Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

Review Petition (Crl.) Nos.637-638 of 2015

IN

Criminal Appeal Nos.2486-2487 of 2014

Vasanta Sampat Dupare ….. Petitioner

Versus

State of Maharashtra …. Respondent

J U D G M E N T

Uday Umesh Lalit, J.

1. These Review Petitions are directed against the Judgment and Order dated 26.11.2014 passed by this Court in Criminal Appeal Nos.2486-87 of 2014 affirming conviction of the petitioner for the offences punishable under Sections 302, 363, 367, 376(2)(f) and 201 IPC and various sentences imposed upon the petitioner including death sentence under Section 302 IPC and life imprisonment under Section 376(2)(f) IPC. In view of the decision

of this Court in ***Mohd. Arif @ Ashfaq*** v. ***Registrar, Supreme Court of India and others.***[1], these review petitions were listed in Court for oral hearing.

2. The facts leading to the filing of criminal appeals in this Court including the nature and quality of evidence on record have been dealt with and considered in the Judgment of this Court dated 26.11.2014[2]. The charge against the petitioner was that the victim, a minor girl of four years was raped and battered to death by the petitioner. The petitioner allegedly lured the victim by giving her chocolates, kidnapped her and after satisfying his lust caused crushing injuries to her with the help of stones weighing about 8.5 kg and 7.5 kg. The prosecution relied upon the evidence of PW2 Manisha, PW3 Minal, PW5 Vandana and PW6 Baby Sharma who had seen the petitioner taking away the victim on a bicycle on the fateful day. In his disclosure statement under Section 27 of the Evidence Act the petitioner had shown the place where dead body of the victim was lying and the tap where he had washed his blood stained clothes. The medical evidence on record was dealt with in paragraph 14 of the Judgment under review as under :-

> **14.** According to the doctor, he had found during internal examination that under scalp haematoma was present over left frontal and right frontal region of size 4cm × 4cm, dark red, the

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1 (2014) 9 SCC 737

2 (2015) 1 SCC 253

> frontal bone was fractured and depressed, fracture line extended up to occipital bone through right temporal and parietal bone fracture on interior and middle cranial side. The subarachnoid haemorrhage was present all over the brain surface and meninges were congested. In his opinion, the cause of death was head injury, associated with the injury on the genital region. He has testified that the two stones that were sent to him in sealed cover along with the requisition, Ext.62, for opinion, could have been used to cause the injuries on the victim. He has weighed the stones, which are, 8.5kg and 7.5kg, and has opined that there had been forceful sexual intercourse."

3. After taking into account the evidence and the circumstances on record, this Court in the Judgment under review concluded as under:-

> "On a critical analysis of the evidence on record, we are convinced that the circumstances that have been clearly established are that the appellant was seen in the courtyard where the minor girl and other children were playing; that the appellant was seen taking the deceased on his bicycle; that he had gone to the grocery shop owned by PW-6 to buy Mint chocolate along with her; that the accused had told PW2 that the child was the daughter of his friend and he was going to 'Tekdi-Wadi' along with the girl; that the appellant had led to discovery of the dead body of the deceased, the place where he had washed his clothes and at his instance the stones smeared with blood were recovered; that the medical report clearly indicates about the injuries sustained by the deceased on her body; that the injuries sustained on the private parts have been stated by the doctor to have been caused by forcible sexual intercourse; that the stones that were seized were smeared with blood and the medical evidence corroborates the fact that injuries could have been caused by battering with stones; that the chemical analysis report shows that the blood group found on the clothes of the appellant; that the appellant has not offered any explanation with regard to the recovery made at his instance; and that nothing has been stated in his examination under Section 313 CrPC that there was any justifiable reason to implicate him in the crime in question. Thus, we find that each of the incriminating circumstances has been clearly established and the chain of circumstances are conclusive in nature to

exclude any kind of hypothesis, but the one proposed to be proved, and lead to a definite conclusion that the crime was committed by the accused. Therefore, we have no hesitation in affirming the judgment of conviction rendered by the learned trial Judge and affirmed by the High Court."

