CHAPTER- V

DOCTRINE OF RAREST OF RARE: 
A MYTH OR REALITY
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DOCTRINE OF RAREST OF RARE CASES: A MYTH OR REALITY

“A punishment to be just should have only that degree of severity which is sufficient to deter others.”

-Beccaria

5.1 Introduction

Indian judiciary has grown up their views about death penalty by ruling out in \textit{Bachan Singh v. State of Punjab}\textsuperscript{431} that the penalty of death penalty must be surrounded to the “rarest of rare cases”, this view of Supreme Court was very much supportive to reduce the use of death penalty to punish the criminals, but this view of highest court was challenged by the legislation by increasing the number of crimes for which death penalty is awarded.

In \textit{Bachan Singh case} Supreme Court expressed some outstanding reasons relating to wrongdoer and criminal. In this case further noted that “in settling the level of discipline or settling on the decision of sentence for different offences, including one under Section 302 of Indian Penal Code, the court ought not bind its thought “chiefly” or just to the circumstances associated with the specific wrongdoing, additionally give due attention to the circumstances of the criminal”\textsuperscript{432}.

In \textit{Santosh Kumar Bariyar v. State of Maharashtra}\textsuperscript{433}, the Supreme Court got an opportunity to explain this further: “The rarest of rare dictum serves as a guideline in enforcing Section 354(3) and establishes the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that

\textsuperscript{431} (1980) 2 SCC 684
\textsuperscript{432} \textit{Ibid}
\textsuperscript{433} (2009) 6 SCC 498
exceptions are to be construed narrowly. That being the case, the rarest of rare dictum places an extraordinary burden on the court, in case it selects death penalty as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.”

Constitution clearly states in Article 21 that “No person shall be deprived of Right to life unless done following due process of law” but Capital punishment denies due process of law. Its imposition is always irreversible forever depriving an individual of the opportunity to benefit from new evidence or new laws that might warrant the reversal of a conviction, or the setting aside of a death sentence.

When the consequences are life and death, we need to demand the same standard for our system of justice. It is central pillars of our criminal justice system that it is better that “many guilty people go free than that one innocent should suffer. Let us reflect to ensure that we are being just let us pause to be certain we do not kill a single innocent person. This is really not too much to ask for a civilized society.” Since the reinstatement of the modern death penalty, many people have been freed from death row because they were therefore through litigation, legislation and commutation by helping to foster a renewed public outcry against this barbarous and brutalizing institution, we strive to prevent executions and seek the abolishment of Capital punishment.

In addition to the six cases which Bariyar faulted for having followed Ravji’s case wrong precedent, it identified another case where the commutation of the death sentence is justified. The case is *Saibanna v. State of Karnataka*434 (2005). Saibanna was convicted for life imprisonment. While he was on parole, he killed his wife and daughter. The Supreme Court penalized him to death on a reasoning which effectively made death punishment mandatory for the category of offenders serving life imprisonment sentence.

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434 2005 (3) SCR 760
However, the Supreme Court had in *Mithu v. State of Punjab*\(^{435}\) already struck down Section 303 of the Indian Penal Code, which provided for mandatory penalty of death for offenders serving life sentence. The reason is that if the death sentence is mandatory, then it has no meaning to hear the offender on the question of sentence, and it becomes additional to state the reasons for imposing the sentence of death. The ratio Decidendi i.e. the legal principle which forms the basis of the judgment, of Bachan Singh case is that the death sentence is constitutional if it is prescribed as an alternative for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life. In Bachan Singh case, the court also asserted that a court could impose the death penalty only in the rarest of rare cases when the alternative option is indisputably excluded. The ratio Decidendi of a five-judge Bench would be binding on other Benches of the Supreme Court, unless overruled by a Bench comprising more than five judges. Bachan Singh was delivered by a five-judge Constitution Bench.

In *Saibanna case*, the court was uncertain whether a person already undergoing imprisonment for life could be visited with another term of imprisonment for life to run consecutively with the previous one. Rather than resolve this doubt through constitutional means, the Supreme Court opted for the easy way out by imposing the death penalty on Saibanna. In Bariyar, therefore, the Supreme Court declared its own ruling in Saibanna as being inconsistent with both the Mithu and Bachan Singh judgments and, as a result, per incuriam. Of the 13 convicts who have been identified in the judges' appeal, Bantu’s death sentence was commuted by President Pratibha Patil. Another convict, Ankush Maruti Shinde, has been declared a juvenile and has been removed from death row. Dayanidhi Bisoi’s death sentence was commuted to life imprisonment by the Governor of Odisha in 2003. President Pratibha Patil commuted the death sentences of Sattan and Upendra in July 2011.

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\(^{435}\) 1983 SCR (2) 690
Thus, there are now only eight convicts whose death sentences ought to be commuted in line with the Supreme Court’s judgment in Bariyar. Of these, only Saibanna’s mercy petition was pending in the President’s Secretariat when Pratibha Patil completed her term. It is incomprehensible why the Ministry of Home Affairs did not recommend the commutation of Saibanna’s death sentence even though his case was brought to the notice of the President more than a year ago. Going by Pratibha Patil’s well-known record in commuting the death sentence of 35 convicts in just two and a half years of her five-year tenure, she might have commuted Saibanna’s sentence, too, had the government recommended it.

The mercy petitions of the remaining seven convicts have not yet reached the President. Most of them have got their mercy petitions rejected by the Governors of the States where they are lodged in jails awaiting execution. When Pratibha Patil completed her term, she left a fascinating record and a legacy that none of her successors can ignore easily. She began with a backlog of 23 undecided mercy petitions from her immediate predecessors and received nine fresh petitions, involving 40 convicts. Of these, she accepted 18 petitions, rejected three, involving five convicts, and passed on 11 undecided petitions i.e. involving 16 convicts to her successor, Pranab Mukherjee. One of the 35 convicts whose sentences she commuted, Bandu Baburao Tidake had died on October 18, 2007, while waiting for her decision, but the report about his death speciously did not reach the Home Ministry when it recommended his commutation. It is a moot question whether Tidake would have lived longer had the President commuted his sentence before his death.

But Pratibha Patil’s legacy should not be just seen in quantitative terms. It also has a qualitative dimension. The Home Ministry had often changed its recommendations with regard to the rejection of mercy petitions whenever there was a change of Minister with a new government or with a Cabinet rationalization, and agreed to a review of the pending recommendations with the President. If one Home Minister recommends the rejection of the mercy petition of a convict, it does not follow that his successor would recommend rejection, if reconsidered.
Legally, the President is bound by the advice of the current government and not the one preceding it. Therefore, it can be inferred that she thought it fit to delay decisions on those mercy petitions which the government wanted her to reject. She perhaps thought that if successive Home Ministers had recommended rejection of the same mercy petition, then probably her options were closed.

That Aspect of Rarest of rare doctrine, which needs serious consideration, is interpretation of latter part of the dictum that ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose. Death punishment qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability.\(^{436}\)

In *Alok Nath Dutt and Others v. State of West Bengal*\(^{437}\) this Court after examining various judgments over the past two decades in which the issues of rarest of rare fell for consideration.

### 5.2 What is a "Rarest of rare case"?

The phrase "rarest of rare case" has its origin in 1983 in a Supreme Court decision, *Machhi Singh v. State of Punjab*\(^{438}\). This judgment followed the court's earlier decision in *Bachan Singh v. State of Punjab*\(^{439}\) (1982), where it upheld the constitutional validity of capital punishment but added a caveat that is now famous, if perhaps impossible to pin down precisely that death sentences would be accorded only in the "rarest of rare cases".

In *Machhi Singh case*, the court tried to lay down criteria for assessing when a crime fell into this category. The bench discussed and formalized "Rarest of rare

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436 (2009) 6 SCC 498  
437 2006(13)SCALE467  
438 AIR 1983 SC 1957  
439 AIR 1980 SC 276
cases formula" some guidelines to be adopted in identification of rarest of rare cases. Following is the relevant extract from the actual judgment. Here the important statements as well as some relevant ones to Yakub Memon's case. It should help to understand the real sense of this doctrine:

“The reasons why the community as a whole does not approve the humanistic method reflected in death sentence in no case doctrine are not far to seek.”

Firstly, the very humanistic group 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 fetters of this doctrine.

Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends.

Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so in rarest of rare cases when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:
5.2.1 Manner of Commission of Murder

When the murder is committed in an extreme brutal, ridiculous, diabolical, revolting, or reprehensible manner so as to awaken intense and extreme indignation of the community; for instance,

a) When the house of the victim is set fired with the end in view to bake him alive in the house.

b) When the victim is endangered to inhuman acts of torture or cruelty in order to bring about his or her death.

c) When the body of the victim is cut into pieces or his body is mutilated in a cruel manner.

5.2.2 Motive for Commission of murder

When the murder is committed for a motive which show total depravity and cruelty; for instance, when

a) a hired killer commits murder for the sake of money or reward;

b) a cold blooded murder is committed with a thoughtful design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust;

c) a murder is committed in the course for infidelity of the motherland.

5.2.3 Anti-Social or socially abhorrent nature of the crime

When murder of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.
In cases of bride burning and what are known as dowry deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

5.2.4 Magnitude of Crime:

When the crime is massive in proportion; for instance when multiple murders say of all or nearly all the members of a family or a huge number of persons of a particular caste, community, or locality, are committed.

5.2.5 Personality of Victim of murder:

When the victim of murder is

a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder;

b) a helpless woman or a person condensed helpless by old age or infirmity;

c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust;

d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In this background the guidelines indicated in Bachan Singh's case will have to be waste out and applied to the facts of each individual case where the question of imposing of death sentences arises.

From the Bachan Singh Case the following proposition emerges:

i. The extreme penalty of death need not be imposed except in crucial 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 insufficient punishment having regard to the relevant conditions of the crime and only provided the option to impose sentence of life imprisonment cannot be thoroughly 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 given full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply these guidelines inter-alia the following questions may be asked and answered:

a) Is there something unusual about the crime which renders sentence of imprisonment for life insufficient and calls for a sentence of death?

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

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

Arguably, the judgment wasn’t creating a specific line of judicial reasoning when referring to the “collective conscience.” Instead, the phrase was used only to analyse in what cases, in the court’s view, the penalty of death appealed to society as a justifiable mode of punishment. Since this case, courts have, while citing the Supreme Court judgment as an authority, repeatedly used the collective conscience to justify the imposition of capital punishment. The judgment gave judges of Indian
courts the discretion to determine what does and does not offend the collective conscience.

It always shocks how gorgeously the Apex Court of India or other courts express their judgments and the community's feelings in the simplest yet so sophisticated words. Their hold on the language and use of bombast is admirable and surely not any less artistic than other the forms of art.

5.2.6 Other factors

There are a number of other considerations and circumstances recognized by the court as either enabling or avoiding sentence of death. One important scheme laid down by the court is that the number of victims itself cannot be the index for determining whether it is "rarest of rare case" or not. In *G.V. Rao v. State of A.P.* the court said that "though the number of victims alone is not the yardstick, it would not be altogether outside the scope of consideration and should not be marginalized in appropriate cases. Delay in judicial process is also taken as an extenuating circumstance". In *Gurmeet Singh v. State* the accused had been responsible for killing 13 persons of a family. The Supreme Court, though agreed with the high court that it is fit case to be included within the category of rarest of rare, commuted the sentence on account of delay of two years in the judicial process."

The Supreme Court has refused to accept the contention that sentence of death cannot be awarded on circumstantial evidence. In *Shivaji v. State of Maharashtra*, "a case where a girl of 10 years was raped and murdered the court stressed on the need to impose punishments befitting the crime. According to the Court, the argument that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the

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440 (1996) 6 SCC 241  
441 2005 Cri.LJ 4384 (SC)  
442 AIR 2009SC 56
foundation for conviction. That has nothing to do with the question of sentence, which has to be determined by balancing aggravating and mitigating circumstances. Court further observed that, “any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter-productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.”

5.3 The Scope of the Doctrine of ‘Rarest of Rare’

Until 1973, Courts were required to state reasons for not awarding a death sentence, and preferring the alternate sentence of life imprisonment, in a capital offence 443, making death sentence the ‘rule’ and life imprisonment the ‘exception’. In *Jagmohan Singh v. State of U.P*444 “the Supreme Court upheld the death penalty’s constitutionality, finding that it was not merely a deterrent, but a token of emphatic disapproval of the crime by the society. The Court felt that India could not risk experimenting with the abolition of death penalty; and any errors in sentencing could be corrected by appeals to higher courts. But, the Court articulated a standard that the death penalty was the narrow exception, and not the rule in sentencing. The circumstances of the case had to compel it, to protect state security, public order or public interest.”

Thereafter, the new Code of Criminal Procedure, 1973, gave the accused a right of pre-sentence hearing under Section 235(2)445; and obligated the Court, under Section 354(3)446, to state special reasons for awarding death sentence, rather than the alternate term of life imprisonment.

443 Section 367(5) Code Criminal Procedure, 1973
444 AIR 1973 SC 947
445 Code of Criminal Procedure S. 235, Judgment of acquittal or conviction – “(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of §360, hear the accused on the question of sentence, and then pass sentence on him according to law.”
446 Code Criminal Procedure S. 354, Language and contents of judgment – “(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a
Once again though, the constitutionality of the death penalty was upheld in 1980, in *Bachan Singh v. State of Punjab*447. In this judgment, while taking the special reasons requirement under Section 354(3), the Court formulated the Rarest of Rare doctrine, in the background of an enthusiastic assault by the appellant on the legitimacy of penalty of death as a means of punishment itself. This is reflected in the Court’s conclusion:

“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.”

The Court elaborated on two questions, which must be considered:

*First,* was there something unusual about the crime interpreting a life imprisonment sentence insufficient and;

*Second,* were the circumstances of the crime such that there was no alternative but to impose the death sentence, even after according maximum weightage to the mitigating circumstances that spoke in favour of the offender?448

In a sense, these conditions requiring an uncommon crime & lack of alternative suggest a standard equal to what the Court later coined the ‘rarest of rare’ situation.

In any event, the standard sported a mere wrap of certainty, but was vague in substance and so the Court set out to clarify the latitudes of the doctrine in *Machhi Singh & Ors. v. State of Punjab*.449 “This involved a case of extraordinary cruelty. Due to a family dispute Machhi Singh, along with eleven others, attacked a number of homes killing seventeen people during the course of a single night, for no reason

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447 AIR 1980 SC 276
448 AIR 1980 SC 276
449 (1983) 3 SCC 470
other than they were related to two members of the other feuding family. In deciding on the death sentence, the Court put itself in the position of the “community”, whose “collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.” The Court went on to elaborately elucidate when the community could harbour such a sentiment, along with illustrations.\textsuperscript{450} It provided five categories of murder, within which the ‘rarest of rare’ doctrine was to be practically applied.\textsuperscript{451} These include the motive; the manner of commission; the magnitude; the anti-social or abhorrent nature of the crime; and the personality of the victim. Courts were thereafter expected to decide the cases, aided by these illustrative guidelines. In that sense, they were to take a loose view of Machhi Singh as a precedent, since the illustrations went well beyond its factual matrix.

5.4 Application of the Test of ‘Rarest of Rare’

The formulation of rarest of rare has definitely resolute the course of judicial declarations on the penalty of death in India. But it is not free from criticism. Many opponents have pointed out it to be very ambiguous and amenable to varied interpretations. The solidest criticism came from Justice Bhagwati himself, “who in his dissenting opinion cautioned that such a criterion would give rise to a greater amount of subjectivity in decision making and would make the decision whether a person shall live or die dependent on the composition of the Bench”.

He said, “the question may well be asked by the accused: Am I to live or die depending on the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?”

Though utmost decisions after Bachan Singh has referred to the criterion of “rarest of rare”, the balancing of aggravating and mitigating circumstance and then

\textsuperscript{450} Ibid
\textsuperscript{451} AIR 1983 SC 1957
awarding death penalty only in cases where the alternative is indisputably foreclosed, as mandated in Machi Singh is hardly done. The court has been severely criticized for differentially treating cases involving similar facts and such decisions in fact appear that the separate philosophy of the judges rather than the criteria laid down as "rarest of rare" determine the fate of the accused. The court is also criticized for ignoring the background of the criminal and the chances of his reformation and rehabilitation, at least in some cases. In most of the cases, it is argued, punishment awarded invariably depended upon the nature of the crime and the role of the offender in the crime. Some other case study of important cases decided after Bachan Singh, in an attempt to understand the accuracy of these allegations and also to examine the development of jurisprudence in this area after Bachan Singh, if any murders committed after premeditation in a cold-blooded and insensitive manner.

