regard to a tribal, tribal way of life. The standards of ego, the standards of self-respect in treble society

and keeping all that discussion in mind then the sentence was given. This is what sentencing all about. I will give you another hypothetical question. 23 year old girl. All right adult slightly slow on uptake not mentally retarded. Mentally retarded had also a different stages. The Judge acquitted the boy saying that she is a major. When the girl appeared before the Court. No questions were asked to the girl victim to understand her mental condition. Her mother said that, she is slow on uptake. There is no medical evidence available nothing. Her mother said that, she is slow on uptake, she understands things but she takes time to understand. And her mother said if anybody treats her like a child. She trusts that person immediately and go away with that person meaning thereby she gave an example anybody gives her a chocolate she will go immediately. Twenty three year old girl. So this boy in the village and and… her mother said everyday she washes dishes…she cleans the house. She takes little time to understand. And this boy molested her and he took a defense that his relationship was consensual in nature, because she came with me. And in the Panchayat, when this girl was asked with great difficulty she had to be repeatedly explain all that and all the evidences were there. Then she goes to the boy and holds his hand. She became pregnant and the question was who did it and she goes and hold this boy's hand. The Session Judge acquitted that it was a consensual physical relationship with an adult. How will you react? Pardon, She was not mentally retarded. Let's have other responses.

One of the participant: She was not in a position to give consent. She was not in a position to give consent. Not in a position to give a consent.

Justice Navin Sinha: Any other view. Any other view

One of the participant: Accused had a knowledge about the mental health of the victim.

Justice Navin Sinha: Absolutely correct answers are coming… Absolutely correct answers are coming. But then somebody made a mistake in sentencing. I gave you.... discussed decided matter. This is what sentencing is. This is very difficult and we can't put it in any strait jacket formula. Every case will depend on its own facts. The manner in which it was committed what were the options available at that time the brutality involve the background of the offender. The the the …. Position of the offender to dominate over the victim. What kind of injury has the victim suffered? Can the victim you know you can give monetary compensation, you can send the offender to jail. What are…. And Justice doesn't mean the society only, justice mean that the wrong done to the victim is also sought to be corrected by use of legal force. So it all is to balance it. Everything is to be balanced out. And I will not discuss with you sentencing only under 302. That all of you know. There are too many Supreme Court Judgment on it. You can take your as I told you can take your pick whichever judgment you want. And the facts are always there to distinguish. That a ratio is decided on the facts not devoid of the facts. Let us come down to the pity of sentences more. You will be laying down the law things will come before you. Now can anybody any one of you tell us any one case which you have decided where in a difficult case what

is the kind of sentence you gave and why you gave that sentence. Because we are all…. Let's be very clear I might go from here by learning something from him. That is why I want everyone to discuss. Yes…

One of the participant: My Lord in the year 2010 I was CBI Judge My Lord. When typical cheating case came before me. An officer in Life Insurance Corporation. He has taken some policies and misused those policies to the tune of fifteen Lakhs. The charge sheet was filed against you as removed from the job. He appointed advocate and the advocate did not pray for course then I asked you whether he want to cross examine he said no then all the witness came to witness box. I asked one question what was the behavior of the accused in the office. They said yes sir only for this year he has done it. Then I asked the reason why he has done it, because both the parents were suffering from leukemia My Lord. He has not insured his parents so he misused fifteen lakhs and he has given treatment but he lost both the parents my Lord. He did not preferred to cross examination, to give his statement also. Then I enquire the Manger, he has sold his house and paid the entire amount. After arguments I convict only for three months my Lord. Though the prescribed punishment is two years I gave all those reasons and I have taken a U.S. judgment same ratio was held there, then I convict him only for three months. He was M. Sc. Graduate. I asked the jailor to treat this good one and give him some typing work. I asked to his wife let he go to jail for three months after coming back I used my I called one of my friend to find some job. From 2010 to 2015 every year he used to send some greetings My Lord. That's a fine case even today I remember my Lord.

Justice Navin Sinha: We are just going to give that example. He has put it in more simple terms. I was going to ask you the next question that a man caught under 379 for stealing some money from a shop, from the sale counter and when he is caught he takes the defense that I am hungry for 10 days. I had no food for 10 days. This is next question I am going to ask you. He has given just a different example. How many of you…feel… what do you feel about what he said. That is different, that's come in to plea bargaining, if he is pleading guilty. What he is pointing out is different than what you are pointing out is different for sentencing. In his case, the crime was committed, but the crime was committed in desperation, not as a criminal as offender the desperation was of different crime. In your case, it was money, which was stolen without any reason and then it was returned. Right. So he paid the price for having to fight it for fifteen years, but here, as the Judge said here, he gave his reasoning, that look… look at the reason why he did it. I cannot condone what he did it, he has committed an offence, he deserves conviction, but sentence needs to be balanced out here. So in every case you recently…you see earlier Supreme Court judgments under 307, 302, 376 with regard to sentencing becoming very relevant, when a settlement takes place etc…Now you have a different view coming completely. There are some situation, it's not a…Let me tell you one more thing, it's not a completely new view taken. It was a view earlier also. Again that is showing the difficulty in sentencing. As judges we all think

differently the… the… endeavor constantly is constant endeavor is to find a platform. That is the most interesting thing of today's debate. There is no platform. The whole debate is taking place to find a platform, if not a prefect platform, it will never come. The best possible platform. What to do we break up or to continue. O.K… O.K…

NOW they given more cases here but I told him that you are giving very simple cases. I said you complicate it and give it to them. I said you complicate it and give it to them, people have to think (Laugh) we will do that…. He knows…..he knows…..

## Session Number Two: Sentencing in trials of offences against women

Resource Persons: Justice Navin Sinha and Asso. Prof. Dr. Mrinal Satish

Justice Navin Sinha: Professor of law at National University in Delhi. I was just telling brother Rajendran that, in Chhattisgarh what we tried out was, we called two law Professors from Bangalore and we requested them to come with two Doctors from Government Hospital where they had conducted forensic tests in POSCO cases. And let me tell you one thing it was the…the … the workshop was a runaway success with the Judicial Officers. To see here to you and me to discuss judges giving us one prospective of the case. One perspective of the law. The academician gives you a different perspective of that same law which helps us to think. We may reject what the academician says, it is not necessary that we follow what the academician said. But is gives us what is called as food for thought. So let's listen to Professor.

Dr. Mrinal Satish: Good morning and I have been asked to talk about sentencing in offences against women. Before I begin I would like to give brief introduction about to talk about and some of this work comes from. Naturally this work started here at this National Judicial Academy, when I was working here as an Assistant Professor in 2007. And one of the focus area of my specialization was criminal law, the focus area I was looking on from then was sentencing. Subsequently I have done my Ph. D on the issue of sentencing in sexual offences and for doing that I studied all the cases decided by all the High Courts and Supreme Court on section 376 (1) and (2) decided in between January 1st 1984 to December 2009 for a period of 25 years. And lot of mu conclusion what I share with you is based on those… on the finding of those studies. So in the process I will take you through, what I found that the factors influence sentencing in sexual offences. Thereafter I talk about the entire process of sentencing itself and framework and in sexual offences and Criminal Law Amendment Act and the changes made in that context. One thing that we saw in the context of Rape Law itself from the time of the Mathura Case to the 83 Amendment Act and 2013 Amendment Act Justice Varma Committee Report is that there were certain factors that seem to be influencing the Rape adjudication, which the Supreme Court noted in the case of Gurmit Singh and multiple cases thereafter. And these were, what are called as rapes myth as stereotypes. So rape myths are defined as prejudicial, stereotypes or false belief about rape. Rape victims and rapists. And stereotypes can be of two descriptions one is called as descriptive stereotype. Descriptive stereotype when you believe in any sort of thing not only in rape law that this is what will happen if I come and try to hit one of you. This is what you will do. So that's describing the reaction. Descriptive stereotype on the other hand says that this is what you should do. So if you say that if I tried committing hit on of you, you shoot me back is the prescription you are prescribing that is what should be done. Now I will get to why that distinction between the descriptive and prescriptive shortly but it has some classic examples of stereotypes which we see in various recorded evidences in judgments and as well as literature. For example calling rape offenders monsters, beasts, animals etc…. in some cases when you say things like that, what you are doing is called as a concept where you are

trying saying look rape is committed by someone who is not like us, it's a beast, it's a animal, not the animal behave in that way but we say animal or monsters or beasts, then what happen when cases like POCSO for instance. Most of the people committing offence, are the parent, siblings or the neighbor or someone. So in terms of the loss… enforcement itself where the system looks at it you perceive the offender as someone who cannot be… cannot be of the nature does not fit into that stereotype. So for instance when we talk to police they say, these sort of offences are committed by people from a certain class of society, others don't then you don't perceive the uncle or the father or someone who can commit the offence. So you pushed at a side, don't take the FIR and that is one impact of doing…labelling offenders particular way. Then again the myths of stereotype are across the world not only in India. The other one is that acquaintance rape is most traumatic than rape by a stranger. That influence Rape Law reform in multiple countries where again how did we react once in December sixteen gang rape incidence took place in Delhi. Why did you react in that manner? Some analyst say we reacted in that manner because of it was a brutal rape by a stranger in a bus. What is a law reform brought in change in law…look at what happened in Delhi right now. So we say we introduce more CCTV Cameras. We will put on buses… we will have more policemen on the road. But our statistic seem to indicate that, rape is happening more 85 to 90 % rapes are taking place by acquaints. You can put as many CCTV Cameras you want to increase the police on the road but what it happening inside the house. There is nothing you can do and that sort of reform policy based on the understanding based on the acquaintance rape is less traumatic than a rape by a stranger. Then you had a thing that, there is a requirement that case be reported promptly, of course the Supreme Court in multiple cases said that in case of rape that there can be relaxation of time but this wasn't the understanding earlier. Then that the victim didn't physically resists the rapist in every case of rape the victim will physically resists, because she will physically resists there will injuries on the body of woman or the offender and that's the important factor. Also victims are visibly emotional while testifying and … and the most common one that the woman have false allegation of rape so you have to be careful. So these are the examples of some myths of stereotype. Now I show you how it influences to the adjudication. Now as you know too when an offence of rape in Court the most important piece of evidence is the victim's testimony the Supreme Court has in multiple times said that is sole testimony of the woman is sufficient to convict. Also medical evidence if available any other witness testimony and corroborative evidences if available. We just in a couple of minutes summaries the law. The question of the value of the victim's testimony in 1952 in the case of *Rameshwar v. State of Haryana* the Supreme Court said that, the victim should not be considered an accomplice to the crime. You can convict solely on the basis of the uncorroborated testimony of the victim, but this is 1952 the Court said it …while convicting the court should give reasons, why trust the victim and keep the corroboration warring in mind. Which means that, you should keep in mind that you are convicting solely on the basis of the testimony of a woman as we know in 1986 in the case of Gurmit Singh the court caught rid of corroboration warring it said look keep in mind that it's a sole testimony only if you find that the evidence is credible and believable to you to convict

on the sole testimony. Then you have section 155 (4) of Evidence Act which all of you knows it is repealed in 2003 which provided a….which permitted rather the defence to ask questions to the woman about her past sexual history to show that she was quote an quote that she was morally… immoral character, which then was used to attack her credibility itself and then we had *Mathura and Pratap Mishra cases*. And to see how this actually influenced evidence Law we go back to 1650 when Sir Mathew Hein writing textbook on criminal law said that, rape accusations are easy to make hard to be proved and harder to be defended against. He had no basis for saying this, there was nothing that indicated this in the Law at that point of time. Then John Henry Whighmore … Whighmore's Evidence all of us look at classic text book on Evidence Law. Actually he picked up from what Mathew had said that woman are prone to forge false allegations of rape and there is requirement for corroboration. Hein and Whighmore are influenced by Evidence Law of Britain, and we accept it without really questioning where that got some of these so called principles from. So the other thing that headed up happening in India was if you look at your judgments of Supreme Court in the case of *Badbada Govindbhai hejidbahi v. State of Gujrat* in 1883 the Supreme Court listed a variety of factors because of it said the court should believe the testimony of a woman in case of rape. The Court actually did believe testimony of the woman in that case, but in laying down this entire set of factors, what the Court ends up doing, is that it says that a woman will not make a false allegations of rape because of factors at a court list factors relating to chastity, factors relating to questions of virginity, of honour and of the question of marriageability Now these I told you earlier are stereotype and also of descriptive stereotype because if the court says this is a reason why a woman will not testify falsely about rape it saying that the reaction should be of a particular kind now the case of *Badbada Govindbhai hejidbahi v. State of Gujrat is* one of the most cited case, when it come to the issue of consent in rape, if you do a rough search on the online database you will find that it is cited more than five hundred times, so it shows you that court is using regularly that case. And clear example of how that case can be used though the Supreme Court obviously while laying down those principles in that case was trying to actually permit sole testimony but putting down that list is a classic example is the Tahelka Case Tarun Rajpal case. Where in the Goa District Court an argument was made by the defences Lawyers for Mr. Tejpal, that here is a woman who does not belong to what the Supreme Court in *Badbada Govindbhai hejidbahi v. State of Gujrat* was saying that women Indian women especially those from rural area are most likely not allege falsely allege about rape but there might be some urban woman who might do it. So in the Tejpal case the argument made by the defence lawyer here is a woman well educated a journalist by profession, who probably does not fit in to that reasoning given by the Supreme Court in *Badbada case* and hence she is someone whose sole testimony cannot be accepted, because this was at the stage of bail. So the District Judge in that case said this does not apply to her situation here so far she did not take the case in to consideration. But it does show you, that when you put something in say this is how a person should react, that can be applied by lawyers while arguing in that cases well. Similarly we have a 1980 judgment in *case of Raffiq* where the Supreme Court said, that a woman when she is raped experiences

a deep sense of deathless shame. Now how does that impact rape adjudication? All of you know Section 280 in the Criminal Procedure Code. Section 280 says that the Trial… the judge should know demeanour of the witness when she was testifying. There is a case in the Supreme Court in case of Kamlananda, which was case where professor Scodman had raped multiple young girls in his Aashram between the age group of 12 to 17 and he killed one of them. This was a rape and murder trial, before the Trial Court and it was on a death sentence appeal come on the Supreme Court. Now in the Supreme Court, the Court notes the testimony of the young girls the victims of the rape. And …and says and the Court actually verbatim from the Five Judges noting on the demeanour where the Trial Judge says that one victim was crying profusely either started feeling giddy so that postponed the cross examination. Thirds was she was so upset that the Court adjourned so they couldn't complete the proceeding. Now the Trial Court the High Court and the Supreme Court say that, the believing these three girls, not because of their testimony but they were feeling upset while testifying. The Supreme Court says it seems… we cannot…we have to reiterate here is a situation, where someone is so upset, that means she is testifying truthfully. The Court does not go into the quality of the evidence. The evidence what these three young girls was sufficient to talk about a… a… reaction. And now when you give that much importance to the reaction of coursed somebody who is making a false case of rape might be good enough to act as if there is that person is feeling upset. When we give that much importance to reactions within screwing the entire the adjudication process. The other issue is that of a Medical evidence. Modi's Medical Jurisprudence and toxicology book that all of us read and used. Now if you look at Modi itself and all the editions of Modi's Medical Jurisprudence starting from 1914 when the first edition came in to 2011 when the 23rd edition was published. You see that Modi's Medical Jurisprudence actually picked up a lot of…so called medical Science relating to rape examination and the medical examination and rape adjudication from books written by British Doctors who believe that all Indians were liars, so therefore it is signs that can save the British from early relying on Indian public. That was strait away evident in Modi's medical Jurisprudence in the first edition itself where it says that women will lie, so it is the Doctor's responsibility not the Judges or the Police to see who is actually a truthful woman and not the truthful woman. So therefore uh…it completely reinforces the stereotypes in relation to women and the behaviour for instance Modi's Medical Jurisprudence had the entire thing about so called lower class and lower class woman versus an upper class and upper caste woman. It said that the so called woman from the labouring class, when they are attacked will always fight back, they will resists and because they will resist there will be marks of injury on the body of the woman. On the other hand if it's a woman from higher class and society, because they were never been out of their house, if they are attacked they will immediately faint and the book says it because they will immediately faint there will not be marks of injuries on their body. Now that completely based on when someone thinking what will happen in particular context that remain till the 2008 edition, law has changed, Gurmeet Singh had come, entire law has changed but Modi's Medical Jurisprudence is saying things which are completely contrary to the Law, but at the same time reinforcing all those stereotypes.

It was… it is only when the Justice Tondon started editing Modi's Medical Jurisprudence 2011 that some of these things which becomes completely contrary to the law, they remove, but how does this still…. how does this influence this entire process because, Doctors are conducting the their Medical Examination and writing a medical Report using Modi's Medical Jurisprudence. So for a Doctor when writing a medical Report and says injuries they are looking from the perspective of Medical text book is telling them. So therefore all of these from the back door are coming in to us…through a Medical Reports to the Police and then to the Court so evidence particularly enters from the Medical report similarly the entire issue of the two finger test and looking at the issues of virginity all of these were based on the understanding that there needs to be resistance, there needs to be some sort of ….importance on virginity now the influence of the Modi's Medical Jurisprudence can be seen in one case of the Supreme Court. The case of Sukru Gowada v. State of Orissa. In this judgment the Orissa High Court had said that it is a principle of Law that it is not is not possible for a man, single handedly, for an adult man single handedly to rape an adult woman and on that they acquitted the Accused. The case came up before the Supreme Court in 2008, now the Supreme Court said where from this judge get this principle of law, there is no such principle of law and something they never be said in the judgment and then they corrected it and now, the judge in the High Court got it from the Modi's Medical Jurisprudence. He had cited…he had picked up that entire thing from Modi's Medical Jurisprudence and said this is what Modi is saying, but if you see that paragraph you will see it is from Modi's Medical Jurisprudence. So it is some of those things coming straight and still continue to a … to a rape Law. Now I am giving you 10 minutes introduction to just quickly talk about how this impacts the entire sentencing process. Justice Chinnappa Reddy in his book says in most criminal appeal, the Supreme Court confines itself to statutory interpretation or to issues, the fact determination. It seldom discusses important jurisprudential issues relating to sentencing. Hence criminal law and sentencing have become static. So in various cases involved sentencing the Supreme Court has said that sentence should be determined according to facts and circumstance of every case. It is not possible to prescribe a strait jacket formula for sentencing. Then the Supreme Court also said, sentencing has become judge-centric, there is a need for principled sentencing that was in the Beriyar's decision. Look at the issue of appropriate sentencing and appropriate sentencing in rape cases. One question is, is there a problem when we come to sentencing we always say we should have guidelines, we should do this, that etc…but the first thing that we need to see is, is there a problem at all and do we need to resolve this problem. So the first issue would be, how would you identify there is a problem or not, and that turns while saying whether there is disparity in sentencing. Now it is not possible and it is not right to give the same sentence to every offender. That is uniformity, uniformity is also absolutely wrong, because that means you are treating everyone alike and each case as Supreme Court has said every case is different. But the problem arises when is similar cases you have different sentences and why that happen and why I will used the word unwarranted disparity. Unwarranted disparity is different from disparity, warranted disparity when disparity has to exist its unwarranted disparities is a problem. The causes for

unwarranted disparities is primarily in lies in the India context lack of theory of sentencing. Each one of us, might have a different philosophy that we follow when sentencing someone and we might be hardcore believer of deterrence, you might be hardcore believer of rehabilitation. We saw that happening in the Supreme Court, when Justice Krishna Iyer believed solely in the theory of rehabilitation. He was using rehabilitation in every case. But in another Court Justice Chandrachud believed in deterrence, if you came up before either of these Judges, you will get proportionally different sentences and that is because they were using different theories of punishment and articulating that in their sentencing process. Similarly application of irrelevant factors in sentencing or inconsistent application of relevant fact. How does this paly up. In my study of rape sentencing in India I found …that this is before 2013 Amendments, that there was a minimum of the sentence of seven years and Judges could give below the seven years by providing adequate and special reasons. In 70% of cases all Trial Courts gave seven years. But the problem that I saw in those Trial Court Judgments, was there was no reasoning as to why it was seven years. Now when you give the minimum, the understanding is that it is minimum therefore I need not give reasons. So most of the cases… there was no reasoning. In the High Court actually walked further from 70 % it was 55% High Court gave seven years in 55% of the cases and 45% it was less than the minimum cases and the Supreme Court it was around 65%. At the same time what were the factors that were influencing sentencing, the sentencing process. Now I found this is as used methods of statistical analysis you come to this conclusion. So therefore it is not just not looking at one or two cases this is looking at all the cases, that will decided it. That woman's past sexual history of the victim was cited, the sentence automatically reduced. If the two finger test showed that the Doctors able to insert two or more fingers into the vagina of the woman, sentence reduced, if the Doctor was not able to insert sentence increase or the acquittal and that was normally was increased if the victim is very young girl. One factor that really made difference is the marital status. For an instance we look at landmark cases of the Supreme Court, in the case of Guirmeet Singh where the Supreme Court laid down various important guidelines for rape trials. The case has taken fifteen years…this was a Special Court and TADA and so it was trial Courts strait Appeal to the Supreme Court. So it has taken 15 years to Trial Courts judgment and when the Supreme Court decides the case. And in that case there was a victim was not before the Supreme Court, but the Supreme Court says, that the case has taken fifteen years to reach the Supreme Court in the interim the victim got married therefore there is no reasoning for harsh sentence. So this was an understanding that the marriage is an important factor, if the victim got married in between … the sort of marriageability has not been compromised so therefore sentence…giving lesser sentence is fine. Then we have a case of Madan Gopal Kad v. Nawal Dubey this was also very important case in the context of child sexual abuse. Here the accused was the young Doctor aged around 28 …29 who had raped around seven or eight girls aged 8 to 12 in his neighbourhood. He had used his 10 year old nice as bet to literally to get all her friends into the house and …and raped them over a period of time. One of them complained and by that time again the matter reaches the Supreme Court around six years from the Trial Courts

judgment. This young girl at that time is 18 represented in the Supreme Court unlike in Gurmeet Singh and the Supreme Court gives the life sentence to the accused. Now you might say that the aggravating factor was there, the aggravating factor was child sexual abuse, the aggravating factor was this man was a Doctor and breached the trust of everyone in that neighbourhood at that to me a sentencing perspective is a good reason to give life sentence in that case, about what the Supreme Court says while giving the life sentence, because she is young girl, she is not married yet. She is 18 and she is still unmarried and the chances of her getting a good match is highly reduced because of the fact that she is being raped which is why we are giving a life sentence. Now that reason absolutely irrelevant consideration to keep in mind than what causes the sentencing disparity. And therefore marriage has become an important factor. And that's a irrelevant factor. So in terms of rape sentencing, I found that when injury is present on the body of the victim, the sentences get increased. If there were acquaintance rape cases will lower comparative to rape by a strangers. In case of statutory rape when the age…age was sixteen years the Supreme Court, High Courts and the Trial Courts most cases in cases in situation where there was admission that the sexual intercourse was consensual normally gave sentence below the minimum. So this sort of indicated that Courts were saying that if it is consensual, even though its less than sixteen years let's not treat until the sexual activity something as seven years sentence should be given a less. See that law has changed, now discretion has taken away and eighteen is the age. Again in terms of mitigating factors, courts use age, illness, delay with judicial process, socio-economic status, marriageability of daughters having dependents, loss of employment so this range of mitigating factors are these relevant, is young age a relevant factor in a case of rape. We will keep that in mind and discuss that. So how do you bring in Rule of Law in sentencing? We are working within a constitutional framework and if you are working in constitutional framework we need to have the Rule of Law. The Rule of Law in sentencing implies having rules which are fixed noble and certain thus enhancing liberty and reducing arbitrariness in exercise of State power. And the Rule of Law is enhancing in the sentencing process by providing an equality of approach to sentencing. So when you say that, that there is some sort of equality in sentencing, we are not talking about equality of outcome. We are talking about equality of approach. So you take similar approach. You may arrive at different outcomes, but you followed the same approach. One way of doing that is by providing reasons in sentencing. So if you provide reasons as to why you are sentencing an offender for a particular punishment and those reasons are based on statutory or Constitutional factors then you are within that proper approach that can be taken up in sentencing. So what is the solution that the Criminal Law Amendment Act 2013 the understanding of course through various literature and judgments was that there seems to be problem in rape sentencing. Lot of Courts were giving below the prescribed, so what should we do and what the legislature did is removed the sentencing discretion of judges. I don't think that was the right thing to do, because when you remove the sentencing discretion from the Judges one you take away the power of the Judge to look at each case and in certain cases reduced below the minimum where it was required, but it also a very interesting theory of discretion called the organic theory of discretion. It's a very

simple concept, it says that discretion is like water in a pipe so when you put water in a pipe what happens if you hold the pipe at one point water will just move to just some other part of the pipe, it's not that the water will stop, it will just move away from that portion. So it is said that it is you actually removes discretion of the Judge the discretion goes to some other part of the system. In the United States when they did that discretion of sentencing went from Judges to Prosecutors. Prosecutors then decided exactly what sentence the offender should get. Which is why you see Plea Bargaining of 97 to 98 % of U.K and U.S. because prosecutors decides what subjects you should fall under and when deciding what exact subjection you will fall under. They determine the sentence even before the Judge has looked at the case. So in the Indian context while removing sentencing discretion and we have seen it already happening, the power goes to police. Then the police actually determination of whether it should be rape or not rape which section, which sub-section and that makes a difference in the sentence. So how…so how do you deal with issue of sentencing disparity? U.K for instance has followed a very interesting model so as is real and few other countries. What they have done is, they have identified a primary theory of sentencing. They that o.k. deterrent …for example the theory of sentencing that you will follow. Then they designate what is called typical sentence. They say in…they say in the average case this will be the typical sentence, if in the Indian context before 2013 that typical sentence in rape cases was seven years. So you have seven years sentence in the average case. Then you go below or above, depending upon whether the aggravating or mitigating factor. But when identifying the aggravating or mitigating factors what they have done is they have come up with a list of factors that the legislature considers cannot be called as mitigating. So they say past sexual history of the woman cannot be a mitigating factor in sentencing. So any Judge uses past sexual history as mitigating factor then that is ground for Appeal. You can go to higher Court and say the Court has used wrong mitigating factor and that is why the sentence is less. So you identify the factors that the Court should use but at the same time identify factors that the court should naturally consider when sentencing. For instance nature of the offence, harm caused to the victim, prior criminal record, that in every case the Judge has to consider all these factors and the reasoning then is based on how you have used these factors. So the U.K. sentencing guidelines like I said provided a list of relevant and irrelevant factors, example is the person pleads guilty they have a …they clearly say that pleading of guilty means we will reduce the sentence why so many months if required. Also like I said is really sentencing laws are very interesting, because it provides a burden of proof in sentencing. We really don't get into burden of proof when we come to sentencing. But what is really laws says, that if you are arguing a mitigating factor you have to prove that on preponderance of probabilities. You can't just say that look this person has a family which he has to support. You have to bring in documentation to show that he has family that he has to support. Because otherwise the court will have to trust the Lawyer. At the same time it says that aggravating factor is something that increases the sentence. Right …the moment it increases then you have to prove it beyond reasonable doubt. If the prosecution is saying an aggravating factor it has to prove that beyond reasonable doubt. So the like 235(2) of this Cr. P. C recognizes that sentencing is actually a different

part of the trial process and provides a sentence hearing for that purpose we have not done any of this so in U.K and Israel the sort of saying if you do some of these things, then the sentencing framework will become aa….become less arbitrary and a…. it be disparity will be reduced so therefore to conclude in context of how do you…how do you applied this in what we are doing. One has been waiting for the Legislature or the Supreme Court to identify and you can't identify a theory of punishment for the entire Penal Code. You cannot say that this is a theory followed from section one till section 511, you have to say that o.k. in this sort of crime you will probably follow this theory of punishment and that been done by some other jurisdictions, till then I think the important basis for us is to look at Section 354 Sub-section 3 of the Cr. P. C which very clearly says that, there should be reasoning provided in the sentencing process. The moment we start providing reasoning is when we can figure out that either we are off the mark, because we are not following right approach in sentencing or we are within the mark so we are following an uniform approach and that uniform approach and that uniform approach is then ensuring equality in terms of all the offenders who come up before a particular Court or before a particular …in a particular class. Thank you I will answer any questions.

Justice Navin Sinha: See that was very interesting talk where the different perspectives before us and the different views that has been take in the morning as time are changing thinking, changing a lot of instances where given with regard to what to use, the Supreme Court was taking earlier, now how the thinking is changing. I will take it little beyond that, we are in a Judicial Academy and I believe that in the Academy, it is very important, to encourage the Judicial Officers to start thinking, to start experimenting with responsibility, please mark my words to start experimenting with responsibility. I had told a Judge soon after I was elevated. I was hearing a matter and I told this Senior Judge who retired went on to become a Supreme Court Judge, then retired as senior Supreme Court Judge. I told him that, sir I refused to be a Judge, who scared to go near the boundary-line, I will play up to the boundary-line. I was a new Judge, the answer that I got was. I will tell you in Hindi what I was told; kaun kambakt kahata hai boundry-line cross karne ke liye, boundary-line problem create kar raha hai, boundary-line shift kardo. Right that is I am saying. Experiment with responsibility. You don't have to go, as lot of examples cited you just now with regard to Modi's Jurisprudence. Technology is developing very fast. And…don't go by internet alone, let us be very careful about that, even for sentencing be very careful don't go by the internet alone, internet can be very good material to start at discussion it cannot be a basis for a judgment. Please remember that. That is judicially settled also, relying on the Indian Supreme Court relying on U.S. Supreme Court judgment which has said, internet can be a good point to start a debate not to decide a case. Now how difficult our job is, your job is, I will give an example. I asked a question herein this Academy itself, when I used to come as resource person from Patna. Because this problem is equally applies to sentencing, there will be situations where you will be under pressure as a Judge, because the crime was such, we are sitting here in a closed room and we had discussed academically. We go under pressure times because of the media. You are a

member of the society, you live in this society, you have your neighbours. Whether you like it or not? How much you tried to resists it weighs in your mind and when it weighs in your mind, it weighs on what sentencing you will give on. As I said in the morning all the time the Judges, we are struggling to come out about ourselves, because the case objectively and decide it. Our personal thinking controls us from behind. I had asked the Judges here, I gave them an example, I said that a sensational crime is committed and in the evening the fellow who is being caught. He is on T.V. with the T.V. channel, fellow standing with his mike talks virtually on the fellows face in the Police Station and that fellow is saying that Ki haan khoon hum kiye hai. Right his face is not covered nothing and he is standing in a Police Station. So that is a police man standing behind him. So I asked the Judges that, next day that fellow's bail comes before you, and his lawyers argues what is there against me confession before the police. What will you do? What do you think that the answer I got was…?

Justice Navin Sinha: Anybody else ….I am sorry this was in 2009 in one of the small rooms. They were not district Judges they were ADJ rank officers. Unanimous answer was sir I will reject it. Everybody is going to saying…in the evening everybody has watched the T.V. all my neighbours were watching, if I will give him bail, they will say I had taken money and granted bail. Let him go to High Court and take bail. These are the real problems we face as Judges, and that is why what was just pointed out to you is that a need for a sentencing policy which now being hotly debated. America has drafted certain guidelines it is not mandatory. But even in India the entire debate is taking place about capital punishment only. When we talk about offences against woman it is not rape only. Rape is the most extreme, the worst kind of it. There are many other offences which take place against women and it takes place, because they were women. Because they were not in position to resists. Had a male been there he would have resisted. Now in the same kind of offence which could have been committed a male and a female. When it is committed against a female will you apply the same standard for sentencing? Or will you differ? So we a …usko distribute karwado…it is being distributed…right…hypothetical case…karwa dijiye isko…. karwa dijiye

See the same kind of offence committed against the man and committed against a woman. Do you think it makes a difference? Or will it be called as gender bias. Now you keep quiet, I want others to talk, you have been talking a lot, sorry will come back to you, please not misunderstand me. You are very actively participating. We want others to participate also. Do you think it makes a difference? How many of you have applied it? Let's be honest we are having….we are having an academic discussion. I am learning from you, you are learning from me. How many of us have actually kept this in mind, let's take a simple case of an acid attack. An acid attack on a man, and an acid attack on a woman do you think it makes any difference? Or it makes no difference? So do you think the sentencing will differ? What will be the grounds hypothetically? See the differences of opinion is right here. That is one aspect…that is one aspect he may have been able to resists, because of which the effect of the attack on man will be lesser,

and a woman unable to resists the attack would have been more, but there have to be more circumstances. Take the discussion forward. Male and female then the sentencing should be common. That is what I feel.

Justice Navin Sinha: The question is it's not a similar…suppose a same attack namely the acid thrown against a lady. In normal case where you come across, it is one of my…would you differ…I am saying… just one minute One more situation, to analyse this situation…yes he throwing an acid against a woman at that point of moment, he may be the husband or somebody else approaches stops it, tries to stop it, in that process he also gets but in a lesser form, to… because the main primary one was the woman. In that situation what would be your approach? Will you give more because of the woman also give will equally to the man and the woman is the question. How do you approach? Let us hear the woman…

We will give more severe punishment to the person who was perpetrated offence against a woman because his target was a woman, the man happen to be there…so the punishment will be….

You are not wrong. That is very possible view…he is wielded up…why will you give more to the woman?

You wants her to plot for whole life is untamed…man will be able to manage with the after went also…humiliation….I think…the punishment has to be given more in case of a attacking a woman because…the face holds the beauty in a woman than the man…this is how interesting it is… this is how interesting it is… we cannot look in a particular case. We cannot so easily whish away or a smile at what he had said. What happens if a woman …no …is beautiful and she is earning money…and she is earning money…earning her livelihood out of her beauty we don't mean the wrong way. She is a Model she is a T.V. reporter and because of her good looks, she got that job and she was not married. So therefore you can't wish away what he said. That's why I said in the morning that you have to let your imagination run……. Absolutely….. Absolutely …look this is what the Judges job is. I am very glad that all of you all of you are responding. This is what a Judges Job is? This is what I am trying to encourage all of you, that when you come to sentencing, conviction is easy, when you come to sentencing then it the most difficult part of a criminal case. What shall be the proper sentence? If trafficking, if a woman, let us say 22 year old, 18 year old girl is caught, 18 or 19 year old……and the Immoral Traffic Act is applied. What do we do? Do we treat her as victim, because she was with the customer in a hotel? De we treat her as a victim or do we treat her as a convict….offender…ignore it you can't generally, broadly say that you are very correct. But then whether it should be treated as victim or not victim will depend on the facts and circumstances of the case also. So when you are going into sentencing, the facts will become relevant. Right …we just held a workshop on human trafficking. There were four young girls. Who were trafficked…and they were brought back and we called them in the workshop and they narrated what things had happen to them. Right….and….when you….as pointed

out to you that the victims stands up in the Court is for you….the…it is a very interesting example given by him and he called those, you will have to keep this in mind. What the Professor pointed out was…the demeanour of the witness in the Court which will weigh in your mind and then sentencing. The possibility of a false demeanour…that is again…you have to be very alert…right…. Now look at the paper which has been given to you. It's a….it's a very simple case where the BPO had organized transport for women employees. The woman was going in that taxi…she was taken away. She was sexually assaulted. They smashed face smashed skull smashed and death sentence was given. Do you think it was appropriate? She was sexually assaulted in a cab provided by the Company. I don't want you to read those things, given you the whole case. So she was travelling in a company provided car, those persons had been engaged by the Company in trust. This woman trusted that this cab driver is engaged by the Company. It's a safe vehicle in which she can travel, because the details of this cab owner is with the company anything happens to me the cab owner can be traced out. So this is a safe and reliable mode of transport and then that cab driver, who is not the Company, is an employee of the Company, who assured the Company, that I will not commit a mistake, I will not belie your trust. Relies the trust of the Company, carries this woman away, with his accomplice, assaults her sexually. He could have left her after assaulting her sexually, but kills her and kills her brutally. There please …. I may add Justice Navin Sinha has asked, if you look at…..she… there argument for sentencing given. Do you think that there are any….is there adequate argument of aggravating and mitigating factors, because I talked about that aggravating and mitigating factors. If there were two Lawyers giving you this aggravating and mitigating factors are they adequate one, and since we discussed Medical Jurisprudence we look at the postmortem report extract given here. Is that again an accurate way of providing evidence, so 3…4…and 5 are an indication of how does the Judge does not get assistance, both in terms of Medical evidence as well as aggravating and mitigating factors may be….look at that.

Justice Navin Sinha: What I was telling brother Rajendran last night. Let's keep one thing in mind I quoted a line yesterday I will quote it today again. Crime is getting smart….which means criminals are getting smart. Crime and criminals are getting smart, the police has to become smarter to catch them and according to my thinking the Judge has to become the smartest of all two…of all three of them and therefore even in sentencing…forget the trial. If I ….haan….if I want to say that your role even at the stage of sentencing to get under the case. Like a person doing underwater swimming and then look up. Rather than seeing at the top and saying that this evidence is not sufficient, that evidence is not sufficient. Please keep this in mind. Whenever you are deciding a case, go below the case then look up. Now please answer what Professor said how you react this.

Justice Navin Sinha: There more in theory rather than practical. In every death sentence that is given by the Trial Court Judge invariably it is converted in to life's. So we have to look it from that point of view also…no with due respect don't say invariably, they are upheld also….I think a ….in last looking

at the facts of the case Dhananjay was the last sentence which was executed that was also I think a gap of 15 years. So let's put it like this, that there is a lot of debate taking place on it…the …the…the…debate is taking place because as we discussed in the morning a lot is depending on the individual thinking of the Judge concerned in that case. There is no standard formula. There are cases where the Trial Judge granted Death sentence, the High Court confirmed death sentence, and the Supreme Court upsets it. There are cases where it has been consistently upheld, there are cases…see this is the way our Judicial System works. There are cases, where the Supreme Court had set aside death sentences where it can be seriously debatable. But what the Supreme Court says is the Law, but if you want to have an academic debate, there can be a debate. So here in this case how would you react? What would be the aggravating circumstance for death sentence? And what would be the mitigating circumstances not to give it…suppose you are asked to decide this case. We are not sitting as a Judges from the Supreme Court….it is over….probably an answer is what Lordship says is…then we will see how the Supreme Court has thought…why…how you differ or how you can give a different answer? That what is required… How your thinking goes…

One of the Participant: My Lord…Why….why…Because there are no mitigating circumstance my Lord. There is rare issue far to that category of rarest of rare case My Lord. For example when I was Principal District Judge Gadar…..wait for just a minute then there should be aggravating factors to make it rarest of rare…there must be a higher level of aggravating factors and the lower level of mitigating factors…

One of the Participant: My Lord in the year 2011 my Lord when I was Principal District Judge Gadar, I have given a death sentence and it was upheld by the High Court My Lord. In that case a 24 year old boy My Lord. He has taken a five year old child to nearby farm rape that child, strangulate the child and put the dead boy of that child in a gunny bag and inserted in a small pond….My Lord. Afterwards he was caught and the villagers did not allowed the police to arrest him, because villagers want to kill that boy. And trial was conducted and had given a death sentence to that boy. What I said that is aggravating circumstances is killing a child a female child a five years child and rapping on the child and killing it. in the instant case My Lord a lady was raped, and the lady was killed to cover up the identity that may be out of fear being caught….

Justice Navin Sinha: We interpret you, please come to paragraph 37 of this judgment there is one line which the Supreme Court…..they don't have a judgment and we have alright…now here this whole judgment is here, because it is a Supreme Court finally it is culminating there…so the kind of reasoning given which is required at this stage of this Session's Judge and at the level of the High Court, because there is still an appeal available. What is the primary reason that our judgments must disclose what we were thinking? The Supreme Court had said one line, it says that I had print the whole judgment, when I asked you that question, I framed it that it was a cab hired by the BPO to provide security to its

employees with the assurance that I can sit safely in this cab and we all missed that….and that is what the Supreme Court relies on, it says the gruesome act of raping a victim who had reposed her trust in the accused. It is just one passing line. We don't have the High Court Judgment here. May the High Court…the High Court gave death sentence…therefore the High Court must have discussed it…

Paragraph 33 of the judgment and I was also talk about how factors are so common in any case. Paragraph 33 says in a considered view in a facts of present case age alone cannot be paramount consideration as mitigating circumstance, family back ground is also not, but the argument made before the Supreme Court as well as the High Court was just that seem they both seem to be 28 to 30 years of age and that he has a…and he was married and his wife was pregnant, now are those mitigating factors. One thing you also end up seeing when you read all these cases together this is the only mitigating factors cited before Court. It also means there was saying…. See what a difficult job it is. This is judgment reported in 2004, (2000) 4 SCC 25 here the victim was 7 to 8 years old…right…young girl. The Trial Judge gave death sentence. Now the High Court said that it was a case for showing leniency to the Accused in the matter of punishment, because the accused was 49 years of age at the time of occurrence, he had an old mother wife and children to look after. And then building upon it he there in one year his family members were dependent on him for livelihood. If he was sent… if he was hanged his family would be ruined. He was an unsophisticated, illiterate citizen belonging to weaker section etc…etc…this is what he was saying, and in this case also what was pointed out just now, that obviously where it is a case where trust has been betrayed. That is one category…right… Now I will put you a different question where…before I asked Brother to ….talk to you. How would you react, if I just said 376 cases are extreme, we picked up acid attack, we picked up trafficking, now in the morning we discussed this case where two brothers fought, the wives fought and the children fought and hit their legs and excreta…now if a person is accused of hitting a 70 year old woman with a lathi, on her leg three blows, please keep in mind 70 years old woman, three blows on her leg, bones are smashed, even surgery with putting an iron rod will not do…..right…. conviction I am quite sure none of you will have difficulty saying what is the correct conviction. Under that section will you give maximum or will you give minimum and why…give the reasoning…sentence kar rahe hain aap….your judgment is going to be tested in a appeal. Reasoning I just said think, let your mind run anybody does it suffice go one step further…

One of the Participant: That the man knows that in all probabilities will cause death of a person that bodily injury is caused on the body of a person.