4. On the issue of death sentence awarded to the petitioner, this Court first considered the principles governing the matter in issue as under:-

> **"39.** Now we shall proceed to deal with the facet of sentence. In ***Bachan Singh*** v. ***State of Punjab***[3], the Court held thus:
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> "(*a*) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
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> (*b*) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence."
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> **40.** In ***Bachan Singh case***[3], the Court referred to the decision in ***Furman*** v. ***Georgia***[4] and noted the suggestion given by the learned counsel about the aggravating and the mitigating circumstances. While discussing about the aggravating

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3 (1980) 2 SCC 684

4 33 L.Ed. 2d 346 = 408 US 238 (1972)

circumstances, the Court noted the aggravating circumstances suggested by the counsel which read as follows: (***Bachan Singh case***[3], SCC p. 749, para 202)

"*Aggravating circumstances*.—A court may, however, in the following cases impose the penalty of death in its discretion:

(*a*) if the murder has been committed after previous planning and involves extreme brutality; or

(*b*) if the murder involves exceptional depravity; or

(*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(*i*) while such member or public servant was on duty; or

(*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(*d*) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

After reproducing the same, the Court opined: (SCC p. 749, para 203)

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

41. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances: (***Bachan Singh case***[3], - SCC p.750 para 206)

"*Mitigating circumstances*.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances.—

(*1*) That the offence was committed under the influence of extreme mental or emotional disturbance.

(*2*) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(*3*) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

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

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

(*5*) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(*6*) That the accused acted under the duress or domination of another person.

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

After reproducing the above, the Court observed: (SCC p. 750, para 207)

"*207*. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

42. In the said case, the Court has also held thus: (***Bachan Singh case***[3], SCC p. 751, para 209)

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

43. In ***Machhi Singh and others*** v. ***State of Punjab***[5] a three-Judge Bench has explained the concept of rarest of the rare cases by stating that: (SCC p. 487, para 32)

"*32*. The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."

44. Thereafter, after adverting to the aspects of the feeling of the community and its desire for self-preservation, the Court opined that the community may well withdraw the protection by sanctioning the death penalty. The Court in that regard ruled thus: (***Machhi Singh case***[5], SCC p. 487, para 32)

"*32*. … But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

It is apt to state here that in the said case, emphasis was laid on certain aspects, namely, manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of the victim of murder.

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5 (1983) 3 SCC 470

45. After so enumerating, the propositions that emerged out from ***Bachan Singh***[3] were culled out which are as follows: (***Machhi Singh*** *case*[5], SCC p. 489, para 38)

"*38*. … The following propositions emerge from ***Bachan Singh*** *case*[3]:

'(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

46. Thereafter, the three-Judge Bench opined that to apply the said guidelines, the following questions are required to be answered: (***Machhi Singh case***[5], SCC p. 489, para 39)

"(*a*) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons."

5. In the light of the principles as stated above, the facts of the present matter were considered by this Court in the Judgment under review as under:-

> **"57.** Keeping in view the aforesaid authorities, we shall proceed to adumbrate what is the duty of the Court when the collective conscience is shocked because of the crime committed. When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the intense indignation at the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away by any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to the rarest of the rare case. We are also required to pose two questions that have been stated in ***Machhi Singh case***[5].
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> **58.** Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed

the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life-spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.

60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid-fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be

> sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances."

6. The above quoted observations of this Court in Judgment under review show that the aggravating facts were considered in paragraphs 58 and 60 and the entirety of the matter including the mitigating circumstances were dealt with more particularly in paragraph 61. The aggravating facts not only showed the extreme depravity but in the opinion of this Court they brought to the fore the diabolical and barbaric manner in which the crime was committed. The Court did not find any mitigating circumstances in favour of the accused to tilt the balance in his favour for awarding lesser punishment.

7. At this juncture, it may be noted that the decision of this Court in ***Machhi Singh*** (supra) shows that after having laid down oft-quoted principles, this Court considered individual cases of accused Machhi Singh, Jagir Singh and Kashmir Singh. As regards Machhi Singh, it was observed in paragraph 42:-

> "…….The offence committed was of an exceptionally depraved and heinous character. The manner of its execution and its design would put it at the level of extreme atrocity and cruelty.
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> ……..The crime committed carries features which could be utterly horrendous especially when we know the weapons and the manner of their use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel.
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> ……..The crime was gruesome and cold-blooded revealing the propensity of the accused appellants to commit murder."

Similarly as regards Jagir Singh it was observed,

> "…….The crime committed carries features which could be utterly horrendous especially when we know the weapons and their manner of use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel.
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> ……The helpless state of the victims and the circumstances of the case lead us to confirm the death sentence."