In cases where the crime was committed after planning and in a cruel and fierce manner, the court has in most of the events awarded penalty of death without much reluctance. In a 1983 decision, the court declined to show any mercy towards the accused who has committed the murder of one woman and three kids. According to the court he committed the brutal crime on defenseless and helpless victims and acted like a demon. He was awarded penalty of death categorizing it as a case of rarest of rare.\textsuperscript{452}Ashrafi Lal v. State of U.P\textsuperscript{453} “was also categorized by the court as rarest of rare. Here two brothers murdered their two nieces to take revenge upon the mother of the deceased on account of long pending land dispute. The court awarded the extreme penalty on the ground that the act of the accused was heinous and committed out of greed and personal vengeance.”

In Karan Singh v. State of U.P\textsuperscript{454} “where the accused killed five members of a family, the Supreme Court affirmed the death sentence awarded by the High Court on the ground that the murders were committed in a dastardly manner and that the

\textsuperscript{453} (1987) 3 SCC 224
\textsuperscript{454} AIR 2006 SC 210
accused wanted to exterminate the entire family”. Similarly in *Ravji v. State of Rajasthan*455 “the accused murdered his pregnant wife and three minor children. He also murdered an old man who was coming on his way while he was fleeing from the scene of crime. The court categorized it as a heinous crime and said that there is no justification for commuting death penalty”. Again in *Surja Ram v. State of Rajasthan*456 “the accused murdered his brother, his two minor sons and his aged aunt by cutting their throat when they were fast asleep. He attempted the same with his brother’s wife and daughter and critically injured them. The court took note of the innocence and helplessness of the victims and also the fact that the murder was committed in a cruel and calculated manner. The court observed that such incidents would shock the conscience of the society and ruled that it would come under the rarest of rare category.”

In *Govindaswami v. State of Tamil Nadu*457 the court upheld death penalty for the accused who killed five members of his uncle’s family who was sleeping, in a cruel and calculated manner for the purpose of grabbing his property. In *Holiram Bardolai v. State*458 where the accused had committed multiple murders in a premeditated, brutal and vicious manner, the Supreme Court has held it to be a case of rarest of rare and awarded death.

The case of Swami *Shraddananda v. State of Karnataka*459 would be one probable exception to this general trend, “where the accused committed the murder of his wife with the motive of acquiring her wealth, the court found that the case falls short of being rarest of rare. The court accepted that the cold-blooded murder was pre-planned and he devised the plan in such a manner that the victim could not know till the last moment that she had been betrayed by the one she trusted the most. The facts of the case clearly show that, the appellant had taken advantage of the

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455 (1996) 2 SCC 175
456 (1996) 6 SCC 175
457 (1998) 4 SCC 531
458 2005 Cr.LJ 2174 (SC)
459 AIR 2008 SC 3040
deceased's desire to have a male child and by winning her confidence married her. He planned the murder very minutely so that nobody would suspect him. He even represented her in the meetings of the Company and signed documents on her behalf by virtue of the power of attorney, after the murder. He had disposed of the body in a wooden box, which he had earlier got made for this purpose and dropped it in to a pit, which he had especially got dug up, just outside their bedroom. All this undoubtedly point to the fact that it was a pre-planned cold-blooded murder, committed by a person who was in a position of trust as far as the deceased is concerned. But the court refused to award death on the ground that he did not cause any mental or physical pain to the victim and came to the conclusion that crime committed by the accused was not very grave and the motive behind it cannot be said to be highly depraved.”

As a general trend the court has dealt with offences against women as harshly as they deserve them to be. The court has awarded death in cases where the murder is committed for obtaining dowry, or murder after or in the course of rape, or murder committed by husband suspecting the fidelity of the wife. For instance, in *Kailash Kaur v. State of Punjab*, the court expressed the opinion that “when cases of dowry murder is brought before the court and it is proved beyond reasonable doubt, the maximum penalty must be imposed so that it would act as a deterrent against others. Though the court did not award death penalty in the instant case the court observed that the Sessions court should have considered the imposition of maximum penalty.”

But this view was not sustained by the Supreme Court in the later decision of *Ravindra Trimback Chouthmal v. State of Maharashtra*, “where the husband with the help of his father killed his eight month pregnant wife, for remarrying another so that he can get more dowries. Though the court opined that dowry murders, where life is taken to satisfy raw greed, must be handled strongly, it refused to consider it as a rarest of rare case. The reasoning given by the court is that, “dowry deaths have 

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460 (1987) 2 SCC 631
461 (1996) 4 SCC 148
ceased to belong to that species of killing.” A simple understanding of the logic of the court would mean that dowry deaths would not belong to this category because of its growing incidence. This conclusion was reached by the court even after referring the case as a ‘murder most foul’ and ‘blood-boiling’. This decision has been severely criticized by many. Professor B.B Pande has observed with reference to this case that, the reasoning deployed by the court in reaching such a conclusion is surprising, as it makes ‘rarest of rare’ categorization not dependent upon extreme brutality or exceptional depravity, but in the mere increase in the number of incidents.462

When a person, suspecting the fidelity of his wife severed her head and killed her, the Supreme Court had no doubt in categorizing it as a rarest of rare case and imposing death.463 The decision Amruta v. State of Maharashtra464 becomes relevant here, as a case “where the court has refused to give death even when it involved similar facts as the case above mentioned. “The accused suspecting the chastity of his wife murdered her and his daughter. According to the court the accused nurtured and was labouring under a sense of grievance and was moody and the court justifying what the accused had done observed that, “one should not lose sight of the fact that sexual jealousy and injured vanity often combine together to furnish powerful motive for murder.”

In the much celebrated case of Dhanajoy Chatterjee v. State of West Bengal465 “the court awarded death sentence on the accused, a security employee of the residential colony, who raped and killed a teenaged girl as retaliation for his transfer on her complaint. The court observed that the savage nature of the crime shocked the judicial conscience. Similarly in another case where a seven year old girl was raped and murdered by her uncle the court refused to show any leniency as the accused occupied the position of a guardian and the deceased reposed complete faith on him. The court ruled that a calculated, cold-blooded and brutal murder of a girl of

462 B.B Pande, Murder most foul, though not rarest of rare, P.3, See Also (1996) 5 SCC 1
464 (1983) 3 SCC 50
465 (1994) 2 SCC 220
very tender age after committing rape on her undoubtedly fell in the category of rarest of rare.”

But in *Kumudi Lal v. State of U.P.*\(^{467}\), “which is also a case involving rape and murder of a fourteen year old girl, the court refused to confirm death sentence. Analysing the facts and circumstances of the case the court found that probably the victim was not unwilling initially to allow the appellant to have some liberty with her. It is only when the appellant started advancing towards sexual intercourse that she started resisting it and began raising shouts. In an attempt to prevent her from raising shouts the accused must have tied the salwar around her neck which resulted in strangulation and death. On this probable story, the court ruled out the possibility of treating it as a rarest of rare case.”

Another interesting decision is that of *State of Maharashtra v. Suresh*\(^{468}\) this case is related to the rape and murder of a four year old girl. Though, the court considered it to be a “rarest of rare case”, it refused to award penalty of death on the ground that the death sentence imposed by the trail court was altered by the High court. In *Amrit Singh v. State of Punjab*\(^{469}\) “a girl of 2nd standard was brutally raped. She died subsequently due to excessive bleeding. Both the trial and High court convicted the accused under section 302 and sentenced him to death. But the Supreme Court held that the death was not intentional though the rape was brutal.”

### 5.4.1 Murder misusing the trust

In *Earabhadrappa v. State of Karnataka*\(^{470}\) “the appellant who was the domestic help of the victim’s family committed the murder and took the ornaments, cash and other things belonging to the victim. He used to sleep in the house and was familiar with everything there and actually committed the crime misusing the trust.