Justice Navin Sinha: No it's on the leg. He is not hitting on the head…

One of the Participant: Because the woman is 70 years old….

Justice Navin Sinha: You are coming close, you have to go closure. You are coming close to the reasoning take it closure. You have come closer, go closer, built up your reasoning. That woman may not be able to recover her health. He is come even closer…if legs are injured she will be helpless, go closure you are still away from the answers. What the District Judge Raipur said, was very close, but he is also not all the way. Supposing I was asked…if I want to decide this case. I would give my reason give him a maximum sentence under 326 and the reasoning would be that he did it knowingly well. She is a 70 year old woman. Woman suffer from arthritis at that age…and he knew that her bones cannot be re-joined and therefore I will give him a maximum sentence. This what I am asking you to think. Now you are saying yes, but you didn't say this….so that's a simple the reasoning should come from you thinking in a different way. It need not be as a strait jacket formula. As he already stated, I want to go near the border or exchange the border…only one thing he is concerned whether we have within the framework of law. For that a good reasoning…what you have to think is not the evidence alone, in fact yesterday night we had a very good discussion. He pointed out a simple example that lawyers cross examines a witness and you are lying in a particular case a cross examination. The judge asked him, are you lying? Then he said your Honour I am not lying, here is the evidence, he takes his cell phone, I have recorded everything now produce before you. How do you react? When the police is not giving the evidence, which was available, just not been produced. Even the victim has not stated so, here is a person who is witness who clearly states. I was there, he has taken an evidence which was not before the Court that could have played in the T.V. but nothing is happening, but reasoning. That is the way the Judge should rise up to. Always we expected a judge to raise up to the case to meet the situation, see that reasoning, and give a good reasoning whereby ultimately… it is not whether you have… do not think about. What you have to think about is as he rightly points out, to my conscious to that evidence what I am doing if I go to deep into that, go under water look up side to your conscious but put it in the nice way of … you need not to be fluent English language what is expected…what is expected is a good reasoning. That's the only thing. Sentencing by itself is assertive, it's a different concept, and it's not the trial alone. What you were expected is well I am analysing this or this particular aspect. There might be another angle, there are always be two possible views, merely because two possible views does not mean you are judgment is wrong, it's the Supreme Court, I am quoting a Supreme Court judgment, therefore be very clear, be firm, think on it, yes this is my opinion, but give that opinion a good reasoning. In this particular case, as it is said that 70 year old woman, she can withstand the assault, one sentence knowing wilfully she can't withstand assault, therefore I am giving the punishment. In that case knowing fully that this lady at 11:30 gets into that taxi why alone, because she knows very well, I am safeguarded by the Company, that trust is more important. If you write this in the judgment, that was her trust to completely believe, therefore the higher punishment. Well that is the good reasoning so these are the reasonings which you have to give…but please here afterword think differently also it need not be within the four corners…every case has got every facts, every case differs and your mind

should go faster, thinker, better, as he said now you have to out beat these criminals who are out beating our technology. So here after let's assure you will be the best.

So you are deciding the cases you are giving the sentencing please don't worry what the appellate Court, make sure that you put your mind in it. Your orders should look like a glass, in the sense, when the superior Court was reading your judgment, why this Judge write this, when I will read it, I will say that this was possible. Now your judgment should…the other view that this was also a possible view, now your judgment should be, written in a manner that, sentencing should be in a manner which should display, why you are taking this view and not taking the other view. Without having to say that what the other view is…right…look I will tell you how debatable this issue is as I was telling my brother against a decided matter…there is no only for the…purpose of the academic discussion how complicated the issue is…and that is why the Judicial Academy is arranging this training programmes I just telling my brother in a case I decided where the lady…old lady was killed by her own son. She was…her caught hold the leg and broke it by bending ulta, and he had very badly smashed her with a sword. It all happen inside the house, over a petty reason because the old woman did not gave money to the son to buy alcohol…right… I confirmed the death sentence. The conviction was upheld by the Supreme Court then I gave my reasoning was, as a High Court Judge, I confirmed the death sentence, the Supreme Court took a different view and said that ki…gave its own reasons and, but did not uphold the death sentence. Therefore it's a very debatable issue….there is no strait jacket formula and I am quite sure that…now all this debate is taking place, some kind the Supreme Court is very seriously engaged in these matters. Of course prime concentration today is on whether death punishment should be…death sentence should be given or not. We are on a much broader …much broader platform that in every offence, session's trial which will be coming before you…what is the appropriate sentence, should it be maximum, should it be minimum, should be in the middle…why should the maximum not be given, why should the minimum be given, all this is what sentencing is all about. Does anybody has any suggestion to give? Anybody to share his thoughts with regard to sentencing…yes

One of the Participant: Looking at the conditions in jail. I think that is also one factor there to keep in mind. Look at the conditions…prevailing conditions in jails. Like in Delhi we have jail which can hardly accommodate four thousand….don't worry that is the problem in most of the jails, but Delhi is better than other States ….no…no…Delhi is because it attracts attention…ya…the problem is worse in other States…so there are 15000 peoples dumped there. So we have to look at that and suppose a person has committed a crime in a passion of heat or whatever it is…may the circumstances was such and if you put him in a jail for a longer time. He will be coming in contact of other people like, there is a case of reported few days ago one juvenile who was sent to the Juvenile Home. There the similar people arrived and contacting him to train him in their own set up. So we have to keep that factor also in mind

Justice Navin Sinha: that…definitely correct…I agree with you…once we put him to a jail for a longer period of time and there is no difficulty…the family has no source of income by the time he come out of the jail. He may be recruited by some other organization and he will be working for that….forget coming out of the jail it was in the jail itself he had learnt all the wrong things because we sentence him for a longer time. I think we have to keep that thing also in mind…all right one…I always keep that in mind for sentencing. This a very peculiar thing I had not seen cases like this myself and seen in Chhattisgarh. Tribal society the man and woman, husband, wife after working in the fields the whole day come home both are drinking at night. The local liquor they make form fruits and flowers and then the husband tells the wife to cook the food, to bring food. Now the wife has also in a barited because she is being drinking all alone, she tells him that you go and pick up the food yourself and the husband gets up and there is axe lying there, what is called as Taangi, tangi is…sorry its semicircle kind of an instrument…agricultural instrument, its lying on the house he just picks it up one blow to the wife unfortunately lands on the neck and the artery cuts and she died in 15 minutes. Sentencing…conviction is there…sentencing…one view….another view….is that a defence…some leniency should be shown not maximum…that is one view there some judgments to that effect but that there are judgments to the contrary also…..pardon…grave and sudden provocation. No please think about this. It is such an interesting situation. That there are judgments which have come across taking both of the views some of the Judges Sessions Judges….no nothing but it is 302 life imprisonment. Some session Judges said no…no it is not 302…it is 304 part 2. So that is how difficult sentencing is and the constant endeavor to find a platform and I think more conferences like this, the platform will start emerging. Wind up o.k.

## Session No 3: Sentencing in Trials of offences against Children

Resource Person: C.J. Navin Sinha and Justice B. Rajendran

C.J. Navin Sinha Starts the Session:

C.J. Navin Sinha said: See the last is a…with us is a sentencing in trials of offences against Children. This is much more difficult. It call for a much greater level of sensitivity on the part of a Judge and there will be more complicated situations here. 16 years is a child, but today a sixteen year old child will goes to the gym, builds up his physique has aggression capacity, the law says he is child, crime is committing, he takes the shelter in the Juvenile Justice Act that is one point, the other is adults committing crimes against children, vulnerability of children. As a Professor said most of the abuses are taking place by children who have trusted the adults. Most of you have seen that Hindi movie kya Mausam naam tha kya naam tha…monsoon wedding …monsoon wedding… monsoon wedding again that is a one extreme rare…….extreme cases will pose no difficulty as just telling brother Rajendran, he was giving me some examples just now over coffee…I said brother extreme cases will never pose a difficulty in sentencing. It is those categories of cases which are not extreme, they will pose difficulty in sentencing, because if you give lesser sentence, offender will go on laughing kya huwa…kuch nahi huwa…he will come back again doing the same thing. If you give extreme sentencing in a case where extreme was not required, the High Court will intervene. Where to strike the balance my brother come well prepared in this…

Justice B. Rajendren said: Thank you Chief…well morning we have been discussing regarding woman. The children are the most vulnerable target not only in India all over the world, because we have been seeing it papers and T.Vs people even travel long distances to have may be a sex with a young children, because there are some thinking or belief, if they have a sex with a young boy or young girl, even venereal diseases goes that faith to that extent. In which two weeks ago I attended a Commonwealth conference of Judges at New- Zealand. Some of the Judges pointed out in their countries, it is a phenomenal increase as against the children rather than against woman, because of this belief that they have a sex with a young girl below the age of 10 or even sodomy is very big offence going on. Seeing a pornographic on the child again another important aspect what is going on in large length. Of course in India we have various enactments including the POSOC Act and the Juvenile justice Act both of in different manner. I will just explain you in five minutes, thereafter we will start our discussion. Well as he said, I am going to point out one extreme case also which is in Tamil Nadu. If you see three days before the Hindu Paper it is come out with a twenty five years ago in Tamil Nadu in a particular village called Ujjalampatti in Madurai District there if a female child is born it is killed on the date of its birth by the family members or the child is taken and smashed in the wall kill to death or in a better way a child is given a milk which is from a seed which is very poisons by the mother and she is killed. How do you think of this? Can anybody can even think? 25 years ago this has happened and thereafter a 28

children died in a particular village in that particular year. One NGO brought to the notice thereafter much steps has been taken, it has reduced but they founded according to the Hindu Report, though it is not given a complaint, even last there had one or two instances like that. How do you go about this? Contra in the frame in the very same area the entire district another NGO has taken these children…about 28 children they have save 25 years ago they are all alive they have now come to the picture, that's why this article came 25 years they have now live they are in the safe situation. Imagine this now you go to the POSCO Act. POSCO Act has specifically come only to save or to safeguard the children and what is the effect, and how does the punishment is given, in fact even they described how the persons are taken out in that particular Act. I just refer to in the Act. Children are the greatest gift in the humanity in the object itself it has been stated. Sexual abuse of the children is one of the heinous crimes, crimes against children increasing the reason scenario and as such it is a duty of every court to award proper sentence having regard to the nature of the offence and the manner it was executed are taken in to consideration. They also specifically say child friendly procedures, when they come to the court under the POSCO Act number 1 recording of a statement of a child at the instance of the child or at the place of his choice, preferably by a woman police officer. Evidence has to be recorded within 30 days police officer has not be in a uniform while recording a statement. No child to be detained in the Police Station at night, the statement of the child is to be recorded as he has spoken by the child, assistance of an interpreter, Assistance of special educator, frequent breaks for a child to replay, child not to be called repeatedly to testify, no aggressive questioning or character assassination, the child is allowed, and medical examination of child to be conducted in the presences of the parent of the child. These are the ingrained ingredients, or safeguards which are given to a child. Now come to the Juvenile Justice System, the age is fixed less than eighteen after the Nirbhaya's case the thinking is why not it be reduced to sixteen. But age of course as on date the Supreme Court has categorically stated, even at the time of the Supreme Court cases are pending, even after conviction, that any stage a person can claim immunity under the Juvenile Justice Act, if he had been a juvenile, on the date of the occurrence, if you see at the Bristol School Act, the earliest Act of 1939, that will be a date of conviction, but this Act Juvenile Justice Act system says on the contrary the date of occurrence. So even after twenty years now we are getting writ petitions. I was a juvenile at the date of occurrence, but now a day's sixteen year old child as rightly pointed by the Chief Justice, goes to the gym, he is got power, he commits rape, he commits serious other things, even commits kills, he is iron bully either, he can do anything, but he can come out within three months he cannot be tried regularly, he cannot be put in the prison, he enjoys all the benefits, how does it counts, net result the children are acquitted. The children one time, once I, they take in confidence, the y are going out of sentence, they are going to their family, inside the family as rightly pointed out by the professor, it is not the crime which is committed outside, it is crime a crime which is committed especially against children, they are trusting them as we misused the….totally taken out of control and the trauma goes on years to come which can never change. Some of them comes out of it with several years still the trauma at the eight years what…it's not only the Judge, even courts,

boys are being misused, there can be discrimination against boys and girls everybody the target is not a children, not a child not a gender, that's what is happening. With this background, today we have another problem, it has been circulated to you. This is again a wonderful case, simpler, here a person who got a sister…is girl opposite…. In this case the boy has got a sister, a child which is opposite of comes to that house looking for to play with, why because on that particular day the current was not there, only in this particular house there is a generator, therefore the light were burning, therefore naturally the girl wants to goes to that house to see her friend, then she asked this person where is my friend your sister? He conveniently said well she is in the room, I will take you to the room, knowing fully that she is not there, knowing fully that there is no body inside the house. He takes her in to the room, removes her salwar commits rape, put her on the cot and commits rape, she couldn't resists, thereafter he threatens her, look here if you tell this anybody outside I will kill you. That is how it is being consensual…of course later on a night she complaints her mother, mother gives complaint two days later went to complain…..she doesn't tell anything…I stand corrected, she doesn't tell anyone for two days on 30th that is two days later she give complain to her mother, thereafter only…but in the evidence because the semen was there available in the panties as well as the payjama, therefore ultimately…now give this situation you are a trial judge. Here you are seeing this person who has committed this crime promising her that his sister is there. Now how do you react?

C.J. Navin Sinha said: My brother said react…conviction to aap karenge

Why ….why….

Crime has been committed by him, wilfully when that nobody is inside the house he rape a victim…

All right…suppose if you give you some mitigating circumstances namely in this particular case you would find that, thereafter he is now got married he was there in jail for two years, he got a bail thereafter he got married in 2007, he is got a kid, she is going to K.G. School and also an affidavit states that he is sole bread owner of his family, as he rightly pointed out, inside of remaining period of seven years can it be given a mitigating circumstances, that is the argument, in that context how will you react for sentence. Victim also got married in the meanwhile not this man another man

In that contingency taking in to account interest of the victim also, that she has married with the accused subsequently…another man not this man.

These are not mitigating circumstances….these are all not mitigating circumstances number two it is a very heinous crime it has to be given a maximum punishment….yes anything else.

One of the participant Replied: Lordship these are mitigating circumstances because we will be ruining another family now, because the wife has two daughters they say one is on the lap and another is five

or six year old their entire life will be ruined may be compensation can be there and the sentence should be in the middle will not to this extreme or to that extreme.

C.J. Navin Sinha said: Now I will complicate it little more… you are seeing it on one side. Supposing I will put it like this that there is a evidence available, that notwithstanding with the fact that the victim is got married now as it was said that the victim also got married, but there is a evidence available that the scare of the incident has had…no apart being lifelong…lifelong to rahega hi ….it will be in the mind of the girl. It is having an effect on her married life. The trauma was so deep. That is some evidence is available with regard to it after effects even today, when her marriage is urged is a mitigating factor. You don't know which case will throw what kind of problems at you…..Lordship I had another matter in where same circumstances were there. The guy was convicted in court below, he went to High Court, High Court said undergone and then they give him around 50,000 rupees as compensation to the girl…the girl came to my office and said look I want any compensation, you just donate it to the Prime Minister's relief Fund…..because we work on this compensation theory….the thrust is on the compensation theory…she and her parents came and said look we don't want compensation even a single penny from the accused…I said what should I do…the guy has already deposited the money in the court as per the High Court's directions within two weeks or whatever it may be it was…told it was…..then I talk to the Lawyer of the girl, then he said, Sir best course is to donate it to Prime Minister's Relief Fund. So we donated that money to the Prime Minister's Relief Fund. These types of cases are also coming…

You know that is what we are debating here…that sentencing is such a difficult

Will you all consider ….one minute will you also in this context consider the age of the Victim and the age of the…that's what I am came here my Lord. As per this case I Want to know the age of the boy as I gone to the entire case an instance was happened on 28/03/2008 my Lord but on 16/08/2007 he went to marry….earlier….. to the incident…not the later…but there may be a typographical mistake my Lord what it says accused while in jail had studied and passed class 10$^{th}$ his age may be at that time was 16 or 17 years approximately, some date is wrong so it is very difficult to find out age of the …..no…no he thereafter got married, thereafter….so there is some mistake…what I want to know is the age of the accused he passes 12$^{th}$ means he is also 18 and above thereafter…because he is not a juvenile…so considering the age of the accused and everyone deserves a second chance, so a leniency may be shown while awarding the sentence my Lord…….yes ……..let me complicate it little more…what he is saying…he is a accuse centric Justice, when you are sentencing, how do you achieve a balance, between the victim and the accused, while imposing sentence please…it also seems that offence was committed in five or six years ago and thereafter in between these mitigating circumstances count. So what we should we leave the date when the offence was committed and we should consider only these intermediary matters? Because after….after marriage comes place, child comes in between and we leave

that place at that situation when offence was committed. So I am unable to find out that which mitigating circumstance which comes in between under at the time of the trial. So what we should we do?

Now look at this is another angle O.K…somebody has to say something…yes somebody else wanted…somebody is trying to say something….

Justice B. Rajendren said: In a similar way let's see a child or a boy five or six years old that is also a latest came to in Madras the boy was abducted from the school six year old boy. The abductor was his servant…former servant of that person. The reason he was dismissed from service for some mistake in the office. Now he takes for his original intention was only to take him, gets backs money, he had demanded only five lakhs. Though he is a very rich man, he could have asked much more, his mind probably was only for 5 lakhs he asked. But promptly the police caught him, in the process of running, without even knowing, he was carrying this boy and running catching hold of his throat, by the time he was running, this fellow was dead, there was no intention to kill nothing of that sort. But ransom was demanded by him, when the police was chasing he was running with a child, and the child died. Now the conviction should be there…yes what will be the sentence…..no he was running…number one see mind it he was running on seeing the police. Young boy…he was carrying him, probably without knowing very well, he has holding him in neck also. Intention was not kill. Thereafter when the police caught him, by that time this boy is dead, though according to you, maximum punishment…good…anything else…naa..…lenient how far, to what extent….no…intention originally was to take him as revenge against the father, his intention was against the father…everything to show his vengeance is taken, could it not be a mitigating factor.

There was no intention….another opinion…see that is fair sentencing. How does he rightly pointed out…therefore there is a possibility, sentencing when it comes to sentencing there are two opinions. So don't worry about those opinions…he has rightly pointed, the caught the…if there is two opinions possible, Supreme Court stated that cannot be a reason to….you have your opinion, but for that opinion you will have to give the reasons, you will have to give the reasons. How you have arrived at that particular point of time, though it is a totally different way….anybody else….any other angle in this case… the act of taking away the child from the custody of father is a serious offence, that deserves no mercy….the original attempt itself was serious, so what therefore everything followed should also be considered as serious as well…good that is a very good opinion. That will become an aggravating circumstance.

Justice B. Rajendren said: Think of another case a girl again a young girl 14 or 15 year old. She goes to a family friend's house where she was sent to have a some work, so she was coming from that house that particular person takes her to the prostitution…engage and takes her to prostitution, where she is found trust, and there what will be the question taken note of is the priority concern, we take a note of

in certain…sorry….see a girl child was of about 14 or 15 year old was sent to her relative's house from the village thinking that they will get her a job or keep her in the house for the job. She comes from the village background. That person to whom the girl is sent, later on put her into prostitution, without her consent of course she was relived later on, in that context, to that person be sentencing policy how best and what way he could go to that extreme. No leniency at all.

That person has taken disadvantage of her situation of getting the job, that is the best reason, and being her relative, that is the best reason therefore it becomes serious. Trust is one thing, he has misused her position to enrich himself, that unlawful gain would be the best one for sentencing in your judgment. We give the ample thing for the whole case. You cannot have any other second thought of convicting him to the maximum sentence possible, such a person cannot have the any leniency at all. This is the way your approach, naturally as a of course, these are all cases of extreme nature. I think he has also got something…where the servant was…no…no, this is very nice. This is (2013) 5 SCC 546, I would request to take note of this, I will give you the paragraph. This will help you a lot that you have a case before you against the child offender. This was a (2013) 5 SCC 546 the name is *Shankar Kisanrao Khade v. State of Maharashtra*. This was case of minor girl with a intellectual disability, she was raped by a middle ager, he was sentence to death by the Bombay High Court. Death sentence was approved, paragraph 72 and 73 this will give you a complete picture. Child centric justice. Isse jyada nahi bolenge aapko jab sentencing karna hoga… page no 51 of this book…you have this book. He has summarized it, very good. Death penalty and its execution must not become matter of uncertainty nor must convert it death sentence into life imprisonment and it became a matter of chance. In fact he reasoning given by Courts has rightly pointed out by Lordship Chief Justice, therefore this court is not required to record reasons for commuting a death sentence to one of life imprisonment. It is only required to record reasons for either confirming death sentence or awarding it. Taking the case on touch stone of guidelines laid down in Bacchan Singh and Macchi Singh another decisions are invariably considering the aggravating and mitigating circumstances emerging from the evidence on record we are not persuaded to a accept the case can probably called for rarest of rare case deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person if alive will endanger the community, we are also not satisfied there is circumstances of crime was such that there is no alternative, but to impose death sentence even after according maximum weightage to the mitigating circumstances in favor of the offender. It is our considered view, the case is one which on humanistic approach should be taken in a matter awarding punishment. As I said in a earlier case, the child goes to that house for working, at least she will earn to give back to the house. If that child is taken to this extent of course definitely not. In fact one more case, which is being given to you Justice Bhanumati and…yes page no 42 latest case A.I.R 2015 SC 1016. Very interesting case. This is a case the appellant is a deaf and dumb, see mitigating circumstances how much it can differ, but he has committed rape. He is a different person but he has committed rape, he was convicted by the lower court. Therefore he was given a punishment

to undergo life imprisonment. Life imprisonment and fine, the High Court have confirmed. Now interesting question arose in the Supreme Court, there in the Supreme Court he stated, I was never went to school, I was a deaf and dumb person my age was not available, medical examination at that point of time ultimately held to be either form 17 to 19 at those he was treated as 19 and convicted, tried everything done, at this point of time Supreme Court says well he is a deaf and dumb person after all his age was not questioned at that point of time. In those it was not relevant. Now we will take into consideration he might be a juvenile at that point of time, extreme step he could have been a juvenile, because only medical examination which is always a factor which gives two years period, we will let the lesser year, but in that process, between this period, he has already undergone 14 years in sentence. They equally balance it. One side they take the view, he could have been a minor, therefore it is a mitigating circumstances. Second time he is a deaf and dumb person, yes again mitigating circumstances, at the same time the victim, we need to see that…he is already been punished, he has been jail for 14 years. Therefore we say no more sentencing is necessary, that is how it is…in fact if you read that judgment in full. I will read that judgment. There they analyse entire thing, why they gave this benevolent legislation, even though it was not fully applicable, because of this practice, mitigating circumstances, how it could be worked out all, has been discussed in this particular case in detail, Latest case, of course following Bacchan Singh case, extract Bacchan Singh case also, to that extent we do, this is another extreme case, where also you are getting mitigating circumstances, but can it be said, merely because he is a deaf and dumb person or in any handicap person. Whether he can forced upon a lady? One more thing, why we are taking all these case…rape cases or other things, even small cases…small cases. A boy trying to be, even abused physically, not sexually, physically by an employer by an employer, will it not amount to…a person is engaged in the house rape a servant, think of this case, he is not sexually assaulted. A boy of 10 or 12 or 13 year old employ this also …that lady in the house or in the, if he abuses and kicks him or he does not give him proper food…if that case comes to you, what will be reaction in so far as sentencing is concerned? This is not a big case all right…no sexual offence a small thing but a child, he is being abused, what will be your reaction on sentencing. Any one…

C.J. Navin Sinha said: To what extent do you think it will be relevant? What impact the incident can have on the mind of a child as compare to an adult, would be relevant for sentencing? How will you react to that? If a child is faced with a situation, a child has a mental capacity and physical capacity. The impact of the incident on the child, how far is that a relevant consideration for sentencing? Will it be relevant, will it be irrelevant? This is what the judgment I gave you, we talks on those two paragraphs and we talks of child centric approach is discusses in those two paragraphs…in fact I am going in to, how child centric approach we have adopted.

Sometimes we get these cases, referred back from High Court, there again that person, might have been below that age, then we are asked to conduct an inquiry and send it to Juvenile Board. Suppose a person has committed murder then he was, let us say less than 18 years of 16 years of age, now he is in jail for one year, two year, now he is on during trial, he was on 30 years of age, now sending him to juvenile justice home on the basis of mere date of crime he was below 18, is it justified? I am not talking about the law…I am not talking about the Law……

C.J. Navin Sinha said: We have to go by the law. There is a judgment of the Supreme Court also on this issue itself. See this is how our law keeps changing. There is a recent judgment I think, if my memory is correct. It is a 2011, 12 ka judgment hai, that where this one judgment strikes a slightly a different note by saying that, very well, we have said that the defense of juvenility can be taken at any stage, but then there is a word of caution there, I think if I am correct perhaps that is the only judgment I have come across, where the Supreme Court has said, what if it is raised at very late stage, there has to be some possible and reasonable explanation, why it was not raised at the earlier stage? And the court in the particular facts and circumstances of the case can reject that defense. Therefore the law is evolving debate keep taking place.

We have to be careful in the Juveniles act, at the age of 30 years…is it justiciable, what is the truth…

Judge Saahab I fully agree with you, even I have come across cases, where the crime was committed in 1997 and today when the Appeal is taken up in 2013, because Madhya Pradesh and Chattisgarh got separated, files were transferred, for some reason or the other not heard, now this defense has been taken in two hundred fourteen and fifteen, that I was juvenile in 1997.

A juvenile for absconding after 10 years he was caught, now produced before the Magistrate. The question before the Magistrate is, the offence was committed in…he was juvenile, no dispute, now he is a major, where to send him. The trial should be conducted unanimously before the….if I may interrupt you raised this discussion, when the in charge Director arranges a separate workshop, because this is different kind of a problem. You are very correct. It always happen. We expect the Director is taking a…in charge Director is taking a note of this and she will think about, frame it as subject for a discussion. It was my CJM asking me what to do now? I said I don't know what to do. We cannot say he was a juvenile……there is no case law on it…..nothing……. Juvenile Justice Rule say that those kind of say those kind of juvenile can be segregated from the other……..that is not actually not happening in any…but frankly speaking my lord…so what I have done is, I asked my CJM aare bhaai parent ko bulawo aur bail dedo….No but I think ……please sit down…please sit down…

I have a…actually I have a question in my mind I will put to this august audience…actually there is a simple case, as your Lordship pointed out that, there are many extreme cases but simple cases are also

there. There is a simple case, where the…that is coming under the POCSO Act. So what happen in that particular case, the girl is 17 years 10 months age, that is the age of the girl and she was studying in probably in class…that in our state is plus three…after intermediate that is plus three, second year like something. She was in a love with a boy, and thereafter that boy eloped that girl after some days they….boy was…boy was a major, he was a major. So my Lord in that context he was apprehended POCSO Act case was raised and that was under Section 6 (c) of the POCSO Act, only because of the fact in 164 that girl admitted, that she was having sexual cohabitation with the boy, but with her consent and that has been repeatedly sexual cohabitation and by that also, she has become pregnant. So during the course of trial the girl also deposed the same thing she didn't turned hostile or anything like that I have not made it or didn't know. She said sir I was having….. I am… I am… I am… I am…coming to that problem. The point is now she has blessed with a girl or daughter whatever it may…that girl… that girl… the boy wants to marry. Now the girl is also more than 18 years, but the thing is, the offence was committed in 17 years 10 months. The minimum punishment imposed is ten years and maximum is life. So in those circumstances what should be the sentence? Obviously minimum is ten years. Here it is not a case of rape, not a penetrative sexual assault, rather it is case of consensual one…and……my Lord her consent is immaterial. That is the point I was…exactly the point I was making in the morning that there was so many cases of these nature and Supreme Court and High Courts in such cases…exactly in such cases 99% cases are of these nature and in most of these cases, there were….the legislature was aware of it and then they put in a provision…they put minimum sentence and you don't have a discretion going below that. What other countries have done is, do deal with situation like this, they set the age difference, is set five years then they will give six months, they did that, but our legislature done is the exact opposite of it. There is judgment I don't know why it has been not taken note of. There is a very old judgment of 1965 its reported in AIR I have forgotten the page number…any way….its…I am definite it is 1965 it's a case from Madras Vardrajan, now read that, you will get your complete answer. Then when you are sentencing, apply that judgment. Many of you are applying it. There also the girl was below seventeen.

It's a case of kidnaping My Lord….correct.

No, but I will turned this act upside down, this POSCO Act an di will ask you another question, the way our society is changing, that case have…I have not come across any case like that, but what will be your approach, if it does, if the woman is 20 years old and the boy is 16 year old. It will come….because it defines only child, nothing else, he or she is not used… good…good keep this in mind and having discussed tomorrow in session no two, tomorrow, sentencing of woman offenders. This is not…I have not come across a case like that as yet. What the way our society is changing anything is possible. As judges as I said, you have to be ready for….

In the conference in New-Zealand, there was case from Uganda which a Chief Justice pointed out, there the case are totally different, where the husband come and complained about domestic violence including chopping off …off his fingers and other parts of the body, because the ladies are very aggressive there, they are now doing this. But the men also feel reluctant to give a complaint, because their ego clashes with that. That is the situation which we have now going. Days are not far as Lordship said, it is now happening there, they are also revolved around, because there also the word he or she was not introduced there. Now they are making an amendment, whether it is he or she, the complaint could be done under the Domestic Violence Act that was the latest discussion we had two weeks ago in New-Zealand in respect of Uganda. So things are changing, so you will come across. In fact in the session no 7, the point which you have raised is a question which is to be discussed there. The problem which is to be given, is a very same problem which is already now disclosed it.

See there is another case, how complicated sentencing is? There is this case of a tribal man and a tribal woman. This conflict is a very big conflict. Two situations a tribal does something according to tribal customs and end up violating IPC. What kind of sentence is to be imposed? It's an offence. He was following tribal custom. Therefore in this case, it's a reported judgment, its some Khujur akrke haina…it is from Chhattisgarh. The husband was a doctor, he was married, he left his wife behind, and married another woman, and when he was prosecuted for bigamy he relied upon tribal customs. Now it is shield case, he has no defense to bigamy, the Supreme Court relied on the evidence relied by him with regard to tribal customs, to hold that he did not do anything wrong when he followed his tribal customs, gave him the minimum sentence possible.

There is a case in madras also resembling, there is a particular community, where we call this playing of tadi for marriage. There particular community permits if he takes the tadi from the wife in the presence of the village panchayat and give her some alimony amount by way of rice bags that is all. What a rice bag…that's all. That has been prevalent, then the marriage is dissolved according to the Panchayat. A panchayat Muchlika…they call it panchayat Muchlika and the Panchayat President will sign it, that is the end of marriage. He marry…another marriage, then at that point of time that was judgment of 1968 a division bench of the Madras High Court at that point of time held that custom is also man made law, in this particular community is being allowed, therefore subsequent conduct was not issue at all, but later on the custom does not prevail, later on they said here afterward you can't do that, but earlier this has been the rule custom, but it is still said in some religions that particular community still they are called as " Arath Guter"… Arath Guter means remove the tari, that is still going on, but legally it is not correct, now legally it is not correct, definitely it cannot be accepted. No court now said, I accept it, go for bigamy, yes there is open and check is, there cannot be defense at all. Custom may be a reason, but custom cannot that's what sentencing, because in that case for sentencing definitely you can take into account. If it has to be established, it's a long standing custom, it cannot be

recent one, it has been run long standing procedure maintained by that particular community or in that area, if for a local area may have a same thing, but that envy again, it can be a mitigating factor, but it cannot be reduced, it cannot totally take away off. So that is one aspect in mitigating circumstances…

There is a saying in English, there it is being very strongly debated. There are people who believe in it, there are people who don't believe it…which is called spare the rod and spoil the child…right…at least when we grew up theory was very strong spare the rod spoil the child. Today when the rod is picked up, there is too much noise about it. If you get a case like this, that the child is misbehaving in school, it will come…it will come tomorrow, unless it is come before you that child was misbehaving in school, to enforce discipline, the teacher used forced, I will not define force, I will just leave saying force, the result was either a complaint by the parent or the child going to an extreme, creating a totally unforeseen problem for the teacher who never in his wildest thought had any intention doing anything like that. You had cases, Calcutta ka hai, Bombay, Calcutta…where Maharashtra… in Bombay a child was slapped by teacher, he went in the balcony and did suicide… Calcutta main bhi huwa tha ye some time back…so all this will come before, how will you react, when you are doing a sentencing what are the things you will look at. Let us take a hypothetical situation we all been discussing since morning how a judge is required to think. So let us see of thinking. How will you think when you are going to…look the child has gone and jumped from the roof that is established, the child has died…right…are bahai the entire evidence is that 12:30 the teacher reprimanded the child in the classroom, 01:30 lunch-break, the child went to the terrace and jumped, and all the children are testifying, the other teachers are testifying, yes the class got over at 12:30 till 01:30 the…the class peon sits outside the classroom he said yes Dedbaje ke pahele ye baccha bahar gaya tha….

Discipline was also there…there was no intention to…

You are missing out one thing, I said force, I said nothing about intention…absolute…. absolute….

Physical force is not supposed to be used….supposed to but how many of you not got that…. Till become a judge today. How many of us have not been reprimanded during the school? Now the thinking is changed…you cannot touch the child….yes…yes…yes absolutely correct. Christens schools their students are found out…that they killed people, number of people in school campus using gun, if you can't use force against that boy, because he is a child, well what will happen.

There are generally seventeen, eighteen years of age…as his Lordship has pointed out they are going to gym…every second child is going to gym, and they are so strongly built, teachers are so thin, may be, teachers are the…..so…no…no…he is right….so ya…because….how to control them. The teachers are almost surrendering before the students, and those days are gone there…the students are ruling and

the teachers are at their mercy, any time they can go around and lodge a false complaint, teachers job is over.

When that incident happen, the teacher's job is over, the judge's job begins and the Judge how will he consider it in sentencing at that point of time that is the next question.

There is another case the boy scores less marks in second PUC, he comes to the house, the father scolds him. The boy went inside commits a suicide. Abetment for suicide? Will convict the father, but sentencing the question comes my Lord, what is the punishment should be given to the father? It's a very debatable question. If the father reprimanded the boy only once. What you have done, and the boy being over sensitive, goes in and commits suicide. I don't know….it's a very debatable question whether it will amount to abetment also. It is very debatable question…

One of the Participant: In this matter mother has complained. Mother files complaint, because of the reprimand of the father my son has committed suicide. That's why Lordship correctly pointed out that, whether that particular incidence…abetment has been defined 107, defines it. One of the parental duty is to take care, that he should not go astray, in that context, can it be a reason for convicting him.

C.J. Navin Sinha said: I will take it one step further, the two cases which happen one was I think Canada and one was I think Finland or somewhere, where Indian parents, were hold up, that situation has not come here. You don't know it may come tomorrow. With the, our social structure changing, with a nuclear families living, the support of the grandparents not been there, father and mother both come back late from the office both are tired. You may be getting a case tomorrow. You know we have to start thinking to handle such situation. Don't expect that the National Judicial Academy to find solution for it.

Justice B. Rajendran said: Thank God people are not using that 111, and the 100 has been used so far by the children, days are not far. In America all our Indian parents authorized because, the first thing that the boy or girl that you do something or I will call on 100 and there in America, they also know if a 100 call comes from an Indian family, especially if it is a wife, husband wife problem, if it is child, it is beating problem, once or twice they leave or otherwise they take you, takes the child out. That problem is going to arise nor sooner a later here in India.

C.J. Navin Sinha said: I think we have been discussing since morning, please keep one thing in mind, I will said two things in mind. Whatever laws are laid down, by the Supreme Court, both you and me have to follow it. It is judicial discipline we work in a hierarchy, even if we do not agree, as long as we are sitting as a Judge, we have no option but to follow the law. It will not be proper for us, whether you are from the High Court, even for a High Court Judge according to me, to find…to adopt a needle in the hair stack approach, and try to distinguish judges, no, please don't do that, you will end up in trouble,

but if on facts you find, that despite the superior court having taken a particular view, your conscious is repeatedly telling you that no, in this case your approach towards sentencing is in a particular direction and you are not satisfied your conscious is not allowing you, because, as judge you don't listen to your conscious. What did Swami Vivekananda said, "If you can't find an answer, just close your eyes and sit back and do what your conscious tells you" and that is what we do as judges every day…right…therefore the correct approach in sentencing would be, notice what is against you, against the view that you want to take, and if you after applying your mind, take time to think about, if you are able to find a reasoning, and if you are satisfied that the reasoning will possibly hold…as I said experimenting with responsibility. If you are satisfied that, this reasoning may hold, then do it, otherwise don't do it. Otherwise whatever your views may be your personal predilections, may be you go by what the settled law is. Experiment whatever we have discussed today, experiment only when there is absolutely virgin field, but do experiment wherein you find a virgin field do experiments.

Justice B. Rajendran said: one thing is clear from all the discussion, sentencing by itself is an art. It's an art I will say, because the Judge mind and the perception comes only at the time of sentencing. Conviction is a, everybody has to say yes, this is an offence, conviction. Now moulding a sentence is with you. That's why your imagination, as he said through your imagination in the deepest level, go deep inside the water look up, then come to a conclusion number one. Number two, please make it note very clearly, do not make yourself to be called as convicting Judge or an acquitting Judge, be firm on your opinion, be firm in your mind, but when it comes to sentencing be flexible, when that is there as you go by your conscious and the mitigating factors as well as the aggravating factors, that should be reminded, not that no…no I am a convicting judge, this fellow may not any idea at all, that please take it from your point of view. That is what the people said, look here this gentleman goes by this kind of thinking, that thinking may be influenced, you have to come out of the individual to become a Judge and a judge to analyze, then give your sentencing. Thanks, I today I have learnt a lot from his Lordship Chief Justice and every one of you have learned. Thank you so much.

C.J. Navin Sinha said: to wind I will say your problems starts after you ordered conviction, thank you.

Prof. Geeta Oberoi expressed vote of thanks in following words: Thank you so much. We must thank our Recourse Persons especially Hon'ble Chief Justice who has, factually, experientially, procedurally and even spiritually enlightened you on many aspects when he told you about Vivekananda, Swami Vivekananda that may be…when there is out most trouble, that may be you have to sit back and close your eyes. So we need to thank all our resource persons, today, also we have to thank Hon'ble Justice Rajendren, who has given you so many solutions, then asked so many questions and may be you decide about things. And we also need to thank Mrinal Satish who is also be…who gave us what are our stereotypes and how we can actually think about coming out of those stereotypes, if it's possible for us.

With all this thank you so much. We must give a big round of applause to Hon'ble Justice Navin Sinha, Hon'ble Justice Rajendren and Mrinal Satish.

Before we proceed for lunch, we have a group photograph, because Hon'ble Justice is there so it would be…I think all of you would love to have his photograph with all of you. Thank you so much…its at the porch.