8. Further, paragraphs 44 and 45 show that one of the accused namely Kashmir Singh had caused the death of a defenceless child of six years and the matter as regards said accused Kashmir Singh in particular and with regard to all the accused in general, was dealt with as under:-

> "**44.** Insofar as appellant Kashmir Singh s/o Arjan Singh is concerned death sentence has been imposed on him by the Sessions Court and confirmed by the High Court for the following reasons:
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> Similarly, Kashmir Singh appellant caused the death of a child Balbir Singh aged six years while asleep, a poor

> defenceless life put off by a depraved mind reflecting grave propensity to commit murder.
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> **45.** We are of the opinion that insofar as these three appellants are concerned the rarest of rare cases rule prescribed in ***Bachan Singh case*** is clearly attracted and sentence of death is called for. We are unable to persuade ourselves that a sentence of imprisonment for life will be adequate in the circumstances of the crime. We therefore fully uphold the view concurrently taken by the Sessions Court and the High Court that extreme penalty of death requires to be imposed on appellants (*1*) Machhi Singh (*2*) Kashmir Singh s/o Arjan Singh (*3*) Jagir Singh. We accordingly confirm the death sentence imposed on them and dismiss their appeals."

9. The assessment and the consideration bestowed by this Court in ***Machhi Singh*** (supra) shows that the aggravating circumstances namely the manner in which the crime was committed, the brutality and barbaric manner of execution, the status and helplessness of victims and the fact that the crime was gruesome and cold blooded were given due weightage. These facts themselves were found to be tilting the balance against the concerned accused. In the present case a minor girl of four years was raped and battered to death by the petitioner. The brutality and diabolical nature of the crime and the fact that the victim had reposed trust and confidence in the petitioner was taken into account and this Court found the aggravating circumstances completely outweighing the other factors. The evidence and

circumstances were dealt with in the Judgment under review in great detail and this Court had no hesitation in affirming the death sentence.

10. In the present Review Petition, Mr. Anup Bhambhani, learned Senior Advocate appearing for the petitioner, at the outset, raised a grievance that in the light of principles laid down in ***Bachan Singh*** and ***Machhi Singh*** (supra) mitigating factors ought to have been taken into account and that proper and effective hearing in that behalf was not extended to the petitioner. This Court therefore by Order dated 31.08.2016 permitted the petitioner to file material to indicate mitigating factors for conversion of the death sentence to life imprisonment. This was in keeping with the principles laid down by this Court in ***Dagdu and Others*** v. ***State of Maharashtra***[6] wherein three Judge Bench of this Court had observed:-

> "**79** …..The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence."
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> **80**. …….For a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction……Remand is an exception, not the rule, and

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6 (1977) 3 SCC 68

ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases."

11. The petitioner thereafter filed Crl.M.P. Nos.16369-70 of 2016 placing on record certain facts and material. It was submitted :-

"**Education and Activities undertaken by the Petitioner in Jail**

i) The Petitioner submits that he had to discontinue school after class 6th during childhood. Thereafter he worked in various jobs such as electrician, construction labourer, nursery worker, security guard. Death row prisoners in Maharashtra are not permitted to work, but the Petitioner as an undertial has worked in the jail nursery. During incarceration, the Petitioner has undertaken studies, art competitions as well as several programmes aimed at reforming himself. The Petitioner's counsel is informed that his drawings are exhibited in jail as well.

ii) The Petitioner has in 2015 successfully completed the Bachelors Preparatory Programme offered by the Indira Gandhi National Open University. This course enables people who have discontinued schooling before matriculation to prepare for bachelors-level studies.

iii) The Petitioner in 2015 also successfully completed the Gandhi Vichar Pariksha (Examinaiton on Gandhian Thoughts). This examination seeks to rehabilitate prisoners who have committed violent crimes, by learning from the life and teaching of M.K. Gandhi. The course includes classes on the teachings of M.K. Gandhi, reading his autobiography, and a descriptive exam.

iv) The Petitioner is quite proficient in drawing and has also participated in a drawing competition organized by the Nagpur Municipal Corporation and Kalajarn Foundation on 10.01.2016.

v) It is therefore submitted that the Petitioner is on the path to reformation and rehabilitation and therefore the death sentence imposed on him deserves to be commuted to imprisonment for life."