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\(^{467}\) (1999) 4 SCC 108

\(^{468}\) (2000) 1 SCC 471

\(^{469}\) (2007) 1 SCC (Cri) 41

\(^{470}\) (1983) 2 SCC 330
the master reposed on him. The trial court as well as the High Court convicted and sentenced him to death. But the Supreme Court refused to consider it as satisfying the requirements mentioned in Bachan Singh.” One could find it difficult to reconcile this decision with that of *Amritlal Someswar Joshi v. State of Maharashtra* 471 “were also the accused, a cook, for committing robbery brutally murdered three members of the family. The court found no mitigating circumstance and held that it is a cruel, heinous and cold-blooded murder manifesting depravity of mind. It is opined that these two decisions show the extent to which the penalty depends on the individual philosophy of the judges.” *Mukund v. State of U.P* 472 “is also relevant to be quoted here. In this case the accused, a frequent visitor in the house, misused his acquaintance and murdered wife and two children with the intention of committing robbery. The Supreme Court conceded that the murders were ghastly and involving betrayal of trust. It also took note of the fact that the victims were innocent and the murders were committed for gain. But, it refused to categorize it as a rarest of rare one. In another case of similar nature where the accused murdered a widow, taking advantage of the trust she had on him, the court refused to award death, considering the personality of the accused as a mitigating factor.” 473

5.4.2 Kidnapping and murder

In a case where a young boy was kidnapped for ransom and murdered, the court ruled that the offence committed by the originator of the idea is very heinous and preplanned. The court noted that he was attempting to extract money from the boy’s father even after he was murdered by making him believe that his son would be returned if he paid the ransom. The court ruled that this case would fall within the category of rarest of rare case probably because the accused misrepresented the facts and extracted money from the gullible father. 474 Similar was the decision in *Mohan v.*

471 (1994) 6 SCC 186
472 (1997) 10 SCC381
State of Tamil Nadu⁴⁷⁵ “the court refused to show any leniency towards the two accused who kidnapped and killed a 10 year old boy. The court found that the accused, Mohan played an active part in procuring the boy, conceiving the idea of taking the life of the boy and killing the boy. He actually threatened the other accused who persuaded not to kill the boy. In addition, he even obtained a ransom of five lakhs, even after disposing the body of the boy. The court found that his brother also took an active part and confirmed the death sentence of both. As regards the other accused, the court refused to give the extreme penalty as they did not take part in the crime actively and also refused to share the ransom.”

But in Girdhari Paramanad Vadhava v. State of Maharashtra⁴⁷⁶ the court took a diverse view. Here also, the accused kidnapped and confined a boy for ransom and demands Rs. 2 lakhs for his safe release. The brain behind the crime absconded and others were prosecuted and convicted. The court refused to consider it as a “rarest of rare case.”

5.4.3 Robbery and murder

In Narayan Chetanram Chaudhari v. State of Maharashtra⁴⁷⁷ “the three accused conspired to commit robbery and while on their job they killed five innocent women. They committed robbery also. The Supreme Court took the view that the case is fit to be categorized as rarest of rare, but showed a lenient view as there was no premeditation to commit murder and the main object was to commit robbery.” In A. Devendran v. State of Tamil Nadu⁴⁷⁸ “the accused persons committed triple murder in the course of robbery and were sentenced to death by the trail court which was confirmed by the High Court. The Supreme Court differed and held that there was no premeditation to kill and their main purpose was to commit robbery. Again the court

⁴⁷⁵ (1985) 5 SCC 336
⁴⁷⁶ 1997 SCC (Cri) 159
⁴⁷⁷ (2000) SCC (Cri) 1546
⁴⁷⁸ (1997) 11 SCC 720
said that number of person killed in the incident could not be a determining factor in deciding the question of extreme penalty.’’

Again, it found that from the evidence it would be difficult to hold that the crime was diabolical, ghastly or gruesome. This decision has been severely criticized. It is said that, “the reasoning does not seem to be appealing to commoners. The accused entered in to a house to commit a serious offence and in the process happened to kill the members of the family in the course. The eventuality of killing must surely have been contemplated by the accused before they embarked on robbery. The man in the street might consider such accused as most dangerous criminals who should be given death penalty.”

5.4.4 Rape and murder

The death of an unnamed young woman “Nirbhaya”, a female physiotherapy intern, following a cruel gang rape in the last month of 2012 in Delhi, India, incited the world to identify the gradation of violence against women and it has been noticed that sexual harassment is not only an Indian problem but it’s a worldwide one. “It looks back into the law existing in India regarding prohibition of violence against women in India. Brought against the backdrop of Nirbhaya’s case, the new ordinance, 2013 changes numerous clauses in existing criminal law by amending Indian Penal Code, Code of Criminal Procedure and the Evidence Act. There are already ample laws prescribing deterrent punishment for offences against women. What is actually required is an ordinance, of course if it can be made, to infuse sensitivity, understanding and more significantly, the mind set among police, executives to implement the laws more in spirit than in letter. Only then deterrent punishment can be awarded in crimes against women.”

479 Dr. K.N Chandrasekharan Pillai and Dr. N.S Soman, Rarest of rare case-A Myth, 25 (Academy Law Review, 2001)
In August 2005, the Supreme Court awarded the death penalty to Afzal Guru; an accused in the 2001 attack on Parliament, after holding his was a classic example of a “rarest of rare” case. It said the “collective conscience of the society” would only be satisfied if the death penalty was awarded to Afzal Guru.

Last year, the Supreme Court handed out the death sentence to Ajmal Kasab, involved in the 2008 Mumbai terror attack, ruling that gallows remained the only punishment for the man who had “no feeling of pity and killed without the slightest twinge of conscience. While the verdict in Guru’s case did not explore on the aggravating and mitigating factors; balancing these have been used as a standard to decide whether to award the death penalty Kasab’s judgment duly considered it.”

These two cases could be similar in view of the fact that they related to terrorism, but the fact remains that law mandates punishment only in accordance with crimes and their punishments under the Indian Penal Code. “So, the cases of Guru and Kasab are no different from any other case in terms of charges of murder, waging war against country, sedition, etc. Several recent Supreme Court judgments have, however, advocated a re-examination of the parameters that decide which crimes qualify for the awarding of capital punishment under the “rarest of rare” criterion. Judicial discussions on conclusive parameters for the death sentence have taken center stage, and several judgments expressing what constitutes the “rarest of rare” are being delivered.”

The first such judgment came in November 2012, when Justice Madan B. Lokur, “authoring a verdict in a murder case regretted that the sentencing has become “judge-centric”, rather than based on the principles of sentencing that require considering crime and criminal equally important. He pointed out that the courts continue to focus only on the severity of the crime, while ignoring other circumstances relating to the criminal.”
Subsequently, in another judgment, Supreme Court bench saved from the gallows a man sentenced to death for killing his wife and daughter when he was out of jail on parole. He had been jailed for 12 years for raping the daughter when she was a minor. The Supreme Court adopted a "humanistic" approach and said this case was not "rarest of rare", since the possibility of the convict's reformation was not foreclosed. However, a few days later, the SC sentenced to death a man convicted of killing a seven-year-old boy in another judgment. While justifying this case to be "rarest of rare," the court also said that the murder of the "only male child" would have caused extreme misery to the parents. A subsequent verdict involving two men on the death row for killing a couple and their two children decided "to go a little further" and explain the test for awarding death sentences. It said that after drawing out the aggravating and mitigating circumstances, the "rarest of rare" test will be required. This test, the SC said, will depend on the "will of the people" and "perception of the society", and will not be judge-centric. The judgment read that the death penalty would "depend on the perception of the society, whether the society will approve the awarding of death sentence to certain types of crime, or not".

Now, when different benches are apparently suggesting that the earlier Constitution Bench verdicts are not being applied uniformly, it would be interesting to see if the apex court delivers another Constitution Bench judgment to suit the present moment.

5.5 Inherent and Acquired flexibility of the Rarest of Rare Doctrine

The two Constitution Benches in *Jagmohan* and *Bachan Singh* decisively refrained from standardization or categorisation of case where death penalty could be awarded, despite keen pleas of the appearing counsels to do so, to protect the doctrine from the evil of arbitrariness. In *Jagmohan*, the Court strained that laying down standards would not serve any purpose; rather "the exercise of judicial discretion on well recognized principles is, the safest possible safeguard for the accused". In *Bachan Singh case*, it was contended that the term “special reasons in Section 354(3)
of the Code was very loose and hence open to whimsical and arbitrary interpretation. But the Court said that standardization was a policy matter to be done by legislation, and it “would not by overleaping its bounds to rush to do what Parliament, in its wisdom, warily did not do.”\textsuperscript{480} What is noteworthy is that the Court discussed the issue extensively, giving over half a dozen reasons for non-standardization. It observed that such standardization was in any case, practically impossible, and the infinite variety of cases and their particular facets would make general standards either meaningless boiler plates or a statement of the obvious that no Judge would need.\textsuperscript{481} Earlier in \textit{Jagmohan}, it had been held that sentencing discretion was to be exercised judicially on well-recognised principles. It now clarified that this was a reference to judicial decisions illustrating different aggravating or mitigating circumstances. Consequently, though it propounded the standard of \textit{rarest of the rare}, it is evident that it left the sentencing process as it came from the Legislature, flexible and responsive to the merits of each case. The Court’s decision takes the form of a general principle, rather than a narrow rule of law, which can be applied widely, to cases with materially different facts.”\textsuperscript{482}

The strongest criticism of what the Court did is found in the dissenting opinion of Bhagwati, J. \textsuperscript{483} “a faithful abolitionist, he cautioned that the doctrine would give rise to a greater amount of subjectivity in decision making and renders a person’s life dependent on the composition of the Bench, which was violative of Articles 14 and 21 of the Constitution. He raised a crucial point, arguing that the labels or epithets used for describing the crime, such as ‘brutal’, ‘cold blooded’, ‘gruesome’ etc., were not clear-cut categories, but only expressed the intensity of judicial reaction to the crime, which may not be uniform for all judges. Thus, the factors considered relevant by one judge may not be considered so by others.”