C.J. Navin Sinha said: I have just asked Dr. Satish, that the presentation he had prepared… see I very firmly believe…even I was in charge of Bihar Judicial Academy….I very firmly believe that, there has to be a proper interpretation academic view of the Law and the Judges view of the Law. Now the presentation which he has given, has its own importance. How the Judicial thinking is kept changing. What are the principles basically to be kept in mind? In fact I will go to the extent of saying it in polite language, which he has presented a very critical analysis. I have just requested him that, to give you a hard copy. And whenever you find free time, just read it, just go through it, keep it with you, whenever you find time just read it, because I founded it very useful. I am going to be asking him…tank you

## Session No 4: Sentencing in Trials of offences against Children

Resource Person: Adv. Trideep Pais, New Delhi

Adv. Trideep Pais started the session: Good Afternoon Judges, can you all hear me clearly. Good Afternoon. First was thank You for having me here, thank you NJA, this the only second time I am speaking to District and Session's Judges, and to be honest I am very nervous, because, normally I look up to you people and I look for relief from you. And so I have a slightly difficult topic in my opinion. Is it still clear...O.K.… so I will circulate amongst you, that way you know it doesn't becomes this a lecture method. I have slightly difficult topic, and I want you people to…a kind of participate with me when I am doing this. So sentencing in offences against the State. I would like to first get, your impressions on…I know that it's very inclusive, broad topic. I would like to get your impressions on what you think fall under this. What are the offences you think will fall under this and then based on your impression that I would like to proceed. Unlawful activities, so can I broadly say there are…NIA cases, so broadly I have got one answer from here says Terror. Organized crime, so MOCCOCA, I am from…I am practicing in Delhi, but I hell from Karnataka, and I just wanted to know, its applicable in Maharashtra and in Delhi, any other State, from where you judges are coming, where MOCOCA is applicable. Is has been notified in Delhi. Is has been notified in Delhi and we had regular MOCOCA Courts in Delhi. Anywhere else MOCOCA is applied. O.K any other…any other offences which occurred to you as being against a State. Counterfeiting…counterfeiting of currency, waging war under the I. P. C yes 121, anything else under the I. P. C directly against the State. Sorry…ya…POTA, though repealed I may occurs to us, POTA, TADA, MOCOCA, UAPA in their different formulations. Anything else in the I. P. C can I safely say sedition…ya…the victim being the State. Can I invoke the…FERA, FEMA.....no…no I am not talking about parents patre and state taking one every prosecution? I am talking about….see my topic is really difficult, it is Sentencing in offences against the State….COFEPOSA, Custom and Excise Act, Income Tax Act. Can I say Official's Secretes Act, yes Arms Act, now I want to drop a thought here, between all of you and ask you whether we should go straight to sentencing, or would you think, that it can be viewed in Sentencing in such cases in isolation or should we look at the substance of the crime also, before we go to sentencing in State crimes. Would you say that, one should look at only sentencing, or one should look at substance of the Crime? So let me give you an example 406 criminal breach of trust, let me aggravate it and not take it to the straight 408 by servant, so criminal breach of trust, lesser punishment, by servant higher punishment. 409 the State comes in by Government servant. So now we are in the net of our topic. Would you say…so this is where my topic sort of creeps in at the 409 state. So everywhere we would have to look it like this, that can this be a crime deserving the individual and when it goes from the individual and it goes to the State. So can I say, that the burden of proof on the prosecution. This is a question for all of you to ponder upon. Would I be right in pitching it as being higher in 409? I am just asking a question to you people, because the punishment is serious higher, it goes up to life, the

difference is a world of a difference, but the reason is because you are sitting in a chair which is again to prevention of corruption. 409 is goes hand in hand with Prevention of Corruption. So I am asking can I say that, the burden is much higher on the prosecution or is it just a status of the offender. I just want you to think over this, because that is where you will pitch your discretion while sentencing.

No sir…fine…O.K…I anticipated this. Let me give you a slightly different example theft of the data in a private Company, say it is a typically a BPO in Bangalore or BPO in Gurgaon. An employee steals on a pen-drive some data, and he goes home, next morning the finds that the competitor had it. What all you pitch it under I. T. Act, 406, because he had access to it. 408, just replicate this with a Naval Officer, sitting in the Naval war room in the North Block and taking the pen-drive away. Would you give yourself, even that the punishment is now stretch to life under Section 3 and 5 of the O.S. Act would you give yourself a greater level of scrutiny and the prosecution is a heavier burden to arrive at that conclusion. Or would you treat both as the same, just because it is against the State? I will treat the gentleman as punished under that Act, or will you say no, there this involves a minimum of 14 and can go up to life. He hasn't got bail for 39 operates in a different way once you say life, that is true also, that is true…now let me take it a notch lower, so I went from O. S. Act, first I went to 409, then I went to O. S. Act. Now let me take it a notch lower, you have a civil suit for recovery of money, based on cheque under Order 37. The cheque amount is hundred and the plaintiff is able to show 90, plaintiff gets 90, the burden is on me and proves it to be. The same cheque is laid in a 138 complaint, the cheque is of a hundred, the plaintiff is able to show a ninety, could you agree with me that the whole case is false, in a criminal case, while the burden is on him, there is a presumption in his favour, but that presumption is rebuttable and it is shown that the amount goes in four days ninety and despite this the amount is being 90 the cheque before presented. So what I am saying is, when you criminalize, I am just asking you people to think this is not a lecture, this is for us to think. When you make something more onerous on the accused, would I be right in saying, that there is more of a burden on the prosecution and the Judges, while deciding on culpability an thereafter the natural corollary the sentencing. Just…just think about this. I don't want any answers and if anybody wants to say anything please stop me at any stage, because I have only one hour and I barely will be able to complete within that what thoughts what I have and these are just thoughts for discussion. Let's take it…let's take it to another level, let's assume that there was no law, special law dealing with, absolutely not. How would we dealt with that and under the I. P. C 3 O 2, 34 conspiracy etc…now is it correct, that when I went back to the Negotiable Instrument example that is it correct, that is has been held in numerous judgments under 138 of the Negotiable Instrument Act, that criminal Law constitutes strictly, if the offence is not made out, then the whole things falls, numerous judgments specially, in Kerala there is Judgment called Joseph Sarthu which was passed by a division bench, where they found that the accused had been clever enough to make a deposit of some money into the complainants account, just to scuttle it ke bahai Cheque ka amount na bach jaye, hundred, I made it ninety and I give him ten and hundred is accepted

it, in fact the judges go to say, that the conduct cannot be made punishable. You have to fall within the formulation then, they are not concerned ki that this was very clever and he kind of manage to scuttle it and he got away, because the cheque which was presented thereafter the amount was hundred and the old amount was hundred, and subsequently that is followed by Delhi High Court by Justice V. K. Jain in a judgment called Reliance….what I am saying is, simple conduct cannot make a crime. Associations cannot make a crime. You are so and so's brother he is bad man that cannot make a crime. So what I am asking is, if that was the test for a lower crime. What you give yourself, come back to my original course, would you give yourself higher threshold, to decide on a sentence where the punishment is heavier, the severity of punishment is heavier based on the status of the individual. I am just asking you to think about it. There have been recent amendments to 375……376 (2), if you people give me the favour looking at the 376 (2) it is again an aggravated situation. Whoever being a police officer, meaning to say it is his status like in 409 government servant 408 servant as opposed to theft there was Naval office, it's a simple theft. I mean it is state all right, in one case you are taking confidential information of private individual, in another case, you are taking it from the State. Of course there can be accompanied by a offences like sedition, waging war against the state, I don't know. A particular fact situation mind have it. My question is would you look at a police officers in that sense and thereafter his culpability and thereafter his punishment, on a higher plane if the facts under 376 (2) were made out…

One of the Participant replied, that there is a difference between rape by a normal man and a rape by the Police officer, the second one is under the trust of the law, and hence there will be greater punishment.

Adv. Trideep Pais: Correct…….so the punishment is more severe. Status is very important…..that goes without saying. I am saying would you put a bigger burden on yourself, saying we are in a Session's case, because of the status of the individual, as opposed to it would have been before the Magistrate, if this was not the aggravating crime…correct……correct…now…… I have for the first time got a positive answer from these three tables, clearly saying that we will look at….and you can stop me if I am wrong in my understanding. We will look at 406 with as much as scrutiny like the Judges over there said, but if its status were deserving a 408, then we will punish him under 408, then if his status were deserving 409, then we will go there. Though it doesn't matter for us that 376 (1) or 376 (2) our initial scrutiny for 376 (1) that strictness should be applied to ourselves to test we will apply to ourselves. Thrust of my interaction today is, does it work like this when it is, does it operate or is there a kind of a public pressure, media pressure or a general pressure, saying this is of a higher order because it is against the State. We have to somehow, secure a conviction. See what I am saying is… let me give you some hypothetical examples, these are hypothetical examples because they did not have, in fact the contrary. We had a horrific bombing in Delhi in 2008 and many cases session's cases thereafter, what kinds of

bomb went…….after which there was a raid on a house where some boys were suspected to be there and it is said in the charge sheet that he one boy named Pappu escaped and the others died, in the shootout which followed when the police went there. Yes Patla House. In that there was an F. I. R registered with regard to that Police Officer. There was no F. I. R registered with regard to the death of the boys. That matter recently decided may be 2 and half years back, which resulted in a conviction. I will place that Judgment before you. I am just wondering, as citizens of this country how would you have reacted, if that case resulted in acquittal. Just pass that that thought. Let me go to another case in Bombay there was this film Director who was having dinner with a girl and her jealous boyfriend supposed to have walked in and they had a fight and as the Newspaper reports that the jealous boyfriend and girl killed him, hacked him and chopped his body into seventy two pieces, that's what the paper said and put him in a dump bag and threw that bag somewhere far away. After few years, the judgment came anybody knows that judgment. It was held that it was a spontaneous fight between two people. Culpable homicide not amounting to murder. The boy got only 10 years and it was also held that the girl's involvement was only to the extent of destruction of the evidence. That too they found that it was not 72 pieces, she just fit into a bag. She did whatever damage to it, to fit him into the biggest bag, which she could find in the nearest mall. But the way in which the press went about it, and the way in which the general public thought about it. They said, we don't want anything less than death sentence further. But remember it wasn't against the state. So that the noise lasted for two weeks barely. I remember that girl is from my home town and six months after the incidence, she left for house, because by that she has served her destruction of evidence term. So he was released, along with the judgment she was released. She went to the local church for the funeral of her grandfather. It was reported in the newspaper, that former accused in so and so case went to church today for….what I am saying is society still blame her for her role at some level. There was a session's Judges fairly and squarely held that, this was a crime and this was her punishment for that matter, he got 10 years and not like that was the conclusion. Imagine this two weeks hysteria juxtapose in Patla house and the acquittal in Patla House. It is my lay person's practicing, Delhi based practicing lawyer under pressure. In the Marrria Monika suicide case where a…..she was acquitted of murder and culpable homicide. I am …. I am …. I am ….very… very happy to hear that, but I am not…I am taking it to a slightly different level from what Judge here is saying…I am saying would that be different, the pressure on the Judiciary or the pressure generally shown would that be a different it were a crime against the State as opposed to Marria Monika suicide case, there are two different situations. I am just…I am not….you see there was also a furor by the press like the judge said here. In fact in Marria Monika suicide case my typical recollection is that two lawyers who fought the trial, I met them two and half year back, they held a press conference, tell the judges that our client is innocent. That press conference was such a mad idea, because we lawyers we are not so articulative to tell the press, neither sometimes the Judges. That is a different field altogether. We have the arithmetic of law and we add a substance and we come to a precise decision. We cannot so articulate as Aruna Goswami and we are not supposed to be, but when they held a press

conference and these two gentleman as good as lawyers they were. They were really bad before the press. When I met them two and half years back and said such articulation at the trial, why did you hold that press conference? Why did you make fools of yourself? And they told the press…you know this girl who is Christian going Matunga, Don Bosco Church to worship god for the gratitude of having got a lesser sentence, so the press followed her to the Matunga Church and while she went down on her knees and prayed to God, they video graphed everything from the door. According to me that had a negative effect, it worsen the situation, like the famous Mr. Rathod who came out, doing this out of a Session's Court, I think he is in Panchkula or Chandigarh or Mohali Panchkula, that is really destructive of his own case. Today accused come out of Jail while he get into auto rickshaw car, they remembered Rathod. What I am saying is, in that situation when I ask them, yes what they told me Session's Judge Start getting angry, and he said I am convinced that my Judgment is right that is culpable homicide for one and destruction of evidence for another. He told two lawyers after the court hours, what are you people doing. I am getting the bad name for doing the right thing. Why don't you go out to hold a press conference? Correct… Correct…what I am….I completely agree, that instead of seeking to his conviction, he told the defence Lawyer you know, you owe duty to the Court also. What is this you are doing? And I saw those interviews, being a person unconnected and I told myself whatever little public impression, they could have created by keeping quite went further someday….but it is my lay person's opinion, that the same kind of reaction is not there when it is a crime against the State. I am not referring Judges alone, I am referring to the press, I am referring to the general Public, expectations, I am referring to the hype created to such an extent, that should the Judge acquit, he will look like a compromise man and sometimes it is my…I am mainly a complainant or a defence lawyer, I never practiced on the prosecution side. It is my impression that the State creates this pressure. It does. Let me try to give you some examples, with this same logic that is taking in ordinary crime, with ordinary procedure to special Laws, and why should they exists. Let us see yesterday came a conviction of I think of five death penalties, it was five death penalties in the serial blasts of 11$^{th}$ of July 2006. I just want your reactions not as Judges today, because I assume that none of you are Judges in that trial or if you have any special knowledge of that trial, then I would not request you to answer. But anybody, because I haven't seen, I know that there are people from all over the Country. What would your impression have been if they were acquitted, complete acquittal, in that case I just want some reactions?

One of the participant replied: As a common man of this country I may get really angry. Jab itna log margaye hai, ye kya Judiciary sabko acquit kardiya, kya chal raha hai idhar. As a judge, what I see that there may be a lack of evidence, or perhaps they fail to prove the guilt of the accused, so what Judge can do, so Judge acquitted him. So there are two versions. So people may think that, the main reason is the press. And as example I will tell you one case, one interview was there on Udai T.V. in Karnataka. Wife killed her husband hidden dead body under the cot, next day she removed the dead body and she confessed before the press, that the husband tried to hit her, in turn she hit him and he died she throw

dead body nearby. So this was the case discussed on the T. V. unfortunately the case came before me, I said have seen T.V. witnesses turned hostile, therefore naturally acquittal was there, what people may think, what I have done is correct, because I can do only the legal conviction not moral conviction. But whatever you think…aare bahi police itna kaam kiya usko arrest kiya aur Judge ne chod diya. There are two versions naturally. The most unfortunate is the press will conduct pre-trial. Press will conduct a pre-trial and press will pass a sentence also. Unfortunately after passing sentence passed by the press, case will be commit before us.

Adv. Trideep Pais said: I completely agree with the Judge what the judge here is saying. Out of complete curiosity of such situation, which is completely no part of this interaction mine with you. Please read the Judgment of Bombay High Court in the Black Friday case. They stopped the telecast of the movie not on the ground that the Judge concerned Judge will get involved…influenced, but on the ground that you will create an impressions in the mind of the general public, to such an extent, should the Judge hold otherwise. We don't know which way going to hold like as he said it depends on the file, what the file says. Should the judge hold contrary to the expectation built up by this movie? Then the people will lose faith in the Judiciary. So they stopped the telecast of that movie, till such time the trial was decided and they did not hold good for the appeal. Going by this logic, now the file is crystalized you can say what you want. You can come up with alternative theories you can write 10 reports in the newspaper saying the Judgment was wrong, we will stand by it. Or the appellate court will only look at his file and say not get influenced by T.V. so just try that judgment, it's a very…very nicely written judgment. It's called mid-day multimedia. They were the once… I will give the full… I will give the full judgment to you people after this class. But I have a slightly different impression of the way in which the Supreme Court and in some instances Trial Court, have decided matters where, if it were a Murder case under Section 302 I am sure it would have been very different. I am sure all of you have heard the celebrated case of Harman Nargundkar of Supreme Court and which has been followed in Delhi High Court. Basically in circumstantial evidence, if you have a several circumstances, each one of them taken to be proved on their own and their linkage should be definite and none of it should be a product of the mind of the judge, because the human tendency is to connect dots. I just wanted you people in this context to contrast to judgment. There was a horrific murder in Karnataka some years back, in fact I was in school then a gentleman by name Murali Manohar Mishra befriended a divorcee who came with lot of wealth through inheritance, she was a princess I think and when they married it was in very posh locality in Bangalore called Richman Town and they married and after they married she realized that he was coracoid a man highly disturbed, so they started falling apart so he planned, he called some workers and they said dig a pit here we are going to make an additional septic tank as a outlet of swage from our bathroom, then he made it solid and then he puts some other carpenter on the job on some other pretext to make a box like a coffin, then he got somebody else to make a slab, he went about for months planning this, finally he drug her one day, she probably was alive, he put her in that box, put her into that pit

sealed it closed it and claimed it was a septic tank and threw a lot of through her daughters, it came to light that way. He confessed to the police and the discovery was to pointing out the dead body, this is a judgment I like you Judges to see its (2008) 13 SCC I am sure many of you are aware of it when I tell you the name 13 SCC 767 Swami Shrddhananda v. State of Karnataka. The manner in which I have described it to you, the Judge goes through pain, the Supreme Court while sentencing him there was a difference of opinion one said life and the other said death. So that difference of opinion would carry to a three judge bench. This citation which I have given you is the opinion of the three Judge Bench holding that they shall not give death to this man for he does not fall under rarest of rare. So they first go into the manner of killing, then they into the motive to take over her property and the way in which he went about it clinically, you know as soon as he married her, all her Bank accounts he transferred the money etc…etc…etc…basically he was on a fund gathering mission, then they go into the manner of killing, the planning for it, then they even say in the Judgment that, when he pushed her into the box, after drugging her, she was probably alive. Then they go into the test of Macchi Singh and Bacchan Singh and each one of them… each one. The manner in which the Supreme Court has gone about it, it has devoted about just the test of Macchi Sigh and Bacchan Singh have gone about five pages every aggravating circumstance has been analysed in some detail and then in the end Supreme Court says that we are not unconscious that in a simple case…simple logic that five crimes go undetected and there is no reason to apply the logic that the culprit committed all those five crimes. But this logic, does not hold good in the case of death penalty look at the doubt it expresses, let not one innocent man be convicted, better hundred go free. Here it says that logic doesn't seem to be applied here for death penalty. On this logic a convict of logic may be punished for imprisonment as long as you pleased, but death penalty is something entirely different no one can undo an executed death sentence. It seems to me from this judgment that there arrived that closed to the formulation of Macchi Singh. They ticked all the boxes and they are feeling hesitating therefore to one report by Vikramjit Batra, where he says…Vikramjit Batra analysed death penalty over many years and he comes to the conclusion that death penalty seems to be happening on the personal pre-dereliction of the Judge. So he calls it a lethal lottery depending upon where you come up…this is…this is….now we are talking about sentence. All of you have made it absolutely clear to me that the files speakers and not your personal pre-derelictions or not the pressure asserted on you by external forces like the press. Batra tells you that somehow when it comes to death penalty everything takes the back sit, they arrive at the formulation and on the same formulation someone says no death, irreversible, hard decision…no we will not take this. Somebody else say no, I think we have to be clinically analyzed, arthmatical about it, one two, three, four, five, six, seven, eight, nine, ten, if it is nine I not giving it, if it is tenth I am giving. That kind of sort of arithmetic, so the judge here says no what's wrong with the life imprisonment, there is nothing wrong with the life imprisonment, and I am sorry we go on discussing remission, commutation etc…and he says no life means life Shraddhananda shall remain in custody for life, it was a hard decision according to me, the State was for his death a very good lawyer a sitting Supreme Court Judge today U. U. Lalit

was appearing for the complainant pushing for death. Legal representation was impeccable on both sides and the result was, a bench which said, no we shall not go to that extent. A similer exercise was done in Mohammad Ajamal Kasaab and the same exercise was carried out by the same Judge ticking the boxes going over the test one by one mind you in Sharddhananda case it was individual versus individual the crime, in Ajmal Kasab State Same Judge extreme thought not a flip rent judgment at all, really thought out and said no all the boxes it meets the requirement. In my mind if I believed in death penalty I would say Shraddhanand is wrong, it's another matter, if death matter death penalty is personal. Look at the….he met with every test you read Shraddhanada look at the depth of the planning, he marries her to kill her. He acquires all her property with her in the house, he plots her death, he builds her grave, he puts her in the grave….so what I am saying is…

One of the participant said: body was alive, that is the main thing, that indicates the cruelty of the person

Adv. Trideep Pais: It is so difficult no to death in Ajmal Kasab's Case. It is difficult for a person who's pre-derelictions are against the death penalty. Look at the scale of the crime, scale of the planning nobody expected different from the Supreme Court. Now if that is the doubt the Judges were in, what would the reaction of the general public would have been if they crop shrot the death for Ajmal Kasab and everything made out is life is life. The difference is the not of sentence alone, the difference is not of a conviction. We are all had not to talk about the conviction in both the cases. Now we commits to this crucial…state of individual. I am giving you some examples. Stop this thought here we are not here to answers and to give answers immediately. I wish life were that easy? Let's look at another case. I am sure all of you knows the facts of the case, some of you have watched T. While, when he went about his so many of his colleagues killing people. Let's look at another case. Let's look at the Judgment in the attack on parliament Navjyot Snadhu…let me…I am so sorry…I found it. This is a very interesting judgment in fact I part time in the same college, where Mrinal is the full time Professor. I tell my students if you want to understand Cr. P. C and its interactions with special laws, please read this famous judgment, here I will just summaries it quickly. There was an attack on the Parliament, all those who physically attacked Parliament that time on that day all of them died on the spot, all they ended up killing a law of a defence police personnel, but they all died, there was a connection or an interaction or a telephonic connection between one of the dead terrorist and this Afjal Guru and the rest of the accused i.e. Navjyot Sandhu @ Ashfak Guru, her husband Shaukat and one professor by name S. A. R, Gilani were Afjal Guru's Social acquaintances, friend, associates whatever you may call it, all of them were given death in the Trial Court. Gilani Ashfak got acquitted in the High Court, but other two got death, and finally in the Supreme Court only one got death…only one got death and Gilani got acquitted, you see the difference. The difference was not of a reduction for example in Shaukat's case he got death and Supreme Court said under section 123 he is was aware and he should have disclosed the conspiracy to the Authorities…a lawful Authorities and therefore, he could have avoided this whole crime and gave

him ten years. That is a reduction in this case what happened and in Gilani's case and Ashfak's case they went to acquittal from death and while assessing the evidence please bear in mind this was POTA confessions were accepted by the High Court. In this case, Supreme Court has before it a person who did not actually remain present there, did not actually shoot admitted to being present while the Accused hired a room purchased some chemical, hired a car, the car went in to Parliament therefore knowledge of the conspiracy and probably the chemicals which were purchased went in to bomb making and the house was a safe house they hired. He offered some explanation, they did not believed, but all confession's rejected, all POTA confessions were rejected as not believable. All….therefore death could not be given to Afzal Guru, because he actually did not commit the crime. He only abetted it. Abetment was read to be part of 120 B by High Court and Supreme Court said no, they does not contemplate for death by abetment, so no death for terror, no confession believed finally nothing left to give him death. It came that close. You see we have a case like Ajamal Kasab where its very difficult to argue should he or should he not have been given death. I mean horrific and on the spot first person. Here you have one step removed conspirator and immediately you didn't do any of those acts. The Supreme Court in its judgment, I have gone through it several times, it just devotes half a page and I will read out that portion. In the instant case….I have highlighted it and you can see it this is how much space. I just read out Shraddhananda I mean I pointed out Shraddhananda, then I pointed out Ajamal Kasab…Ajmal Kasab goes into rims of paper while coming to the conclusion you know it is almost like a test one, two, three, four, Shraddhananda also, here it goes, in the instant case there can be no doubt that the most appropriate punishment is death sentence, no discussion what so ever on what are the tests of Macchi Singh, Bacchan Singh nothing, that is what has been avoided by the trial Court and the High Court. The present case has no parallel in the history of Indian Republic presents us in a clear terms, crustal clear term a spectacular rarest of rare case. Without going into that assessment straight away coming to the conclusion that this is a rarest of rare. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosive and imperilling the safety of multitude of peoples representatives how constitutional functionary is and official of Government of India and engaging combat with the Government of India, security forces is a terrorist act of the gravest severity, it is a classic case of rarest of rare case. Then it goes on to say, the incident which resulted in heavy losses had shaken the entire Nation. O.K. Just keep it in the mind what weighs with the Judges shaken the entire nation and collective conscious of the Society will only be satisfied if the capital punishment is awarded. We just go back to your thought under 406, 408, and 409 this an extraordinary circumstance so that would apply an extra ordinary test. The society make a representation in the Supreme Court said, these are the words, "we are shaken as a nation and only be satisfied if death penalty is given to the offender, because it is a challenge to the sovereignty of India" so basically it is as if society or some external force. You see we started by talking about that, some external force made an appeal to the Supreme Court and say that our conscience will be satisfied only if you are hanged. This was difficult case they found they can't hang under Terrorism, they found, that they cannot believe

the confession, they found that one by one each of the accused got away. So this man was left with these three circumstances are the chemical that he purchased and the House that help them acquire and the Supreme Court said almost as if, and that's why I carried this impression, it is almost an appeal by society you asked us to hang him, that's what the Supreme Court is seemed to be said, your conscience is to be satisfied therefore we are hanging, on our own we are not getting into anything, what I am saying is there are Batala House is such case, I will give its details, this is one such case there are judgments which says in offences against the State, that it is because of a crime by society if a justice, that we are doing with. This doesn't gel with the three table and what the judge here said and the Judge there said, look we don't get swayed by all this, we go by the files even he said the Judge from Karnataka, even he said we go by the file, there is no plebiscite which is held in India ke Afjal ko hang karna hai ke nahi. So let me stop that here and from that point of view try to…there is an interesting report you people must see, this is colleague of mine who given me VIDHI Centre For a Legal Policy, I think I can email it to you. It's on terror laws in India ion the end of it there is a table of it analysis is really beautiful…analysis is really beautiful but end of it she made a table like this, she name all the cases, and she tells you that at what level what each court did, what the Trial Court did, what the High Court did, what the Supreme Court did, its interesting reading that the…it really a pyramid keeps reducing…it keeps reducing, it's really a pyramid yes I think I will give it to Mr. Milind and I will just give as it is, I just taken. What I am saying is sentence keeps reducing which is …. I am glad amongst you and love your reactions, but it is slightly contrary to what you people told me, if the pyramid is like so, its not bad, that means the filter is really working, but what I am saying is there more pressure I am just parking that thought from that point of view… from that point of view I want you people to think of these four Legislations TADA, POTA, MOCOCA, and now the present avatar of UAPA. TADA allowed for police confession, allowed for majorly increased police remand I forget the exact…. I think I will open that for you, I will open the table, can you look at the screen I have a comparative, I will just put it. We can do this within five minutes, if can do the comparative on the.

Is there a time constrain?

Prof. Dr. Geeta Oberoi: Yes

Adv. Trideep Pais: Can I have a 10 minutes

Prof. Dr. Geeta Oberoi: Yes

Adv. Trideep Pais: O.K. ……..is there something to increase this. So the parameters on which I am comparing these legislations is Bail, all of you know that. In NDPS TADA, POTA, now the present UAPA, next important to thing to get in the course of the Trial I am not talking about an offender who will get a way an alien like Ajamal Kasab, there is no question of giving him bail, because he will never

come back, confession UAPA doesn't allow it TADA allowed it POATA allowed it, MOCOCA allows it and MOCOCA is in force it seems to be the only in force…I am sorry allows for confession, then look at this presumption, if there is recovery of Arms or the finger prints of the accused found, then there is a presumption against the accused, then there are special court set up, I don't have a much grievance with that, special Courts are set up for many other offences like sexual offences against the children, that's a act expediency not a…it doesn't operate in. So now think about what I told you in this background. First you said that if the status is extraordinary and if the punishment is high it doesn't make a difference, the way you give the case. Now you have a harsher punishment, I will never want to say that you need the definition of the terrorism, that is wrong, you need to define terrorism, as we go ahead we define new crimes, which starts because of I. T. Act, because of cheque bouncing, so you define terror all right, but what is the hesitation to decide it under the Cr. P. C why do you need a confession, just ask yourself this question because sentence run high and the procedure are loaded in favour of the prosecution. They have a longer police custody, chances of torture I am not saying in every case and I know some of the fact where very…very high profile cases in Delhi, defence lawyer has been told me that there has been no torture, what so ever, and those cases even don't have confession, but it is strange that, when confession put in TADA you had so many confessions. How come these same people did not confess or similar crime people did not confession under 302, so what I am saying is now view sentence, when the procedure is loaded, in favour of the prosecution, and I will request one of the Judges who have the micro phone to read this portion and I think I will stop there. My thought on sentence is this, that if you think an extra-ordinary crime, generally the crime against the State is quite extraordinary, it does not require a higher level of scrutiny or doesn't put a higher pressure on you, then why should the State going to the extent of making it simpler for the prosecution and ensure a higher sentence. So…

One of the participant: The only reason was to ensure that there are more convictions

Adv. Trideep Pais: But that be right in your formulation in that initial

One of the participant: it may not be right in that formulation

Adv. Trideep Pais: correct so what happens is in the VIDHI report….so I got this reaction saying that these crimes are not of the same nature. Let me put a different fact situation here, slightly different, what are the name so the Act, let us read out the names of these Acts, Terrorist and Disruptive Act first, second, Prevention of Terrorism Act, you see that it gives impression that it prevents it, Maharashtra Control of Organized Crime Act, there is organized crime and when the Act comes in to force it controls it. Unlawful Activities Prevention Act, just look at these provision when they kick in, they start if you make an arrest, no matter the Act prevents it, it helps you facing the process of getting a conviction and a higher sentence but there is nothing in the Act which prevent the terror from happening. Please

understand. Now when TADA was passed, there was three judges bench said that confession is good, two said bad….

One of the participant: though there is nothing to prevent the terror, but the higher degree of punishment prevents the potential criminals

Adv. Trideep Pais: correct…correct, but it's the Act says, it's an Act to prevent…

One of the participant: it is altogether different Act…there are several special statutes like Prevention of Domestic Violence Act…

Adv. Trideep Pais: Prevention of Domestic Violence Act is a departure from specific relief, if you moved to a specific relief saying come and watch my husband and ensure he doesn't bit me, specific Act, they would say sorry, we cannot keep watching your husband that's not the relief you can ask for…but domestic violence is an exception to the Specific Relief Act and it actually prevents because when the Magistrate passes the first order, every act thereafter within the domestic household is a cognizable offence, therefore the husband doesn't commit it. That's parallel is not there other preventive Acts such as Food Adulteration etc…they give you the standards by which…if you fall of the standard then it is considered, therefore it prescribes a standard. These Acts do not prescribes the standard of behaviour, they only give a easier standard for the prosecution since I have been asked to stop, I will take two more minutes, for the prosecution, to deal with the case once that case has happened, it's a post facto act. In this back ground I just wanted to tell you TADA was upheld by Kartar Singh 3:2 said the confession is good. POTA was upheld by PUCL two judges and they said Kartar Singh is right and there is nothing that we need to do, in fact POTA was fairer than TADA in some respects yes POTA is fairer than TADA, because all the safeguard that the Kartar Singh said should be there were incorporated in POTA especially in 2002, despite there being a five Judge bench upholding confession and another two Judge upholding confession in POTA and another three judge bench upholding MOCOCA, see what the Supreme Court has to say when it deals with confessions in the Parliament attack case, why it rejects all the confessions…. I think I will stop here.

One of the participant: we are here to discuss the sentence in trial in offences against the State what we are discussed up to, how to convict, whether TADA, POTA and…. Here we are supposed to discuss sentencing policy not about convictions. Conviction is over whether TADA, POTA, whatever it is now what will be the duty of the Judicial Officer…what will be the policy of the Judicial Officers while passing sentences

Adv. Trideep Pais: that's why as a representative… as a representative sample I gave you some examples when it comes to the State somehow the sentence is different. What it would have been, had

it been between two individuals. Similar is the problem of the Official Secrets Act, I don't know have enough time. I will go and…I could have gone into it. There is a kind of an aura

One of the participant: official Secrets Acts, what the Academy wants why there should not be uniformity, why there are vast differences, for example ….

Adv. Trideep Pais: correct same judge in Shakire and same Judge in Ajmal Kasab…

One of the participant: if it is one year two years its O.K. but here there is difference of Zero to ten, some judge go for one. Why there is such difference…

Adv. Trideep Pais: and some judges discusses in five judge Bench and some judges discuss it in half a highlighted page. Please read that and I will stop here.

One of the participant: the constitution bench judgment is binding on us, in fact the ratio of that judgment applies to grater force to the POTA as the guideline set out by the Constitution bench are substantially incorporated in section 32, it is perhaps too late to see the pre-consideration taken by the majority of the Judges in the Constitution Bench, but as we see section 32 a formidable doubt lingers in our minds despite of pronouncement in Kartar Singh case that pertains to the rationality and the reason behind the drastic provision making the confession to the police officer admissible in evidence in a trial for POTA offences. Many questions do arise and we are unable to find satisfactory or even logical answers to them. If a person volunteers to make a confession, why he should not be produced before the Judicial Magistrate at the earliest and have the confession recorded by a Magistrate.

Adv. Trideep Pais: could I request to stop there, this a Supreme Court saying despite there been three bench upholding saying, wherein he is saying willing to, under the Cr. P. C you would have been taken him to the Magistrate. What is the hesitation and why? I come from a small town, where it is difficult to find the magistrate or a police but I have four magistrate before whom I am, but we will go to that singular person, should be applied POTA, TADA, or MOCOCA, what I am saying is, what is the need to have this and thereafter arrive at a sentence, which is higher, that's the question I was posing to you. Please continue Sir…

One of the participant: the mainstream could be within the same time, within which they empowered the police officer could be approached. The doubt they pose is more puzzling, that we notice in practical terms the greater degree of credibility is a test to a confession may be made before the judicial officer…then why should not the investigating officer at a strait forward course of having resort to the ordinary and age old law if there is any specific advantage of conferring power on a police officer to record the confession receivable in evidence if the intendment and desideratum of the provision indisputably remains to be ensuring atmosphere free from threat and psychological pressures by the

circuitous provision of having confession recorded by the Police officer of the rank of S.P even if he may be the immediate superior of the I.O. who oversees the investigation and then requiring the production of the accused before the Chief Metropolitan or the Judicial Magistrate within 48 hours. We can understand if the accused is in a remote area there is no easy means of communication and the Magistrate is not easily accessible. Otherwise is there real expediency or good reason for allowing an option to the I.O. to have the confession recorded either by the superior police officer or a judicial Magistrate. We do not think that the comparative is with which the confession could be extracted from the accused could be pleaded as justification. If it is so should the…

Adv. Trideep Pais: Please bare that in mind the comparative with which you can extract the confession out of the accused, that expediency should not be in consideration.

One of the participant: If it is so should the end justifies the needs, should the police officer better for state than a Magistrate. There is magnitude and severity of the offence justify the job of recording a confession to a police officer. Does it imply that it is a key to easier to make and accused confessed the guilt before the police officer, so that it could pave the way for conviction in a serious offence? We find no direct answers to these questions either in Kartar Singh or the latest case of People's Union for Civil Liberties. The polity of civilization can largely measure by the methods it uses there and the enforcement of its criminal law as said by the imminent American Jurist, we recall as well the apt remarks Krishana Iyer J in Nanni Satpati v. P. L Dani the first obligation of the criminal justice system is to justice by seeking and substantiating truth by proof, of course the needs must be as good as the ends and the dignity of the individual and the freedom of the human being, cannot be sacrificed by resort to an improper means whoever worth the ends, therefore third degree should be outlawed and indeed has been we have to draw clear lines between the whirlpool and the rock, where the safety of society and the work of the human person may coexists in peace

Adv. Trideep Pais: Now I after this I just want to one thought for you people as I leave. Please understand that extraordinary laws such as NDPS, MOCOCA, and the erstwhile POTA and TADA, provided for recording of confession or statements which were directly admissible in evidence as oppose to 164 where does that step wrong. The state has the three organs the Legislature, the Judiciary and the Executive. The Legislature makes a law, which ensure that between the prosecution and the conviction, the involvement of the Judiciary. You see that portion where he says is it more expedient to record before a police officer than before a Judge? Why do you do that? You want to side step the Judiciary and ensure a quicker conviction and this happens mostly in cases against the state. And therefore to coming back to answer your question, I am just leaving you with that thought is the State trying, when the State is on the other side when crime is against the State. Is there a tendency to somehow get a higher sentence? These are thoughts I cannot say it as definite. I thanks for chance being here. Thank you

Prof. Dr. Geeta Oberoi: With this we thank Trideep Pais and we close for the day till we meet tomorrow, you have a session where you can go to library for one hour. And we have Mr. Talwant Singh from Delhi Judiciary who is being a member for e-committee for long…long years. He can definitely show you the progress that e-committee has made in computerization, so that you all can acquaint with each other, and each other's skills. And there will be one hour computer skill Mr. Talwant Singh can help you in that regard. Is there any Master Trainer over here amongst you… no master trainer, this time so Mr. Talwant Singh is going to help? Thank you so much. See you tomorrow

## Session No 5: Sentencing in Economic Offences

Resource Person: Justice Anjana Prakash (Patna High Court)

Prof. Dr. Geeta Oberoi: Very good morning to all of you, so today we have with us Hon'ble Justice R. Basant former Judge Kerala High Court and now Senior Advocate in Supreme Court of India. We also have Hon'ble Justice Anjana Prakash Judge Patna High Court with us, now with the first session as you can see about sentencing in Economic offences and before we begin the Session, if we could have each one of you what kind of economic offences are pending in your court, so that we map out that where we are and how we can address you. Is it possible we can begin with you Mr. Rajanikanta?

Justice R. Basant: A word of introduction also, so that I may know my group, so I know my target group you know, briefly how long you have been a session Judge, how you select your career, so I know what's type of people I am handling thank you.

My Lord Mr. Justice R. Basant and Madam Justice Anjana Prakash and dignitaries on the dais. I am Rajanikanta from Manipur High Court I have been District and Session Judge for the last six months, before there I was Registrar in the High Court of Manipur. And I have joined my service in the year 1997 and in Manipur we don't have cases on economic in Money Laundering problem as such right now, but then of course the time may come up so I am very grateful that I can learn something from this…thank you.

Prof. Dr. Geeta Oberoi: In Manipur Money Laundering is not pending any other economic offences

No, no not in Manipur

Prof. Dr. Geeta Oberoi: Fraud, cheating…….

That is there but very few cases are there are charge-sheeted with a Government officer but we don't have at least money laundering cases

Prof. Dr. Geeta Oberoi: Any other economic offence…….

Like vigilance, like, government employee using government money, those cases are pending, but not exactly it is on money laundering going on in Manipur

Justice R. Basant Not only on money laundering all economic offences of course will be there….

We have some vigilance cases, vigilance cases…

Justice Anjana Prakash: Vigilance cases, meaning bribery cases

Ya…ya…bribery and I mean misappropriation of Government money entrusted to the officer those type of cases are there, but this Money Laundering Act is not there

No, no I am not on Money laundering specifically…any other…..this I am telling my Lord we have 420 cases misappropriation of government money, but not in broad way as you have in a Metropolitan cities and other big cities like Kerala, Punjab, Haryana…..

Good Morning Mam and sir, I am Amarpal I have recently joined the Judicial Service in the last year 2014, earlier I was posted as Additional Public Prosecutor, I have practiced for seven years as Advocate and thereafter I joined as Public Prosecutor for seven years and thereafter I recently joined the Judiciary. Now I am posted at Hoshiyarpur in Punjab and Haryana High Court

Prof. Dr. Geeta Oberoi: Do you have any economic offences with you?

No as such…

I am holding the post of Principal District Judge, I have worked in various Districts in Karnataka, I came across the economic offences that is cheating more cases, I deal with Prevention of Corruption Act, form last four years and misappropriation of government money and misappropriation in the Bank and disproportionate income and Income Tax cases…thank you

Good Moring everybody I am Ashutosh Pandey from Tripura and I have just joined in this year so I have no any experience…

Good morning to all dignitaries I am R.C.S Samant, I am District Judge at Raipur Chhattisgarh. I have been District Judge since 2007 this is my fourth term as District Judge. Personally when I was Additional Session Judge at that time I was a Special Judge for Anti-Corruption Bureau so I have dealt with corruption cases there and in Trial Court particularly the number of cases of cheating, fraud cheat-fund etc…are on the higher side there are also cases of the Vigilance that is Anti-Corruption cases which are on the quite higher side and some cases are there regarding the counterfeit currencies so that is there, thank you so much.

I am Noordeen Tigala District and Session Judge Raigad, economic offences ki cases bhi hai, money laundering ki kuch cases hai Raigad main unko deal kar rahe hai, Chattisgarh

Good morning sir, Good morning Madam myself Om Prakash Pandey I am principal District Judge from Sahebgang, Jharkhand, I have been posted as Principal District Judge since 2007 appeal of 420, 138 of N. I. Act are pending in my Court

Myself Ashok Kumar, District and Session Judge Kasganj, Allahabad High Court Uttar Pradesh, no such cases are pending in our court

I am Talwant Singh From Delhi Lordship, I had dealt with the Commonwealth Trial for long time in Delhi, so that was the only case I was dealing for two years where the Charge-sheet was of one lakh twenty five thousand pages and the I have framed charges in 278 pages, then I was called by the Supreme Court as a member of e-committee for one year and then there, lordship was there in that committee, got a good training and now I have got a promotion District and Session Judge East that is the only Court in Delhi which is by designation as CBI Court so I deal with civil cases, I deal with criminal cases in Appeal as well as CBI cases, other CBI Judges, 24 CBI Judges are there in Delhi but they are nominated by the High Court and then the notification comes, but my court is only court which deals with PMLA cases also and CBI cases also that is the only designated Court for the, even the Kidney racket if lordship remembers in Gurgaon where somebody had opened a Clinic at a home and they were treating patient by watching You Tube as to how to remove and replace a Kidney and transplant a kidney they success was equal to Apollo's success rate, so they were also before me in that case, because the proceeds of that illegal transection were invested in properties so that case I am trying now

Good morning my Lord I am P. K. Bora District and Session Judge Kokrajhar, Gauhati High Court Assam. I have been holding this post since five months back. I have no such types of cases, except appeals under section 420, 406, 409 thank you,

Cheating and fraud cases are there

Good Morning all I am S.M. Gavhane District and Session Judge Satara, Bombay High Court. I worked as a Registrar vigilance, presently in my court there are cases of counterfeit currency, there are also cases of Prevention of Corruption Act

Good Morning Sir I am N.R. Borkar I am working as District and Session Judge Nandurbar, since last one year Maharashtra. There are cases of Prevention of Corruption Act I do not have other cases of economic offences. The same cases I dealt with when I was a Special Judge for CBI for Prevention of Corruption Act, but not other cases

Good Morning all the dignitaries on the dais I am S. Sarma Roy Additional District and Session Judge, Tripura High Court. I am holding the post of Additional District and session Judge for last seven months, but unfortunately I had no opportunity to deal with Money Laundering cases, except one case under Section 409 of I. P. C

Respected Dignitaries on the dais and my participants I am from Orissa I am Principal District Judge since 2013, prior to that I was a vigilance Judge and by that time I was dealing with the P.C.Act cases only. Now although I don't have any this economic offence cases except under the I. P. C the counterfeit of currency that 489 I. P. C cases, but so far as my District is concerned it is having a designated court

under Protection of Depositor of Financial Institution Act, that cheat-fund cases and CJM also dealing with cheat-fund cases and vigilance cases are also there, those type of economic offences cases are there. Thank you.