The application then set out that the Disciplinary Record of the Petitioner in Jail was without any blemish and that there were no criminal antecedents.

12. The matter was thereafter posted for hearing. Mr. Anup Bhambhani, learned Senior Advocate principally submitted:-

a. The judgment of conviction and order of sentence were passed by the trial court on the same day namely on 23.02.2012 which was completely opposed to the law laid down by this Court in ***Allauddin Mian and Others*** v. ***State of Bihar***[7] and against the spirit of Section 235(2) of the CrPC.

b. As laid down in para 206 of ***Bachan Singh*** (supra) "the probability that the accused can be reformed" was an important facet and the burden was on the State to prove by evidence that the accused could not possibly be reformed. However, such burden was not

7 (1989) 3 SCC 5

discharged by the State and no evidence was led. In the absence of such evidence by the State, no death sentence could be awarded or confirmed.

13. Para 10 of the decision of this Court in ***Allauddin Mian*** v. ***State of Bihar*** (supra) on which reliance was placed, is to the following effect:-

> **10.** Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:
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> > If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.
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> The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section

(2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed

> before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code."

14. Sub-section (2) of Section 235 of Cr.P.C. obliges the Court to hear the accused on the question of sentence and normally it is expected that after recording the conviction, the matter be adjourned to a future date calling upon both the prosecution as well as the defence to place relevant material having bearing on the question of sentence. The effect of recording of the conviction and imposition of death sentence on the same day, was also considered by a bench of three learned Judges of this Court in ***Malkiat Singh and others*** v. ***State of Punjab***[8]. In that case, this Court did not deem it expedient to remand the matter after six years and converted the sentence of death to imprisonment for life. It was observed:-

> **"18.** On finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well

8 (1991) 4 SCC 341

> as the accused to place before the court facts and material relating to various factors on the question of sentence, and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. No doubt the accused declined to adduce oral evidence. But it does not prevent to show the grounds to impose lesser sentence on A-1. This Court in the aforestated ***Allauddin*** and ***Anguswamy***[9] cases held that the sentence awarded on the same day of finding guilt is not in accordance with the law. That would normally have the effect of remanding the case to the Special Court for reconsideration. But in the view of the fact that A-1 was in incarceration for long term of six years from the date of conviction, in our considered view it needs no remand for further evidence. It is sufficient that the sentence of death awarded to A-1 is converted into rigorous imprisonment for life. The sentences of death is accordingly modified and A-1 is sentenced to undergo rigorous imprisonment for life for causing the deaths of all four deceased."

15. In a recent Judgment rendered by three learned Judges of this Court in ***B.A. Umesh*** v. ***High Court of Karnataka***[10], the facts were more or less similar, in that no separate date for hearing on sentence was given after recording conviction. Para 8 of that decision of this Court is quoted for ready reference:-

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9 (1989) 3 SCC 33

10 (2016) 9 SCALE 600

> "8. In addition to above, it is contended on behalf of the petitioner (Review Applicant) that since no separate date for hearing on sentence was given in the present case by the trial court, as such for violation of Section 235(2) Cr.P.C., the sentence of death cannot be affirmed. We have considered the argument of Ms. Suri. It is true that the convict has a right to be heard before sentence. There is no mandate in Section 235(2) Cr.P.C. to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Had any party pressed for separate date for hearing on the sentence, or both of them wanted to be heard on some other date, situation could have been different. In the present case, the parties were heard on sentence by both the courts below, and finally by this Court, as is apparent from the Judgment under review. As such, merely for the reason that no separate date is given for hearing on the sentence, the Review Petition cannot be allowed."

This Court then relied on the principle laid down in ***Dagdu*** v. ***State of Maharashtra*** (supra) which was followed subsequently by another Bench of three learned Judges in ***Tarlok Singh*** v**.** ***State of Punjab***[11]**.** In the circumstances, merely because no separate date was given for hearing on sentence, we cannot find the entire exercise to be flawed or vitiated. Since we had allowed the petitioner to place the relevant material on record in the light of the principles laid down in ***Dagdu*** v. ***State of Maharashtra*** (supra), we will proceed to consider the material so placed on record and weigh these

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11 (1977) 3 SCC 218

factors and the aggravating circumstances as found by the Court in the Judgment under review.