\textsuperscript{480} AIR 1980 SC 276
\textsuperscript{481} Ibid
\textsuperscript{482} Such an approach is at odds with the traditional common law rule of adjudication, which requires that the decision of the Court be confined to a strict interpretation of the material facts on record. For a further discussion see Ruggero J. Aldisert, \textit{Precedent: What it is and What it isn’t, When do we Kiss it and When do we Kill it?}
Ostensibly, standardization of the doctrine came about with Machhi Singh’s categorization of crimes. But a look through these categories shows that they fall into the very trap that Bhagwati, J., cautioned against, being generalized labels. Though the Court elaborated certain instances, these were only illustrative, as subsequent application of the judgment in later decisions has shown.

In the past decade, Sinha, J., in particular, repeatedly pointed this out. In Aloke Nath Dutt v. State of West Bengal484, “where the accused bludgeoned his sleeping brother to death over a property dispute, he cited a plethora of cases in which the Supreme Court awarded either death or life imprisonment to similarly situated convicts, without any justification for the difference in the outcome. He concluded by admitting the Court’s failure to evolve a uniform sentencing policy. After this extensive discussion, he finally spared the accused of the death penalty, holding that though the manner of commission of the offence was gruesome, the method applied could not be termed to be cruel. The murder was committed due to greed for money, arising out of his bad habits, whereby he was pushed back to a situation where he thought he had no other option but to kill his brother. Though the decision does conform to precedents, where death penalty was not awarded as the conviction was based on circumstantial evidence, Sinha, J. clarifies that his conclusion is because the factual matrix does not warrant death penalty.

In Swamy Shraddananda v. State of Karnataka485 “the accused murdered his wealthy wife, over finances and her apparent inability to give birth to a son. Sinha, J. felt death was unwarranted on the specific facts and circumstances, but Katju, J. disagreed, holding that they fell within the first, second and fifth category enumerated in Machhi Singh. The matter was referred to a Full Bench, which acknowledged the changing social dynamics and incidences of crime since 1983, when Machhi Singh was pronounced. It concluded that the categories provided in that judgment were very

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484 2006 S.C.A.L.E. 467
485 AIR 2008 S.C. 3040
useful guidelines, but not inflexible, absolute or immutable. Further, this flexibility was envisaged in the rule in *Bachan Singh* itself; a reference to the inherent fluidity. The Court went on to accept that the question of death penalty is not free from the subjective element and depends a good deal on the personal predilection of the judges constituting the Bench. Death penalty was not confirmed, despite the Bench accepting that the murder was gruesome and cold blooded, on the ground that it did not cause any mental or physical pain to the victim and that the appellant had partially confessed his guilt before the High Court.” These cases evidence that the rarest of rare doctrine has acquired fluidity in its application, as the Court itself admits repeatedly. This occurs at two levels:

“First, the categorization in *Machhi Singh* itself being made in fairly general terms and; Second, subsequent decision, in any case, refusing to consider these as inflexible categories, instead deciding on the specific facts of the case.

The latter introduces a host of external influences, including public opinion and the personal predilections of the judge. Sinha, J., admits to undue influence of public opinion in awarding death penalty too, with capital sentencing often becoming a media spectacle.”

5.6 The Impression of “application of settled principles”

The Court in “*Ramnaresh case* spoke of examining each case in the light of enunciated principles. However, it is not clear as to what precisely these principles are, and when they are to be applied. In other words, what constitutes the rarest of rare circumstances is far from a settled position. What appears to be settled is a more fundamental principle that life imprisonment is the rule, and death is the exception. But this is too broad to mitigate the discretion and subjectivity that may be applied to individual cases.”

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This discretion is reflected in numerous cases, decided by the Court over the years. By way of illustration, “one may consider cases involving crimes against women. The Court has itself noted that the rising crime rate against women has made sentencing in such cases a matter of concern. Machhi Singh had considered that the specific examples of bride burning, committed in order to remarry to collect dowry again; cold-blooded murders, where the murderer is in a dominating position or position of trust; and where death is brought about by inhuman acts of torture or cruelty, merited death sentence.”

Also, in the category of personality of the victim, a helpless woman and an innocent child—were illustrative personalities that invited the penalty of death. Yet, the Court’s approach for crimes against women continues to fall target to the fluidity of the ‘rarest of rare’ doctrine. Even in a single species of cases, say the rape and murder of a girl child, death sentence has not been uniformly imposed.

In Dhananjoy Chatterjee v. State of West Bengal488, “the Court awarded death penalty to a security guard, who raped and killed a teenage girl as retaliation for his transfer on her complaint, as the savage crime shocked the judicial conscience”. But in State of Punjab v. Harchet Singh489, “decided in the same year, death was not awarded ostensibly because the offence was committed out of lust and not enmity. This distinction drawn between enmity and lust-based crimes seems frivolous, devoid of any legal or moral justification.”490

Two decisions of the Court in 2005, on the rape and murder of girl children, further expose the judicial dilemma. In State of U.P v. Satish491, “the Court upheld death penalty where the victim was a six year old girl, considering its views in Bachan Singh’s case and Machhi Singh’s case. The Court reasoned that rape, an

488 Ibid
489 (1994) 3 Crim.LJ (S.C.) 1529
491 (2005) 3 S.C.C. 114
iniquitous, flagitious act in itself, becomes abnormal when the victim is a child, and
reaches the lowest level of humanity when it is followed by brutal murder.”

to uphold the death penalty where the accused had kidnapped, raped and murdered a
teenage girl, because her mother had refused his sexual advances. The evidence was
practically identical to Satish’s case, with a confession by the accused, and available
circumstantial evidence of the accused being the last person seen with the victim,
blood-stained clothes etc. In a single paragraph, the Court opined this was not a
‘rarest of rare’ case as the accused was aged 36 years at the time of the crime, without
any criminal record, and was a migrant labourer from U.P. living in impecunious
circumstances. The standard applied appears to be that there was nothing to establish
that he would be a menace to the society in future, though the Court did not refer to
any precedent for relying solely on such standard.”

The Court has also ruled differently where death results from rape, compared to
where murder is committed as a consequence to rape, though both cases are classified
as ‘murder’ under Section 302 of the Indian Penal Code, 1860. In *Amrit Singh v.
State of Punjab*⁴⁹³, a 2nd standard girl died of excessive bleeding following a brutal
rape.

The Court refused to uphold the death sentence solely because death was not
intentional. In *Kumudi Lal v. State of U.P*⁴⁹⁴, the accused tied a salwar around the
neck of his fourteen year old victim to prevent her from shouting while resisting rape;
however, she died due to strangulation during the act. Again, he was spared the death
sentence. One of the most arbitrary decisions however remains *Ravindra Trimback
Chouthmal v. State of Maharashtra*⁴⁹⁵. Here, the husband killed his eighth-month
pregnant wife, to get more dowries by remarrying thereafter. The Court accepted that

⁴⁹³ AIR 2007 SC 132
⁴⁹⁴ (1999) 4 SCC 108
⁴⁹⁵ 91996) 4 SCC 148
the blood-boiling act was committed to satisfy raw greed, but refused to consider it as a rarest of rare case since dowry death has ceased to belong to that species of killing ostensibly a reference to their growing incidence.