Good morning My Lord I am Ramana Naidu from Andhra Pradesh from the High Court Hyderabad. I am holding the post of Principal District and Session Judge at Medak from last four months back. Promoted as Principal and District judge in the year 2005. At present there are no economic offences cases except appellate jurisdiction of 420, 138 like that, but earlier I was a CBI judge at Hyderabad, I dealt, those, such type of case My Lord

Good Morning My Lord and everybody present here. I am K. Durga Rao Principal District and Session Judge, Nellore Andhra Pradesh. I have been Principal District and Session Judge since 2003 and in 2013 I have been Principal District and Session Judge except one Act dealing with financial establishment i.e. Andhra Pradesh Protection of Rights on Depositors Act which regulates the financial establishments activities and also protection of Depositors money circulation schemes which deals with companies financial establishments which deals with money circulation schemes primarily and there are very few cases because it is a recent legislation. Thank you.

I am Alok Kumar Verma District and Session Judge Chamoli, in the State of Uttarakhand State. Appeals are pending in the nature of fraud cheating and misappropriation of money Thank You my Lord.

Good morning My Lords I am Mahender Singh Additional District and Sessions Judge from Haryana. I was promoted in the year of 2012, I have dealt with the cases of cheating and criminal misappropriation of money. However I have never dealt with money laundering cases and at presently I am in a High Court as O.S.D General, Officer on Special Duty. Thank you.

Good Morning Your Lordship I am Prem Ranta Distrct and Sessions Judge Kullu and I am dealing with cases under prevention of Corruption Act and appellate jurisdiction like bank frauds, embezzlement and cheating, Thank You My Lord

Good morning my lord I am District Judge at Bhopal except cheat-fund cases no other cases of economic offences are pending in my court

I am R. K. Shrivastva District and Session Judge, Rewa, Madhya Pradesh from last three years. Except 420, 409 and corruption cases no other case of economic offences are pending in my court.

Good morning  Lordship I am Nazima Bano presently holding the post of Principal District Judge at Perambalur State of Tamil Nadu. I was recruited as District Judge in the year 2011. As if now there no economic offences are pending in our court except in section 138 of I. P. C

Good morning Judges and other dignitaries on the dais Sir I am Shircy District and Session Judge Thiruanantpuram Kerala I joined in the year 1988 as Munsif and promoted in the year of 2012 presently I am dealing with the cases I don't have any economic offences as such, except the cheating cases and 138 cases.

Good morning My Lord I am Subba Devi I joined in 2011 now I am holding a post of Principal District Judge, Dharmapuri so I am not dealing with any cases in the economic offences thank you my lord.

Good Morning I am Shubhra Ghosh from West Bengal, I am presently holding the post of Chief Judge City sessions Court Calcutta. I presently deal with money Laundering cases and appeals on I. P. C on economic offences. I am a 1992 cadre joined as Civil Judge Junior Division so I dealt with case on 449 a, 449 in the month of June this year.

Good Moring My Lord I am Rajesh Desai From Desai principal District and Session Judge at Bhavnagar state of Gujrat. In my court P.C. cases are pending regarding corruption and bribery and some appeals are pending arising out of forgery and cheating cases thank You My Lord

Good morning My Lord I am recruit of 2001 I joined District Judge cadre in 2001, presently I am Principal District and Session Judge, Udaipur. We don't have any cases pertaining to economic offences. Thank You. Pankaj Bhandari I am sorry.

Justice Anjana Prakash: Actually I don't think you know, that many of you have, very few of you have economic offences you know trying any economic offences, but those of you who are doing it, do you feel there is a difference between the way the ordinary criminal cases prosecuted and a way in which economic offences cases are prosecuted? Do you think there is a difference? You have some cases, you feel any difference between the prosecutions?

My lord in ordinary I. P. C cases, it is burden on the prosecution and they feel that there is no doubt that the accused only committed the crime, unfortunately in economic cases same applies. And it is difficult for the prosecution to prove beyond reasonable doubt that the accused committed the crime. In my view, In my view there is a preponderance of possibilities, then as a CBI Judge for two years I came across many economic offences and I remember two cases my Lord, if my Lord permits (o…sure…) a person has taken a bribe of Rs 200 My Lord, that trial went on for sixteen years, when he has taken bribe he was of 59 and when he came before me he was 74 I convicted him, I convicted for the till rising of the Court, there was no other option for me, he was unable to walk ( but there is a minimum sentence isn't it?) yes I given entire reason My Lord he is unable to walk, he is fully Diabetic, two peoples are carrying him to the Court, so I have given all those reasons and I convicted him till the rising of the Court My Lord. That is the one case. Second case I explained to all my colleagues where an insurance officer, very prompt officer, he was very honest officer in his entire carrier, when he posted to Bangalore within

six months he has misappropriated 22 lakhs rupees My Lord. And the charge is framed he felt guilty, but he did not appointed any Advocate, he stopped cross examination My Lord, then I gone through 65 witnesses, every witness said sir he is very good person, but why he has done it, don't know? Then he came up and asked for the enquiry also, his both the parents were suffering from cardiac My Lord, so he misappropriated Rs 22 Lakhs and he spent entire money on treat of his parents My Lord. His parents died and he sold his house and he has given entire 22 lakhs to Life Insurance Corporation, but enquiry was held, he was removed from job. He had small kid my lord then I convicted him only for six months My Lord. These are the two cases in my view, economic offences are of two types My Lord one is white collar My Lord they will make money another is by those who are in desperate conditions My Lord. So in punishment also what my view in Prevention of Corruption Act, if a person who has taken a bribe or fifteen rupees, hundred rupees we cannot keep him at par with a person who receive a lakhs together, when I was a CBI Judge in Bangalore I convicted Deputy Commissioner of Income Tax My Lord, where she has taken a bribe 20 lakh rupees My Lord, unfortunately law is same My Lord, hundred rupees same, twenty lakhs are also same My Lord. As per Malimath Report, I was just reading, that should be there My Lord it is the Accused who has to that he is innocent My Lord as much the prosecution proves. What the Prevention of Corruption Act what we are seeing is a strong defence My Lord weak Prosecution, in CBI cases the accused will engage four to five advocates who are eminent, they are imported from Delhi, they are imported from big cities and on the side of the Prosecution CBI appoints a Prosecutor even he do not know how to speak in English and such person is appointed as Prosecutor My Lord, so now in all CBI courts in all, even in sessions courts also there is a weak prosecution and the strong defence My Lord so naturally strong wins the case My Lord, that's the reason the conviction rate is very meagre and moreover poor is not getting the justice My Lord, what poor can opt, he can opt for legal services authority, and what legal services authority can provide a small Advocate of a practice of three or four year, how he can defend a serious case of 302 My Lord, My Lord rich will engage advocate who is very experienced, naturally justice Is not given. So in my view what is going on as a Principal District Judge for Last six years what I watched is the tussle between a weak prosecution and strong defence My Lord so at this juncture even my District Government Pleader confess had an opportunity to speak, that's what I requested to appoint a eminent District Government Pleader My Lord, even in civil cases same thing a weak District Government Pleader who is appointed by the political influence, he don't know what is C.P.C what is evidence Act, his qualification is that he belongs to a particular ruling party of the State, he will be the District Government Pleader My Lord. Whereas in defence a strong advocate an experienced advocate. The reason being the Government Cases 70 percent cases we are losing My Lord and thank God now all my officers, we used to put question them, we try to extract truth and we try to do justice to the Government that's all My Lord.

Justice Anjana Prakash: But you know, when you say about the weak prosecution and the strong defence is it true with every kind of offence? It's not you know, peculiar to economic offences that you have a

weak prosecution and a strong defence, it can be you know it can be true in any other case, but I could say you know, that where the economic offences are concerned somewhere you know the, the Court is also you know backed in a document. So the entire thing you know it does not appear in an eyewitness account, you don't have to decide a case on an eyewitness account, so there you know the difference is there, if the documents are not produced before you obviously you know, you cannot you know rely on those documents, even though they may be on record, they may be you know part of your case diary etc…but unless they prove you know legitimately you cannot rely upon them and there I think the weak prosecution you know that plays a part. The rules of evidence you know, it's not known to them and that is why you know, but it is don't think you know there is any failure on any commitment as such, you know, don't think you know like that, because everything is documented. A person you know, like suppose…a very simple thing if bribe is taken, you know the report is given, first an entry is made, after that trap committee, whatever trap group is constituted after that you know, then they go, then the search out and the seizure is made all this is documented, if this document is brought on record you know and supporting even by one witness brought on record, that I think it is easy for you to convict a person in bribery cases. That's the simplest thing for all.

Same Participant Continues: But one problem My Lord is in CBI cases and Lok Ayukata cases is the element of demand and acceptance is to be proved ( yes of course) so what they do shadow witness, the shadow witness will not accompany the trap. Even the reason given in Lok Ayukata is that they say they will not allow the shadow witnesses, they will not allow the shadow witness inside, inside the office or accused will not take the bribe in front of the other person. Now the problem arises, they will not convict the accused only on the testimony of the trap members, there should be a demand and acceptance, recovery of money is not sufficient to convict the accused, but the main ingredient is demand and acceptance and they carry tape recorder. 90% of the micro-tape recorders are not working properly, when I them to on the tape recorder, even in my CBI Court, even as a Principal District Judge dealing with Lok Ayukta case where is the micro-tape recorder, sir it is not working sir (it's not working meaning) means it is not working (it's not working when the case comes for the evidence) in fact it is not recoded my lord. What lacuna they will do, when a complain come to the Lok Ayukata or CBI office what they have to do is they have to use micro-tape recorder or they has to ask the complainant to record the demand with the mobile phone, then after hearing that they have to lodge the F.I. R, then, they have to produce the witnesses, in some cases they produce the witnesses, then they lodge the F.I.R in all extra NDPS cases My Lord these all technical mistakes, disproportionate income what the CBI will do cut period say form 1996 to 2000 in this cut period they will collect the documents three to four zeroes in even you do a Archana in a Temple for three rupees, that's a document for the CBI, if he go to movie that is also a document for the CBI, if he purchase a small thing of two hundred that's a document for the CBI, it's very difficult to depose one case even for six to seven years My Lord, there are documents of fifteen thousand sixteen thousand, all useless documents My Lord, the problem is

who is CBI they are deputed from the Police Forces, they are deputed from the RPF, no person of the CBI is there all are deputation all are police deputation,. Reserve police deputation railway police deputation and they will not through the procedure, what they all want to, just collect the document form 1996 to 2000 cut period. I do not understand why are taking this cut period, they have to start from the joining from service then till the date of trap, they have to collect the important documents such as purchasing a house or going for a foreign trip or giving donation for his son or this one, collecting document for rupees two thousand for that one witness, conducting pooja for his father for one rupees is also a document and one witness, they are humorous witness four hundred, five hundred, six hundred……..

Another Participant: This a problem in Rajasthan also, the CBI is just documenting and documenting, lodes and lodes of documents and the CBI judge is not in a position to decide a case in a year six year, one month, it take for deciding for one case, because documents are too many the prosecuting agency is not helping the Court.

Earlier Participant Continues: For CBI There is no independence for the Prosecutor, everything is done by the I.O. entire powers of the Prosecutor is curtailed, when I was CBI judge even the application is signed by the I.O. then I said why you want Prosecutor, you conduct the case, I do not want to see your signature in the application, I want to see the Prosecutor's signature, the Prosecutors has to file the application on behalf of the Prosecution and not by the I.O. entire game is controlled by the I.O My Lord. So especially disproportionate income it is a very difficult for the Judge to dispose the matter in years together and the defence is waiting for the same thing they have to drag the case, drag the case till the death of the……till the death of the accused. And there is no procedure for proper attachment My Lord the CBI is taking the 1948 some ordinance and the defence Counsel file an application, sir Ordinance is not there, how they are going to attach the property and the CBI want to freeze his accounts of the person without any proper procedure is known to law CBI is relying on 1948 or 49 that Ordinance and that is the basis of the conflict which is going on and the CBI will freeze all the accounts even they will not allow any single SBI account for the accused, how can accused will live My Lord. He is retired from the service, he needs fifty thousand sixty thousand per month, no pension is coming from him, all his accounts are freezed, all his property is freezed and accused is foiling application before us sir allow us at least one account. I am asking CBI just, they listed which are for the properties valuable properties see, you freeze those, attach those properties there is no….even in Lok Ayukata also same thing My Lord 99% complainant will become hostile

Justice Anjana Prakash: When you say that the investigating officer is really committed to his you know to take the case, to its logical end what is the difficulty in prosecuting them. If the investigating officer knows… you know that you know, this the important document and then he gives to then the problem,

is his own hand, he looks. Most important document…what is the problem in the prosecutor you know bringing that document on record

The same participant continues: Even at the time of the evidence My Lord, even at the time of the exam in chief he will interferes…..

Justice Anjana Prakash: Who interference, the investigation officer, no, no what I am saying if the Investigating officer is so interested in prosecuting the case, what is the inefficiency of the Prosecutor…

The same participant continues: My Lord see, if he interested if he follows correct procedure there is no problem My Lord, he is not aware about any procedure, he just ask the Prosecutor to file the application. Under what provision, he don't know, on what provision you are seeking this, he don't know, no sir it was the Section Officer asking for it, I am a investigating officer, he is deputed from the RPF, some officer are deputed from the Police Department, some officer are deputed from the some other Department

Justice Anjana Prakash: So mean to say that it's actually the inadequacy of the Public Prosecutor which is you know, which is the main cause for failure

The same participant continues: Inefficiency of the Public Prosecutor, Inefficiency of the investigating officer that is the main reason for the loss of CBI cases My Lord, even Lok Ayuklata cases also 90 percent cases, what I came across so many cases, if hundred case come before me I can convict only one or two case My Lord. All 98 cases either witness turn hostile, complainant hostile and that show witness will not turn hostile, because he is a Government servant, but somehow he will shake his evidence intentionally and that other witness will also somehow shake his witness so ultimately it turns in the acquittal of the……. most unfortunate thing is in a trap cases is an officer is trapped and that officer continues the same office, so naturally he is having the influence in the office, that officer will not be transferred that officer will not be not be suspended for that reason, when I become first time a Principal District Judge when Lok Ayukata cases, what in our State, in trap cases immediately he used to give bail My Lord and the person has started and he used to keep the accused 15 days 20 days in a custody, because I wanted that fellow should be suspended at least, so to start the enquiry against him. So some amendment should be there in Prevention of Corruption Act. The officers trapped, he should be suspended till the enquiry or at least he should be transferred from that key place to some other place, so that the investigation officer can investigate the case My Lord

Justice Anjana Prakash: So at the end of it what we are thinking is that, actually what I think is…generally what is understood is that an economic offences are different from any other offence, because the victims are invisible you think that you know suppose there is a contested murder case where the victim is substantial, where the accused is also substantial, the prosecution is much more

aware about the situation and the defence is much more competent there, but here is a faceless victim and therefore all these problems, the Government may say that it is committed towards you know controlling corruption, but at the same time the Government which works, it appoints Public Prosecutors who are really not up to the mark that is the, that is a very big problem, now the same government actually appointing the investigating officers who are in depth at the investigation as they should be. There should be training whatever you know, based on basic understanding of law at both the level, at both of the level at the investigating officer as well as the public prosecutor otherwise this thing you know, the faceless victim will never become substantial and will never affect you know in the courts of the trial it contuse to happen and the same thing like this is an abstract crime you think in this term you know the bribe somebody is taken a bribe of two hundred rupees, no matter how much you know substance of two hundred rupees is there, but still the fact you that still the bribe is taken, it's very faceless kind of a crime, it's an abstract crime, it may have affect the society as you know at large but at the same time, it's an abstract crime, there is no physical violence in it, there only violence to the economy of the country to the social fabric of the country to the moral fibre of the country, fabric of the country, there is no physical violence in it, it is obvious commitment with an intendment, no matter what the intention you may want to get your parents treated or you may want to get your children to study in a good school or you may want to make ends meet, but the end of it it's the intent, you always intended it when we see you know when a case is instituted, when a case of economic offences is instituted you see that it is a crime-centric, it is not a person-centric, now my friend said about common wealth game, we did not know who is the accuse were, who the main players were except those who had been highlighted by the press, but there were so many others, at others at whom none of us were interested because all that we wanted that the crime should be you know should come before you should be able to discover this, even that being pushed under the carpet, it was with the greater, with great effort that it came out. Even that crime could not come to the pole, it could not be brought up. Then we see there are serious repercussions to the national economy. All economic crimes, no matter even if it is a bribery as you said you know this person is takes you know the bribery and nothing happens to him, he continues to take bribery, what does he do, what is the effect of this bribery. It is a personal game no doubt, but then it is the economy of the country, somewhere a person who is deprived of two hundred rupees, he could have invested it somewhere else. He could have contributed to the national gain which he did not, he contributed to the person with one person, the bribe taker. So we have to understand that all bribe, no how compassionate you will feel towards this person this is a mitigating circumstance, but at the end of it you have to understand that an economic offence is different from any other offence, in the nature it affects the national economy. Where sentence is concerned, we all know that at the end of trial two things can happen one either the person can be acquitted and the other he can be convicted. Part of conviction is the sentence, now how do you determine what is you know, what is the sentence which is adequate? You think you know that this is what the criminal deserve at the end of it. Unfortunately there is no definite methodology in India. In U.S. there is a you know a sentencing policy,

but at the end of it, even there in the U.S what happened was that they say that it is just a guideline, so they have to two hundred questions which a judge has to answer as to why you are you know using your discretion in a certain manner you do it you know say this A, B, C why but at the end of it is again a question of discretion. So you see that actually this the guidelines that been set. Here you know I would like to read just a little bit of an article you know, in the U.S system that the guidelines that has been the product of the United States sentencing commission and a part of overall federal sentencing reform package that took effect in the mid 1980's. In the aftermath of U.S booker, the guidelines are discretionary meaning that the judges may consider them but not required to adhere to the standards in sentencing decisions that been said the Federal Judges almost invariably use the guidelines at least as a starting point when sentencing criminal dependents any sentence outside the scope of the guidelines requires a written explanation by the judge so as to reason, so to the reason of the discretion the guidelines determines sentences primarily on two factors the conduct associated with the offence now as you said this person taking bribe to you know to get his parents medically treated, so the conduct associated with the offence and the defendants criminal history the statutory mission started in 2005 Federal Sentencing Guidelines manual is deterring crime, incapacitated the offender providing the rehabilitating, it deletes to the commission broader authority to review and rationalised the central sentencing process. Once again discretion though guided is not completely removed in the U.S. also. Here I would like to read from you know, the report of Malimath Committee 2003 it says that the procedural, I think we passed it around to you also just turn to it. The procedural laws regarding presumption of burden of proof in the case of economic crime should not be limited to an explanation of the accused who must rebut charges conclusively. Now you look at it, this is what we are talking about that you know, burden of should not be limited to the explanation of an accused who must rebut charges conclusively, so equal amount of responsibility is pass upon an accused in economic offences, adverse inference should be drawn in violation of an accounting procedures a prima facie established in public documents including bank document should deem to be correct, so there is a certain guideline based which is been said that an adverse influence should be drawn in violation of accounting procedures a prima facie established in public documents including bank document should deem to be correct, whether it is actually you know it is according to the criminal jurisprudence or not that is you know, that's a larger discussion but this is you know the recommendation. Sentences in economic offences should not run concurrently but consecutively, find these cases should be partly based on seriousness of the offence, partly on the ability of the individual, corporation to pay but ensuring that its deterrence is not lost. So the main thing is that deterrence, the objective of the deterrence should not be lost. Now as we know you know that when you come to sentencing it's the aggravating circumstance and the mitigating circumstances. The aggravating is to the crime and the mitigating is referable to the criminal. Now what is the mitigating circumstance that you go you know in economic offence? Can you think you know that the social condition of the person is such that he was compelled you know to do this? Can you think you know that he has five children he has to look after and therefore this sentence

should be awarded and not the graver sentence? Can these factors looked into? That is the challenge you know before a court which decides economic offence. You cannot apply the same yardstick as in the criminal case, as in other criminal case. Here the yardstick will have to be little different, because the objective of the Act has to be gone into. I will come to that. Here whether you can think into term of this whether, what is the life after, what is the life the criminal led after commission of the crime? Or what is life going to be after he is convicted after he is sentenced, after he comes out of jail. So you have to balance the too, whether this balance is that the ordinary balance that we usually apply in other criminal case or other economic offences that is what needs to be considered. Now specifically let come you know to the Prevention of Money Laundering Act. I think we got a copy of it

One of the Participant: Your lordship I like to point out one section in this Act which is something which is beyond my imagination?

Justice Anjana Prakash: We will come to that later. Let's look at the statement and object of, objects and reasons, "it is been realised world over that money laundering poses a serious threat not only to the financial systems of Countries, but also to the integrity and sovereignty. Now look at the broad perspective of the Act. Introduction the Prevention of Money Laundering Act 2002, right in the beginning I think it's at page number one, one yes one. Have you come to it, it is been realised world over that money laundering poses a serious threat not only to the financial systems of Countries so this a very narrow thing that we know up till now we always think that it is going to destroy the finance you Know, the financial security of the Country, but no this is not all, but also to the integrity and sovereignty some of the initiated international community to obviate such threat are outlined below, the United Nations convention against illicit traffic in narcotic drugs and psychotropic substance to which India is a party cause prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence. So the word is, the important words here are financial systems integrity, sovereignty, prevention of laundering and then you come to, to in view of an urgent enactment for, of comprehensive legislation inert alia for preventing money laundering. So when we talk about preventing what it means can we look at the past conduct of the person or can we think only in terms of a punishment which is deterrent can we go to the back history of this person? How the crime is committed? When we look at the object of the Act, that is what I am asking, can we look into it now? When the objective, when the object of the Act is to the prevention of laundering of the proceeds, prevention, whenever we talk about prevention what does it mean? That you stop a person from doing such an act. When you stop meaning you deter a person. When you deter a person, do you think in terms of this as to what happened before, or what kind of person he was etc..etc..? Can you think in those terms?

This shall be the main consideration.

The deterrence should be the main consideration. That is what I am asking see as a trial judge, as a trial judge this is the challenge, see conviction, what happens at the end of the trial as my friend from Bangalore was saying that you can't go anything beyond what has been brought, by the prosecutor, you can't forcibly overstep yourself you know limits and say this was there in the case diary this person committed this crime and therefore convict him, no you can't do that you have to go by procedure, have to adhere to the rules of the evidence and then record a conviction. And that conviction has to be according to the procedure established. That is the fairly easy work I would say. That doesn't allow much discretion to a judge. In criminal cases, we are not talking about murder cases for the present. We are talking about economic offences. Where things are well documented, there is hardly any discretion that you allow that you can allow for yourself. You can't say that this person was not an eye witness or this person was not this and that because this is not one of the murder case that we are talking about or theft cases, that you could not going above the wall, he did not did this etc… the eye witnesses you know all were caught up etc….that cannot be gone into. Economic offences when the sentences concern you know you have to go by the rules of procedure and that's fairly easy I would say. When you come to you know conviction what happens then, that's the time when you know apply your discretion. Do you give this person what are the mitigating certain circumstances, because there is already reached you know the crime stage. You already judged the crime, you already convicted that person. Now is the time you have to think in to the terms of mitigating circumstances, aggravating there can't be any aggravating there, because that crime is already committed you already punished that person. Then again I would say that you know that you have to go to the objective of the Act. The objective of the Act is serious threat threats not only to the financial system of the country but also to the integrity and sovereignty of the country and prevention of laundering of crimes proceeds and preventing money laundering, so that person no left lose once again so that you he committed, not commit future crimes on others like came, we are still in the making, making an example that if he could get away. Here I would like to draw your attention to the schedule, before that, if you come to you know this section 23, 24…24 burden of proof in any proceeding relating to the proceeds of crime under this Act, in the case of a person charged with the offence of money laundering under section three the authority of Court shall, unless the contrary is proved presumes that such proceeds of crime are involved in money laundering and in the case of any other person, the authority or Court may presume that such proceeds of crime are involved in money laundering. Now you see the difference between may and shall. Section 24 (a) and (b) please in the case of a person charged with the offence of money laundering under section 3 the authority of court shall, unless the contrary is proved presumes that such proceeds of crime are involved in money laundering and (b) says in the case of any other person the authority of Court may presume that such proceeds of crime are involved in money laundering. Now let's go back to section three who so ever offence of money laundering, who so ever directly or indirectly now look at the words attempts to indulge, or knowingly assists or knowingly is a party or he is actually involved in any process or activity connected proceeds crime includes in it concealment, possession, acquisition or use

or projecting or calming it as untempted property shall be guilty of offence of money laundering. So it convers you know eventualities, here whether you are attempting to indulge or you are knowingly assisting, or you are knowing a party or you are actually involved in the process or activity or presenting this untempted property, where the property is untempted one you are guilty of section three. Section 24 casts a burden of proof shall unless the contrary is proved, how close we have got to the Malimath committee, what does the Malimath committee say the procedural laws regarding presumption of burden of proof in the case of economic crimes should not be limited to the explanation of an accused who must rebut charges conclusively. Now you read this in conjunction with section 24 in the case of a person charged with the offence of money laundering under section 3 the authority of court shall, unless the contrary is proved presumes that such proceeds of crime are involved in money laundering. Now after this shall we go to the schedule, before that section 43 please, Special Courts section 44 offences triable by Special Courts notwithstanding anything contained in the Code of Criminal Procedure an offence punishable under section 4 and any schedule offence connected to the offence under that section shall be triable, then again schedule offence, schedule offences, it talks about schedule offences. Section 44 please offences triable by criminal courts, by Special Courts, have you seen it any schedule offence, schedule offence now let's turn to the schedule at page 48 C. Actually there was an amendment do….. I think they have print outs of this, the latest print out, you have the schedule with you Accha…it is there, now you look at the schedule offences under the Indian Penal Code, now what are the offences criminal conspiracy, now 121 see at 121 waging or attempting to wage war or abetting waging of the war against the Government of India. Now do you understand what it means, the objective of the Act serious threat threats not only to the financial system of the country but also to the integrity and sovereignty so section 121 waging or attempting to wage war or abetting waging of the war against the Government of India conspiracy to punish the offence for such and such forget that. Then 255 counterfeiting Government stamps then 257 making or selling instrument for counterfeiting Government stamps 258 sell of counterfeiting Government stamps, having possession of counterfeiting Government stamps. Then 475, 476 counterfeiting device of mark, using a forged property mark, 486 selling goods with counterfeit property mark, 487 making a false mark upon any receptacle containing goods. Now then it says offence under the NDPS health of the country finances of the country even sovereignty of the country. Now you see the offences under the Explosive Substances Act, offences under the unlawful prevention of unlawful activities prevention Act, sovereignty of the country, punishment for the Unlawful Activities, punishment for terrorist act, punishment for making radio-active substances, nuclear devices, punishment for raising fund for terrorist act, terrorists camp, person of a terrorist act, harbouring terrorist or terrorist gang or terrorist organisation for being member, holding proceeds of terrorism, offences relating to membership of terrorist organisation, offences relating to giving support to terrorist organisation, offence for raising fund for terrorist organisation sovereignty of the country. Then offences under the Arms Act manufacture sell etc…offences under the wild life protection Act, immoral prevention…you see you know all these offences in the schedule

the entire Act you know, you have to see the entire the scheme of the entire Act. Right from the beginning to the end of the Act. Only then the trial judge can understand the importance of the conviction as well as sentence. Thank you. Accha we will give that hypothetical situation later on. So we finish it now…

## Session No 6: Sentencing of Woman Offender

Resource Person: Justice R. Basant (Former Judge Kerala High Court)

Justice R. Basant: have you all in. welcome. We can start the session. A very good morning to all of you. I think you have introduced yourself and I think I have not done that myself I am… I have been a…when I come to the NJA and when I meet the District Judges, subordinate as such. I always take pride me in saying that, I belong to your type, I was a direct recruitee as District Judge and Session Judge, after about my fifteen years of my practice in the District level Courts I was called to the bench. I served about fifteen years like you as in the direct recruitee in District and Session Judge and in the next decade I was a …. I was a Judge in the High Court and then the next…the last the, I have been back my second inning in Supreme Court as a Senior Counsel. So why I am saying this is that, I know your problems. Do not be under the impression that I am bookish, that I do not know your problem. I know your problem at the receiving about a case, how it has been inspecting as a Judge, how it is being as a portfolio Judge I know that. You can have that confidence when you discuss with me. O.K. I always feel, that it's important when we look it ourselves in the system. We all are part of a system. And the important is to identify how to keep ourselves in the system, find out the role of the system and the macro challenge before the system, the challenge before the macro system. And the… my role in as micro unit in that macro system. I think that will give a real perspective. I want only one hour may be two hours to interact with you. And then if I go into the integrity in detail I may not have…may not be able to fully cover. So in all the sessions I would like you to look at the sublime aspect. And if we are sure that the sublime aspect…I am sure you will find the way to discharge your micro role in the macro system.it is in this context I always ask a question about what is the role of the State. Many of you may be students of political history, you know the contract theory of State. What is the contract theory of State? The State says give me some rights I will give something in returned. That is the barter between the state and the citizen. You give me certain rights, you surrender rights to me, you pay me taxes, I will give you something in returned. And what is that something in returned. They are two major things that State gives you, one is protection against the external aggression, or the Army or the Aram forces will protect you against the external aggression. And more importantly in a welfare State the second one is the protection against internal disturbances, which I call rhyme study. A protection against internal disturbances, so it's a duty of the State to ensure that there is no crime. I will call it a primary duty of prevention of crime, the rightly said about it, the prevention of crime. The State must be crime free in Utopian, it may be in idealistic, but the destination is very clear and the State always attempts for it, a crime free State, right. As the Criminal Justice administration system has it as dream as

destination as a goal. A crime Free State, where the citizen will be assured, that we shall protect you against crime. We are part of that system, which should try to discharge this basic obligation of the State, to ensure that, the society is crime free. This is on the angle of the State. Now I would like to look it from the angle of the Citizen. You all know under Article 21, which has obtains such a revolutionary interpretational expansion these days, that under Article 21 you and I have a right to live, and right to live is said not of animal existence, it is right to live with dignity, and the right to live with dignity includes in it right to live without fear, and I say in this context is, I must have a right to live without fear of crimes and that's why I bartered with you and become part of the barter citizenry I have a right to live in dignity without the fear of the crime or even the threat of the crime. This is what we are trying to do as far the Criminal administration justice system to the smallest Magistrate to the Lord Chief Justice of India is trying to translate into reality, the systemic commitment to a crime free State, where the State will protect you from crime, where the citizen can live in dignity without fear of crime or the threat of fear of crime. This is the basic function that we have to discharge. Now the topic today is very…very specific. It is sentencing ethos. I would therefore. As judges we must able to refute our attention into the subject specifically and therefore sentencing is the, I will not try to take you to the…the conviction, what goes before the conviction of the unequal bargaining forces we know that, that's not mu cup of tea today. In this session my cup of tea is only sentencing. The crimes free society is a goal and what is the role of sentencing in…in…ushering in a crime free society. Well prevention of the Crime is the aim, punishment of the criminal is only incidental to your larger objective of preventing crime. Why does the system exits? Some people will say to acquit the innocent, some people would say to convict the guilty. I will tell you the real purpose is the system is to ensure prevention of crime. When you come to sentencing, I also want you to concentrate on aspect of prevention of crime...right… and therefore I am not going to take you to go through like Malimath Committee Report and etc…etc…pointing out the inadequacies in the system, but today I am trying to point you to concentrate on only one aspect namely, sentencing and its impact on preventing crime…well once having said that I would like to take you to another aspect. In order to prevent crime what is the best method? You know when the Nirbhaya case occurred unfortunately in the Capital, people came out on the street and they started saying hang them without trial. See I have hang my head in shame because, after having lived in a society where Rule of Law for 60 years, if the major educated polity in the country went to ask for hang him without trial is the total failure of the system. That is not what is expected. Now in a Law in accordance with Law, trough to Rule of Law we have to ensure prevention of crime. How do you do that is a question? Prevention of crime through Rule of Law. Now everyone said make offence or rape punishable with death. I call it as a knee jerk reaction. You know what is, knee jerk reaction is, where they don't have commitment to the larger issues. They don't have awareness of the propensity as individual judges. You raise the punishment see death sentence or death you look for more full proof piece of evidence. The acquittal rate will go up…right… well the real deterrence lies not in the severity of punishment. This is one thing which I always try to tell before the grass root level functionaries, the

real method to prevent crime, the real deterrence is not the severity of punishment, but certainty of punishment and immediateness of the punishment. Well if the person know the person know, he will certainly be punished he will be deter against the commission of crime. Now if he is told, that you will be punished tomorrow, then also he will be…a very simple example I will tell you, lane pumping is an offence, you know that lane jumping in a traffic is an offence. Now everyone knows that if I jump over the lane, nobody will see me, they will never be able to caught, if at all it they caught, it will take a long time and therefore I can jump the lane. Now technology has come in that in every corner you will find the Cameras are there, I am now afraid of it. I am now afraid to jump the lane, because I know if I jump the lane by the time I reach next point they will be waiting for me, and I have no defences because they have the photograph jumping the lane, and therefore I will think myself, that it is not the severity of the punishment that I will get which is deterrent, it is the certainty of punishment. It is the immediateness of the punishment as said in a celebrated quotation, "more people can be deterred from committing a crime, if you are able to convey them that you will certainly be punished tomorrow" that they will hang, you may be hanged years later, I will understand, and if your attempt is to prevent crime certainty and immediateness is the most important. I a country wedded to Rule of Law there is always a distance between the event and punishment. Well they in Gulf there is a wonderful system of law. If you commit a crime, you will be drag to the Police, to the Prison, to the Court all immediately. In a country wedded to Rule of Law, the country wedded to the fundamental doctrine of *Audi Altrem Partem* cannot do that. So there is inevitable distance between the crime and its consequences, I am not talking about that, when I say immediateness of punishment and conscious of the fact that country wedded to rule of law, wedded to rules of procedure, the must be a gap between the two, but reducing that gap of between the event and the consequence is very important and that where I think, you and I as judges, lawyers can contribute a lot. In reducing the distance between the event and the consequence, the crime and the punishment, that is very important. Now you all know that, if trial takes place tomorrow of today's crime is easier to get witnesses, righteousness of the witness, which will be exhibited immediately after the crime will gave ways to misplaced sympathies, misplaced concerns and after all there is one man. That is what I say a righteous commitment an indifferent relaxed approach to the crime that again is important in your attempt to reduce, sentencing has a very important role, in preventing crimes, I am not going to take you to convert to law school class, then you will say what are the purposes of punishment the four fold retribution, deterrence, rehabilitation, reformation etc… you all know that, it's not the place to talk about that, but you must be always be conscious. Any judge sentencing a person from a petty theft to the crime of murder must always read, re-read, convince himself about the broad objectives of a sentence? Why a sentence, what a sentence, why it is this sentence, it is always to be understood the perspectives, or the broader perspective of the purpose of sentencing and not only prevention of crime, and the methodology employed to prevent the crime is sentencing, and that you must be very sure of. I just want to say one more thing, there is a very important quotation which says if a criminal is not meted out with the punishment that he deserves, and the whole society has to bear

that punishment. If you don't… If you don't a… If you don't dispense the punishment that he deserves, all of us tighter will have to suffer the punishment. One more there are judges, who are timid, who do not want to punish, you think who I am to punish, I don't want to punish. I always trying to warn those timid, shall I say too soft, too considering judges, to…to…to…satisfy themselves, impress upon themselves, that it is my duty to impose a sentence. Well the great Gandhian, it come through the Cristian thought, if somebody commits a discreet sin…if you… if you… if you seek for…if you seek for…what is called…if you go confess and seek Lord's grace and then you come back to the soul of the innocence, a sin which is committed, which is repaint you will fall back to the soul of the innocence. In crimes also judge call upon to impose a sentence and brought to understand that, what you are doing a person stand on the Zone of crime, you have to take him back to the zone of innocence, you take him to the conduit of punishment and take him to the zone of innocence, so be very sure, that you are not doing something which is bad, be very sure you are not doing something which is very harsh, you are actually helping a person to walk from the zone of crime to the zone of innocence by taking him through the conduit of punishment. This should make you strong, this must make you feel, that it is my duty to that the criminal also in order to enable him to travel him from the zone of crime to the zone of innocence, that he must go through the punishment of law, it will… it will… it will enthuse you that you are doing something not against him, but in favour of society, and in favour of that person also. Well any one amongst us may be timid, trumpet, unsure, non-confident let this be a Gandhian equation…what Mahatma Gandhi said crime plus punishment is equal to innocence, he took this principle from that Christian theology may be then said crime plus punishment is innocence. And therefore a criminal you are imposing a punishment help him to lead him from the zone of crime to zone of innocence, that thought may empower you. Let any amongst us timidness in imposing a harsh punishment, then you realize, I know… I know you would have read it, it is interesting, you must read it, you know how the theory of reasonable doubt came. Those days death sentence was very…very ordinary, so the Judges started getting worried, life is given to a person by God, I am taking it away what will be in the ultimate day or how it will my creator will deal with me, this was the problem, then the theologian themselves gave the answer, if there is… if there is… if there is satisfaction beyond doubt you can impose any sentence authorized by Law, the Lord will protect you. Lord will not going to be angry with you for that. Lord is not going on ultimate day punish you for taken away the life of another, which God has given. So the topologists gave the answer, if there is no reasonable doubt on the commission of the crime you can impose, Lord will save you. If you read, you will understand this is how the theory of reasonable doubt came into and developed not purely from law but it moors in theology. Well and therefore let's not have a doubt in imposing a punishment you are doing some against the creator you have been harsh…no you are doing what according to Law you are bound to do. You are doing what according to your conscious you are helping him to travel from the zone of the crime to the zone of innocence. You are trying into reality a constitutional commitment of dignity of life. You are trying to translate into reality the solemn constitutional promise, that crime free State will

come if not today tomorrow. Well I find that the Supreme Court interpreted that way. I would say that the day is not far away when the Supreme Court will have to accept that a right to live in a crime free society is a part of fundamental right to live, it must be, the goal may be distant, but it certainly be. I have a right to live, when I go out of my house, I want it to be sure that I will come back in one piece, and my children and grandchildren roar in the house, I want to ensure, law to ensure that they will come back without criminal harassment, and therefore the Supreme Court will certainly, I have only a question of time, it may take some time. Today it may be sound to be an Utopian concept, but it is going to accept Supreme Court will ask this stage ensure that the crime is prevented because it is a part of a fundamental duty of a citizen to live in a crime free society, it will be going to happen, it only a time factor remains, but it is fundamental right to live in a crime free society, even without a courage of crime, so in imposing a sentence is our subject today you are discharging the larger commitment of the State, to ensure a crime free society, you are trying to discharge the duty of the criminal justice administration system to held in ensuring a crime free society, you are helping a guilty man to walk in the zone of crime from the zone of innocence through the conduit of punishment, be very sure to punishing is a wholesome act, which is not something harsh, it's not something against God, it's not something against your… your… your non legal conscious also. Legal conscious yes, but sometime from non-legal conscious no…I mean no offence when we say the bribe taker who used the money to treat his children ought to be treated differently is the part of non-legal conscious working, while legal conscious have no doubt at all, but the non-legal conscious tells me Oh…see what the money he used for, well the attempt must be to liberate yourself from the personal pre-derelictions and choose the appropriate sentence. I do agree that the maximum sentence of life I am not going impose that sentence man like kim, the man like Straitar, there I will use discretion, but I will not go below the minimum sentence on account of their face. Legislative mandate must be respected by every judge. Legislation may be brought by the people who are not educated, but they represent the will of the people you can't shy away from that responsibility. Laws dictate are to be followed, there can't be conscious against the dictates of law, when the legislature say it's a minimum sentence which is irreducible, the law does not give anything below, Supreme Court recently said even Art 142 cannot be used to go beyond the law, well I am trying to empower you, within you that imposing a after all not bad, imposing a sentence is you duty part of the oath which you have taken, part of constitutional oath you have taken to impose an appropriate sentence. Well if you are convinced about that I will take you to the next aspect. And what is the next aspect? That the Indian law is clearly strange, there is so much of the trust on the individual judge, his perceptions and what they call his judicial discretion, well you must know for an offence under section 326 I.P.C you can impose a sentence of imprisonment of till rising of court to a sentence for imprisonment for life. Look at the trust the system has placed on you, kindly see that, kindly understand that. How important you are in the macro system, how the micro functionary is important, the law trusts you, the law doesn't say what the sentence ought to be, it mostly says it shall be either an imprisonment or a fine right… either an imprisonment or a fine, imprisonment may be of either