16. However, before such consideration we must deal with the second submission advanced by Mr. Bhambhani, learned Senior Advocate. In his submission, in terms of paragraph 206 of the decision of this Court in ***Bachan Singh*** (supra) the burden was upon the State in respect of conditions (3) and (4), which burden was not discharged at all. Consequently, according to him, the sentence of death would be required to be converted to life imprisonment. Paragraph 206 of the decision of this Court in ***Bachan Singh*** (supra) detailed certain mitigating circumstances and while dealing with conditions (3) and (4), this Court observed that it would be for the State to prove by evidence that the accused did not satisfy conditions (3) and (4). However, subsequent paragraphs show that those circumstances would certainly be relevant and great weight be attached to them but it was the cumulative effect of the mitigating circumstances on one hand and the aggravating facts on the other, which would be weighed to come to the final conclusion whether the case satisfied the requirement of being "rarest of rare". It is not as if mere failure on part of the State to lead such evidence would clinch the issue in favour of the accused.

17. Mr. Bhambhani, learned Senior Advocate then relied on the decision of this Court in ***Rajesh Kumar*** v. ***State through Government of NCT of Delhi***[12], particularly paragraphs 73 and 74 thereof which paragraphs are as under:

> "**73.** In the instant case the State has failed to show that the appellant is a continuing threat to the society or that he is beyond reform and rehabilitation. On the other hand, in para 77 of the impugned judgment the High Court observed as follows:
>
> "We have no evidence that the appellant is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance."
>
> **74.** It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in the society and the High Court has considered the same as a neutral circumstance. In our view the High Court was clearly in error. The very fact that the accused can be rehabilitated in the society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the appellant is not a continuing threat to the society in the absence of any evidence to the contrary. Therefore, in para 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court has only considered that the appellant is a first time offender and he has a family to look after. We are, therefore, constrained to observe that the High Court's view of mitigating circumstances has been very truncated and narrow insofar as the appellant is concerned."

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12 (2011) 13 SCC 706

The discussion shows that this Court found that mitigating circumstances in favour of the appellant were not properly considered and in the ultimate analysis the case did not satisfy being "rarest of rare" and therefore, this Court substituted the sentence of imprisonment for life to that of death sentence. The discussion in paragraphs 73 and 74 does not indicate that in the absence of any evidence led by the State in connection with conditions (3) and (4) as stated in paragraph 206 of ***Bachan Singh*** (supra), the entire exercise gets vitiated and the matter must always be answered in favour of the accused. It is undoubtedly a relevant consideration which will be weighed by the Court together with other circumstances on record. We, therefore, do not find any merit in the second submission.

18. In ***Ramnaresh and Others*** v. ***State of Chhattisgarh***[13] this Court considered the import of governing principles regarding death sentence and summed up that it is the cumulative effect of both the aggravating and mitigating circumstances that need to be taken into account. Paragraphs 76 to 81 of the decision are as under:-

> **"76.** The law enunciated by this Court in its recent Judgments, as already noticed, adds and elaborates the principles that were stated in ***Bachan Singh*** and thereafter, in ***Machhi Singh***- The

13 (2012) 4 SCC 257

aforesaid Judgments, primarily dissect these principles into two different compartments—one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) Cr.P.C.

Aggravating circumstances

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

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

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

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

(*5*) Hired killings.

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

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

(*8*) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance,

murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

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

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

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

(*12*) When there is a cold-blooded murder without provocation.

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

Mitigating circumstances

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

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

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

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

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

(*6*) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(*7*) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(*1*) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(*2*) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(*3*) Life imprisonment is the rule and death sentence is an exception.

(*4*) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(*5*) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial

pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

79. The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of "*just deserts*" that serves as the foundation of every criminal sentence that is justifiable. In other words, the "doctrine of proportionality" has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly bring the case within the ambit of "rarest of rare" cases and the court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the court may award death penalty. Wherever, the case falls in any of the exceptions to the "rarest of rare" cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

19. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating

circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.

20. The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in ***Bachan Singh*** (supra) but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of

the petitioner are after the Judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present Review Petitions.

..…….J.
(Dipak Misra)

...……..…..……...J.
(Rohinton Fali Nariman)

……..……..……..J.
(Uday Umesh Lalit)

New Delhi,
May 03, 2017