Interestingly, such a case is a clear illustration in Machhi Singh’s classification, but the Court completely supervises it. The decision was severely criticized as it suggested that the ‘rarest of rare’ doctrine was not to be interpreted considering the extreme cruelty or depravity of the crime, but instead by an almost literal understanding, dependent on the frequency of incidents.496

Despite all its introspection, recent cases do not show any improvement of the Court’s predicament. In the much publicized Santosh Singh v. State497, famously known as the Priyadarshini Matoo case, the Court spared Santosh Singh the noose solely due to the circumstances he faced subsequent to the murder. Earlier this year, in Md. Mannan @ Abdul Mannan v. State of Bihar498, “where a small child was raped and murdered by a mason working in the house, the Court imposed death penalty, reasoning that the collective conscience had been shocked by the cruelty to an innocent, defenseless child who did not provide even an excuse, much less a provocation for murder”. But in Haresh Mohandas Rajput v. State of Maharashtra499, “involving similar facts and evidence, the Court refused to award death, despite finding conclusive evidence against the accused, based on the considered opinion that the case does not fall within the rarest of rare cases.”

Some cases decided this year further illustrate the illusion of application of settled principles. In Brajendra singh, a man, suspecting his wife’s fidelity, killed her and his three children; failing in his own attempt to commit suicide. His death sentence was set aside as the Court considered the fact that he had lost his own wife and children, and that the crime was committed out of suspicion and frustration as

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496 (1996) 5 SCC13
498 (2011) 5 S.C.C. 317
499 (2011) 12 S.C.C. 56
mitigating circumstances. In *Absar Alam v. State of Bihar*\(^{500}\), "the accused killed his mother by chopping off her head and thereafter fled from the house with the head leaving behind her body. The High Court considered the dastardly and diabolical nature of the crime in awarding the death penalty, but the Apex Court set it aside considering that the accused was an illiterate rustic and was a cultivator residing in a village with virtually no control over his emotions and has overreacted impulsively to the situation."

It is accordingly apparent that the doctrine continues to be pierced with subjectivity and arbitrariness; furthermore, its application over time, even specifically for the category of crimes against women, has been pure chaos. Though the Court stresses its decision is based on application of settled principles, it ultimately turns on subjective considerations.

5.7 Formulation of ‘Rarest of Rare’

The constitutionality of death penalty was upheld by the Supreme Court in *Jagmohan Singh v. State of Uttar Pradesh*. \(^{501}\) But in 1980 the Court was again called upon to reconsider it keeping in view the legislative changes as well as some judicial pronouncements. \(^{502}\) The new Cr.P.C which was enacted in 1973, by virtue of section 354 (3) obliged the judge to give special reasons while giving death penalty, thereby making death penalty an exceptional punishment.

Again, in view of the procedural and substantial reasonableness mandated in *Maneka Gandhi* \(^{503}\) the Court had in *Rajendra Prasad v. State of U.P* \(^{504}\) "expressed the opinion that the special reasons for imposing death penalty must relate to the criminal rather than the crime and death penalty is the last step in a narrow category

\(^{500}\) AIR 2012 S.C. 968  
\(^{501}\) AIR 1973 SC 947  
\(^{502}\) *Rajendra Prasad* (1979)3SCC 646, See also *Dalbir Singh*, AIR 1953 SC 364, and See also *Ediga Annamma*, AIR 1974 SC 799  
\(^{503}\) *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621  
\(^{504}\) (1979) 3 SCC 646
where, the murderer is not likely to be cured and tends to murder others, even with prison or immediately on release, if left alive. Further, they said it could be awarded only if the security of the state and society, public order and the interests of the general public compelled that course. When the appeal of Bachan Singh came before the division bench, they found these observations running contrary to Jagmohan case and sought reconsideration. One more factor which influenced the decision in Bachan Singh was the fact that India had acceded to the ICCPR that had come into force on December 16, 1976 and thereby committed itself to progressive abolition of death penalty.\textsuperscript{505} The majority of four judges in Bachan Singh affirmed the decision in Jagmohan Singh and overruled Rajendra Prasad in so far as they sought to restrict death penalty only to cases where the security of the state and society, public order and interests of the general public were threatened.\textsuperscript{506} The Court held that while deciding the punishment due regard must be given to both the crime as well as the criminal. Though the court was not ready to lay down standards or norms which should guide the exercise of judicial discretion in the imposition of capital sentence, it recorded certain aggravating and mitigating circumstances. The following are the aggravating circumstances suggested by the court: murder committed after previous planning and involving extreme brutality or murder involving exceptional depravity, or murder of a member of any of the armed forces or of any police force or of any public servant and 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.

The Court gave some mitigating conditions also, as suggested by the amicus curiae. While awarding a death sentence the following mitigating circumstances must guide the court’s discretion, the age of the accused, extreme mental and emotional

\textsuperscript{505} S.Muralidhar, "Hang them now, hang them not: India’s travails with death penalty," p.145, 40 JILI 1998.
\textsuperscript{506} Justice Bhagawati gave a dissenting opinion reported in (1982) 3 SCC 24.
disturbance under which the offence was committed, the probability that the accused 
would not commit criminal acts of violence as would constitute a continuing threat to 
society, the probability that the accused can be reformed and rehabilitated, the act of 
the accused was under duress, and the fact that the accused thought himself to be 
morally justified in committing the offence.

The concluding remarks in the majority opinion can be termed to be a turning 
point in the judicial attitude towards death sentence. They said, “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.” The dissenting opinion of 
Justice Bhagwati on the other hand went strongly against conferring untrammeled, 
unfettered and unguided discretion upon the judiciary under section 302, IPC read 
with section 354 (3), Cr PC to choose between life and death by providing a totally 
vague, indefinite and ad hoc criterion of ‘special reasons’. He maintained that this 
would make death penalty arbitrary and unreasonable and hence violative of Articles 
14 and 21 of the Constitution. He cautioned in the context of the decided cases that 
there is a potential danger that the power shall be exercised arbitrarily and freakishly 
by the High Courts as well as the Supreme Court and the safeguards provided in the 
procedural law are merely peripheral and do not attack the main problem. According 
to him the labels or epithets used for describing the nature of murder such as ‘brutal’, 
‘cold blooded’, ‘gruesome’ etc. do not indicate any clear-cut categories, but are 
merely expressive of the intensity of judicial reaction to murder, which may not be 
uniform for all judges. Thus, there are chances that a factor considered relevant by 
one judge in awarding death sentence, may not be considered so by others.

An understanding of the formulation of ‘rarest of rare’ would not be 
complete unless a reference is made to the decision of Machi Singh v. State of 
Punjab507 “where the court further explained the approach to be taken in capital

507 AIR 1983 SC 1957
sentencing. The court directed that a balance sheet of aggravating and mitigating circumstances has to be drawn and while 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. Adding to the aggravating circumstances already given in *Bachan Singh*, the Court said that when the community’s collective conscience is so shocked that it will expect the holders of judicial power centre to inflict the death penalty irrespective of their personal opinion. According to the court before awarding a sentence of death the court has to satisfy itself that ‘there is something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence.’ The court also has to consider whether the circumstances of the crime are such that there is no alternative but to impose death sentence, even after according maximum weightage to the mitigating circumstances.”

The following factors are demonstrated by the court as appropriate in determining whether a certain case would become eligible for imposing sentence of death. First is the manner of commission of murder. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community, the extreme penalty shall be imposed. Second is the consideration of motive i.e. when the murder is committed for a motive which evinces total depravity and meanness. E.g. murder by hired assassin or a cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust or murder committed in the course of betrayal of motherland. Thirdly, anti-social and socially abhorrent nature of the crime was also considered relevant. When murder of a member of scheduled caste or minority community, etc. is committed not for personal reasons but in circumstances which arose social wrath; or in cases of bride burning or dowry death or when murder is committed to remarry for the purpose of extracting dowry once again or to marry another woman on account of infatuation. Fourth factor that the court has to take in to account is the magnitude of the crime. When the crime is enormous in proportion, for
instance, when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed. Finally, the personality of the victim is also to be considered. When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community, the court should not hesitate to award death penalty.

Both in _Jagmohan_\(^{508}\) and _Bachan Singh_\(^{509}\) the Court has upheld the constitutional validity of death penalty keeping in tune with the legislative policy of retaining it. But one can find a shift in the penal policy in as much as the Court has made it clear in the latter decision that death sentence is an exception and not the rule. Judicial creativity evident in the formulation of the rarest of rare principle is also significant. This formulation has in fact made a substantive shift in the law relating to death penalty without legislative intervention. The decision is also important for the recognition of the rehabilitative and reformative purposes of punishment. In short it can be said that in _Bachan Singh_, the court has balanced the need to restrict imposition of death penalty and the intent of the legislature in retaining it for certain offences.