description look at the discretion I am only trying to impress upon you that in matters of sentencing how important you are. How mush this system laid trust upon you. I wanted to impress about that, because the responsibility the importance always bring with it a train of responsibility also, when such wide, elastic is the discretion, it's important how you exercise it, and therefore it is important that you understand that trust the law has placed upon your shoulders, our slender shoulders, law has placed a grate trust, between life and death today, the discretion is that of an individual judge, there was an interesting story in a judges meeting, they say whom greatest power on earth under our laws, under whom the greatest power conferred and somebody said it is on a session Judge, why, you can either sentence a person to death or sentence a person to life so the greatest of it the most valuable possessions of a person is his life, that depends upon a district and session Judge, because High Court may confirm, the Supreme Court may alter and impose a death sentence, but they can do it o9nly when they sit into benches, only person who can singly impose a death sentence is a Session Judge, interesting, you are more powerful than even the High Court Judge or even a Supreme Court judge, I am not… I am not… trying to weird and think like that, I am only trying to make you feel the responsibility which arises with the power that's my purpose to make you feel in that way. What is important is that you realize the importance, the burden of responsibility on your shoulder and then decide how it is to be that. Well when such is the discretion you have, how do you choose, that's very important. Madam most enlighten told you about there are certain jurisprudence where you have a normal sentence, a mitigated sentence and a aggravated sentence, two, three categories, no the law says if it comes three pigeon holes to be made you have to fit it in to one or the other, and then say it goes in to this pigeon hole and imposing death sentence, whereas for an Indian Judge…individual perceptions…may I call it runs the riot, and hence it is very important that how you choose the sentence, my grievance with the Indian system is, even though such amount of discretion has been conferred, on the individual judge, we have not so far evolved, the methods to channelize this discretion to be acceptable to everyone. You have a public accountability, when I impose a sentence, I must be satisfied, the others must be satisfied as to why I am imposing this sentence right…for a 379 offence you may impose only a fine, you may impose a much harsher punishment, but then you have to explain to yourself, to your conscious first to the individual who receive the sentence and to the public at large as to why you are imposing that sentence. That is what a judgment does, isn't it? What is the judgment do judgment explains your decision, judgment is your explanation to yourself, to the accuse, and to the whole world as to why you are acting in a particular manner, and therefore it is important that you give the reasons for the sentence you impose, reasons for the discretion that you are exercising and very unfortunately excuse me for saying this, from the lowest Magistrate to the highest court in this country, when it comes to exercising of discretion forget about life and death discretion for the others I would say….the classic expression is having considered all relevant aspects this case…you see its very unfortunate this is your reason, ultimately this is your reason be it the High Court, be it the Supreme Court, be it the District Court to the lowest magistrate. You will say something… something… something and say considering all the

relevant inputs this is what I give at the end of it your subjectivity runs riot otherwise I would have thought, with so many years the Indian penal code in force one would have devised the method for which you say where to start from right…where you start from an offence carries a sentence of an imprisonment up to three years, I would have thought, that if I am rational and reasonable I would think that if there is nothing else one and half year I must start right…the midland then I go to arrive either aggravating circumstances I would go to the left if there are mitigating circumstances I always for one court to lay down this principle, as to where to start from, if you do not know where to start from, believe me ladies and gentleman it is arbitrariness running riot. There must be some understanding of when a maximum see even then there could be difficulty in a 326 offence before the session's court it comes, he can impose up to a sentence up to life. If he come before Addition District and session Court he will go up to ten years, if it goes before a CJM it goes up to seven years, if it goes before a Magistrate it can be up to three year, now three years and therefore may be you start for the same offence from a different all together… I am not going in to that, but at least the Magistrate concerned he should know 326 is an offence which is punishable for imprisonment for life, I have a jurisdiction to impose a sentence up to three years, where do I start from, yes to be reasonable I should start at middle part turn left or right as the situation warrants, unfortunately ladies and gentleman till today Macaulay when Indian Penal Code came 1898, if I remember, isn't it? 1860 right till today we have not evolved a method to where to start from. The system must take seriously and more importantly because Judges have been question for everything today. The type of allegations today raised against the Lord Chief Justice of India are one of which I would not have heard of anyone who has mustering courage to make such an allegation against a pity Magistrate in a local centre. You are under the scanner, every judge is under a scanner today, and gone are the days when people would implicitly trusts you. Earlier your office brought with is certain respectability and you have not questioned, today you are questioned for everything, in a 304 (A) offence which because of the personality involved in came a 304 (A) allegation a court imposes a sentence of 50 lakhs fine and the period already undergone and next morning all the ladies come out with a big banner, judges have been influenced, judges have been soft towards…gone are the days when people have willing to accept, because you are a judge and today all the more important from 1860 onward it may not have been very important, today it is very important that all your decisions are explained succinctly in your judgment. Well we have lot of people who criticize judges without reading the judgment forget about that, I am not worried about that…there are many people who do not read the Judgment, a grate Judge from my state said, I have not read the judgment but this is my view, I am very sorry for it, I can only write a judgment, if you are pleased, please read the judgment and understand, if you want to criticize without reading that judgment do it, I am not worried about it your judgments must always give the judgments, your judgment must say why you have choose a particular sentence and this why I am repeatedly saying from the lowest to the highest court in this country, you have a responsibility to explain your judgment, explain your decision your judgment is the platform. You can't call a public meeting and say that, this is why I did it. What can a

judge do, my conscious choice of exercise of the discretion will be reflected in my Judgment. Read it, please, if you don't read it don't read it that's all. I can give you the platform, from which you can understand my decision, nut in that decision you have to give convincing reasons for your choice. The course which you have adopted is, I will do a little introspection as not being fair or proper, form the Magistrate to the Supreme Court. It is no to be there if, it is not fair, it is not very transparent, you have got to explain the discretion choice made for which there first of all some rules, for which there must be some approach, well I can say, I takes three years of sentence I start from one and half, I find this boy as just found about of his juvenility 18 years and one month, I think that is reason enough to show away to the left and go to a lesser sentence, while in a case I find that it is very organized, it's very pre-panned committed I slop to the right and go to the right extreme broader line this has to be like this. Now Magistrate has to write it, the District Judge like you, who review the Judgment has to see the reasons and then say and not simply said, "having considered all again when it comes to the session judge also, by having considered all this is very bad, I am very frank about it is very bad, you have to give reasons and for which at least a system must inform you where to start from" if you don't have that, this is… this is… non transparent if I may use that, with all sense of responsibility I would say this is not transparent, this violate Art 14 all the options that are available, why you choose it, it is important. If you do not give reasons, it is arbitrary, it is anathema to Article 14, well that it cannot be there. Now in other aspect it is between A judge and B judge this is a variation, it is again Art 14 violation right…it is again Article 14 violation, see for example you know, I will take back to you to an aspect, which you have already been taken for a murder, or say capital offences, there can be either be a death sentence or an imprisonment for life in the Supreme Court not today little earlier they used to call hanging benches and some benches life benches, see hanging benches use all sorts of very… very extreme adjective to describe a crime, horror thing, horrendous, diabolic, depend on your language and the other bench says poor man…. poor man, because of circumstances, well my life cannot depend upon the propensity of an individual judge, or a bench of judges and that is why I say, if you do not exercise your sentencing discretion properly, it is violative of Art 14, may be a writ will not lie against you, I admits that. We being judicial…yes madam rightly points out, even death sentences are challenged but, they say that a judicial decision is not amenable to writ jurisdiction, but on the challenge of the very constitutionality of death sentence, I would take…my very humble opinion of all the arguments against the death sentence death penalty that argument that argument impresses me the most, that there is violation of Article 14 because it is constitutional bench that chooses between my life and death, that is the regard, my life cannot depend upon the bench which the computer chooses to be assigned, that's what it happens. I don't want to give you names, but know, being persons in the field of law, you know, some judges thought that it was a part of the State's Duty to extinguish life one view, I am not criticizing, one view, but if same view is not taken in all cases and some cases go to softer benches and some cases go to harsher benches the Article 14 guaranteed is violated when it comes to life and death it vary but that's not happening before you sir, every day that's happening before you in 326 case one judge impose a

life and the other judge impose a 3 years 7 years like what is happening. What is happening is exactly this the sentence mostly depends upon the individual propensities of the judges or the bench of judges. This is the worrisome aspect and I think immediately as persuaded by the National Judicial Academy to show as a subject, this particular… this particular subject, they call it as Sentencing Ethos, some people call it sentencing policy, I don't know which is the correct word I would think, as they said that a cat should catch the rat call it by whatever name you want, I want arbitrariness to be avoided, personal predilections to be avoided in the choice of sentence for which it is a must to evolve a method of sentencing, illustrate sentencing by which it must be possible for a person to predict what the sentence would be in the given circumstances. Predictability is one of the prime attribute of good judging. Good judging must partly take in predictability, there should not be such a big variation between A and B if that happens it's the failure of the system and it is in this context we come across, the subject particularly today learned sister has already taken economic offences. My subject today is sentencing of a youth offender and a women offender and later in 138 cases will be dealing with that, for choosing a sentence in a particular case two things become very important, you must know first of all that, the purpose of the macro system and your role as a micro-functionary in this macro system is to prevent crimes right…to prevents crimes is your responsibility. And then you must also know that is your duty to be consistent in sentencing as a system, there is no use of saying that I have always been consistent, when children below 21 years of age I always not impose a graver sentence, when old people come I did not ….now imaging you do it as a system you must be able to find out a method whereby arbitrariness personal pre-derelictions are alienated to the extent possible in sentencing. I know so long as the sentencing is done through agency certain amount of variations are unavoidable every judge is a product of his past right…every judge is a product of his past and therefore you try to discard your personal… personal moulding and get into a judicial moulding to decide, but as it has been always said computers cannot replace human beings and so long as human beings continue to decide it is impossible to altogether avoid subjectivity in decision making, including a choice of sentences, but it is a duty to eliminate that to the extent possible. How do you do that? Yes… all judicial discretion you know, it must be informed by the precedent, informed by the doctrine of reasonableness, informed by the… informed by the… informed by the precedents on it, on how Courts has reacted to similar situation, well if all of us start writing considering all the relevant circumstances, there will never be a set of guidelines. It must perhaps must start with Magistrate, it must permit to the District Judge, Session judge, it must go up to the High Court and it must be in the final court. Final court got 142 that is means that they can say Oh… I think this much is enough, that what happening unfortunately I am not criticizing anyone, but that is what happening and that is what must not happen, there was a judge also, I am not trying to put the blame on someone else, because the system don't have inbuilt mechanism to avoid arbitrariness you and I ALL have to play working of the system. What is the mean of that you can do now I would wish that the Supreme Court in one case would say every judge should from the middle, then go to left or right as a I want that to be stated. I want that to be stated until that is stated perhaps it we will have

to devise our own methodology. And I keep repeating this always, always start in a middle way, find out plus and minuses, minus is served to the right plus is served to the left. Give your reasons. We generally find that you know…hearing in sentence what came after the amendment to the Code you see, I tell you the history, the hearing on sentence also a subsequent introduction, earlier judges used to say your are guilty whatever you want to show, say about the sentence and the Supreme Court in one case said, by the time he got over the stock of conviction what he has to say… say on the question of the sentence and then it is not there, so this adjourn to another day for hearing on the question of sentence, the Indian judge today does not had to input on sentencing in many countries, in many jurisprudence they have a probation officers report which is authentic, on which reliance can be placed I need not tell about the type of probation report you and I get consider they are wholly unreliable, they are wholly unauthentic, they are wholly unreasonable and many times you cannot touch that paradox, that is the type of a report, and you have never sure that they are genuine or authentic whether it is purchased or not, you are not able to know it. And therefore that sort of interregnum between conviction and pronouncement of sentence you have to decide this. And we do not equipped ourselves, in how many cases do you ask for a probation report sufficiently early? You know the law you can ask for the probation report earlier keep it under the seal cover open it only when in the event of conviction, it doesn't mean that you have decided anything. You are not going to open it until actually a conviction is pronounced and then you take it to the question of sentence. If after conviction you don't have a time to get a probation report. Imagine if a report is made by the probation officer, you have got to get some, you ask for it at earlier stage by that time probation officer will not be under pressure to give a quick report, then the matter reaches conviction, you can do it, you will have the advantage of that. Now tell me how many asked for a probation report, before conviction in every case, that's what I am saying, yes in some cases you do, where you want to consider invoking the probation of offenders Act you are bound by law to call for a report. But how many of us otherwise call for a probation report, before we have decided on conviction keep it in a seal cover, don't open it might influence it, if it is an adverse report it might influence it, so law says keep under a wraps open it only after the conviction, but we don't do it, I have not done it as a Session Judge as a High Court Judge I have never asked for a report, you know you learn from the mistakes, and therefore I can today tell you, you don't commit that mistake. You can always do that, in a couple of cases I may have done it, but not in every case as a matter of routine, it must, I suppose you frame it, it may carry simultaneously call for the report of all the accused, it might be useful, it might be relevant, it might be outmost importance for you. In the final discharge in your duty at the sentencing stage. Well law today stands that, our sentencing is extremely inadequate, there is no discernable principle which can been seen in all the decisions. You…you put all the circumstance into one and then don't analyse them what one by one and then say he is 60 years old he has a family to look after, he has this, he has that, and taking all the circumstances in to consideration we don't really reveal in our judgment what is the importance of the significance which we ascribes to each circumstance. Well a certain amount of introspection is required on this. Until the Supreme Court

is going to continue with the present method very good, that's one way of looking at it, but I tell you after my… I have seen some of the Judges, their judgments have never been reversed by the Supreme Court. I know how judgments are reversed or not being reserved, how admissions are granted, how admissions are not granted, it's not all the Supreme Court is able to deeply in to every matter, one percent of appeal different ball game, every matter the dismissal of 136 case does not that the Supreme Court approves it, tis not entertain that's all. Well what is the important is your duty to do justice as important as that of the Lord Chief Justice of India's duty to do Justice. A magistrate who tries an offence in a 379 it is as important as the Lord Chief Justice is discharging his duty. That is how you all are important. When I say you are important, what I want to realize to you is the responsibility which is important alone. Well many people realize their importance, I keep telling them and the Magistrate as he sworn in and he come all the Lawyers are bow before him, all the policemen salute him, and he feel that I am really… really important. I don't mean that importance, I am on the responsibility which tends out importance isn't it? I am on that. Keep repeating a story…we had a High Court Judge. A high a Court Judge came to one of the Judicial Academy for classes and said this. He said the paraphernalia he has is very important isn't it? All the new interns were very impressed by his paraphernalia. How lawyers bow before you, how all the Police men salute you, how the whole house rises when you enter in the court room. He said this does not mean a thing. He went for his morning walk. The learned judge went for his morning walk. His wife and the driver go and fetch fish. You know the drivers. See even when the judge is not in the car they don't remove the red beacon light, so with the beacon light this man was going on, after purchasing he was returning, dead fish inside no judge was inside only dead fish were inside the car. So the judge was walking down, and the Policeman pushed the Judge aside and gave a big salute to the car. So always keep telling my Academy there will be young interns of this. This the importance of all the paraphernalia. Dead fish gets a salute but the real judge gets a push right…so I am not to say that is your importance. I am trying to say this to realize this responsibility which tends a human mind. Well please do some introspection. You see I have been a District and session Judge, I have been a High Court. I think, the greatest power you get is, the opportunity, you get a judicial Officer, then you are a District Judge you can improve the system. After going to the High Court I realized that I could have laid down a law on certain aspect, but as a District and Session Judge you are completely responsible for the administration of the Justice in your territory. You can impress upon your sub-ordinate officers the importance of doing things properly. That is where a District and Session Judge becomes all the more important in the system. That is you grate opportunity. Many of you later on become a High Court Judges you will realize hard way, that I could have done better service to the system when I was a session Judge. It is my personal experience. I had a very long tenure in the High Court for ten years, which normally come for a high court Judge, because they were recruited and they were rather at young age therefore I got a full decade as a high court Judge. But I believe except to lay down the law or some contribution as a portfolio Judge, the real importance is of a District Judge at the grass root level. You can do a lot, please go back call conference of your judges and tell them that

when you write a judgment on sentence last column is as important as the rest of the function. Tell them that they should call for probation officers report, tell them that they should start at the middle course go to the right or left as the case may be advise them you may not have power to lay down the law before them, because at the District Judges directions are not binding you can in the calendars, in the calendars you can certainly say no you have not explained why the sentence which is imposed, you are not properly adopted the course not be accepted, that is where you can make big difference in writing judgments tomorrow onwards, when you go back understand the responsibility, this is all that want to say on the larger issue of sentencing, I have only ten minutes more now, I had specific problem to deal with and also women offenders, first subject is women or youth, women offenders, well in these days article 14 women, to call or classify them as women offender and men offender itself cannot be too correct. But, But, she rightly pointed out to me in the morning, very important that crime which is was supposed to be the Exclusive domain of male bastions is now being assert by women also earlier it was thought it is the exclusive domain of men to commit crime isn't it? when I get a woman offender I oh women offender before me because it is not usual, when I started District Judge in 1988, in those days it was very, very difficult to find women offender in a sessions case except where in some cases where husband says this child is not mine, she along with child jumps in the child dies and she is saved than we say that she is women offender, the classic is of the women offender that I have dealt with, which I dealt with. Now, today mothers are killing their sons for game, terrorist women are there and therefore laws is to readjust. you know recently Pope went to which country and the Pope went to US in one of the stage a women was to be imposed death sentence, even the pope appealed don't kill a woman, a little inconsistent with my norms as a citizen of a constitutional Republic where women and men are treated alike. If A can commit crime attract this offence then why a woman attract the same offence I do not know, same punishment I do not know, but some readjustment, your value systems are for, when a woman comes as an offender, well I remember I have to decide, see it's a bad analogy, it's a bad argument, in one case facts and in other case facts the, it is a bad argument. Always go to principles that again incidentally I say, I told the Supreme Court other day, earlier you know the…one could not be founded well and looked on first principles, then you should know the law, the statutory provision and then in interpretation if there is difficulty, you used to go to the precedent right that is the root, be well grounded on your first principles, be sure of your statutory provision and then if you are not able to solve the problem, then you go to precedent. Today people go to principles first no first principles not even read the Statutory provision, look at the precedent and Lord chief Justice, Justice but I don't know how many of you know it he not doing well now, else he used to come here. He used to tell us today precedents are used by Judges like husband when they go…when their sent them to the cloth shop, she choose a sari and say choose a blouse piece for me and you keep it, keep it, keep it, keep it, ah…this the one why see it is not acquaintance by going deep into principles you are just matching, just matching, and no facts can ever be matched believe me, no facts are identical, no facts can ever be matched and today going first to the precedent is a very, very bad manner, be sure of your first principles, read the statutory provision. I take pride worked under senior who used to say read the Section, no first principle he was sure of, read the section, and he closes eyes and said me read it again, then I say…read it again, stop there and read it again,

then he would tell me this the Law, look up there will be precedent. You understand if are surely off principles precedents will come. And you will be able to distinguish between the precedents against… I take pride in that, because that must be our approach to read the laws of precedent. Don't go the precedent to find out for what's happening. The precedents also should lay down the principles, must advert to the principles well I conclude… I conclude in general aspect saying, that even when a woman offender come Article 14 will influence you, nothing will be decided on the base of sex, but where deterrence I required a crime which is often committed, a mother puts a child in the well in the stiff quarrel between the husbands on the fraternity of the child, that influenced a mother to throw the child in to…for the Indian context one does not required a very deterrent sentence, to deter future mothers from killing the children. So your approach must be that, a very deterrent sentence is not required in the facts of this case because of this. Crime free society is my aim, this crime I don't think likely to be repeat, and therefore I show all the leniency that is allowable under the Statute in favour of this woman. So gender may also be relevant in the societal context not merely on gender and therefore when a subject is of woman offender I would request you not to be carried away by the norms of earlier bye done days where a woman would not normally commit of found to be true to commit an offence, was found to be too soft to commit an offence, that may not apply today, unless in the facts of the case that is particularly agreed and if you show some leniency on the woman Art 15 would certainly come to your help. The constitutional norms must inform all this in justice making and therefore Article 14 may also help you in choosing an appropriate sentence to a woman if you think in the facts of the case, it is justified, but please give your reasoning. Please the judgment should be explicitly as to why you have choose a particular sentence. I have only four minutes more, I find this young man who coming to the academy has introduced the concept of giving hypothetical facts and wanting you to respond to it. It is an exercise that is given. I have not done this many times earlier but I think this time he wanted to do it. Do you all have it. Is it circulated to you or now all you have it. Always oh… I pleased to advise, give it yesterday so that they come it by reading. Here they can't be reading and understanding, it may involve lots of time. Because when they come to Academy they have a jolly wood type, so in the evening you can read that and come prepared for the question next time. O. K you read it during the break now, because it is already 11:27 only three minutes more. You read it and come back after tea I have some more time, I have one more hour with you. And then we can take up all the question during that session. There are three hypothetical questions I want to congratulate him to for having to devise a new method we will try to see, how it works, and if it works well, we must try to…to…to extend to other also. Do that, Do that, please read that there are three questions. We circulated all the three questions, you get time you read it between the next break. That too something the Academy has introduced now, after every session of a break, I so happy to see that. You know half an hour break after each session is very good, you know because, see the speakers are so boring you must have seen today during the last one hour isn't it? Because it was so boring that you can't do anything and so this half an hour break will bring you back. So please have a half an hour break. Have your, Have your tea and then come if possible after reading those three questions, hypothetical questions which are given to you. Thank you very much.

Milind Gawai (Programme Coordinator): The idea of hypothetical was of Mam actually, she has asked me to prepare all these cases.

Justice R. Basant: I thought it's a new young man's idea and I know, Geeta…

Milind Gawai (Programme Coordinator): I worked on the directions of Mam.

Justice R. Basant: O.K. very good, very good. He is too strait forward you know, he acknowledges it, very good. I appreciate that.

Ya…you can go for coffee and come back. Enjoy your break, she given you, this Director given you. For me also we will also come for a coffee.

## Session No 7: Sentencing for Youth Offenders

Resource Person: Justice R. Basant and Justice Anjana Prakash

Programme Co-ordinator: all of you might have got three problems, hypothetical cases i.e. Session no 6, 7, and 8, 8 will be the post lunch Session, but for your early reading I have distributed it. All of you got that, any one of get missed out 5, 6, and 8.

If you have answered problem Number 5 could hand over it to our colleagues. If you have don't with problem number five. Hypothetical case number 5

Justice R. Basant: If you have read those questions and formulated some idea about it, we can start about it. As soon as you ready, tell us we can start. Another five minutes you completes 12: 15 we will start the session. Now I think we can start. You all…you can pass on….it is not very important, how we think is really important, because the final answers are not that crucial. If it keep thinks us, then they have posted hypothetical questions. Don't be too worried about, what the result, you have decided it correctly or not. Whichever line of thinking you have, the possible approach that's all. You are not finally deciding any issue.

One of the Participant: while sentencing cited para before me 118, see while sentencing it become difficult for me to distinguish the case as to pass appropriate sentence. In situation like this… I can record my reasons, but distinguishing a case is difficult for me.

Justice R. Basant: well…fine…well I understand your problem. I would like to every judge to remind it, that the law declared by the Supreme Court is alone is binding under Article 141 it is not the course followed by the Supreme Court or a High Court in a given case that is binding. It only the law declared by the court that is binding, have that clearly, clearly in my mind, the course adopted by the Supreme Court in one given case and they are say they have 142 jurisdiction also. Unless principle is discussed, it's not really binding. They may not have said, they may not have said it 142 is used. It's not matching the colour. There are so many facts involved in each case. Unless the law has been declared, be not unnecessarily type down a precedent of the course followed by the Supreme Court or nay superior court for that matter. You can always say that facts are true, is totally different and give your reasons and I don't think that is going too far away from that.

Justice Anjana Prakash: No, no please, you need to understand see what is binding upon us…what is binding upon us, just what the Supreme Court said is not binding if there is any proposition of law only then that is binding, it's not obiter, yes

One of the Participant: As a convention we are part of the system….what if as sentence of five years

Justice Anjana Prakash: May have been convicted. No, no one minute, see your reasons will be very different, than the reason of the Supreme Court. You see that's the difference. There is no principle of law that in a case under section 304 A, if a driver is driving negligently and to dying of a seven persons, kills them, then this, see the sentence that you should give and this the fine you must award, that is not the principle, so when the principle is not really, you know enunciated, then the difficulty is your personal difficulty, it's not a legal difficulty. Now that is the system, that, what is Justice Basant saying, being half in you know, that your perception, your personal perception has to be something different, from the perception which you can hold as a District Judge.

One of the Participant: it's not 304 A or 304 B for a whole serious offence, it's not for the Advocate why to pass that sentence, the sentence according to me is, so that position I want to get clear….

Justice R. Basant: no one understanding… having founding guilty not under 304 a or 304 B imposing is maximum sentence under section 304 A may not have been proper, that what he is try to say, I understand

Justice Anjana Prakash: You held him guilty under section 304 A

One of the Participant: When I am convicting for a serious offence Alister Parera all that is there, excellent cases where this 304 A, if I am not convicting him for 304 A I would have sentenced him for one year or two year, if you are convicting him in 304 B and sentencing him for one year, that is something absurd

Justice R. Basant: Could not understand, what he worrying that I understand is that when you are convicting him for 304 but imposing a sentence which you may have imposed under 304 A only is not sufficient, that's what he is worrying. I can understand…it's not a legal worry if I may say so. Nothing say when you are convicting him under section 304 you must convict him for more than what he would have convicted under 304 A

Same participant: That is what I am saying that is not legally permissible…..that is not my worry that is not my worry I may sentence for one year…..

Justice R. Basant: Do that then why are you worrying then....

Same participant: that is not my worry, I want to know how to reconcile the situation. If I am convicting for serious like 304 then why to punish him for one year… why to punish him for one year that is my difficulty,

Justice R. Basant: No, no if you are convince for one year sentence is not sufficient, then sentence him for whatever period you thinks just you do that, you do that. I have no call on that, but that's the Supreme

Court have followed in particular course or if he is tried under 304 A, alone you could have imposed as sentence of three years should not peruse you to impose more than three years. I leave it there. I leave it, to you to decide. In a given case I am not going to tell you as to how you should do. You must at the ……I understood practical problem, it's not a legal problem, it's not a legal problem, it's not a problem at all, as I see it's not a legal problem at all. The Supreme Court decision is not binding on you on the quantum of sentence, it does not bind you on quantum of sentence. It binds you on

Justice Anjana Prakash: In a lighter way that should be the worry of the Supreme Court, not the worry of the District Judge, what worry for then, worry for yourself.

Justice R. Basant: O.K. I said the most the, the, the question part of is over now we come to last session, that the topic is sentencing for youth offender? I would like to speak about the Youth offenders, I would like to introduce one more idea. How my Judges are worried about with the Media reactions? Even on the question of sentence. That's what something, I think we all worry about it.

One of the Participant: We are not worried, we are not worried

Justice R. Basant: very good, I am happy to at least one who immediately said I am not worried about it. I don't want to give worry, that's what I pointed out to you.

Another Participant: Yesterday we had a discussion about it.

Justice R. Basant: You have it O.K. I will leave it.

The same participant: One hour we have discussed about it, only one problem was unsolved, that problem is posted today. For example in a case of Juvenile, he escapes, after five years police arrested Juvenile, produced before the CJM, now the age of the Juvenile is 24 years, 23 years, now the question before the CJM where this person should be sent, to send to the regular Jail or sent to the Balak Home

Justice Anjana Prakash: Once he become an adult, there is no question of sending him to the remand Home, see that is very clear, you are just trying to complicate this issue in to you know by going in to unnecessary details. Now let us look again to the concept of Juvenile Justice Act. What is the concept? Why did you set up you know, why did you set, they are Juvenile Offender separately from a male, from a regular male offender, for a female adult offender, because the person who committed that crime at that point in time was an immature understanding. Is that clear, that's it. So the question is that the Trial subsequently when the Constitutional Bench once again decided as to what is to be the determining date of trial, whether it is a date of occurrence or the date of whatever now it is incorporated in also Juvenile Justice Act. Now it is sure that it is you know on the date of the occurrence if that person is below 18 years of age, he can be you know tried as per the Juvenile Law. Now there are two aspects in Juvenile Justice Act one is the aspect of trial the other is aspect of reformation, now for reformation

what you do with the Juvenile who has not attended the age of 18 years, what do you do? You send that person to a reform house, to that reformatory, you don't send him to a jail. So you treat him a Juvenile of a person of immature understanding, who should not mingle with adult, you know undertrials so that his life is not further spoil, he does not mingle, that's the ethic of Juvenile Justice Act that he should not…even bail…you know, he should not be released if there is any danger that you know he will mingle you know with the anti-social elements that's the only anxiety. So what happens in a trial when you hold you know this person who comes before you now, then, there two aspects one is the trial, how he does it to be dealt that is decided now in the Juvenile Justice Act itself that you have to hold him, the other is whether this person has to be sent to the Reformatory or has to be sent to jail? Now you have to only think whether this person is under 18 years or over 18 years of age? You can't possibly sentence a person who is 24 years of age, to a reformatory, for the illogical, for the logical reason you know the same reason as why you don't you lodge a person a juvenile offender in jail. Why don't you afraid then? Because he should not be amongst the adults, but if there are hopes of adult before you and you send them to the reformatory what happens then. You are putting you know you are actually putting the danger of this juvenile once again, something which is you know prevented in law. Something which is prevented you know by way of enacting this law. So there are two aspects you have to be very clear on this.

One of the Participant: We have a separate cell in the jail for such juveniles who have crossed the age of 18

Justice Anjana Prakash: And then that's why, that's why, if there are, not in many places in fact that's why you know as a Judge, just recently I was going through you know, what there was one case you know where a person who was a juvenile come for an appeal for release, so for that person you know, there was no reformatory, there was no Juvenile Home you know, so he has to be kept in jail, so I immediately released him for this reason only, because he cannot be kept you know, with adult under trial. So if there is a provision fine, but if there is no provision, this is the logic to it

Justice R. Basant: Well that can be that can be problem of the approach, because a Juvenile is different one who on the date of the commission of the offence was a juvenile, he has not attended the age of so and so years. So there after the Act speaks about how he is to be treated and therefore whether he can be put along with the other inmates of a jail is a question open to cause confusion. I would think that every possible effort must give to release him on bail otherwise as she pointed out, that the Juvenile Justice Act itself provides for certain special provisions to be keep him in a place of safety etc…etc…where the State Government is notified portion of the Jail as a place of safety you can certainly put him there. See Juvenile, the, the, the rationale of the J. J. Act we may have to have certain amount of disagreement there, the rationale of the Juvenile Justice Act is not capability at all, because culpability is still governed by those two sections, tell me doli incapax and the other section of the I.P.C

82…whatever it 82, 83 it says up to seven years incapable to have, seven to 11,,what is the age that is doubtful so, there can be three see culpability is decided on the basis of that. How you treat a juvenile alone is controlled by the Juvenile Justice Act? Juvenile Justice Act does not make the conduct of Juvenile as an offence or not that is decided in the I.P.C by the relevant sections. What it deals with is this special manner in which the Juvenile is to be treated. And that the whole idea is that, a person who committed an offence and at that stage, before four years had the opportunity to fully blossom in to his fullness, deserved to be treated differently. That subject is strait away, because when I deal with youth offenders I wanted you to consider that aspect of the matter. See the culpability is not decided under the Juvenile Justice Act. The culpability is defined under the respective penal law may be the I.P.C whatever law it is? How a person who has not attainted the age of 18 years to be dealt with, a person who has allegedly committed the offence is to be dealt with alone is controlled by the Juvenile Justice Act. It's not as to his culpability is decided under the Juvenile Justice Act, culpability is defined by other sections, other provisions of law. Only the manner in which such a Juvenile offender is dealt with is controlled by that Act. And the Supreme Court now very clearly said is onward the problem is going and going and going ultimately the Act is amended after having to say that, the, the juvenility is to be decided vis a vis to the date of the offence. And that means the whole rationale is how you treat a person under the age of 12 years who has committed the offence. How do you treat the offence, it is to be adjudicated according to the law, but how you treat him alone is differently. You don't send him for a trial for the other, you don't send him under the general laws because, the courts…the systems anxiously accept that he has committed the offence below the age of 18 years he deserves to be treated differently that's all. Now see…if I straight jump to our subject now, of youth offenders. The whole concept of a youth offender being dealt with differently is the immaturity of age. Even at the 21 years of the age probation of offenders Act has certain for it, Borstal School, had the certain provisions for it. And therefore a youth offender deserves to be treated with compassion, deserves to be treated slightly differently even on the question of the sentence, because he had not the opportunity to develop in to his fullness. 18 years earlier it was thought about 16 years, everyone could be treated alike, now it is 18 years, but 18 years and one month I am sure a compassionate view can be take in that case. You will not treat an eighteen year old offender at par with the 35 year of age offender, because he has not blossomed in to his fullness and that is where I think, the compassion towards, the, the person who had committed the offence and relatively young age has to be there for every Judge, it has to be there. When Kasab was hanged firecrackers were bursted, isn't it? I really felt very bad on that day because a system wedded to Rule of Law, a system where compassion to the young is the signature tune could not have enjoyed it. You could have certainly thought that yes he deserves it and therefore…we could not have enjoyed it. I thought the Indian legal system would done itself a great conduct, I am sorry there will be law centres with greater glory by accepting that a person who has just crossed the Rubicon of 18 years should be treated differently on the question of sentence. I would never, never have thought of view posing a death sentence for such a person was indoctrinated because of things which he thought was

right, is very important isn't it? Many of my concepts were developed for what I have been brought up like. So before we had an independent opportunity to assess, this boy was indoctrinated. India what is that, haram, India is this, if you kill one Indian you will go to heaven…such a person…yes I not a….yes am I not aware of the possibility, but I am only on the point that the youth offenders to be treated separately on the question of the sentence. I don't know how many would agree with me. The very shocking nature of the crime committed cannot blow me off my feat. Even there a system wedded to Rule of Law will have to understand. I know by taking a softer approach towards and the youth offenders the International terrorist will find it easier recruit them, I am conscious of that, not the case I am not conscious, that I am conscious about that. Even then I think it….the system is to basically consider that. Does the young age of the offender, deliver to him any entitlement for any different treatment on the question of sentence? And my answer undoubtedly is yes! Yes, the Constitution of India calls it socialist, I don't think socialism is the political jargon and the political ideology. The, the Constitutional socialism is compassion for the weak, concerned for the underprivileged a young boy had not the advantage of, of informed growth or properly trained growth, a socialist State a socialist Judiciary a socialist system of an administration of Justice, cannot but take in to account, this research wanting law. And therefore a young offender…the subject is youth offender, I would definitely treat youth offender on par with an adult offender on the question of sentence, unless there are very peculiar circumstances in a case. So broadly speaking I would very, very, very empathetically comment to you that the youth offender deserves to be treated differently from an adult offender because he has not had the full opportunity for growth evaluation and his own decision. Yes culpability is decided by section….forget that section….tell me….section 80 I forget. Eighty two and eighty three isn't it? These are the two sections, culpability is decided by that, he is culpable, he is guilty about that. Even if he is a juvenile, he is only entitled for the protection of procedure and the protection under the Act, but even if he has crossed eighteen, a youth offender to me with the compassion which the constitutional mandates must be entitled to be treated differently from an adult offender law accepts it 21 years' Probation of Offender's Act says why. Well you cannot equate an adult offender with the youth offender where you draw the line is itself….I know it's thwart with lot of difficulties but even then I would think merely because of eighteen years and one day, I am not going to treat him like a 28 year old offender. I think he deserves to be treated separately. Each individual case is to be analysed will have to consider all that, you know that even Supreme Court Judges who are juvenile justice Act, you must have been reading, they say no…at 16 he did grow fully and he can be sane, forgetting international commitments on the treaties. Well two views are possible, but then it is always better to speak to the legal perspective. It's for the Parliament, it's good they change it, they change the law they say it to 17, they say 16 yes, there we follow the Parliaments wisdom, it's still on the Parliament to amend it, and when the Parliament say it is 18, I don't think it's proper for us to fight against that. Our personal concepts of Justice should not interfere with the Justice in accordance with Law. That's why I find it little difficult for it, to understand, why a youth offender, may he be alleged of worst type of the offence deserves to

be treated separately. Merely because all the people in the world shout, that he must be hanged, the Judges should not be swayed, that's way the Justice is important. I remember the grate pain what I saw in the morning in the Bombay case being decided, every news channel came with the public participation one lakh twenty one thousand people say hang, one person say do not hang, they are trying to influence the mind of the Judge and the decision ultimately come because of that, I don't know, I don't know, I think a refined system to understand that a youth offender is youth offender, who has not the opportunity to fully developed, groom and make his own decision about right and wrong. Yes on culpability there is no question about it, it is question of sentence, question of sentence think about it. I am not taking one position or the other, I am taking, what I would have thought. Each one of you has to think about it, youth offender, when the subject is on youth offender, I am emphatic, that the youth offender deserves a different treatment, by the compassion of law.

Is this the youth offender, O.K I will stop there? I will complete that aspect and then end up. There may know because they already dealt with media pressure on the Judges I don't want to say anything more, but I definitely want you to make you realise that the Judges must be made of sternest stuff. You are not going to be influenced with the all and sundry would shout. That's how the Jesus was ultimately the roman people that were shouting for, hammering for his crucification and that's why the Judge said that I am not responsible when the ultimate day will come. We are not…see the judicial institution is not a majoritian, please understand that, we are not majoritarian at all. We don't try to please the constituency, which is outside the Law. If all the people in this country, or the n-number of people or the n-number of one minus would clamour for this result and I am convinced that one is right my decision will be with that man, mine means the judges' decision will be with that one man. I am not concerned with the one person minus the people will shout, my commitment is to law and my conscious of the law. I cannot go than the law. And therefore please understand, now these days become very important when in 1988 when I become a district and Session Judge, this was not very important, but today it is very important, today it's very important. My Judges ought to realise, that they are not going to cater to any constituency in the name of the public opinion. One institution which can ignore public opinion in a Constitutional Republic is a Judiciary. You are not bound by public opinion, you are bound by public interest, you are bound by the conscious of the Law or the Constitution, your own conscious, but not what the men on the street may demand, creates great danger today. I think some of the decisions, Higher courts not swayed, depends on what tomorrows headline would be, curse the day when a Judge would decide the matters on the basis of what tomorrow's headline would be or what people would think about you depending upon your judgment. As a judge you are not worried about, what people would think about you, that is also fear and it betrays the oath which you have taken. My oath is I will decide without fear or favour, even if it is a fear of public opinion against your conscious if you are subscribing to that you are committing breach of the oath. Well the, the, the new generation of the judges has to face a lot different challenges, and this is one of challenge which I told you. Everyone wants to be a good boy

right everyone wants to be a good boy, you are approval seekers. The judges now becomes approval seekers, I have a small grandchild you know, whatever you want to do, wanting to do when he does, to clap, then he laughs, he seeks approval, why judges today are sometimes reduced to an approval seekers and I am worried about it, I am really worried about it. Judges should not be approval seekers, they must be sternest stuff, they should know what is right and what is wrong and not seek the approval of the others am I worrying you, I am troubling you, I think you want to, you want to think for yourself. How many times at least indirectly you have been victim of the fear of what others would think about you for giving a judgment in a particular way. Rule of Law would crumble, if Judges are worried about what others would think about it. It is a very worry some concept to me and I think it's happening every day. Every day it's happening, people are…judges are worried about what others would think about them. Very interestingly I heard in one High Court, I will not tell you the High Court, earlier the bench used to be a handled by one bench of the High Court, today there are four benches sitting to deal with only with bail applications, you know why subordinate Judges are refusing to grant bail, because if they grant bails, somebody would think that they are influenced by somebody for something else, fear, fear which operates against your oath if you are convinced that you are, that he is entitled for bail, at the risk of the whole world disapproving you I would like to decide that way. That is the glory of the judge, four benches sitting of one High Court to grant the bail, consider what only bail applications…fine… I am sorry he…O.K…I know, I know, the reason, I know the reason, see the investigation is over, trial has started, important witness has been examined, still bail is not granted. I say when there are four hundred meter is enough when you are going to grant me bail, you have already punished me before the trial is complete, buy because it is X scam, because it is Y scam, because it is Z scam you don't grant bail, don't give me I know that.