5.8 Should Rarest of Rare doctrine be abolished?

Recently, again an accused is awarded a death sentence by a Mumbai Sessions Court “for raping and killing under Indian Penal code Section 302 with section 201” terming it as the “rarest of rare cases”. It is unable to understand the exact “application of what the Rarest of Rare” doctrine is and how it is applied each time. The “Doctrine Rarest of Rare” was first articulated in 1980 in the _Bachan Singh case_. Then in 2008, the Supreme Court judges, in the _Prajeet Kumar Singh v. State_
of Bihar510, “had ruled exactly on what a rarest of rare case would constitute. Court
said that a death sentence would be awarded only, “when a murder is committed in 
extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse 
intense and extreme indignation of the community”. There is no statutory definition 
of what rarest of rare means but the controversy to this doctrine arises each time the 
Court awards death penalty and the debates go on and on. There are a number of 
cases in which the crime is same but the punishment differs. There are judgments in 
which the accused has committed either rape or murder and has been awarded death 
penalty but also there are cases in which the accused has committed rape as well as 
murder but then also he has not been awarded death penalty. It is hard to find out 
what led to the variation in punishment in such cases. Is it the ‘Crime’ or the 
‘Criminal’ or the ‘Judge’?” Bachan Singh considered all the circumstances relating 
both to the criminal and the crime, whereas Machhi Singh v. State of 
Punjab511 “attentive only on the crime and not the criminal. What makes the Judge to decide whether the case falls within the “rarest of rare case”? Does the age of the victim cold be a deciding factor to make such categorization of sentence or not? Because in one case the Bombay High Court confirmed a double-life and double death sentence for rape and murder of a 2 year old girl”; whereas in Mohd. Chamat v. State (NCT of Delhi)512, “the Supreme Court commuted the death sentence for rape and murder of a 1 year and 6 months old girl to life sentence. Also there are different assumptions of this doctrine as to when the collective conscience of society is shocked; which differs from judge to judge.”

The issue under Article 21 that, “Does death penalty violates the fundamental right of Right to Life”? The judgments relating to Uncertainty in sentencing the person to imprisonment to life or to the penalty of death in similar crimes is, violating the “Right to equal protection of the laws guaranteed under Article 14 of the Indian Constitution.” Reasonable insight among the citizens can only be made by the State
by passing a proper law but here judiciary has walked in to take this burden on its own shoulder, which is leading a very subjective interpretation of the doctrine created by it.

With the time, the doctrine which was imaginary to be a principle based doctrine has now turned into a “Judge-centric doctrine”. If Judiciary still wants to keep this doctrine then they need to ascertain specific elements and circumstances on the basis of which the doctrine would completely rest. It is high time for the legislature to step in and clear the fog surrounding this doctrine because judiciary is giving a lot of subjective interpretation and in the course of that it is formulating itself as a “Super-legislative”.

5.9 Rarest of rare test needs society's approval

The “rarest of rare case” test is not 'judge centric' but depends on the perception of society and whether it would approve the award of death sentence to those convicted in certain types of crimes, the Supreme Court has held:

“Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not judge-centric,” a bench headed by Justice K S Radhakrishnan said “To award death sentence, the aggravating circumstances have to be fully satisfied and there should be no mitigating circumstance favouring the accused.”

“Even if both the tests are satisfied as against the accused, even then the court has to finally apply the rarest of rare cases test, which depends on the perception of the society and not judge-centric, that is whether the society will approve the awarding of death sentence to certain types of crime,” the bench also comprising Justice Dipak Misra said.
The comments were made in a judgement by the Supreme Court which commuted the sentence of death awarded to two men for hacking four members of a family in August, 2000 over a property dispute, in Punjab.

The Supreme Court, on their punishment to life imprisonment of 30 years saying “so far as this case is concerned the extreme sentence of capital punishment is not warranted.”

Gurvail and Satnam Singh were awarded the sentence of death by a trial court in 2000. The sentence was upheld by the Punjab and Haryana High Court in 2005.

The court while altering their punishment said, “Some of the mitigating circumstances, as enunciated in Machhi Singh case, come to the rescue of the appellants. Age definitely is a factor which cannot be ignored, though no determinative factor in all fact situations. The probability that accused persons could be reformed and rehabilitated is also a factor to be borne in mind.”

Gurvail was 34 years old at that time of committing the crime, while Satnam was 22-years-old. The Supreme Court in its judgement also perceived that while awarding the sentence of death, the court has to look into variability of factors like “society's abhorrence, extreme indignation and antipathy to certain types of crime; like rape and murder of minor girls, especially intellectually challenged minor girls minor girls with physical disability, old and infirm women etc.”, and elucidated that the examples are explanatory and not exhaustive.

5.10 The ‘the Rarest of the Rare cases’- Rule to justify imposition of death sentence.
1. Killed in a very brutal grotesque, horrific, revolting or dastardly manner to ensure that the community's intense and extreme indignation rose;
2. Shows total depravity and meanness yet determined a motive for murder;
3. When murder is that of a member of Scheduled Caste or minority community;

4. When murder is in enormous proportion i.e., several persons are murdered;

The Court ruled that penalty should be the only punishment to be awarded in the aforesaid cases.

In *Satyendra case*\(^\text{513}\), “the accused persons who were variously armed came in group by using cars and motor cycles and intercepted a city bus knowing full well that deceased were traveling in it. They entered the bus from both doors without giving an opportunity to deceased person to escape, and killed them on the spot.”

Two deceased who strained to escape from the bus, were chased by the accused they were convicted under Section 149/302 and punished with death sentence by the trial Court which was affirmed by the High Court. In appeal, the Supreme Court held that punishing the accused to death was not proper because various explicit acts of individual accused persons were not established. Therefore, the sentence of death was converted to imprisonment for life.

In the case of *Jay Kumar*,\(^\text{514}\) “the accused was a young man of 22 years of age who attempted to rape his sister-in-law i.e. brothers wife (Bhabhi) but having failed in his attempt, he murdered her and hanged her mutilated head on a tree. He also murdered the 8 year old daughter of the deceased who was the sole witness to this incident. The Supreme Court rejected the appeal and upheld the death sentence on the ground that the double murder was committed in a brutal and gruesome manner and deserved no leniency in the award of sentence.”

The Supreme Court in *Ram Deo Chauhan and Another v. State of Assam*,\(^\text{515}\) “the death of four persons of a family in a very cruel, heinous and dastardly manner. His confessional statement showed that he committed these murders after previous

\(^{513}\) AIR 2004 SC 3508

\(^{514}\) (1999) 5SCC1

\(^{515}\) AIR 2000 SC 2679
planning which involved extreme brutality. Under the circumstances, the Court held that the plea that the accused was a young person at the time of occurrence cannot be considered as mitigation circumstance and, therefore, death sentence imposed on the accused cannot be interfered with. The Court further observed ‘Tooth for a tooth’, an ‘death nail or the death of a nail’ rule is not a civilized society really, but it’s a man's beast becomes and the community's threatening, he can be equally true to himself as permissible punishment, the death penalty has recognized constitutional law generated according to the procedure, without his life.”

In of Govindaswami v. State of Tamil Nadu, the Supreme Court speaking through Mukerjee, J., observed that, “in case of murder committed in a gruesome brutal, and calculated manner, law and justice certainly deaden death sentence reduced. The commutation of such is the case of the death penalty with life imprisonment irregular passion, grace and false sympathy yielding is unregulated.”

In the case of Laxman Naik case “it was conclusively proved on the basis of circumstantial evidence that the accused committed rape on his brother’s daughter aged 7 years in a lonely place in forest and thereafter murdered her. The evidence or record indicated how diabolically his plan to fabricate a cruel plan and carry it, and a white, cold as a crime are undoubtedly attracting the rare case of the rare category that falls on her rape and then a very young age a woman bloody and brutal murder the death penalty, no life.”

The Supreme Court in this case held that injuries instigated on the person of the murdered child and the blood saturated undergarments found near the body completes the chain of evidence as not to leave any doubt about the sexual assault followed by cruel, merciless, immoral and monstrous murder which the appellant had committed. The Court, therefore, upheld the death penalty passed on the accused and the appeal was dismissed.

516 AIR 1998 SC 1933
517 AIR 1995 SC 1387
In a recent criminal appeal against the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur on 11-2-1998 to the Supreme Court by both appellants and the respondents; “the Apex Court was called upon to decide the propriety of alteration of conviction of 5 accused from Section 302 read with Sections 149, 148 and 341 of I.P.C. to Section 304-1 read with Section 149, 148 and 341 I.P.C. The accused were found guilty of committing murder by beating the deceased with lathis and axes on a trifling issue of damage of crop by goats entering into their fields. This had resulted into instantaneous death of the deceased. The High Court found no grievous injuries having been found on the body of the deceased, altered the conviction of the accused under Section 302 to one of 304 Part I, IPC and reduced, the sentence to the period undergone (i.e. six years) but enhanced the amount of fine from Rs. 2000/- to Rs. 10,000/- to be paid to the widow of the deceased as compensation. The Supreme Court emphasizing the principle of proportion between crime and punishment held that in many cases, the imposition of sentence without considering its effect on the social order and in fact may be a futile exercise”.

“The social impact of the crime, e.g. Moral turpitude or the social order and the public interest it big impact on women involved any moral delinquency, guards, kidnapping, public money, treason and other offenses related to crimes against fraud, lost vision per se require exemplary treatment. Penalties for petty crimes or very sympathetic view merely on account of lapse of time in respect of any liberal approach taken and cared for by a long counter and threatening inbuilt are strengthened by string, as a result of the punishment for community layouts.”

Allowing the appeals partly, the Court held that sentenced to six years imprisonment for the offense relatable general penalty clause should serve the ends of justice. But it really is a case that falls under 304-II, IPC in this regard, although there is no appeal on behalf of the defendants. The enhanced fine must be paid within two months and default custodial sentence will be two years rigorous imprisonment.
Death sentence has always been a question of controversy, while on one hand it becomes a matter of human rights with respect to the accused; on the other hand it is one of weighing the gravity of the crime and its impact on the society. However, in the wake of the recent gang rape that took place in the city of Delhi, society has voiced strong opinion to award death sentence to the perpetrators. In the said case the death of the rape victim has led to imposition of section 302, IPC that prescribes the punishment for murder.

The crime of rape simpliciter does not attract death penalty under the current provisions of law. In fact the maximum punishment which can be sentenced under Section 376, IPC is life imprisonment. The article here looks at four judgments of the Supreme Court given in the last year i.e. 2012 to analyze the stand of the Apex Court on the situation where the rape victim eventually died and the considerations under which death sentence can be given to the accused in a case. As an established rule death penalty can only be awarded in the rarest of the rare cases.

It may also be reinstated beforehand that causing the death of a person itself does not necessarily lead to imposition of death sentence. The court takes into consideration both aggravating and mitigating circumstances, a line of thought that has developed over the years in various judicial pronouncements.

The cases below and the relevant observations from each judgment throws light on the judicial discourse relevant for understanding the working of law and sentencing decisions.

5.11 Case Study

5.11.1 Rajendra Pralhadrao Wasnik v. The State of Maharashtra\(^{518}\) The appellant enticed the 3 year old victim with the promise of buying her biscuits. Took her to a deserted place and raped her. Thereafter in a bid to destroy evidence he killed her.

\(^{518}\) (2012) 4 SCC 37
The Supreme Court upheld the Trial Court and High Court decision of death sentence for offence of murder and life imprisonment for offence of rape. The case was held to be eligible to fall in the category of rarest of rare to warrant death sentence. The court while affirming the punishment observed that the child whose medical record showed grave injuries on her body must have suffered brutally which shocked the conscience of the society.

5.11.2 Ramnaresh & Ors. v. State of Chhattisgarh\textsuperscript{519}

Four accused raped the victim who was a mother of two infants. The accused entered her house while her husband was away and took turns to rape her, after which she was found dead by the servant. One of the accused persons was the brother-in-law of the deceased victim.

The Apex court partially allowed the appeal by commuting the death sentence to life imprisonment of 21 years. The court while giving this judgment weighed the fact that the accused were of young age and the possibility of reforming them could not be ruled out also that there was a possibility of the victim dying accidently.

The Court that it could not be said with certainty that the case fell in doctrine of rarest of the rare case.

5.11.3 Neel Kumar @ Anil Kumar v. The State of Haryana\textsuperscript{520}

The father of a 4 year old girl raped her while the mother was visiting her parental house. Thereafter the child victim was killed and the body concealed.

The Trial Court gave death sentence for the offence of murder and life imprisonment for rape. The High Court confirmed the death sentence. However, the

\textsuperscript{519} (2012) 4 SCC 257
\textsuperscript{520} (2012) 5 SCC 766
Supreme Court set aside the death sentence and ordered for him to serve a minimum sentence of 30 years.

5.11.4 State of U.P. v. Sanjay Kumar

The accused working as white wash worker in the house in which the victim was residing with her uncle and aunt. The accused in the absence of the said uncle and aunt killed the girl and the post mortem report showed that there was sexual assault as well.

Decision: The High Court commuted the death sentence, given by the Trial Court, to life imprisonment. Supreme Court upheld the High Court verdict.

A brief look at the final decision of the Supreme Court shows that out of the four cases analyzed only in one case did the Supreme Court upheld the death penalty. In three cases the death penalty was commuted to life imprisonment as the case did not fall in the category of rarest of rare case.

The relevant considerations for arriving at the decisions have been discussed at length in Rajendra Pralhadrao Wasnik v. The State of Maharashtra where Justice Swatanter Kumar, observed “This very Bench in a recent judgment, considered various judgments of this Court by different Benches right from Bachan Singh’s case, in relation to the canons governing the imposition of death penalty and illustratively stated the aggravating circumstances, mitigating circumstances and the principles that would be applied by the Courts in determining such a question.”

It will be useful to refer to the judgment of this Bench in the case of Ramnaresh v. State of Chhattisgarh decided on February 28, 2012 wherein it was held as under:

521 (2012) 8 SCC 537
522 (2012) 4 SCC 37
523 (2012) 4 SCC 257
The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while ‘death’ would be the exception. The term ‘rarest of rare case’ which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression ‘special’ has to be given a definite meaning and connotation. ‘Special reasons’ in contra-distinction to ‘reasons’ simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons. Since, the later judgments of this Court have added to the principles stated by this Court in the case of Bachan Singh and Machhi Singh, it will be useful to restate the stated principles while also bringing them in consonance, with the recent judgments.”

Further the Court observed that “the principles that were stated in the case of Bachan Singh and thereafter, in the case of Machhi Singh are dissected into two different compartments one being the ‘aggravating circumstances’ while the other being the ‘mitigating circumstance’. 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 their 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) Criminal Procedure Code.”

5.12 Factors considered for Rarest of Rare:

Thereafter the Court enunciated the two categories of factors to be considered thus:

5.12.1 Aggravating Circumstances:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a previous record of conviction for 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 already engaged in the commission of another serious offence.
3. The offence was committed with the intention to create a fear in the public at large and was committed in a public place by a weapon which clearly could be dangerous 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. Killing by hiring the killer.
6. The offence was committed disgracefully 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, Criminal Procedure Code.
9. When the crime is enormous in proportion like making an attempt of murder on 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 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.

5.12.2 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 pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

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

5.12.3 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 circumstances.
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.

Justice Swatanter Kumar further observed that, 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.
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. 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. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings 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.

Further in *Ramnaresh & Ors. v. State of Chhattisgarh*\(^{524}\) while elucidating on the sentencing pattern and punishment of death penalty, the court observed:

“Despite the transformation of approach and radical changes in principles of sentencing across the world, it has not been possible to put to rest the conflicting views on sentencing policy. The sentencing policy being a significant and inseparable facet of criminal jurisprudence, has been inviting the attention of the Courts for providing certainty and greater clarity to it. Capital punishment has been a subject matter of great social and judicial discussion and catechism. From whatever

\(^{524}\) (2012) 4SCC257
point of view it is examined, one undisputable statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of a given case. This Court has stated various legal principles which would be precepts on exercise of judicial discretion in cases where the issue is whether the capital punishment should or should not be awarded. Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty."

In *State of U.P. v. Sanjay Kumar*\(^5^{25}\) the court while enlightening on the importance of striking a balance between mitigating and aggravating conditions observed thus, "Sentencing Policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgements of this Court prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasi

\(^{25}\) (2012) 8 SCC 537
on individualized justice, and shaping the result of the crime to the circumstances of
the offender and the needs of the victim and community, restorative justice eschews
uniformity of sentencing. Undue sympathy to impose inadequate sentence would do
more harm to the public system to undermine the public confidence in the efficacy of
law and society could not long endure under serious threats.”

The above discussed judicial opinions which have come to be accepted as
important principles of law are relevant for consideration while awarding the
punishment to the accused. While the decisions of the Supreme Court may appear to
be unjust to our common sense the above discussion goes a long way in
understanding the working of the justice delivery system keeping aside the anger and
hate against criminals.