One of the Participant: Going to the back ground of it, one person he was a shop keeper and politician. There was allegation of rape against him, he was brought to the court where I am now posted at Karkaduma, because those were baseless allegations, this guy was granted bail, next day Hon'ble Judge of the High Court read this news in the Newspaper, tooks suo moto cognizance, cancelled the Bail, took that fellow to task, that had happened I think 15 years ago. That fear has not gone

Justice R. Basant: Sir I accept it, but I would want judges to say Administrative action against me, I don't care because of my conscious matters. One High Court or one High Court Judge is taking any action against me, but that will not persuade me to deny a bail to a person who is entitled. I understand, I understand

One of the Participant: No on that pretext that particular Judge was not elevated to the High Court. This is the result of it, and ultimately that person was acquitted in the trial, no conviction for that person.

Justice R. Basant: My point is not disproved by even what you say. You know I always say. Even if the High Court disagrees with you, even if your administrative judge takes to the task, the glory of Judgeship is what your relationship between you and your District Judge, you and your High Court Judge, you and the Supreme Court Judge is not that the Tahasildar and the Collector. Both are sovereign in the area that you operate. I am sovereign in the area that I operate. Lord Chief of India cannot tell me what I should do, that is the power of morality that is the moral power that every judge should have. Conviction that I am doing is right, but we convinced, not your personal conviction, but conviction in accordance with law. That High Court judge is long 10 years back in one case cannot persuade you, then you are becoming…you are reducing your own mercenary sir, you are unworthy of Judgeship, you are unworthy of Judgeship. If you would decide case because of the fear, your portfolio Judge. That's why I say very strongly at every time…the, the, now there are no Second Class Magistrate in most of the States, a second class Magistrate and the Lord Chief Justice of India are sovereign in the area in which they operate, in the domain in which they operate. You are not subordinate to another in the sense of the administrative sense subordinateness in the matters of your conscious you are sovereign yourself. Please read all India Judges case, that distinguish the part of sovereignty vested in each Judicial Officer. The consequences unfair, improper unjustified which may visit you because of the idiosyncrasy approach of one judge cannot persuade you to do something which is not legally just. Well I remember when I came here for one of the programme, when I was the District Judge, then I came on behalf of those days. Somebody said see you can say all this, but what will happen when my administrative Judge will write an adverse remark against me. I said have a courage to face, if you don't have the courage quit. If you don't have a courage to stand by your conviction, there is no point to continue in the service as a judge. What is the great pleasure for being a Judge, you tell me. You can make ten times money that you are making as a Judge and if you become a Lawyer, I know that, that is certain you can make ten times money that you are making as a Judge this amount of competence you have, you can certainly do that. Have the conviction in you. The great opportunity of being a Judge is the freedom of Conscious which you have, enjoy that, completely enjoy that. Let your let your say you're District Judge, that you're subordinate, forget about it, forget about the High Court Judge, and forget about the Supreme Court, you're conscious what matters subject to the Law of course. Don't say that my conscious is this, no subject to the law. I am always talking about subject to the Law. I am talking about the legal conscious not personal conscious. The groomed, the personal conscious groomed in the law. Please this is no excuse, there is no rule of law, the moment you are worry not about the law, the senior Judge may be looking at you on the possible action that may be taken against you, you are not going to change your decision. That is why I say Judges must be made of the sterner stuff. The moral power if you do not have, this job is not worth for continue. Give it up, give it up, don't be part of it. If you think that you cannot be true to your conscious give it up. Go back you will earn much more money as a conscious lawyer you can make much more money than as a Judge. If you don't enjoy the pleasure of being a, being a Judge then freedom of conscious, which I keep repeating to my Judges that is the greatest asset

that I have, that I had as a Judge, which prompted me to lead career as a lawyer and join the Judiciary. Even now as a lawyer I know, I am not the… I don't have the freedom as a Judicial Officer. I take a brief which come to me and that what I found what is it, then look at you, you have much higher perception what is happening and you can decide according to your conscious. Try to look at my client's point of view and put it across to the Bench, whereas you have the option to decide for yourself, find out what is truth, find out what is just, that is why you must have come to this profession not thinking about the salutes and guarantee of monthly pay package no, no, you must have come to this because you value something more the sublimity of the conscious you have right. Don't be worried unnecessarily about what the High Court Judge might in your ACR, yes it's a worry, I know that. I am saying that, as am I not aware about that. I have my own stories to narrate, well it's not proper to do it here, I have been a receiving end for lot of things but I did, but what matters is your strength and nobody touch you, I tell you if you have the slender, the power of your moral conscious, nobody is going to touch you, some people may try it but if you have, if you have that, you must have that conviction then that will succeed. Every system works in some assumptions isn't it? Matrimony works on assumption of fidelity, the, the, the justice system work on the conviction that "Satya Meva Jayate" it's not simply written, it must have within you, that if I am true, that if I am correct, it will always win, it may be an assumption or a presumption, but without that the system cannot function. Sorry I took some time, because you said about, don't be, I started by saying don't be worried about what others might think about you, then don't be worried that somebody may think that I am correct and therefore no way for me at all, and every bail application is rejected and it is the High Court to decide the bail application, which means that there is a failure of justice. How many of people are able to come to the High Court and the Supreme Court. See some judges say you look after you reject, that's not a business at all that somebody else has to do justice and therefore I can do what I want to do. Well I take leave. Some of may say that this man say this and go tomorrow CR will be written by somebody else. At least somebody must be thinking like that.

Justice Anjana Prakash: Now there are lots of checks and balances you know it's not arbitrary as it used to be before. Now a days I don't think that an Administrative judge can go to the extent, he may cancel the bail, it's another thing but it can't spoil your career now there are lots of checks and balances you know, people have realized you know. Even amongst the High Court judge someday coming in the full court and all that he will realize the importance of building, barring the individual perspective on a certain Judicial Officer and moving collectively it's not arbitrary as it used to be before, but we still take that you know as the starting point and say fifteen years back this has happened to this person, but you know that is why I don't do this, for fifteen years back and now so many people have granted the bail and so many things had happened but nobody talks about the affirmative you know the affirmative part of it. People only give an example as an example as the negative aspect not the positive aspect, this is also we need to search also, on this also. For non-functioning you may have hundred reasons, but

whether those hundred reasons are also you know valid or not you need to test it. Just giving one straight example, there could be, there could be example also I don't say that but for every one, one bad example there are at least hundred good examples

Justice R. Basant: Hypothetical question in session number seven of that prosecuterix and the accused being in the love with each other. Seven, seven, youth offender… being in love having eloped, they had sexual intercourse and later on it was allege that, it is an offence, because she has not completed the age of sixteen years this is the case. All of you have try to answer it he said moderate punishment due to consent, then severe punishment some others stated, three of you say severe punishment is required at any case it cannot be below seventeen years mandatory minimum. You should know that mandatory minimum was coupled with an expression a proviso that an appropriate lesser sentence can also be imposed. Now you don't have a that jurisdiction to impose like section 13 which you said P.C. Act there is no provision by which you can go below six months or one year as the case may be, but here is the provision there is a provision to come below….which one…I don't know….as per the Law declared by the Supreme Court binding….earlier section five…section five because there was a proviso, there was a proviso which says six months mandatory, seven and five, but then you can impose a lesser sentence even in last week we got an order from the Supreme Court in the section five matter…that is know….

One of the participant: section 376 does not have any proviso (earlier) even earlier does not have a proviso (no, no there was) of the…earlier had (even now it has) the present does not have. I can just read it whoever except in the cases provided in for section two, commits rape shall be punished with the rigorous imprisonment of a either description for a term which shall not be less than seven years, but which may extend to imprisonment for life and shall also be liable to fine

No, no this provision….this particular date is given I don't know…..this obviously apply to the next….as you rightly pointed out….it cannot go below seven years, but this problem relates to 2003 so in that case the sentence can be less….that's right…I was thinking on those lines. You are right. Now case comes up today then it may not be possible. But then one thing that I found was, how did you ascertain the age of the accused. I looked at the question, I don't think to decide it without before getting me the age of the accused before me. If you all think the accused…what is the age of the accused…then how do you decide? I thought anyone should look at that, now if he is a thirty-five year old man then my approach would have been different…here also a boy of just eighteen my approach would have been different right, because if you did not ask for the age of the boy, the session is on youth offender I think you are mistaken, you have committed an error. You should have asked the age of the boy? Before taking a decision on the case like this. Of course, I have an amendment post amendment does there, does there,

but nobody…otherwise also section 360 Cr. P. C youth offenders that is why the age is important as you said you know, as it was important…no, no also see what is the age of the accused is important, because we are talking about youth offender, you know that is important

what date he get married, what date he get married? Not you, I am saying at what age a person get married? I don't know….Karnataka judge is very sure of the…in the….what shall I call it cow belt or the red belt or the Nexalite belt…I find lot of people get married at the age of four years, five years…so without knowing that we cannot give an answer….that's why I thought. See even though the question is not framed that way…I thought number of you have thought…don't ask me without telling the age tell me the age of the offender, then only I can decide. If you are a compassionate for the youth offender that should have been voiced right, right, that question was not asked before…(no, no this was an assumption that he must be a youth offender, this was an assumption) if he were a youth offender eighteen to twenty one then my approach would have been different on the question whether if law gives me an option whether the minimum sentence ought to be imposed or not. I would have considered that, I would have considered, I am not saying that sentence would have imposed, I would have considered in that input again, again I would have considered, I would have certainly considered. See that is an age when you see the idea rushing to your brain, the hormones have pumped in your in to your body and therefore it…if a person commits that sort of an offence in that young age, my approach would have been certainly different. At eighteen if has committed it would have been very different from, would have been committed at the age of twenty-five, you see even the code of Criminal Procedure they deal with you know persons under twenty-one years you know in a different category altogether, so you to keep this different prosecution in mind, criminal jurisprudence in mind. It's a one O'clock any quick questions, any quick discussion on this topic.

One of the Participant: Whether judges can alone prevent the crime My Lord? What you said sentencing policy, Judges should prevent the crime. Whether Judges can only prevent the crime? Where there is another strong for the increase in crime, because forty fifty years back if we compare, there were no such crimes. There is no safe place for human beings, husband kill wife, wife kill husband, son will kill father, father will kill son so there is no safety place now. What is the reason because of failure of judiciary in awarding a sentence or doing a deterrent theory all failure in our, any other system My Lord

We are not concern about the failure of the other system, we are concern on how imposition of appropriate sentence can prevent the crime

Is it the only reason?

Only proper, see you can say that see the social condition contribute to the commission of crime, want of proper safeguards lead to the commission of crime. When I say a crime free society you as a micro-

participant in a micro system as a role, it is not a role which is non-judicial in nature. We are only considering the sentencing part of it

One of the Participant: My Lord has rightly pointed out in a strictness and the certainty of the punishment that is the only thing we can curb the conviction.

Justice R. Basant: That is where we can contribute significantly, that's what I am talking about.

The Same Participant: This happens in Ajmer, the Railway Magistrate decided the cases very fast, all the criminals who were doing activities in the Railways they shifted from that place, because he was deciding immediately, convicting them immediately.

Justice R. Basant: You are right as I started by saying, immediateness and certainty of punishment is a much greater deterrence, many time grater deterrent than the severity of the punishment, you are right, you are absolutely right, he pointed out rightly will have lunch and come back, will have lunch and come back O.K.

## Session No 8: Sentencing in Cheque Bouncing Cases (Fraud and Cheating)

Resource Person: Justice Anjana Prakash

Programme Coordinator: Welcome back, we will start with the Session

Justice Anjana Prakash: Just one second, before I come to 138 N. I. Act I just want to draw your attention you know to Section 354 of the Code of Criminal Procedure. 354 you know its talks about 353 talks about Judgment and then 354 now look at this a language and contents of Judgment except as otherwise expressly provided by this Code, every judgment referred to in section 353, shall be written in the language of the Court, shall contain the point or points for determination, the decision thereon and the reasons for the decision, (c) shall specify the offence (if any) of which and the section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced. I just want to read you know section 354 (c) just note this shall specify the offence (if any) of which and the section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced and before that it says shall contain the point or points for determination, the decision thereon and the reasons for the decision. So when we talks about points for determination, it does not mean determination on the conviction, it also mean your determination decision thereon the reasons for the decision on the sentence because section 354 (c) say specifically, after that shall specify the offence if any on which and the sentence on the Indian Penal Code or other Law under which the accused is convicted and the punishment to which he is sentenced. So before that contain the points for determination the decision thereon and the reason for the decision. Toh…(b) and (c) cannot be read independently form each they have to be read together and this is means decision and determination, it means for both the conviction as well as the sentence and on hearing I am as I you know in the session trial of cases there is a special provision for it…one minute 229 nahi 235 sorry, 335 it says unless you proceed in accordance with the procedure under section 354 (c) hear the accused on the sentence and then pass sentence according to law, so the determination after this comes the judgment and this is what the Judgment shall contain Section 354 tells you this and in warrant cases 248 also tells the same thing. That is what …it says 248 (2) where in any case the Magistrate finds accused guilty but does not proceed in accordance with the provisions of section 325, 326 he shall after hearing the accused on the question of sentence pass sentence upon him according to Law. So thing is sure that in your judgement you are supposed to discuss both things and open your mind on that, whether you know there is a method to that you can explain reasons in your judgement only you know, in no other way. Because there is you know, the judge has to speak through his judgement, now a common man who reads the judgement or the prosecution he must know the reasoning as to why you come to you know to deduce to a certain point, your deduction is for your reasons.

Now where cheque bouncing cases are concerned, if we just you know refer to Negotiable Instrument Act dishonour of cheque for insufficiency of fund etc…when any cheque is drawn by a person on an account maintain by him with a Banker for a payment of any amount money to another person from out of that account for the discharge loan or impart or any debt or any liability etc…etc…that the account and shall without prejudiced to any other provisions of this Act, be punished for an imprisonment for a term, which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. When you look at the scheme of the N. I. Act it is both, it is both you know actually like Justice Lodha said you know that N. I. Act looks to the civil as well as the criminal consequences of the act of cheque bouncing, where the criminal offence is concerned, the person who is punished, where the civil consequences are concerned instead of filing of money suit etc…etc.. The court can help you to recover that amount by ordering twice the amount of cheque amount that disputed cheque amount. Now you see you know, there is another section which is important in Negotiable Instruments Act section 31 liability of drawee of cheque, the drawee of a cheque having sufficient means of the drawer in his hand properly applicable to the payment of such cheque must pay the cheque when it is duly required to do so and in default of such payment must compensate the Drawer for nay loss or damaged caused by such default. Then Section 139, presumption in favour of holder, it shall be presumed unless the contrary is proved that the holder of a cheque received the cheque of the nature referred in Section 138 for the discharge in whole or in part of any liability. This is well founded on the principle that once a person you know is in a position to show certain advantages, it is for the other person to rebut the same in a trial. Now… you want to give that hypothetical case first

Programme Coordinator: Hypothetical case no 8 is with you, some of you has returned it back

Justice Anjana Prakash: Before that you know, I will just refer to this Justice Lodha's judgment I think it is very, very good, *R. Vijayan v. Baby* that is there in your paper book also *R. Vijayan v. Baby A.I.R 2013SC 528*, if got your reading material you can refer to it. You know, he, it deals with how should a sentencing judge imposed the fine and the compensation. The scheme of 357 as well as you know of 138 and it says you know, It is of some interest to note, though may not be of any assistance in this case, that the difficulty caused by the ceiling imposed by Section 29(2) of the Code has been subsequently solved by insertion of Section 143 in the Act (by Amendment Act No. 55 of 2002) with effect from 6.2.2003. Section 143(1) provides that notwithstanding anything contained in the Code, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the Code (relating to summary trials) shall, as far as may be, apply to such trials. The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding Rs. 5,000/-, in case of conviction in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the

amount of fine stipulated in Section 29(2) of the Code is removed. Consequently, in regard to any prosecution for offences punishable under Section 138 of the Act, a First Class Magistrate may impose a fine exceeding Rs. 5000/-, the ceiling being twice the amount of the cheque. The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument". In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour cases. Chapter XVII of the Act is a unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realization of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief.

The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under Section 357(1)(b) of the Code. Though a complaint under Section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount, (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under Section 357 (1) (b) of the Code and the provision for compounding the offences under Section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary.

We are conscious of the fact that proceedings under Section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. We are also conscious of the fact that compensation awarded under Section 357(1) (b) is not intended to be an elaborate exercise taking note of interest etc. Our observations are necessitated due to the need to have uniformity and consistency in decision making. In same type of cheque dishonour cases, after convicting the accused, if some courts grant compensation and if some other courts do hot grant compensation, the inconsistency, though perfectly acceptable in the eye of law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. This what Justice Basant is talking about that it is actually

violation of Article 14, there is no uniformity. Citizen will not be courageous to regulate their affairs in proper manner as they will not know, whether they should simultaneously file a suit or not. The problem is limited having regard to the fact that in spite of section 143 (3) of the Act requiring the complainants to complaints in regard to case of dishonour of cases under section 138 of the Act to be concluded within six months form the date of filing such cases seldom reach finality before three or four years that not the six months. These cases give rise to complications where civil suits having not being filed within three years on account of pendency of criminal cases, look at the pairing, when you don't grant compensation, this person poor fellow, his case is to be decided within six months it's not decided, now it takes another ten years, in the meanwhile after the lapse of three years, he loses you know the opportunity of filing a civil suit for recovery. Why it is not the duty of the Criminal Courts to ensure that the successful complainants get the cheque amount also. It is the duty to have uniformity and consistency where the other courts are dealing with similar cases. One other solution is a, further amendment to the provision of Chapter XVII so that in all cases where there is a conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum interest, followed by award of such sum as compensation from the fine amount This would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of Chapter XVII of the Act, which is to increase the credibility of the instrument. This is however a matter for the Law Commissioner of India to consider. So, but you know this sort of guides you in the manner in which you supposed to deal with it. But assuming that you would be Appellate Court in N. I. Act matters, I would like to just refer one case you know *Damodar S. Prabhu v. Sayed Babalal* again it's there in the paper book *AIR 2010 SC 1907* page 112 it deals with the issue whether you should compounding or not and at what stage The issue is whether it is permissible to compound cheque bouncing case at Appellate stage? At this point, it would be apt to clarify that in view of the *non-obstante* clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147 and the scheme contemplated by Section 320 of the Code of Criminal Procedure [Hereinafter `Cr P C'] will not be applicable in the strict sense since the latter is meant for the specified offences under the Indian Penal Code. So far as the Cr. P. C is concerned, Section 320 deals with offences which are compoundable, either by the parties without the leave of the court or by the parties but only with the leave of the Court. Sub-section (1) of Section 320 enumerates the offences which are compoundable without the leave of the Court, skip all this while Sub-section (2) of the said section specifies the offences which are compoundable with the leave of the Court. Section 147 of the Negotiable Instruments Act, 1881 is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby serving as an exception to the general rule incorporated in Sub-section (9) of Section 320 of the Cr.P.C which states that `No offence shall be compounded, A bare reading of this provision would lead us to the inference that offences punishable under laws other than the Indian Penal Code also cannot be compounded. However, since Section 147 was inserted by way of an amendment

to a special law, the same will override the effect of Section 320(9) of the Cr.P.C, especially keeping in mind that Section 147 contains a non- obstante clause. Now it's you know they talks about this, It is quite obvious that with respect to the offence of dishonour of cheque, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect, then they you know accept the suggestion of the Attorney General and they lay certain guidelines, the guidelines that directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused. So the first or second hearing itself summon shall be issued as to whether you want to compound the offence or not if he says no If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, if it is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount, then if it is before the Supreme Court, the figure would increase to 20% of the cheque amount. Then it says that we are also conscious of the view that the judicial endorsement of the above quoted guidelines could be seen as an act of judicial law-making and therefore an intrusion into the legislative domain. It must be kept in mind that Section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. We have already explained that the scheme contemplated under Section 320 of the Cr P C cannot be followed in the strict sense. In view of the legislative vacuum, we see no hurdle to the endorsement of some suggestions which have been designed to discourage litigants from unduly delaying the composition of the offence in cases involving Section 138 of the Act. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance, so this is how they dealt with it. Now also I gave even you know, at the Appellate stage at the first instance you know, maybe you can ask the Appellant, whether he wants to compound or not, as per the guidelines.

Justice R. Basant: Amendment to section

Justice Anjana Prakash: then at the end of it, Haan 147, Haan this is a 2010 case, 14 says what, 147 offences to be compoundable notwithstanding anything contained in the code of , every offence shall be compoundable. No, no this the amendment they are talking about, this is the Amendment

Justice R. Basant: Has there been a subsequent amendment in the

Justice Anjana Prakash: That is why they say non obstante clause is there, notwithstanding anything in the Code of Criminal Procedure, because this is not you know, this is not included in section 320.

Justice R. Basant: has there been a subsequent amendment in 2014.

Justice Anjana Prakash: No, no, no, this is in…..

Justice R. Basant: This is the amendment in 2014.

Justice Anjana Prakash: Yes, yes haan. How N. I. Act is….

Justice R. Basant: If you say that there is 2014 amendment, I must apply my mind to it. I have not seen any

One of the Participant: There is no Amendment in 2014,

Justice Anjana Prakash: 147 is already here, what is there in 2014, I think there must be some confusion

Justice R. Basant: According to an amendment was required in the law in the light of this decision the *Damodar* decision, *Damodar* decision has

Justice Anjana Prakash: Amendment to what effect, I am asking haan toh… that is what it says 147 says that, notwithstanding anything contained in the Code of Criminal Procedure every offence shall be compoundable

Justice R. Basant: Then *Damodar* is considered also, Then *Damodar* is considered also, I want to know is there any subsequent Amendment thereto, there ought to be, because don't think *Damodar* lays down the direct law, *Damodar* is not correct law because Section 4 and five of the Code of Criminal Procedure you know unless the special enactment is provides contras Cr. P. C used to apply and therefore 320 would apply to Special enactment like the N. I. Act. Have I made myself clear? Are you all conversant with section 4 and 5 of the Cr. P. C 4 and 5 say in a special enactment unless a contra procedure is laid down, procedure in Cr. P. C would apply. In the, in the Act there is no provision for composition only 147 Amendment came. So prior to that 320 must apply, but the Court says there is no provision by reading notwithstanding whatever, whatever procedure, that was the necessary because under Code this offence is non-compoundable, under the Code only I. P. C offences are made compoundable and

therefore they had the provision that notwithstanding anything contain, that was read by, read by *Damodar* to say that 320 would not apply, according to me a wrong law, absolutely wrong law, because notwithstanding only mean Cr. P. C may not say that it is compoundable, but notwithstanding with that it should be compoundable, that's all the judgement. Therefore an amendment was necessary, I don't know whether the Amendment has come, nothing has been brought to my notice that the amendment has come.

One of the Participant: That was an ordinance that was an ordinance relating to the jurisdiction whether the payee account is, that is different

Justice R. Basant: That is different, that is after Justice Thakur's decision came, then the offence takes place where the, Bank, where it is dishonored. Only there you can file a complaint. That I know, I thought 14 amendment, *Damodar* is very

Same participant: We have not heard about it

Justice R. Basant: No I have not about it, that's why I was asking, that's what I, that's why I…

One of the Participant: State Legal Service Authority has approach the Supreme Court, and there was decision that we should apply.

Justice R. Basant: No, no because those who are alertly following you know 138 prosecution may be killed by the complainant, by not appearing, if they are really compounded which they fool of the accused is going to apply for composition, because if he does not appear, it will get dismissed, if it gets dismissed what happens is, that effect in to acquittal, then who is going to pay 10 % money for that. You must have come across it actually dealing practical operation when starting on. Problem is only with the Appellant

One of the Participant: When a case come for a mediation then the question whether this 10 % is to be given or not, there since it was a mediation so they are insisting on it that it is not required, that mediator said that it is not required. That was challenged subsequently M. P. State Legal Authority in the Supreme Court…that has to be followed even in case of Mediation under the Legal Services Authority, that has to be paid in Appellate Court, and so far as Trial Courts what they are doing they are settling the matter out of the Court and thereafter withdrawing the case. That they are doing. In that case 10 % is not required.

Justice Anjana Prakash: You see here the Appellant files the Appeal and if it is dismissed, obviously…

Justice R. Basant: Whole confusion according to me because, they did not take the note of the fact that 230 is applicable to 138 also, see why 147 say is that it should be compoundable, thereafter the Cr. P. C will have to be applied

One of the Participant: With regard to that delay in payment in compounding, for curtail the delay the provision that stipulation has been made.

Justice Anjana Prakash: Actually it is more like an anomalous, this the double punishment to the offender. Firstly you know, for having come late for saying that I want to compound, firstly you commit you know an offence by not honouring the cheque and then secondly you come late and say O.K, O.K I will pay the cheque amount, so that's why you compensate

Justice R. Basant: Those who have practical experience would say money lenders takes cheques ten time fifteen times above that and then if you say ten percent is to be paid, if the Money lender himself say he want to compound. Those who have jurisdiction of the mediation would understand this better, the very unworkable provision, very unworkable provision

One of the Participant: This is no positive effect of the Judgment, no positive effect, they thought that the litigations would be curtailed or it will end up early, but there has been no positive effect…

Justice Anjana Prakash: In all metropolitan cities it's a kind, it's like virus or something you know, I don't know….Delhi flooded with N. I. Act cases, Bombay imaging

Justice R. Basant: No on the question of sentencing in 138 I thought, I have something more to add you know. See 138 is an experiment by the legislature to introduce a new commercial morality, through the instrumentality of the Penal Law. What was hitherto only a civil wrong has overnight converted in to a criminal offence. Well in such a situation, it is a case of Judicial Engineering, the Legislature is engineering to introduce a new commercial morality and now all of a sudden a civil acts becomes a criminal act. The question is should the Courts, sentence a person to undergo imprisonment for such overnight transformation of the Law. You all aware crimes are…crimes becomes crime because the public opinion desists it, you don't have to look in to books to find out whether an act is a crime or not. Mu sense of morality tell me that, whether an act is a crime or not and that is the crucial distinction between the crimes…traditional crimes and new generation crimes, now if you say for a 138 offences sentence of imprisonment has to be imposed, I may little worried because, the person becomes the, the, the deterrence of the prison will be vanished. So in all cases it is most advantageous for you to impose a prohibited sentence on fine and the default sentence rather than to impose a substantive sentence, because you are, you are taking away the deterrence of the prison ordinary person to prison when the allege not a…in morality it is not an offence it is in law an offence, see in fact what it amounts is non-payment of an amount, now you are trying to make that criminal offence so that commercial morality

in the country will be improved. This can be done overnight and that brings with lots of deterrence of imprisonment be watered down and therefore I feel that the Supreme Court is doing it many a case now that, the sentences converted in to sentence of imprisonment till the rising of court and a default sentence…penalty is imposed, a fine is imposed, now fine can be imposed, earlier you know fine could not be imposed because five thousand was the limit and therefore it cannot be imposed. Now after the Amendment even a Magistrate can impose any sentence permitted by Law, so any sentence of fine he can imposed, so he impose a fine and the default sentence, such is the check is for a X mount you say up to 2x it can be to choose an appropriate amount you, you satisfy the requirement of the compensating him at the same time, you do not send the person to prison, who do not really deserve the prison that's the point I want to make. If you send, if you send people to prison when your sense of morality is does not think that he deserve to go to prison, you are watering down the effect of deterrence of the prison system and therefore it should be very, very advantageous, not to invoke what I may say the prison sentence subsequently in an offence under Section 138 of the N. I. Act for some more time until the morality, the, the polity morality is changed. Polity must accept it as a criminal offence right now it is only a civil offence, it's not only a payment of money, for non-payment of money invariably you don't have to send a person to prison, of course second offence, third offence you can perhaps could doing that, not the first time the person commits an offence I think this course will be O.K. in sentencing a person to certain sentence of imprisonment, fine and default sentence can be appropriate in that a real, real sentence ought to be imposed in a 138 case at least now, I some time may be when this this goes down to the polity of, they accept it to be a criminal offence may be prison sentence is warranted not at this point. It's a question of opinion, it's a question of opinion, I am only, I am only, only my point of opinion

Justice Anjana Prakash: The intent of the Act also same

Justice R. Basant: That's why a sentence or fine or both

Justice Anjana Prakash: And then double the amount of you know of the cheque etc, etc…

One of the Participant: Even the sentence was one year, and after the amendment it's two years

Justice Anjana Prakash: That's what is happening, that's what is happening, the recovery of the cheque amount….otherwise who is bother about securing this person, we doesn't want to put him behind the bar, you think about that, you know the intent of the complainant is also not to put him behind the bar, it's only to recover the cheque amount. So what is that….

One of the Participant: There in almost all the 138 case that some loan was taken in cash and in returned the cheque has been given. Every case is same for giving the loan in cash there is no receipt. I think the

people will get some money then the cheque is give as a security or there may be some other type of the thing…money lenders are doing this thing, cheques are immediately bounced 12 lakhs, 15 lakhs

Justice R. Basant: money lender are ruling the…misusing the provision. See a man in need did not mind for giving a cheque a blank signed cheque is given. Later on it is filled as they pleased, that's why they said actual borrowed is one lakh, they put it as one crore because the blank cheque they can include any amount and 139 presumption would apply signature is admitted, transection is admitted only the quantum will be in dispute and therefore in Appeal transfer into show it otherwise, but what is the solution. So long as people, illiterate people, the people who do not important of a blank cheque is given, indulge in that this law will become very harsh and it may be oppressive law and so what is that see one suggestion that is made is may be 139 applicable in cheques written in the hand of the person

One of the Participant: Sometimes it is hand written note, what is the problem is once the person comes and ask for ten thousand rupees, he is ready to give any security looking at their financial condition, their social status, I cannot make out that this person has taken ten lakh rupees, nobody will give them, he is not even owing a house, no job, then you say you have given him ten lakhs rupees two years ago, then he has given a cheque back and now this cheque has bounced. We got generally view, if you ask the accused to deposit some money at least you know, if the complainant is going to win, he should get some money. So when we ask them to deposit fifty percent they don't have fifty percent, some of them are not even able to deposit ten percent of the amount what then the compensation is fixed and even compensating them is not possible, they may undergo punishment, there are some ladies also, woman also, who have issued those cheques, it's very difficult, it is very painful to set in appeal…

Justice R. Basant: Money lenders insists that the wife also signs the cheque. So that she will go to prison and that would be a good deterrent. Those who sat in the Lok Adalat and the Mediation jurisdiction will really understand the pinch of this because the cheque may be for one crore and then you call both of them and say if ten thousand rupees I spent on settle the matter. Then you realize what an extent of abuse taken place. It's very weird I have found in Lok Adalat and Mediation they made able to do better justice than the courts themselves, because this option is available, the Court can either acquit or convict, but he cannot obviously say that the actual amount is not one lakh but, it is only ten thousand that is very difficult for a court. You may either say the cheque is not for discharge of any legal liability dismiss the complaint or say that it was for one and…find him guilty either way it's big problem, it's big problem that's why 138 laws passing through a difficult situation now see half the Judges not willing to accept it? Half the Judges see that it's a great abuse by money lenders and therefore you must be very careful in consistent, very, very strict about the liability, then what happens is criminal trial till half way becomes a civil trial, when the next step becomes a criminal trial

One of the Participant: Another problem Lordship is the accused, he will invariably go and lodge the report that my cheque book was fallen from my car and scooter, then there were sign in that cheque book, blank signed cheques in the cheque book. In every second case in appeal we get kind of….sir I look that the Trial Court has not considered the this fact, that my cheque has stolen and lost it somewhere else in the past, something is

Justice R. Basant: See that may not be…I don't know subject to your experience that, may not be very difficult to resolve, because invariably you find such complaints coming up after the dishonour of the cheque. After the dishonour of the cheque such case, that sort of complaint generally come. Some cases…strait cases there may be in exception, only when he knows he is actually presented demanding acceptance to the reality and then tries to find out difficult, then he go to the lawyer till then it does not come how then. See signing a blank cheque itself should not be permitted, keeping a signed blank cheque can also be made an offence. I am just thinking it in the larger interest of the society, what can make it, make it law more just and reasonable. The one is the 139 presumption can be apply to the cheques written in the hand of the person, that you may say some one of you going to give full returned, I pay ten thousand, I give one lakh, cheque for one lakh that may take place, that's not taking place usually, what taking place usually is a blank signed cheque is taken, and thereafter he consider where he wants so it should not be in the handwriting of the complainant and that can be to certain extent reduced, an approach to that extent. Misuse is so gross that you are tempted to

Justice Anjana Prakash: If such case to you, you know that my cheque book is lost etc…you can always you know disregard that fact, because obviously I may like sating in quashing application invariably when such complaints coming you can quash them, because it seem like a blatant abuse of the process of the Court you know that it is false case and only because you know instituted upon him, such a complaint is filed

Justice R. Basant: If you use a blank cheque is also an abuse of the Court, no, no they are trying to offset it…

Justice Anjana Prakash: When blank cheques are given a security that's another case, but saying once a case is instituted I lost my cheque, my cheque was stolen etc…all that seems like to be you know clear case of abuse of the Court. There is a business transection and the cheques are kept in the person's you know of that other person by way of security, that is often done you know in a business transection and that can be misused also, some time for recovery of your own money, we do that you know if supply is good that person, he is not going to pay that money, so if he uses the cheque and it bounces obviously and then you file a case. So you know the cheque amount the value of goods may be much less than the value of cheque you know of the cheque, so that is why they are ke chalo bahi ke ten thousand miljaye ga to that is enough, that is you know that the value of the goods that I had supplied, so all this is you

know matter of trial you see that you know see these facts you know come up with, because the fact you know the drawee he has this cheque, main you know it rise to a presumption that it is in discharge of a liability but, this is a rebuttable fact, during trial, because the accused also bring forth the evidence of material to show that it was some kind of a transection by which the security cheques….the cheques were kept in his security you know, blanks cheques were kept, here the burden is not full proof, you see the burden is also to certain extent, that burden is to…I don't think that the onus can shift here, the burden may shift but the onus does not shift, the onus is still on the prosecution to prove beyond all reasonable doubt…the onus may not shift, burden of proof will shift, but not the onus, because that onus cannot be shifted you know, according to criminal Jurisprudence under no circumstances it can shift See after so many sessions that you are supposed to give your reasons, why you agree, why you don't agree and all that. The question is we are giving to you unfortunately once again you don't fulfil the norms. See one person has in this background of cheque bouncing case, it says in this background will you allow this appeal? Clearly mention yes or no with reasons so of course one person has said yes meaning no accuse committed offence under section 138 of N. I. Act based on the documentary evidence admitting sign on cheque no defect brought. Whether conviction and sentence awarded to such and such by the trial court is appropriate is not supported answer with reasons, yes according to the facts of the case unfortunately is this is how you are going to perform, here on such a simple matter, how do we see successful resource persons I would say that both of us failed miserably in a test which is conducted by you, both of us have failed.

One of the Participant: Sir I would like to ask one question. There is a recent judgment of the Supreme Court which says that the fine amount should be twice the amount of cheque, in fact it came like a direction to the Judicial Officers, that the fine amount should be twice the amount of cheque. Now this judgment of the Supreme Court is taking away the discretion given by the Parliament to the Judicial Officers. In that condition…it should be…I will just….up to know…2015 itself and in that case they have awarded twice the amount of cheque plus interest also

Another Participant: Even if the cheque is given in security 138 is applicable

Justice Anjana Prakash: No, no the Act itself permitted see what does N. I. Act talk of, it talks about dishonour of cheque, but whether that person can be held culpable or not that is the thing, you see

Justice R. Basant: Even if it is given as security, the presumption applies, it may be on facts of the case, because see it cannot go against the statute itself, because what the statute says where a cheque is issued for the discharge of legally enforceable debt or liability, that's what the statute says

Justice Anjana Prakash: But how it can be in future also

One of the Participant: May I read the relevant portion Lordship, in my view it makes no difference whether or not it is an express understanding between the parties that, the security may be forced against even in failure or render to that does not a discharge of the liability on the due date. Even if there is no significant agreement, that the mere fact that the cheque has been given in the form of security, or a current cheque in in discharge or the future date issued into the arrangement and in agreement in case of failure to discharge or to make payment, security cheque may be presented for encashment. That is recovery of due date, if that were not so, there would be no purpose of obtaining the security cheque from the debtor, the security cheque issued by the debtor so that the same may be presented for payment, otherwise it would not be a security cheque as observed above the MoU does not speaks specifically that the security cheques are not to be used to recover the instalments even in case of failure by the respondent debtor. Section 138 of the N. I. Act does not distinguish between the cheque issued by the debtor in the in discharge of debt or other liability or a cheque issued as security cheque on the premise that on the future date, that the debt shall have discharged by them, so long as there is this cheque is issued in my view would attract the Section 138 of the N. I. Act

That is existing, it is, it is existing, it is….

Justice R. Basant: All that can be distinguished from the facts don't because…what it says is this today there is a liability and it say tomorrow if there is a breach, you can present this cheque, that's call a security cheque, they will not be referring to a blank cheque if given as a security. Now suppose today there is a liability and you say you will discharge it in two months and then you also give a cheque that if I do not discharge the liability you present it. Then it clearly come under 138, it's not a security cheque which this decision refer to. Security cheques are blank signed cheques given as a security. Now there is a running account between the two of us, I give you a blank check for, so whatever is the outstanding alone is…you can use the cheque only for that. That is a real security cheque, but existing liability it is discharged if you issue a cheque, it is not a security cheque. I think…

One of the Participant: Section 138 doesn't distinguish between the cheques by the debtor in discharge of an existing debt or the other liability or a cheque issued as security cheque on the premise that on the due future date of the debt which shall be paid so long as there is a debt existing in whereas the cheque is issued is in my view, the same would attract section 138 of the N. I. Act in the case of dishonour. They talk about future also

Justice Anjana Prakash: Liability itself about existing….

Justice R. Basant: If you go to that extent it is a law, if you say that for a future liability which maybe created a blank cheque is given to you can also be a 138. Let read that in existing liability discharge whether the breach comes today or tomorrow no policy in nature that the liability will continue that

itself is correct. Am I say we are going in to the, the validity of conviction and we are on sentence? We are here only on sentence, but true while imposing a sentence all those worry. A conscious reply is often in trouble, I have seen it, because if he is convinced that the entire liability does not exits part of the liability exists also, you will not be able to distinguish, you will not able to get sufficient evidence in rebuttal of the cheque amount and he is in trouble. Especially in Lok Adalat if you are sitting you are finished, because you know what's happening, today you know what's happening all these Money Lenders takes blank cheques fill up the amount as they please and then launch the prosecution, no problem one hundred rupee stamp paper, for one crore or ten lakhs it doesn't makes the any difference.

Justice Anjana Prakash: But here like you said you know that N. I. Act, I mean there is no question of you know the greater sentence or lesser sentence, the intent of the Act is as such is not punitive, it is more compensatory than the punitive and therefore you know the, the, this view you know try or avoid sending people behind the bars better you know if he is sentence to minimum sentence but at the same time the victim is compensated

Justice R. Basant: At least for the moment. After couple of years or couple of decades you know may be fine can be….you know it is plastic money it is as good as cash that the intendment of the legislature. When I give you ten lakhs as have given you ten lakhs currency cash that is the dream of the statute, but so long as it go down to drain you know the polity and there is lot of abuse happening lets be very careful

Justice Anjana Prakash: See the problem that was you know given to you all of you I think the, the answer that we expected is of course no law no doubt you said that accused committed offence under Section 138 of N. I. Act the minimum thing that you could sentence him to you know that these are the ingredients that are required you know for proving this offence and this was met by the prosecution. The ingredients that are required you know for the prosecution to prove beyond all reasonable doubt has been proved, has been brought on record and that is why the conviction under section 138 should you know should be upheld because you see you know somewhere it is said but he neither made payment nor responded to the notice, but she did not dispute the cheque or her signature on it, so you know see this was the indication, she did not dispute the cheque or a signature on it this you know the key word. If she did not dispute signature on it, obviously it was in discharge of an existing liability and then the conviction was you know was liable to be upheld 1999 cheque or whatever is immaterial, but it is expected you know a few more lines in giving your reasons or at least you know this ingredients of a the offence has been made. Finished

One of the Participant: We therefore award compensation to the twice the cheque amount and simple interest thereon 9 percent per annum to the complainant. Accordingly the respondent is sentenced to undergo simple imprisonment for a period of five months for the offence under section 138 considering

the fact that the cheque amount 74 thousand direct the respondent to pay compensation of one lakh 48 thousand with simple interest of 9 percent per annum to the complainant with default of compensation the respondent will have to undergo accordingly this appeal is allowed. I will just that portion where that they have said that the courts should do this; as the provision of the chapter 17 of the Act strongly lead towards grant of reimbursement of the loss by way of compensation, the courts should unless there are special circumstances in all cases of conviction uniformly exercise the power to levy fine up to twice the cheque amount…up to…. up to keeping in view the cheque amount and the simple interest thereon 9 percent per annum as the reasonable quantum and direct payment of such amount as compensation this they have refer to some judgment in this case

Justice R. Basant: I will explain that here, I will explain that here, should not be very difficult. I will tell you if it is fine the maximum is the twice the cheque amount. You cannot thereafter issue a direction to pay any amount the cheque is for ten thousand up to two years then the fine up to twenty thousand. No court in India can impose a fine exceeding twice the cheque amount. Supreme Court cannot go against the Law so that you will have to read it with assistant with the Law. The fine amount can never exceed the twice the cheque amount right, you call it interest, you call it compensation it cannot increase right in which it can be twice the amount out of which you can direct the payment as a part of compensation. Now there is another option if you impose a substantive sentence of imprisonment, then you can impose a compensation under Section 357 of the… that law has laid down the sufficient subject to the limits and then compensation you can impose more in an appropriate case all they say up to

One of the Participant: Order is considering the fact that the, cheque amount is seventy two thousand we direct the respondent to pay a compensation of rupees one lakh forty eight thousand four hundred with simple interest thereon of nine per annum

Justice R. Basant: That is compensation not the fine

Same Participant: But they have not mentioned it as compensation

Justice R. Basant: Have you read it,

Same Participant: I have read the entire portion, sir the compensation can be twice the amount of the cheque plus the interest at 9 percent

Justice R. Basant: The Law says for compensation there is no limit, eminently section 357 (3) is invoked and 357 (3) is invoked binding precedent which says the cap on the Magistrate's power is cap on the sentence that's not apply here.

Same Participant: Yes, they have not imposed fine here they have awarded compensation

Justice R. Basant: Exactly that's why I am telling you, if they imposed a fine, they could under no circumstances, impose a fine in excess of twice the amount. That was the ceiling anything beyond that is not justified fine, but compensation does not go by those rules…right. It's little confusion but need not to worry about it, if you understand the concept then it is very easy. That's the Supreme Court judgement but in any case Supreme Court cannot say more than what the statute has said, you have to understand the Supreme Court judgement in the light of the Statute and that be there you cannot give…no court can ever impose a fine more than the twice the amount of the cheque, you call it interest, compensation whatever it is, fine can never exceed than twice of the amount.

Same Participant: They say in the form of compensation…..

Justice R. Basant: Then it is justified, then according to me it is justified. They want any questions to be asked, it's a final session, isn't it? It's a final session we can have another fifteen minutes. Anything that you want to ask any question, there have been more of a monolog here, not much of a dialog, if you think any question you can ask, next fifteen minutes can be used for that. Questions expression of opinions, not questions really, where is the question and answer, the point is nay opinion anything that you want to check on, any idea that you want to convey

One of the Participant: There was something where I was stuck,

Justice R. Basant: I don't want to PMLA matters so, I will have to read and find out that

The same Participant: Something more stringent than that, section 45 (2) I will read it your Lordship, notwithstanding anything contained in code of Criminal Procedure, Cr. P. C, no person of a….
Justice R. Basant: Just a minute, just one minute, section 45 you are reading, O. K…

The same Participant: Notwithstanding anything contained Cr. P. C in, no person accused for an offence for a term of imprisonment for more than three years under part A, now all the offence under part A, because has been abolished, of the Schedule shall be released on bail or on his own bond, unless the Public Prosecutor has given an opportunity to oppose the application for such release and where the Public Prosecutor opposes the application, if the Court is satisfied that there are reasonable doubts of feeling that, he is not guilty of that offence and that he is not likely to commit any offence. So Lordship how can I give this guarantee that this is binding at the stage of hearing the Bail, that this person has not committed an offence

Justice R. Basant: Why you have that doubt, look at the N.D.P.S Act the same provision, verbatim reproduction of same provision.

The same Participant: This is if we are contending, Lordship N.D.P.S offences are severe, here if you go to Schedule A all petty offences are there in the Schedule, otherwise for seven years in normal circumstances he is allowed a bail

Justice R. Basant: No, no the question is, the question is how do I satisfy myself that he is not likely to commit an offence in future, whether seven years, two years, or rising of court, the question id that, that's the real question. That question has been considered in the N.D.P.S Act then they said N.D.P.S Act…other enactments also where they say similar expressions come and there the answer is by…how do you decide that he will commit an offence I don't know what happen tomorrow isn't it? Much less what he would do and therefore the question is something from the past from the available inputs you find whether this person, man has shown a propensity to commit such offences, if this is the sole offence that he has committed, you say I find nothing to conclude that he is likely to commit such an offence again and therefore the prosecution has no allegation

The same Participant: The first condition is that will lead to a conclusion that he has not committed this offence …

These are the mindless legislation, beyond the understanding and he also knows the Judicial Officers…

The same Participant: I granted the bail…..

Justice R. Basant: The constitutional validity of this provision is itself challenge is issue in law. It is said to be oppose to the Makena Gandhi where the law was unreasonable, oppressive and capricious this and they have not accepted, the challenge they said that the Judicial Officer is this…this must be able to identify whether this case belonging to this category or not. Which prima facie case you conclude, you can't conclude that he has not committed an offence

And for the present case that you know that

Another Participant: If you grant bail, if you grant bail that means you conclude, considered that this is the fit case for acquittal.

This is what it means, fine these are all fundamentals, a finding at the preliminary stage Is not going to bind you later either in favour of the accused or against, you are right…but that's not the problem in law, that's I wanted that you can say inadequacy of draftsman-ship or….

Another Participant: In the main case the CBI registered, this guy got bail three years ago, before I took over this post, three years this guy was languishing in jail only because of this provision I came and granted a bail, otherwise the Trial will takes its own time, because we have to….

So you have your own reasons for granting bail, you know where to go around it, that's the way every Judicial Officer supposed to work

This is how something that they have put this condition here, that on the date of hearing I should give a bail finding that there is no material to…only thing I have to grant the bail

Justice R. Basant: I started with that, if I remember, we started with that many other subsequent legislation are copy written, copy written statues, we have something like Abkari Act in Kerala, where this provision has been extracted exactly. The Abkari Act you know become very difficult, one was processed, one was…the court find it to getting out of it…there is a sense of justice we need to….

You want to ask the question, in the morning you were supposed to ask the question

One of the Participant: Actually juvenile my view was deciding the age, yesterday we had a discussion regarding like eighteen years, the children they are so grown up… I am talking about today's context, because of the exposure, because of the Gymnasium, because of the something physical development at the age of eighteen years they becomes so matured, very matured, so they are capable of committing crimes you know…this accused of sixteen years and they are very young you know and in the west also children drink liquor, they become a big threat this and that. So regarding age my Lord there was confusion

Justice Anjana Prakash: That's the concern now a days, that's the concern

The same Participant: We had a topic, we had a discussion yesterday so I just wanted to read about that about the concept of the age now…we are talking about the adverse effect on eighteen years old in this Country, they are very matured physically

Justice R. Basant: See at the moment law says eighteen years, it's for the Parliament to choose it to change, so long as it remains eighteen we will follow the law as it is. I know there is a lot of discussion going on in various circle, whether this lowering or increasing of the age has really contributed to the welfare of the child or not, so there is a big dispute going on. The terrorist, the bootleggers they all recruit young children now have you advanced the interest of the child or have you retarded the interest of the child that is a big question that is going on. Now some people say children become the vulnerable targets of the crime syndicates now, because they will assured that nothing will happen to you worst come worst you will be for three years been in a special school, special home, that is the worst thing that can happen to you, so this is very pain get recruited to crime terrorist the vulnerably very easy to recruit them, there is a big debate going on whether by increasing the age you are really helping a child or may be more vulnerable to such crime syndicate's advantages. This is the argument going on, but right at the moment we are not get into the Parliament right now. We will decide what the Parliament

has already decided eighteen years is the cut-off date and it is in consonance with international treaties and the instruments on the point of the eighteen years India also accepted that they will go with that until Parliament changes it that the graver offences are taken out of the purview you know, we need not worry at the moment go by the law, go by the law, if you trench in to the areas, earmarked for the Parliament it become very dangerous right now go in accordance with the law. That's what I taken the view, that's why in the morning I said it's not your conscious uncontrolled conscious, it is conscious trained by law as just it operate and when the Parliament says it is eighteen years you have no right to ask yourself, whether there is eighteen is justified, that's why I said each one has a role in a Constitutional democracy, each one has a role that the Parliament defined for the age. Very good, suppose that's all is there anyone want to ask, discuss, I said 3:15 we have another eight minutes if you really want. I find the ladies are very silent all the time through, I have not heard one question, one opinion from them, only one lady is speaking, you have abundantly did but they have, the other lady can speak now. Is that over, is that everything over. Can I assume that the discussion can be closed? Thank you very much. Finally I would like to say thank you very much for very interesting discussion that had taken place, very…I say when I see very alertness between as I perceived I am very happy for taking part in the discussion, and that is given us that satisfaction to you today thank you very much for that. Before we conclude I just one thing, I keep repeating those many, many times that I have to, my wife tells me I am not going to come with you, that's the…but then as judicial Officers I want you to really understand that, something I keep repeating for all academies and this is what is the concept of the work you do, what's your approach to work? To this I remember the Chief Justice narrated this to me when I was a very young lawyer at an impression is, now he says, he gave his story of a there persons were cutting stones all standing under the hot sun and cutting stones. A man went to the first one and asked him, what are you doing? Man got angry and said, you can walk around and ask me this silly question, I am standing under the hot sun and working, he said doing hard work. He went to the second man and asked him what are you doing? He said you can walk around, I have a family to support, I am earing a livelihood second man. All doing the same job, all doing the same job, first one, I am cutting stone, second one said I am earing a livelihood. He went to the third man and asked him, what are you doing? So he replied, he said I am building a cathedral. Look at the attitude to the work. We are lawyers and Judges who cuts stones, we are lawyers and Judges who earn a livelihood. How many of us approach the work as if we are building a cathedral this is a great opportunity which you and I have as Judges and Lawyers. We are building a cathedral of truth and justice. We proud to the opportunity to be part of this grate human endeavour to a cathedral of truth and justice and that is the greatest reward of being a judge. I wish you enjoy it, I wish when you go back to work, you have start your with this approach in mind, with this attitude in the mind. Thank you, thank you very much

Thank you so much sir and Mam thank you so much. I know you have already given a round of applause but, it could be bigger round of applause, so both of our resource persons for today. Thank you. So

today you can escape from a library reading and computer, yes clapping this is not for ….no, no it's a bribery, because they have a movie to watch and a special dinner waiting at Auditorium. Movie will start will start at 6 o'clock, so you can take rest and be there at 6 o'clock.

## Session No 9: Sentencing in Bribery Cases

Resource Person: C.J. Sunil Ambwani (Former Chief Justice, Rajasthan High Court)

Prof. Dr. Geeta Oberoi: Very Good Moring to all of you. Today we have with us Hon'ble Justice Sunil Ambwani who just retired as Chief Justice of Rajasthan High Court and Dr. Anup Surendranath he is Associate Professor at National Law University Delhi. So I will handover to Justice Ambwani to start the session

Justice Sunil Ambwani: A very good morning to all of you. I am a retired man now. Retired very recently, but it gave a great opportunity to get back to work again while preparing for the two sessions that we have today. While going through the first the sentencing in Bribery cases. Know all of you are very experienced District Judges almost every day, you are engaged in the after conviction in the exercise of sentencing. The National Judicial Academy and its previous Directors had been very critical of the sentencing by the Judicial Officers in the entire country. The Academicians do not accept that there should be any variance in sentences. It is been our endeavour coming from different High Courts to explain in the Academy that sentencing is important but, at the same time Judges discretion in sentencing depends upon the variety of factors. It cannot be put in to any straight jacket formula and that is why there is a discretion between the minimum and maximum. The subject that we are dealing today is a sentencing in bribery cases, it should have been appropriately worded as sentencing in prevention of corruption, under the prevention of corruption Act. Now as you all know this…corruption is one of the most important, rather the most important facet which has to be considered today's judiciary. The entire country looks up to the Judiciary to end the corruption. Variety of organisations have been set up, the corruption which is now in a so many different forms is now sought to be dealt with, firstly by investigation through special force of police organisation and then taking the matter to the court. This provision for corruption for earlier there in the Indian Penal Code from Section 151 to Section 165-A. But in the year of 1947, the year of Independence, it was found that the provisions are not adequate and the corruption cannot be dealt with an ordinary crime law and that is why the Prevention of Corruption Act 1947 was enacted, but at that time perhaps the corruption was no in that form, which is…which is developed from 1947 onward so in order to meet the challenges of deciding the corruption cases the Act was amended in the year 1952, then 1964, and then more comprehensive Act was Prevention of Corruption Act 1988 and then in the year of 2014 it was amended, the latest amendment just a year back, bringing in more teethes to the Act. Now since you are dealing with sentencing in corruption Act. I would like to emphasise that this is one of those Act which talks of minimum of sentences, minimum of sentences of imprisonment. There are offence in which you will find, where this sentence of imprisonment and fine and many a times a fine substitutes a sentence also but under the prevention of corruption Act, considering the importance of the Act, to deal with the problem of the corruption. Right from the beginning earlier in the year of 1947 there was a discretion given 1947 Act. There was minimum sentence but there was discretion given under section 5 of the old

Act, that in case of circumstances the Judge, earlier the Session Judge used to try these offences, now the Special Judges are trying theses offences. The option of giving less than minimum has been taken away under this Act. So this is one those Act which provides for minimum and maximum and minimum does not mean that it can be reduced, minimum means minimum. The gradually…earlier the in the year 1988 when the Act was enacted, the Sentence was six months in cases of cases under Section 7 up to the maximum of five years. It was amended in the year of 2014 that's what we are dealing with now for section 7 it was three years which may extend to seven years and also liable to the fine. For section 13 as you all know, you have been trying the offences, mostly the Charge- sheets are filed under section 7, section 13 even 1(d) (i), 1(d) (ii), 1(d) (iii) or subsection (a) where it is a case of disproportionate assets. In the case of section 13 1(d) the minimum of one year and the maximum of seven years now been substituted in the year 2014 with the punishment which shall not be less the four years and which may extend to ten years. In case of a habitual offender under section 14 this minimum and maximum has been enhanced to five years and ten years. In case of an attempt to commit an offence under section 13 1(d) or (c), this earlier it was up to three years that means that you could have given the minimum of one months or two months, now it has been amended to minimum of two years and maximum of five years. There has been a significant amendment under Section 16 there was a discretion given of fines, but now the fine has been fixed under section 16 for offences under Section 13 or 14, 13 (2) is a misconduct, criminal misconduct of the public servant and 14 is habitually committing offences under Section 8, 9 and 12. The fine has to be commensurate with, or it has to be taken in to consideration the amount of the value of the Property when which the accused person has gained by committing the offence and in case of section 13 1(e) the disproportionate assets, the fine has to take in to consideration the value of the disproportionate asset. Unlike the COFEPOSA and other Acts there, there is also a provision of confiscation of property, I do not find any clues under the Prevention of Corruption Act for confiscation of property, and therefore the fine assumes a great importance and section 16 has to be taken into consideration regarding the value of the illegal gratification or the amount of disproportionate asset for fine. This is the sentencing, legislative sentencing policy laid down under the Prevention of Corruption Act. This Act has also brought, an Amendment of 2014 have brought a very significant change in the method of trial. The trials normally in the Prevention of Corruption Act cases, we all know trial takes a long time, I was not so much concerned with the Prevention of Corruption Act cases Uttar Pradesh where I was a judge for almost 13 years, but as a Chief Justice of Rajasthan High Court for one year, I had a responsibility to oversee and look in to the delay in the cases, in the trial courts also and what I found I must admit complete failure on my part. As could be perhaps with some exceptions, being Chief Justice in the State I could not despite of efforts expedite the trials in corruption cases, these were four areas where corruption cases, juvenile cases, cases there were atrocities on the women, we just could not make any heed way, proposed to call for a conference of all the Judges trying the corruption cases, they were special courts, they were special courts in all the districts, we could not hold the conference, but I called for comments from all the officers what is the causes of delay in

corruption cases, and very striking fact came to my notice one was lack of efficient prosecution, in almost half the Districts prosecutors are not appointed, those who were appointed were working on ad-hoc basis, the second thing was the voluminous evidences collected in corruption cases and because of that voluminous evidence, where every document has to be proved in the presence of the investigation officer in the presence of the experts, hand writing experts, there is a bribery cases connected with, the financial offences also, embezzlements, the witness who were produced, if I have to prove the transection the money the financial experts were to be called all this was the primary cause of the delay in corruption cases and which I found that it was not possible for my judicial officers to overcome, the rate, instead of rate of disposal showing any increased tendency showing down and there were very few cases that where conviction can be secured. Now this is perhaps one of the failures of the Judiciary in dealing with a very important aspect of corruption which is almost eating away the vitals, the Supreme Court has repeatedly said, not only the supreme Court almost everyone whose concern probity in the public matters in public dealings has repeatedly said that, it is the corruption, corruption in various forms which is virtually blocking the progress of the country, development of the country and we can see that, we can see that all over the country. The bribery perhaps is one of the smallest form of corruption, where the money is taken directly by a person to do a job. This is mostly prevalent in the cases of junior officers the junior Engineers, where the question of measurement is there or some special favours to be obtained, but now the corruption has assumed the large proportion, where the matters of has to be referred to the CBI for a very detailed here we are in Madhya Pradesh we are in the midst of investigation perhaps one of the most, may not be the biggest, but having the wildest ramifications known as VYAPAM scam. The State of Uttar Pradesh Mr Ashok Kumar comes from Uttar Pradesh we all know, what are the forms of corruption and what are state of corruption in the public. Rajasthan recently there was a case the Mining, Secretory of the Mining Department Ashok Singh a senior IAS Officer was caught accepting gratifications through the Charter Accountant who was the middle man. While going through the Act, of Prevention of Corruption Act which is perhaps the… there are various other legislations dealing with corruptions, but this the basic way the charges comes under the corruption Act, here there are two kind of cases which come up mostly we have seen it is Section 7 where a Public Servant taking gratification other than legal remuneration in respect of an official act. But we not found that many cases under section 8, 9, 10, 11. Eight is where a person obtains or agrees to obtains or attempt to obtain for himself, or any other person illegal gratification as motive or reward by corrupt or illegal means whether named or otherwise to or forbear any official act. Now there is a difference between section 7 and 8 where a Public Servant take gratification other than the legal remuneration and 8 is taking gratification by corrupt or illegal means to influence the Public Servant. 8 is a section where, a person who pays the bribe, who pays the bribe is also a accused. Nine is a section where exercise of personal influence with Public Servant that has been held to be an offence, substantive offence obtains, agrees to obtain or influence any person to obtain for himself or that any person illegal gratification by the exercise of personal influence and any Public Servant who named or otherwise to

forbear. We hardly found any prosecution under Section nine. Section nine is one of the section where a person takes a gratification or reward by exercising the personal influence on any public Servant as in the case of all offences, it is the person who is actually caught taking bribe is actually…but here is the cases under section nine where he influences, where he uses his influence, he may be a Minister, he may be a IAS Officer. There is a case going on in the State of Uttar Pradesh where five thousands allegations of corruption of five thousand crore by an IAS Officer under the National Rural Health Mission (NHRM) He is an IAS officer who was the topper in his own batch. This IAS Officer, is married to an IAS officer as he is one of the most, one of the most brilliant mind in the Administrative services. In the manner he perpetrated the crime was something which could not be believed. The statement which came from the Directorate of the Medical services, the Chief Medical officers were to the extent. He said I had no knowledge of what is going on from where the medicines and equipment's from where the ambulances are purchased and in one of the statement the Director of Medical Services that this Secretory of Health and Medical Services the IAS officer knew each and every number of the number plates of the ambulance which were purchased. He used to hold meeting between 11 p.m. to 01 in the night and he will only give directions, he will not allow anybody to speak and all the directions were given together as to money has to be paid, by which account, by which to which company and there were maze of Bank accounts through which the money was to transfer. This IAS officer had, could not explained as to why he made 28 trips to United States in one year. I don't know whether the Government is trying to find out black money which is transferred in the foreign Account, where perhaps most of the accounts are maintained by the Government Officers themselves anyway that is not the matter to talk in the Academy. All that I wanted to give the introduction about the sentencing policy of the corruption matters was that these are not the simple offences, where one witness, one prosecution, thee just be one witness or two witnesses PW 1 or PW 2 PW 3 just like an IPC offences and prove the offence and that is why a sentencing policy has to have minimum and not less than minimum and now see under Section 7, the minimum is three years, but which may extend to seven years and under section 13 it is form one year to four year minimum and seven years to ten years, section twenty of this Act provides for presumption where Public Servant accepts gratification other than legal remuneration. This again is one of the most important feature under this Act, presumption, it shall be presumed unless the contrary is proved that, he has accepted it as a motive or reward for some, mentioned under section seven. Section seven is the acceptance of the illegal gratification and section 13 is the misconduct, now mark the difference between section seven and section thirteen, whereas seven takes care of the substantive offence of gratification other than legal remuneration 13 (1) (a) provides for the substantive offence where he is habitually, habitually in accepting or obtaining any gratification, (d) provides habituated to obtains or agrees to accepts or attempts to obtain which he knows to be inadequate for a person whom he is known or having or likely to be concerned and (c) is dishonestly and fraudulently misappropriating or otherwise convert to own use the property in the state have. The forms of corruption which have been defined under section two includes all public servants, where the corporations owned and controlled by

the Government or even a Government company, even the person, even the University is trusted to know any person who is a Vice-Chancellor, any person on a Governing Body or a Lecturer for whose services are available for the University is also included in the definition of the Public Servant. The Act also takes the possibility of the Judges being corrupt which says under Section 2 (c) when a Judge included any person empowered by the Law to discharge whether by himself or any person or body of persons, any adjudicatory functions, so it includes all Tribunals also, the Commissions also one of the more interesting part is Section 2 (c), 6 an arbitrator or other person who cause any matter referrer for his decision or report by the Court of Justice or competent Public Authority. Matter will be referred to the Arbitrator by the Court or a competent Public Authority, here Competent Public Authority will include all the Public Prosecutors and Magistrate. It's a very comprehensive Act, now I can only say that the Judiciary must establish, that it is committed to try these offences successfully, should also award, where a person is found guilty at least the minimum sentence for which there is no option. I will read many of the cases, where the corruption cases are tried I can understand I know it's a very difficult job to try corruption cases, extremely difficult job, not only it takes a long time, it takes a lot of courage. Tell you when I was elevated as Judge People told me that a Judge needs to have a courage to decide the case, at that time I could not understand the meaning of having a courage to decide a case, how a Judge need a courage to fight a war you are not a soldier to lead a battalion of Army or a Police Officer dealing with a riot of a mob, but gradually in the process of working as a Judge I realised that it counts equal amount of courage which is required for a police Officer or an Army Officer in the battle. I equate your functioning almost as a battle ground in the Court. Not with just the lawyers you deal with the entire Government Machinery specially in corruption cases, where you will have to deal with an obstacle of…see one of the very important feature of the Act is the stay has been restricted, no stay can be granted, even any defect in the charge which suppose a date has not been properly disclosed or a particular offence not been specified in the charge, there is a immunity from that, the defect in the charge would not make the defect in the trial. The Appellate Courts have been…virtually the power of staying the Trial has been taken away, but that despite of that there is hardly any progress in the disposal rate in the corruption cases and what I can say from my own experience is that, when the…almost the entire system, the presumption should be otherwise, the entire system is, the Government Machinery, the Public Servant and they are involved in one or the other form of offences which are defined under the Prevention of corruption Act including the…not only the accused, but those who are prosecutors. The fairness of the investigation agency is also a very important factor. So the entire responsibility falls on the Judge by deciding these matters. Now the researchers have given some very interesting…complied the cases for your study on the sentencing in corruption cases Mr Milind Gawai has complied ten cases, I can refer to the first case of Shatilal Meena's case that is at page in your reading material with you….we can get some guidelines for sentencing as it is provided under the sentencing policy where the legislature in the Prevention of Corruption Act and the Judgment at page 119 you will find the reasoning, in this case they say, Police Inspector who was…investigating a case demanded a bribe of

Rs 25000/- from the uncle of the accused the evidence was laid, offence was established on the sentencing the…the Bench said in the reasoning, in determining the quantum sentence, the kind of forbidden conduct, kind of social condemnation, sanction prescribed in law, the object of punishment, nature of the crime, antecedent of the criminal, are some of the relevant factors to be considered by the Court. This all you will find under the Act, forbidden conduct social condemnation, sanction prescribed in law, the object of punishment, nature of the crime, the Prevention of Corruption Act, was introduced in 1947 when "imperative need was felt to introduce a special legislation with a view to eradicate the evils of bribery and corruption". It was subsequently amended in 1952 and 1964. "To make the anti-corruption laws more effective by widening their coverage and by strengthening the provisions", the Prevention of Corruption Act, 1988 was enacted. The Act was amended in the year 2014. Now we all know that the sentencing requires special consideration after the conviction and the sentencing also requires a hearing, sentencing may also requires that the evidence may be taken. It was here in this National Judicial Academy I learnt from Mr. Justice S. B. Sinha from one of his talks, that the sentencing also requires, may require evidence to be taken, I don't know how many of you have taken the evidence at the time of sentencing. Virtually what happens is at the time of sentencing we all consider, now the trial has gone through the guilt has been established, the person has been convicted, sentence is provided under the Act, but as it has been said, sentencing is important because of the, the factors which are…the…both the social demand, the use of proper discretion and the third is adequate punishment. Now these are the things which in the next, when we discussed in the next topic the death sentence all the aspects of sentencing have been discussed in those judgments, but in the Prevention of Corruption Act we hardly find any judgment where the Supreme Court issued any guidelines on how to exercise between the minimum and the maximum, because now you see the minimum and maximum is three years to seven years. Offence is the same, establishment of the offence would not lead to any further aggravation of the circumstances in which it was committed, then how you choose an exercise the discretion between three years to seven years. That is one area, which has been a subject matter of discussion for a very long time, but then I always tell the Academicians, and wherever we have to discuss these issues, that please don't guide the judges on these aspects, because they know their job. The offence, the gravity of the offence, its effects on the society, peoples expectations from the Judges, the judges on…because what I found was that if a Judge gives three years and one month for the same offence, he would not give four years in the other or two years in the next case, he has to guide his own discretion on …one of the worst figure when I was the High Court Judge found was the delivering judgments against my own decisions. What happens is the lawyers are very, very, very, very clever in this regard, they know what the judge is decided he would….it will take him…because the consistency of a judge is one of the biggest virtue of a judge, you cannot be irrational, you cannot use your discretion in a manner where you may vary your judgments or your discretion in almost identical circumstances. And so each judge has his own philosophy of, of sentencing, deciding a case and sentencing, some may be very strict and some may not be so strict about it, but then there has to be some policy, and the policy

has to be found from the legislative…sentencing policy is also to be found from the judgements of the Supreme Court, it is also to be found from the need of the hour which we may say. I would not expect a judge to give a sentence where a bribe of Rs 25000/- is taken, the same amount of sentence in 2-G case or where the, the amount taken or the loss is caused are astronomical mind boggling. So every judge has to adopt his own sentencing policy, within the given minimum and maximum for fine as you see there is some indication has been given as to what are the considerations which are to be gone through. In the ten cases which have been compiled, these are all recent cases, the incident took place long back, these are all, almost the case taken from 2014, 15, 16 of the Supreme Court digest in almost all the cases the conviction were upheld without interfering except in number two in Vinod Kumar's case where the Supreme Court quashed, but on the merits of the case, not on the reducing the sentence. It is only in one case that I find, that will be discussing as a study material V.K.Verma's case, where the person later on sentence undergone, which is now not permissible under the amended provision of corruption Act. In Baldev's case at serial number seven the sentence was reduced from three years to two years, but the fine was increased from five thousand to ten thousand by the Supreme Court on the grounds on the reasons given this is at case no seven that the person has retired, he is 62 years of the age and he is no longer in service, no further reasons were given, now whether this should be taken as a precedent, because see in a person who is either trapped or he is found to be accepting bribe or accused of corruption, will ultimately lose his job, whenever a charge sheet is filed in the case, he is ordinarily suspended, the public servant is ordinarily suspended, we does not give an opportunity to serve and gets in to same opportunity to continue to be corrupt, because no government in our view so far has reinstated a person facing the trial under the corruption Act. So at the time which you found him guilty and you are sentencing him he is almost…by virtue of he being found guilty, he will lose his job, and do not think that the High Courts while admitting the appeals stay the conviction part in corruption cases, so in any case he is going to lose his job, not get an opportunity to do the same thing, where he is held guilty, but should that be a ground to reduce a sentence. You all know the minimum and maximum comes with variety of facts and circumstances in which the person, his family is feeding, whether he has been guilty or habitual of the offences and what is age all these factors are considered at the time of giving sentence minimum and maximum. I hope you will go through all the cases, but except for the first case in Shantilal Meena the discretion how sentence in of prevention of corruption Act cases. Before we…while we were distributing this a case, not call it a problem which has already been decided. I would like to share your experiences, your own experiences of sentencing in corruption cases you all senior judges, District Judges all you District cadre you must have decided many cases and also awarded with minimum and maximum, not on the merits of the case, but of course the merits have to be seen, circumstances have to be seen at the time of sentence, discretion of sentencing. Could any one of you give, your experience in this regard…..for which Act CBI, CBI….any other experience

One of the Participant: My lord last six years I am working as a Principal District Judge in various Districts of Karnataka, previously I was working as a CBI Judge as a Principal District Judge as a Special Judge under prevention of Corruption Act. What I have seen in my experience in Prevention of Corruption Act that the conviction rate is very low. There are three reason for it My Lord, number one is lack of efficiency of Investigation Officer, lack of following the correct procedure, number two is rich defence weak prosecution My Lord sometimes there is no Prosecutor at all. A prosecutor appointed as a special Public Prosecutor in the Prevention of Corruption Act is only from the political side, the person who do not know the Cr. P. C and I. P. C its basics he is the Special Prosecutor for Lok Ayukata cases. In CBI what I came across, naturally CBI there are two categories in CBI Prosecutors one category is appointed by the Central Government directly, of course they are intelligent, but their percentage is very low, they are appointed as Additional Public Prosecutors, they are working in a CBI cases in Magistrate's Court. In Special Courts or CBI Courts the Advocate is appointed on a contract basis, no doubt they are paying heavy as I remember in the year 2010 Senior Public Prosecutor get 90000/- rupees and Additional Public Prosecutors was getting 60000/- rupees in spite of that they are not efficient. One side a Public Prosecutor, other side for accused if he is IAS, higher officer, he is accused, then there are three to four advocates, one imminent advocated imported from Delhi, imported from Bombay and they are fighting the case so at last what happens when there is a fight between a rich prosecution and poor public prosecutor, rich always wins number one. Number two disproportionate cases My Lord what CBI does, where Lok Ayukta ten percent, CBI hundred percent, what they will do, they collect numerous document cut period, what we call cut period I don't know why they are taking a cut period form 1996, to 1999 to 2000 to 2004, they collect more than ten thousand, twenty thousand documents. In my CBI Court in one case there four to five zero of documents, all unworthy document for if he purchase a bike iron box by spending six hundred rupees that bill is produced, that witness that shopkeeper as witness, there are numerous number of witnesses eight hundred, thousand, so ti tis very difficult to dispose one case even if you sit continuously for a period one year. The intention of defence is only the drag the case, they will drag, drag, drag in interest of the accused. As far as Prevention of Corruption Act is concern what all the Judicial Officers trying to convict the accused, the main thing is when the exam in chief is over somehow they give the reasons, they escape from cross examination, they drag, drag, one fine day they complain the complainant comes to the witness box he will give total go by to his previous case and Lok Ayukta cases they take para witness, punch witness, from the clerical job, so these clerks FDS, MJS they come to the court and there they will twist the answer, for example a shadow witness, what shadow witness says in cross examination yes I was with the complainant, then I was standing near the door, complainant went inside, he was talking with the accused, he do not know what happened. Yes, now the word this man now again Lok Ayukta said we hand over the micro tape recorder, in ninety nine case the tape recorder not recorded, the impotent thing is the demand of the bribe only recovery of the money, that's the main reasons the cases failed. As far as sentencing My Lord as My Lord is well aware government officer when he was convicted, he will lose his job, so that

is the maximum punishment given to the Government officer, the question of reformation never arises, reformation never arises, so one is he is already suffered, he lost his job, and I my opinion what I say a minimum sentence is enough for him, because the maximum sentence that God has given is lost his job. And in one case in when one circle inspector, he committed a suicide My Lord though there was lot of twist in the case, the complainant turn hostile, I acquitted the accused and I called him and told him see God has punished you, so remember this if you just be honest

Justice Sunil Ambwani: Any other experience.

The same Participant Continues: I just want to add, that there are two types of convictions one is legal conviction and the other is moral conviction. As judge I know he has taken the bribe, but what some special judge, they do in all the cases they convict the accused. But in my court even I acquit the accused, I call him and tell him see you have done it, leave the punishment to the God, because I am not going to give a moral conviction, because I can give only legal conviction only based on evidence and nothing based other than the evidence

Justice Sunil Ambwani: The two experiences which were narrated one was about the Learned Judge says here is that at the time of sentencing I used to look in to the office, which he was holding. You want to say something…the office the person was holding and the amount of money which he has taken and the other experience which we heard from the Learned Judge was the day when a man already lost his job and in one case his wife committed suicide God has already punished him. There is…this what happens with us. While sitting in courts we all are human beings and that is why the Academy organises this kind of programme as to guide and train us and to share our experience on…and that is why perhaps the Prevention of Corruption Act provides for the minimum sentence. I do not think any one of you would punished, sentenced as IAS Officer who is taking millions of rupees, crores of rupees with the maximum amount of sentence. I don't think anyone of you have done it

One of the Participant: I did it, I was a CBI Judge in Bangalore My Lord one Deputy Commissioner of Income Tax, of Course IRS Officer I had given punishment, I had completed trial within nine months, which is record in CBI Court, and I have punished her for maximum sentence

Justice Sunil Ambwani: This is the dilemma as of a person who is Sanitary Inspector, or a food inspector may not have an opportunity to have a bribe of more than thousand rupees but the enormity of…the, the Act does not provide for a different criteria of substantive offences or what the nature of the offence which was held in amount of bribe which he is taking. And I would say that what you are doing is correct, because that is really discretion comes and that is why there is a difference between the minimum and maximum. The Supreme Court has also said it in Shantilal Meena's case, the forbidden conduct, social condemnation, sanction prescribed in law, the object of punishment, nature of crime and

status of criminal. There is no reformation here a person who has taken a bribe, he may come and say I will not take it in future will not dilutes his, his…and that is why the Act also provides for a presumption but you are right, the one of the CBI Judges from Luckhnow came to me once in connection with his transfer in U. P. I casually asked him by way of an interest, how many cases are pending your court? He said something like about eighty or ninety cases. How many you have been decided in a year? He could not decide any case in a previous year, he has a person difficulty, but a very interesting thing he told me was, that is the Court does not have a place to… for a prosecutor to sit. I said why there are so many boxes are there full with the documents there is…what are doing, you catalogue it… are they classified, are they been indexed? He said no, we did not even open the boxes. We need much, much more infrastructure for deciding for these corruption cases. We need many, many more judges, we need many more courts, specially trained Prosecutors, provided the Government is committed for deciding the corruption cases. And At the same time we should forget about being some units or quotas, these are the cases which are very difficult. And it's a lot of courage for a Judge to decide these cases. Yes please…

One of the Participant: I have tried the Commonwealth Game case, for two years, I framed the charge after hearing the arguments for two years. There were one lakh twenty-five thousand which were referred in that case so all the stalwarts of India there arguing before me. So what we did in that case was something unique. I requested to CBI to digitised the entire charge-sheet and the documents, they took their time for fifteen days, but everything was put on a pen-drive to all the thirteen accused with their lawyers we gave those pen-drives, so one accused asked for the paper copy, so we asked him to bring a small truck otherwise you can't get that charge-sheet so he give up and on third day he returned and said please give me that E-copy only. With the help of that E-copy he was able to finish the arguments on charge in two years, hearing thirteen stalwarts of the Country, otherwise ti was not possible, first thing for the Accused what we did was, we have those legal aid computers in all the Jails in Delhi, where the Legal Aid Lawyers they go in the evening, who assists the accused to file bail application for miscellaneous work, those computers were laying idle during the day time, so we uploaded the same charge-sheet with log in ID and password for every accused and requested the Jail Superintendent to help to go through the charge-sheet during day time, so they were also happy having a chair and table to sit during day time and comfort of an office and look through the charge-sheet. So that way you are…and the Senior Advocates requested that their juniors were briefing them, so whatever document your senior is asking for…seniors are saying we don't want to go through the Computers and we don't know how to operate the Computers, so we requested the Junior counsels whatever your senior is asking for of any form please take a print and give it to him, because in any case he don't want to go through one lakh twenty-five thousand documents, he will be requiring fourteen fifteen document for a day. So that way with the help of advocates and the accused also cooperated to that extent. We were able to save four acres of jungle in one case. India times reported that on third

page with one stroke of pen and court saved, and we were able to complete those documents, otherwise it was humanly not possible where there boxes and boxes of documents papers in one case and every lawyer was referring to file no 15 document number 53 and that was not possible otherwise. We penetrated the entire thing lawyers were telling me only the page numbers and I was having this computer with me only, even my court was not e-court at that time. So we finished those…

Justice Sunil Ambwani: What is the status of that case now?

The same Participant: Sir evidence is being recorded in that case, but the charge-sheet run in to one lakh twenty-five thousand pages, my charge itself run in to two hundred and seventy eight pages, my order on charge, so that was challenged in High Court but it was upheld.

Justice Sunil Ambwani: I must congratulate you for that. So this is what bring taught in the Academy to innovate. This is the best thing which could be done. And the digitalisation has helped. I think perhaps…this kind of documentation can be taken care of by the digitalisation methods, but now…you are fortunate that Lawyers Delhi are very well versed and conversant with digitalised methods, other parts in the country this although its coming up

Another participant: In Karnataka we adopted, my lord, even year diary we abolished now. No question of year diary, every Judge scroll and…..in every case adjourned SMS alert will go to the Advocate, Advocate need not come to the Court and open the year diary, SMS alert will go to him a copy application he can take from the computer directly for today 5:30 we upload everything, all orders, all reports, everything, so Advocate can see, we just open the computer and laptop and he can watch everything as Mr. Singh said that in year 2018, 2019 we are entering paperless Judiciary my Lord. That's the dream of the E-committee

One of the Participant: We are already having thirteen E-courts, no documents, paper documents are going in even in High Court benches are E-benches and in two jurisdictions three Jurisdiction of the High Court no paper is being required, the arbitration, tax matters and counselling, High Court is not accepting any paper filing now

Prof. Dr. Geeta Oberoi: We take break and come back at 11:30, meanwhile if you come five minutes early then we could, we could have read this document in your tea time and we could think about it.

## Session No 10: Death Sentence: Useful or not

Resource Person: Resource Person: C.J. Sunil Ambwani (Former Chief Justice, Rajasthan High Court) and Associate Professor. Dr. Anup Surendranath

Asso Prof Dr. Anup Surendranath: Welcome back every one. So we just start the Session on sentencing in death penalty cases. I will just put all my cards on the table for a start. I…I have a Centre of the Death Penalty at the National Law University Delhi as a part of which, we have a major research component and we also have a death penalty litigation claiming where we currently represent about 35 prisoners on death row. So… and as I said the facts sheet that I given to you are actual cases that court have decided of course I changed the name. Can I just know how many of you have read these fact scenarios, I just want that all of you manage to read it or I just ask Dr. Oberoi, it just take five minutes. There are six problems if this column could read the first two problems and if this row could read problems three and four and this o.k.

All the Participants replied that they have read it last night only.

Asso Prof Dr. Anup Surendranath: o.k. grate, o.k. grate…on that assurance I will go ahead. Now the context in which I wanted to think you about as this the part of research project we analysed it, fifteen years of case law from 2000 to 2015 to understand what happens in India where death penalty cases right from the trial courts to the High Courts and the Supreme Court. What we found was quite…I am interested to hear you all and the perspective you all offer to something on it, as an Academics we rarely get. So I am interested to hear what are your responses to this so we track what happens to these death penalty cases that are given. And we saw in fifteen year period there are about thousand six hundred people sentenced to death not cases, people sentenced to death. What we found was that…of these cases from the Trial Courts and these are the thousand six hundred that in the Trial Courts…about thirty percent ultimately results into acquittals right…you go from a death penalty in the Trial Court thirty percent cases are then gone on to result into acquittals and a further sixty five percent has gone on to result in commutation, either at the High Court level or at the Supreme Court level so essentially what we saw in 95% of India's death sentence cases are ultimately given by the Trial Courts Aare ultimately are reversed or…I think for me the more problematic category is going from a death penalty to acquittal at the appellate stage, I think that's the quite worrying from the course of discussion I am interested to hear, what your sense, why this is happening. If I just take a snap pole and see how many of you would have award death all these…in all these cases that you gone through how many of you award death in all these cases none of you o.k. sorry in all these cases that the document there is a fact scenarios. How many of you award death in none of these cases? Apart from that…no, no…so if I could just take this in a slide in a structured manner. This is on, on actual sentencing guidelines if you could go to apply it and I know it's a concern that ultimately Appellate courts seem to be, more keen to reserves death sentences. How many of you would not give death sentence in any of these cases? Just applying the

sentencing guidelines that have been provided to you. How many of you award death in none of these cases? O.K so there is great, so if we consider a first time discussion as you see the first three set off cases are all rape and murder cases. If we could just quickly have responses to each of those cases. And, and, and if I just suggest that the responses you have could be justified in terms of what you have read as far as the sentencing guidelines are given by the Supreme Court and I know, I am putting a document was intention how the Supreme Court itself has been inconsistent. Has not been clear and, and I know how much difficult makes your job as a District and Sessions Judges in applying the slandered of rarest of rare and I am completely aware of that so if…in responding to these cases if you could justify your answer as to what you read in the sentencing guidelines be extremely useful in terms of what are these factors that you are picking or what more information you could need that also will be very well response, what more information you need to decide these cases, you might be well aware, that the information provided in the fact scenarios are not sufficient to decide whether to give death or not, in some cases you might say that it is more than sufficient. If you could just quickly go through these before…I said in time at the very end. And I will what I have to say in these cases, I just wanted you to hear your responses if o.k. Dr. Oberoi. So in Mayur Kumar's case it's a yaa…the first case

If you could also tell me where you are come from, will be very useful. Very interestingly the Andhra High Court has not confirmed any death sentence in the last ten years right…not a single confirmation right…and its fascinating yaa…why did you gave death in the first case

One of the Participant: Rape and death of a minor girl, that she trust him is one, it is a certainly a fit case where death sentence is to be given.

Asso Prof Dr. Anup Surendranath: But are those the only factors as per the Supreme Court to take into account, the brutality of the crime, I feel may be this is, its extremely brutal crime and as you rightly pointed out, the trust element is quite crucial in the first case, if you could also tell me

One of the Participant: I am from Chattisgrh, I am district and session Judge I would also propose a death sentence in this case, because the aggravating circumstances in this case is the history of the accused, in the first case, there is a history and then the belying of trust is there

Asso Prof Dr. Anup Surendranath: So you are relying on this, in the fact of the second paragraph, where he said, he disclosed that there are five previous incidences where he had raped minor girls…o.k.

In such a case such person is a left out in the society and looking to his age he is…there is no chance of reformation so in such cases death must be given.

So you are saying that the prior history of …but he himself has offered this information

That is one of the relevant circumstances, and you don't see any mitigating circumstances, no, no

My name is Sathish Singh I am from Karnataka: I Working as a district Judge at Hassan, the biggest District of Karnataka. Now to bring out the case within the purview of rarest and rare case number one that he is not accused kidnap the minor girl, raped her, strangulated her to death. Whether it comes into purview of rarest of rare case? As per this case the confession of the accused is recorded, he discloses, he discloses that, he has committed five rapes, but no evidences has been on record, yes because of accused confessed before the Police Officer, he raped five minor girls and he murdered. Unless and until the prosecution bring on record, how many minors he has raped, how many minors he has killed when and for what, everything prosecution has to establish yes because of disclosure of the accused, you cannot bring the case under rarest and rare case, but no doubt that he is, that the act of accused is barbaric and he has taken the girl in his motorcycle raped her, killed her, but as per the number of cases which I came across in my view it will not rare and rarest case, so in my, life imprisonment is the sufficient.

If I could have a response…put a question…oh…sorry, sorry…

I am from Kerala I am also having the same view, the officer, the investigating officer alone has stated that this man has disclosed, there is no other material available, to prove that how many offences have been committed by…similar offences have been committed by him. The mere statement of the officer is alone is not sufficient to conclude that this man is having a criminal antecedent of this nature…in my opinion this is not a case where death sentence is appropriate

That brings me to a very important question, it's a very important question that I had, which is Justice Ambwani also raised, if I quickly make a comment on that, taking of evidence in death sentencing cases, whether, I know this is extremely rare practice what we are saying in death penalty cases, what I want us to think together is that, I don't have a position on this because…would the nature of the evidence and how much you have to prove and how you have to prove it be different in sentencing cases at the sentencing stage as compared to the conviction stage, I mean I see the point in both of you are making would be extremely relevant at the conviction stage, I am just asking you, I am, I am…you feel that even at the sentencing stage

The entire evidence will go and it is a duty of the prosecutor to prove as per your case the accused is already convicted, now the question is only sentence

What I said this aspect is in five different cases. What is the nature of the proof that has to come, is it…will you say the nature of the proof, the nature of the evidence at the sentencing stage is to be…exactly the way it would been in the conviction stage, the burden, the burden of proof, not necessary, not necessary, not necessary

In my opinion, if you could just tell me where are you from? I am from Manipur, Manipur High Court my name is Rajanikanta, in my opinion like investigation during the course of their finding, must have already found out that this person is a habitual offender although it was not proved, it may be not reported, but in the instant case during the investigation he has disclosed that he had committed rape upon some young girls. This fact came out during this particular investigation (But is that a reliable statement for…) may be it was not reported earlier to the Police, (let me just give you a counter example sir, what if there was on-going of these five cases) yes in that case would have been a different version, but, there would have been a different version but, in the instant case, it seems that during investigation it was, that he confessed or he stated that I have already committed rape upon these young girls for four or five instances

Asso Prof Dr. Anup Surendranath: But then interestingly sir on this prior criminal history what the court has to say, the Supreme Court has to say is very clear, this prior criminal history is to be considered only where there are prior convictions, so even if the proof that has been brought forth, there is FIR lodged, there a charge-sheet is filed, there is a trial going on that's not good enough, to, to consider a prior criminal history there has to be…when you are considering prior criminal history as an aggravating factor you have to look…its only conviction in that sense that matter and not…sorry sir..yaa… if you could just use the mike sir… sorry form Jharkhand yes sir…

The material thing is that confession was made without any pressure or not, this fact is not on record, but the allege confession was made without any pressure, without any threats that is main

But the confession made to the Police Officer is not at all admissible, so that is not admissible, exactly that is why I asked would…that's precisely the reason why I asked whether you would apply the same standard at the sentencing stage and at the conviction

The court is bound to hear the, the court is bound to hear both sides i.e. prosecution as well as accused regarding the question sentence at that stage previously convicted in previous case, the prosecution shall produce the document to show that he has been convicted for a similar offence. Then the Court can take into consideration that also

One of the serious concern which is come across during our research is the lack of details of defence counsel in sentencing stage, its like defence counsel don't really know what to do with this extremely important phase in a death penalty trial, I think it is one of those rare areas of law, however confusing and it might be and there is very, very body of the case law that the court has laid down on sentencing in death penalty cases, where defence counsel somehow don't seem to know, what to do and its sorry….

There is all the record all the mitigating circumstances but the prosecution will not in detail at the time of the sentence

Sir I want to add one point…. (Sorry yes sir) if the conviction is there (if you could just tell me where are you form) o.k. if there is a previous convict, then after he is held guilty a separate charge has to be put that under Section 217 Cr. P. C and then an opportunity has to be given to the accused and then only death penalty can be taken in to consideration. Without if the charge is not specifically good after conviction that previous conviction cannot be, that is the position I think so…

I am Alok Kumar from Uttarakhand in section 298 of Cr. P.C it is emerges a previous conviction or acquittal how proved in section 298

Asso Prof Dr. Anup Surendranath: but for purposes of ….the reason I am bringing that there is a very little clarity coming for as to how to deal with these instances and that's I am not, I am not proper find to solution, I am here only to try and get all of you may be think about the gaps in the law on this…yes sir

R. R test is completely fulfilled in this case as such there are no evidence with regard to previous conviction, but PW 9 the I.O has stated categorically during her, his evidence that the accused has voluntarily disclosed a fact on such and such things, that has not been rebutted by the defence as appears from this case, besides that the brutality and bestiality of the murder has to be seen so once those things has been fulfilled, (so you will ) in the present case and categorically, here it is a test where the victim was a seven year old girl and a chocolate was given to her and confidence was reposed and subsequently the confidence has been breached, so trust has been breached, so this is a clear case where RR test completed.

RR test in terms of Bacchan Singh or Shankar Kisanrao Khade?

It is in case of crime and criminal both as 2015 Supreme Court also said crime as well as criminal both the test

I beg to differ, I am from West Bengal, the defence need not rebut any accusation against him, even if the accused keep mum throughout the trial it is sole responsibility of the prosecution to prove the guilt of the accused. So just because the defence, the accused has not rebutted the presumption we cannot hold it to be satisfied.

I want to clarify to conclude, there should be a separate charge should be framed to enhance the punishment, it is the prosecution who has to prove the previous convictions by providing the certified copies of judgment. See for example a punishment of life and a maximum capital sentence, when I can give it, what is the enhancement of the punishment, life to the capital, life to the capital if you want to put, then prosecution has to prove the previous conviction, yes this man is brutal, yes this man is committed for four…

Asso Prof Dr. Anup Surendranath: If I just bring to your attention...just a second, just a second…. just a second…. just a second sir, if you one case I would like to discuss is a case from Karnataka of Umesh, Umesh has…sorry…from Karnataka You would know the kind of the attention went the Umesh has on….there are movies made about him and really terrible movies made about him the Umesh and he is known as this jack or raper kind of personality in Karnataka and if you read his all through a point of mercy upon him may be projected also up on him the Supreme Court they make him out to be this serial rapist and killer and cross dresser and all of that, but the conviction but the sentencing is for rape and murder of woman, but when it comes for sentencing, there is a reference of multiple rapes that he has committed and the murders that he has committed but there is really no proof as to whether those convictions happened or not right… and I think these becomes really worrying trends when Courts all the way are not seeking the actual…and there is something he is being…when we interviewed him in Belgaum there is something he said that he is tried everything, he is filing RTIs what are these judgements that you have said I have been convicted of, he found no response to that right and even we couldn't find what are these multiple cases that Umesh has been convicted of, yes there is allegations, both in local media amongst the policed officers there are these image that has built that Umesh has been serial murder and rapist. I am not examining whether hi judgment is right or wrong, but as far as deciding it is concern the conviction is for one rape and murder but at the sentencing stage Judge seems to be influenced by this imagery of who this Umesh is? If just take it…are there any concerns about the nature of evidence in case two in, in Harilal's case

Whether the sentencing policy or the facts of the case?

On sentence and that the reason I want to say that the Court in the sentencing guidelines, I have provided are again clear, than…you have to be careful while you might find it sufficient for conviction in sentencing the doubts that you have about the evidence right…should also play a role right…you might say this is o.k sufficient for conviction but the doubt that you have about the evidence and I think, you have lot of doubt the evidence in case two.

But if you have doubt you should not convict...No, no, doubt to the extent of …that's why I wanted you to think about it, is it….In case of circumstantial evidence I think death sentence should be avoided….You think as a rule, you think as, it should be avoided, unless there is a direct evidence it should be avoided death sentence…the accused was convicted in 301, 302 and in POCSO case…yes…but sir POCSO was not in force at the alleged date, the offence date….was not there, was not in force…right…exactly…trust me there is I haven't created any of these facts… trust me there is I haven't created any of these facts right…these are taken from the cases that we are handling right…how we could decide when POCSO was not there, sir how can we convict the person…sir I will tell you Siabbana, Saibanna, Saibanna from Karantaka is currently on death row has been on death row for twenty five years was convicted in a…under section 303, struck down as Unconstitutional by the

Supreme Court, his conviction is under 303 right…and which is…how we can convict a person when Act was not in force…yes I understand and that is precisely the reason I have put it for you sir…we cannot go against the mandate of the Constitution…how we can convict a person?....you admit that you have given that example and it is not the facts of the case….no…no,…this is a matter of 2012 when the POCSO Act came in 2012 sir…sir, if I just….the reason why this is put forth that there are multiple…if you read these facts closely there are multiple issues right….an di think in Harilal's case the question I wanted you all to grapple with is that, for me even let's assume that conviction has happened on that evidence right…I think when I comes to the sentencing stage, when it comes to extinguishing someone's life right…you might think it is sufficient to punish that person to find a conviction but when it comes to the question of extinguishing someone's life. When you are saying this person no longer deserves to live, I don't think this kind of evidence is good enough right…this raises a different set of concerns about could we even have slightly got wrong…are you absolutely sure right…are we ironical or are we dead to show…I think we need to worry about that in the sentencing phase in death penalty cases because the Supreme Court has itself has said, this punishment is very different because it is irrevocable, because there is no going back right…so…just that I wanted to connect the things of different kinds of evidence playing different kind of roles in the conviction stage and at the sentencing stage right…If I just quickly move to (excuse me….) sorry, sorry ( I am from Andhra Pradesh I would like to know, because the provisions of 235 to 354 and 248 provide for hearing, provide for hearing before passing any sentence, they do not provide for enquiry that is the reason many of us without any sufficient material jumps in to conclusion basing on evidence which were sufficient for awarding conviction and which may not be sufficient, or may not be taken into consideration for awarding sentence. How to come out this?) I will certainly say the onus is on the defence Lawyer to say that even in sentencing hearing, as you said it is just a hearing it's not an inquiry that evidence must be laid right…then the question that arises is…is there leading of evidence at the sentencing stage how do we grapple with that as compare to leading of evidence in the conviction stage, the trial stage ( in many a case that course is not resorted) I agree with you and that's a significant part of the death penalty cases in India that sentencing hearing are rigorous enough at all right…there a sort of treated as an automatic stage that conviction has been achieved and therefore we need not…there are precedents that it happens that has not been dealt with, there is no direction absolute to the effect that inquiry need to be hold) I am on complete agreement with you on that. If I just take you to set two that is Mohan and Girish v. State of Rajasthan and you know at this, at this I must put on table this we have slightly changed the facts this is actually the case coming to us from even though actually a case from Maharashtra one of the Accused mercy petition pending before the President two of them in this case are in Yarwada Jail and since 1994 one of them has always maintained that he is a Juvenile this we have changed the facts in this case right…he is a juvenile that he was about 14 years old when he was arrested in 1994 in Pune for whatever reason and I must tell you it was only…there was writ filed in the Supreme Court and Supreme Court admitted that writ, he had a transfer certificate that was issued about 2007 from his

school and I don't know the court seem to want to rely on that, because it was issued after the case was instituted but only about six weeks back we traced back to his village school in shridongergad in Rajasthan and we went to his school, they fortunately had records from 1987 when he entered school which showed his age and has actually been fourteen by the time of the offence in 1994 and this man has spent 21 years in jail and I can understand the suspicion of a transfer certificate was issued after the case was instituted in 1994, these records from 1987 from his school, thankful he went to school for about two years and in many of these prisoners has raised juvenile claim. What we really find it difficult to do is to trace back the records. Because the bone density test is not good enough unfortunately the technology and the science has not advanced enough to tell you the accurate of people but fortunately in this case where we were able to trace back the record, which the school had thankful to the Government School has maintained these registers, these yellow musty registers that we were able to dig out and hopefully something can be done that is just an offshoot of this case, but clearly in this case we have changed the facts to not to be a juvenile. So what would be the sentencing factors clearly there are mitigating and aggravating circumstances in these cases are very different. What are the aggravating and mitigating circumstances in this case that you would consider? Burglary, it's robbery rather than…so how would you balance in this…is that clear from the fact as to what you were each one play…so that's another interesting case that we lost in the Supreme Court from Chhattisgarh we lost in Sonu Sardar we lost the case. Where Sonu Sardar was a part of five people the only evidence was that placed Sonu Sardar and his companions in the house of the deceased people. There was no evidence as to what each one's role was, three of them were absconding and there were only two who were arrested their role, who struck the blow they place them there were no …there is absolutely no doubt that they were there and they involved in the event that took place in that house, but there was no evidence as to suggest as to whether it was Sonu Sardar that struck the blow or whether it was his compatriots or whether it was the people who were absconding so in that….that I am saying sentencing you might say that this is sort of sufficient evidence, sufficient for conviction I think at the sentencing stage becomes extremely crucial as you were saying as to know the precise role of each of the accused…without that I don't think that you can clearly get in to what the Supreme Court calls as extreme culpability of the crime, without that, without going exact role I don't think it is a sort of….it become difficult to…as again as I says because these are death penalty cases and these are irrevocable and you know it become extremely problematic not to interrogate the evidence even at the sentencing stage and I don't think, the treatment of evidence at conviction stage is just automatically assume full culpability at the sentencing stage right….and the distinction needs to be made (in burglary case there is only circumstantial evidence o.k. there is no eye witness, in my case burglary case it was investigated by CBI because the people don't have any faith in local Police, there CBI disbelieved all the eye witnesses because they were party to case, some other reason who were not arrested at that time. They try to settle some previous course so that…there I convicted the people only on the basis of the circumstantial evidence of course I went for a….i awarded life sentence, but in those cases how you can fix the which person did what, it is not

possible, because there is no eye witness death has taken place during burglary, these are the three persons or two persons involved in it, then you go on that presumption you know by their own confession or whatever they have stated before police we are not going to believe that.) Sir I am not saying that it is not good enough for a conviction, what I am saying I think that we need to worry about whether that is good enough for a death sentence right…I would say that I am completely in agreement with you and I think the court, the Supreme Court in multiple judgments has said that circumstantial evidence can be used for conviction, but my point is we need to question…see how to deal with that circumstantial evidence at the stage of sentencing in capital punishment cases and in certainly burglary cases like this where there are multiple accused are there, unless you are sure each one's role I will…I think the more humane and Constitutional course of action today is to avoid the death sentence, because there is just no way of saying…and I don't think that these are areas in which we must take chance or we must speculate…anything else I was…I was surprised that none of you thought that Mohan's age is a mitigating factor, he is just 18 years and two months and I think Bacchansingh has made it very clear that too young or too old is a…where we will not give a death…( so far as balancing act is concerned discussed in Shankar Kisanrao Khade's case now they say that you observe all the three tests crime test, criminal test, and rarest of rare case, considering our balancing of a all the three aspects have to be judged….I love Shankar Kisanrao Khade's judgement, I wonders it is consistent with Bacchansingh this sort of hundred percent crime has to be satisfied that this person…in favour of the criminal, I wonder. I think we needs to certainly progress to but I wonders whether it's consistent with Bacchan Singh. I completely…another aspect is so far as investigating capacities of levels of India are concerned, we fall all these things because in rarest of rare case falsity of the investigating agency is need to tell, it is the effort of the judiciary I think, I may be wrong in it, subject to correction these reason are brought out if you say that even then, death penalty is warranted and all these three tests have to be undergone, how far it is justifiable in any condition and I think that is the what Bacchan Singh actually says that we are making it extremely difficult for you to give the death penalty, right…the idea is not to find the ways to give the death penalty, the idea is certainly to make it as difficult as possible to give the death penalty and Bacchan Singh truly applied without problematic mediations that the Supreme Court talk in Macchhi Singh and Raoji they said it is extremely problematic for you for the mediations which the court has recognised in Bariyar right it went wrong…I think it would be extremely difficult as you said in Indian conditions to give the death penalty but yet we still seen about over one hundred death sentences every year and I think that something to ponder about o.k Chirag Mehata the bus driver case again I have not made up these facts and these are actual, Chirag Mehata is an actual, accurate description I have changed the name changed the State is there anybody from Maharashtra, the idea you must have recognised the cases. What would you do to Chirag Mehata, he is a maniac, so what would you do to? We will send him for psychological and medical treatment, but they have done all of this, as I said they have done all of that, but when during the time of trial also it has to be balanced there whether he is fully cured or he is still under death manic sickness, then only we can take into consideration

regarding the quantum of sentence to be awarded. That is why we provided the facts that they said they subject him to a period of observation and psychiatric evaluation which came out of saying that neither, during or death preceding incidence or a two days after the incidence was Chirag Mehata in that sense unsound mind, but then he has no reason to act, the drastic act, why he did it…you are saying lack of motive. The Courts position on unsoundness of mind has to be legally established and the legal test of establishing unsoundness of mind is not lack of motive. You can't say we will establish unsoundness of mind by showing….I am saying from the Judgment of two courts, the Trial Court and the Bombay High Court saying that we can't…you are saying he is unsound mind because who else will take a bus and go and kill nine people and hit people and they argued that the Court said unsoundness of mind is a legal test, what about the statement of Chirag Mehta has made couple of time that State road transport has ruined his entire life the doctors also noted that during observation period Chirag Mehta had shown no remorse. Is there anybody would give death? Sir you would give death in this case. There was a case when I was a Principal District Judge I gave death sentence. Facts of the case a 24 year old boy taken a small child of three years offering her biscuits, taken the child to jawar field, raped the child, strangulated the child and brought the gunny bag insert the body in the gunny bag. Do you remembers the prisoner's name? It was State of Karnataka versus…I just forgotten, I think the prisoner you are talking about, he committed suicide in….then he inserted the bag in the pond after few days he was arrested villagers protested against the Police, don't arrest him, what the court will do? Court will acquit him, we are going to kill that person. Then with great difficulty the accused was brought and committed before me, going through it I sentenced him to death that incidence was came on International Woman's day, on that day a T.V show was also telecasted and that judgement was confirmed by the High Court also, nut in this case what is really crucial is the trail court at the sentencing stage is the court being influenced by the massive public outrage that resulted in this case and that's the another reason that's why I put this case in…so that all of you can think about what role should public outrage, be it village level outrage, town level, State level, National level to what extent the public outrage play a role in the sentencing? In sentencing it has no role……would you say something like, but you know that Courts do…have even cited…I would rather say….what about this collective conscious…..some time it influences the Judicial mind whether intentionally or unintentionally it doesn't make any difference, but legally speaking it should not, but unintentionally we are uninfluenced by anything, it has its impact…..and I think in death sentence cases that's a huge challenge for judges like all of you, because all these are horrific crimes, there is going to be lot of public outcry, there is only be that all revenge the society needs revenge needs retribution and I think that is a challenge for judges at the Trial Court level and later on. Instead of if you look, read Santosh Bariyar where well said I think, say that in the worst case of possible that is the judicial challenge right….where there is unmitigated public hate right…for the accused that is the real challenge right…and I …..of course someone was saying, that individuals who occupies this position and the challenge is to the….consciously aware of the fact that judges are not made sort out….figure out what the public wants and articulate what the public want,

that's not , that's not that sense job of the judge, because as the Supreme Court itself has said that judges cannot determine what public wants and it is very problematic when judges started sentencing on that basis or crime to kill own voice to the collective conscious, because there is no way to determine….presently there is a POCSO case charge-sheeted, before the charge-sheet the accused has completed and he was ready to furnish his…accordingly I have released him for murder, there was a hue and cry from the public, what they said that until charge-sheet is submitted the court has no right to give bail in the case and there was a big hungama from the women side from the NGO this and that and the police was very lethargic to file a charge-sheet and because of that influence the police was also fail to file a revision petition against in the High Court. The honourable High Court couldn't take up the matter and still pending and in the meanwhile time RCS are being filed. So I am telling you that this for a public outcry is there, but we have a duty what a Law says. I have been termed as very unsympathetic Judge, it was not just murder, it was rape and murder but then, we have to go the law…it happens everywhere….this is a forefront of you know, these are all difficulties of the job that all of you have. The public don't know the law…they go by sentiment and they go by the offence, hence naturally you know become very outrageous thing….this happen.

If we quickly finish of the last case that's a Adamali and Amanali it's killing of….multiple murders of family members. Would you give death in such case? Sorry sir, because you say it's a private dispute, if I heard you correctly, there was a disputes among the family members….for you still irrespective of whether its private dispute or not….the way the brutality of the offence, the way in which the murder was occurred….but sir does it show criminality, does it show criminality of the individual concern….yes even Bacchan singh say all murders are itself brutal and cruel…but does killing of family members over a property disputes show a criminality to the extent that the person should be guilty…..there were children also five year, eight year and twelve year and eighteen years but it's all in the context.....it was not a sudden fight and provocation, but don't you think it just…overarching context in which it is happening, becomes very important at the sentencing stage. Because you are saying what the…you want to take away the life of people who have no chance of reformation…I would like to speak on the reformative theory, what does the Supreme Court do, it gives life imprisonment and says that they have to stay in prison for life, what would the reformative theory do if they are stay for their life in the prison, when they cannot come out what would the reform do, they are no good to the society….I will respond to that sir, I will respond to that sir……so this is a case in which capital punishment be imposed…must be imposed….I feel so…..because jails are not capable of reformation but that's our fault….but there is no purpose of reforming…he could lead very good life in the jail….so that's why Court will recommend this….that is the theory you should practice…our jails are….they will rerate the over the incidence which they have committed….they don't have any reformation….i am completely agree….they feel sorry about the incidence or the offence committed by them, that show that is reformation….isn't that our failure…that is not sufficient…is it not our failure that we haven't

time, invested sufficient….then we take away the life of the accused because State failure…no question of….I think I am sorry…..to say that you will be a better defence Lawyer….I just want to respond to this, it's something very important that you raised that, about our prisons, what kind of institution are, if you look at the kind of Government funding for prisons, our prisons are still very colonial institution if you look at Prison Rules except for Bihar which has 20/12 prison Rules, everything else is so ancient and so non-modern and unscientific and they are certainly places for reformation, but I am saying to be failure of reformation I don't think it is fair to ask individual prisoners because we have failed to make that places of reformation, the failure is on our part and in that sense, I think this case gives us and at least make us think lot about, yes is it rarest of rare, how brutal it is, we rarely come across the cases like this, very rare and I will admit that, but it makes you think about what is criminality what is criminality, that….is surely a private dispute where things are gone out of hand, is very different from let's say serial murder, I am not saying that other persons can't reform, but I am saying that different these two situations are different and we need to think about, how are these two situations are different and we need to question our own understanding of criminality is this…are these two people so criminally minded that we want to extinguish their life and I would say that…I will just say one last thing and ….I was stuck in our discussion only in these cases that, very rarely deal with the point of reformation come out even though in Bacchan Singh it is a very, very explicit requirement that the State bring forth some sort of material to show that this person is beyond reform, that this person cannot be reformed and most importantly that not only to we need to establish the rarest of rare we also need to then subsequently establish that the alternative option is unquestionably foreclosed and now I leave out which was puts in Bariyar, and I think very…in our study of death penalty cases 2000 onwards it is amazing how so few judgments pick up on this point. The Supreme Court picked up on this in the Tandoor, I think it is a tandoor murder case is picked up in that case right….but we don't see a consistent application of this and that's very troubling, it can't be you pick up in some cases and you don't picked up in some cases and I think it's the last problem with death penalty in this country been documented so many times over the inconsistent, and I would like to differentiate from Judicial discretion right…I am not saying that I am…I think the problem of death penalty in India is not the….i am not saying that it must be judicial discretion and I am not saying that there has been significant errors in the way this test has been understood and applied right up to the highest level and that's what Bariyar acknowledges it when the Supreme Court in those cases that they have listed and then Raoji was wrong and some of them mentioned in those six cases still continues beyond death row. Now I don't think the problem in death penalty in…but we often tend to dismiss it…oh….it's a judicial discretion some judges will give death, and some judges will not give death I don't think that's a problem the problem is of error…error in understanding the test as laid down by Constitution Bench in Bacchan Singh and very rarely, very rarely all elements of that test actually applied in the cases. In the last session that I read here is very interesting response to that question that the test is so impossible to apply. You talk of ….there must be…State must produce the evidence on non-reformation and all that in country like ours that it is

something impossible to do, so they are saying it's a impossible test for us to administer, but still there is a death penalty on the Statute and if there is death penalty on the Statute, it has to be given in some cases, so I will just stop for that

Recently an American lady was executed for murdering for her husband, America being very advanced State, where they have reformation and despite of all those she was given a death penalty, even imposed…

I think America is not a great example for Death penalty

Prof. Dr. Geeta Oberoi: No, no its European jurisdiction which are advanced, not America, it is financially well advanced, politically and scientifically not legally. In Europe death is not allowed

One of the Participant: I am talking about advanced European Countries or other places even the Pope the highest priest wanted to burden, influence the Authorities, but despite of that lady was executed.

I think the point Dr. Oberoi and me are making is……what you are saying happened in America, but what we are disagreeing with you is that America is certainly no shining light in the area of criminal justice, it is very problematic practices and I think that's very well acknowledged world over that its criminal justice system is quite regressive. So in that sense I wouldn't look to America as a example of how to run a criminal justice system and

The Same Participant continues: But sir they have lot of reformation, they have Probation of offenders, criminal are given parole this and that to attend classes and to go to church and

Asso Prof Dr. Anup Surendranath: But sir if you read about highly discriminatory impact of all those things that you have said. How America has ever increasing population of African Americans, it's very problematic, sir I will just respond your question once Justice Ambwani makes his remarks. I will certainly….if not in session I will certainly will give response to you, because the case before the Supreme Court right now, any way before a Constitution Bench, I just

C.J. Sunil Ambwani: A very interesting discussion. This hue whether death sentence is to be given or not, abolish or not under what circumstances…highly debateable issue almost every society I am not talking about the countries, in every society, Dr. Anup Surendranath appears to be less Professor than a Lawyer for death row convicts and the kind of work he has done, before I say anything I will like to tell…give one example, I was a witness to that example, I have not tried any death case I was practicing in Supreme Court I was caught there in 1988 to 1989 it was a last Appeal of Kehar Singh in Indira Gandhi assassination case the three judges assembled as a Special Session, Justice Shetty, Justice V.C.Ray and one more Judge. Ram Jethmalani had come up with last prayer to avoid the death sentence and what he said I still remember very vividly. He said my Lords on this evidence circumstantial

evidence, there is only one factor that Kehar Singh had taken on that night, Stawant Singh while his wife was cooking food on the roof top and said you come to Amritsar with me and given me an Amrit vachan no judge in this country, law of this country cannot permit death sentence to Kehar Singh. He said there is no civilised country and no country in the world and there is no example in the entire world where a person has been hanged, put to death on this kind of evidence, says, words are still in my ear when the real conspiracy will unearth the head of the Supreme Court will hang in shame, you are going to do a wrong thing, please avoid it. There was one remark by Justice Shetty, we have seen the evidence, we have gone through the evidence, we have discussed the evidence, on which Ram Jethmalani said, so has the entire country has seen the evidence, how did he get the opportunity to, each word of the witness is reported in Newspaper, in this trial the entire country is a Judge and I can tell you if you take a referendum, no one will allow Kehar Singh, Kehar Singh is still hanged, was it because the Indira Gandhi was assassinated, was it because of public outrage absolutely debatable question, see today's topic was….in India how many people have been hanged in last ten years 2004 Dhanjoy Chakrawathy who was put to death only in 2004, for eight years there was no complete moratorium, because for many reasons, Supreme Court was deliberating matters were pending, all the matters are accumulated, the clemency petitions were pending before the President which appears not to have any clear idea as to how the power is to be exercised. Ajaml Kasab in November 2012, Afzal Guru in February 2013 and the last one is Yakub Memon July 2015. Mr. Talwant Singh rightly said what is the fun of giving death sentence, when it is not to be executed at all we only have death row convicts, we do not have death sentences whereas in America in two thousand…last one year 21 have been given the death sentence and the last one which was Kelly Gisandnon and she was not, she did not commit the murder of her husband, she induced her boyfriend to commit the murder, death penalty was…..there the death sentence is awarded by giving a lethal injection it was twice deferred because once it was a storm in that area, second time the lethal injection liquid was having some clots. So in U.S also nineteen States have abolished death sentence. See today's topic is whether death sentence is useful or not. That is how it is said in the session. Justice A.P. Shah has done a great job he has given a report recently it's a 218 pages report, it is a 216 report of Law Commission of India, submitted in August 2015 unfortunately this report was signed only by A.P. Shah, Justice S. N. Kapoor and Dr. Mulchand Sharama, Justice Usha Mehara did not signed it Dr. Snajay Singh did not signed it the other Ex-officio member V.K.Malhotra, Narayan Raju, Venkatramni, Kuldip Singh they gave certain notes on it of their own. The recommendation has been made that the death penalty should be abolished except in the crime against the State, terrorism, or crime against the State now that is a report. The report is very interesting reading it's a complete research material, I will sum up the report by saying that initially there were no reasons to for giving death sentence in Jag Mohan's case for the first time no, reasons has to be given, because 354 clearly says that you have to give reasons. Section 354 is very interesting and that on which the entire law has been developed. 354 sub-section (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 seven years

the judgment should shall state reason for the award of sentence and in a case of sentence of death the special reasons for such sentence the moment the reasons come in, the moment the hearing comes in that evidence comes in, it may not be evidence of proof of guilt which is already been established and that's why thereafter you are giving sentence it is the evidence on mitigating and aggravating circumstances, it is the evidence on five points in Macchi Singh's case, it was in Jag Mohan's case where they said no, you have to give reasons, earlier reasons were not required and it was thereafter in Macchi Singh which crystal the……..which is that case…leading case…Bacchan Singh's case which still hold the field, Bacchan Singh has been explained from time to time, again and again, now the difficulty with the Supreme Court facing is why the matter was referred to the Law Commission of India in Bariyar's case and Khade's case was not the inadequacy of the guidelines on giving death sentence, because the Constitutionality of the death sentence has been upheld in Bacchan Singh's case. Bacchan Singh's case talked of mitigating and aggravating circumstances and rarest of rare case doctrine thereafter it was in Macchi Singh's case in which it was explained as to in what circumstances death sentence can be given these five guidelines, four guidelines are very important and the first guideline is that the life imprisonment is a rule and death sentence is an exception in other words death sentence must be imposed only when the life imprisonment appears to be in altogether inadequate punishment having regard to relevant circumstances of the crime and circumstances and invariably provided an option to impose the sentence of imprisonment, life cannot be consciously having regard to the nature and circumstances of the crime the extreme penalty of the death be in gravest cases of extreme culpability, before opting the death penalty these circumstances of the offender also required to be taken into consideration along with circumstances of the crime. There was a time when the Supreme Court was only concentrating on the crime and not the criminal now the both the factors to be taken into consideration. A balance sheet of aggravating and mitigating circumstances has to be drawn out and during so the mitigating circumstances has to be accorded full weightage and the just balance has to be struck in the aggravating and mitigating circumstances before the option is exercised. Supreme Court had commented upon the arbitrary exercise of discretion, despite of being these guiding factors. Supreme Court has also said about the judge-centric decision you know in India 129 death sentences are awarded in every year. That is the statistic which the A.P. Shah Commission has collected, but as you have seen that they are not executed, either the Appellate stage or in the Supreme Court or they are before the, exercise of power of pardon in clemency petition before the President then again and again resulting into death row convicts. Now in Khade's case the reference was made to the Law Commission not on account of absence of any guiding factor with the Courts, Khade's case also says…Bariyar's case and Khade's case both are decided in the same year. They said we have no doubt in our mind, the judiciary has no doubt, and judges have no doubt, because Bacchan Singh and Macchi Singh so many cases have given clear guidelines, the difficulty may arise in the facts and circumstances in each case but we have not, the problem is with the executive. Now these are the words in Khade's case it seems to me that though that, the courts have been applying the rarest of rare principle, the executive has taken

into consideration some factors not known to the Courts for converting a death sentence into imprisonment for life, it is imperative in this regard since we are dealing with the life of the people both of the accused in rape and murder cases, that the court laid down the jurisprudential basis for awarding a death penalty where the alternative is unquestionably foreclosed, so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a method of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Now just consider one thing suppose there was no power with the President for pardon then this situation may not have raised. These guidelines were sufficient, this uncertainty arise, these people wait for hanging because of only this reason. The persons who have been hanged apart from Dhananjoy Chakrawathy Ajamal Kasab, Afzal Guru, Yakub Memon, now apart from there being an execution of this death sentence is concerned may I asked whether they are been political executions or judicially determined conviction and execution, so do we really have a death sentence in our country, now what does Justice A.P.Shah says, Justice A.P.Shah has taken into consideration first of all the developments in India, so what are the developments, what happened was that in earlier case 1967 when the constitutionality was challenged and it was upheld, the matter was referred to Law Commission in the 35$^{th}$ report of law commission which was rendered in the year of 1967 what was said was that condition in India are not suitable, condition in India are not suitable to completely give up or abolish death penalty, now what was those conditions social upbringing of the evidence, disparity in the level of morality in education, vastness of the area, diversity of the population, paramount need to maintain law and order, then it was said at the present juncture it is not advisable to abolish death penalty. Then Justice A.P.Shah takes into consideration now what is the situation, now there are two things which is in the area of debate still one is the he says developments are such which are not the level of 1967 per-capita income has increased, rate of literacy has increased, life expectancy is increased and the National Crime Record Bureau says that there has been a decline in number of murders since the year 1992, but then it does not take into consideration the new crimes, the crimes which are on account of narcotics, the organised crimes, the mafias, the terrorism and the kind of crime which are on account of casteism, which has increased many fold in our country, the crime which we recently witnessed, we rerate about in the U.P. where only on the accusation of eating beef a person was lynched to death, these crimes were not there in the year 1967 so this area is again debatable, whether this situation is…has come to a level where we should abolish death penalty. I remember India is one of the fifty nine nations only that they retains the death penalty and so far as international development is concerned in the year 1967 only twelve countries have abolished death penalties in the year 2014 hundred and fourteen countries have abolished death penalty. In fact in last one year in which….in last ten years the countries at least one death penalty is executed as form 1951has fallen to 39 so in fact the execution of the death penalty is declined all over the world. Then Justice A.P.Shah says it takes into notice the requirements of new CR. P. C 1973 that is in Bacchan Singh's case rarest of rare, the emergence of due process has started after Maneka Gandhi's case, there is a complete watershed in the development of law after Maneka Gandhi, where

the due process clause was brought into the Indian Constitution which says law has to be just fair and reasonable, not fanciful, or arbitrary, death penalty has to be judged and after Bacchan Singh's case no court has considered, no one has challenged the death penalty on the ground that it is unconstitutional on the ground of that due process clause, then the judicial developments of …all judicial development that has taken place beginning from this Alok Dutta's, Swami Shradhhdanada, Farukh Abdul Gaffur, Sangeet, Khade all these cases have been only on the whether the death penalty in the circumstances aggravating, mitigating circumstances the test of the crime and the criminals, so the supreme Court has been devilling upon all these factors not whether the death penalty is constitutional or not or whether in today's world death penalty should be actually abolished, then political development, there are two private members bills pending one by Kani Mozi from D.M.K she says death penalty should be abolished another by D. Raja from C.P.I. M until we consider the bill there should be a moratorium, unless there is a National Debate almost all the left parties have decided that there should be no death penalty, now all these factors taken into consideration and all the details which are given in the 248 page report Justice A.P.Shah's report on death penalty, to my mind the question is not of the crime or the criminal, the aggravating or the mitigating circumstances the question is philosophical, question is if we cannot give the life, what right we have to take away somebody's life. We may imprison him throughout his life, we may put him to circumstances where he will not be able to come out in the society if he is such a heinous criminal or his previous record or his crime record is such let you think, but should there be a death penalty provision of death penalty one more very interesting thing Justice A.P.Shah has pointed out that is a very interesting thing that we must take into account we are only considering non-homicidal capital offences…homicidal capital offences where a person is killed or the persons are killed or the person go on killing his prey or there is a murder of a small child of after rape, he has also taken into consideration those non-homicidal capital offences. You will be surprised that there are so many, in the Air-force Act, Army Act. Assam Rifles Act, Border Security Act, Coasts Guards Act, Explosive substances Act, Indo-Tibetan Border Police Act, NEVY Act, Petroleum And Mines Act, Sashstra Seema Bal, even the section Schedule Caste and Schedule Tribes Atrocities Act, there are death penalties provided and there are some mandatory death penalties provided and despite the fact that there is a complete shift over abolition of death penalty. The Supreme Court found that the mandatory death penalty is unconstitutional, Parliament has since enacted laws in continuously to prescribe mandatory death penalties, the suppression of unlawful Act again and safety of Maritime And Navigation and fixed platform on continental shelf Act 2002, Section 3 (g) (i) of the Schedule Caste and Schedule Tribes Prevention of Atrocities Act, Sec 3 and 27 (i) of the Arms Act continues to provide mandatory death sentences. Mandatory death sentence was also introduced in Narcotic and Psychotropic Substances Act 1985 in the year 1989 which was declared as unconstitutional by Bombay High Court. The death penalty in Anti-Terror Laws, now in today's world you are talking about homicidal cases or we are talking about death penalties in all these cases also. So do not want to give any conclusive opinion on my behalf, all I can say the debate is still going on and its very wide in range

ultimately we have to….Supreme Court will have to decide Supreme Court cannot just say that, the Executive have been arbitrary, Supreme Court defend itself by saying of course we are having a discretion, it's a judge-centric some time, this or that but the question is, they are putting a blame on the Executive, but for the Executive also so long as death sentence remains, power of Pardon also remains and as I began with Kehar Singh's case we have again to ask the question and as the right in the beginning, learned Judge Talwant Singh said what is the fun in giving death penalty when it is not going to be executed, it's a big debate the Courts have come, I think first the Parliament and then Supreme Court of India has to decide the issue, but meanwhile the issue has to be not to be whether the death penalty is Constitutional or not, the question has to be if we cannot give life, how we can take away anybody's life.

Prof. Dr. Geeta Oberoi: With this come to an end of our deliberations, on today's session so give a big round of applause, not such a small applause, to both Hon'ble Chief Justice Sunil Ambwani and Mr Anup Surendranath Dr. Anup Surendranath. So we brake for a small tea session which is 11:46 to 12:00 you can discuss more with Anup because he has lot of things to say so tell him, don't worry in cafeteria you can clarify everything. And then we just…the participants will come back, there is a mandatory session of feedback and we have our administration now, yaa…please come back at 12 O'clock