CHAPTER VI

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It is rightly remarked that the primary function of the criminal courts is to dissuade criminality. In order to perform this function the object of the sentence should be, to take minimum action which offers an adequate prospect of preventing future offences.¹ Now the courts are not aimed to extinguish the criminal, their aims, in fact, are the efforts to restore a man to society as a better and a good citizen unless it is convinced that his removal is must in the interest of the society. The society is protected from the offenders when they are maimed in such a manner as to abstain their criminal behaviour. In India, it is believed that while imposing the sentence, the Court should set forth the end to be achieved and make clear what is intended in the imposition of the sentences. Justice Fazal Ali, in Santa Singh Vs. State of Punjab² observed:

"It is the prime need of the hour to set up training institutes to impart the new judicial recruits or even to serving judges with the changing trends of Judicial thoughts and the new ideas which the new judicial approach has imbibed over the years as a result of the influence of new circumstances that have come into existence..."

Since the independence of India in 1947, the number of death sentences has diminished. In case of death penalties judges

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² Supra Chap.VI Note 2.
increasingly tended to commute them into life imprisonment. This trend towards the restraint of capital punishment becomes quite clear from the amendments of the Criminal Procedure Code in 1973. The original Section 367 of the 1898 Code required the court to state the reasons why death sentence was not passed. This was deleted with effect from January 1956 and the court was given option of passing either the death sentence or a sentence of life imprisonment, depending on the facts and circumstances of each particular case. Since the amendment of 1973, Section 354 (3) clearly emphasises that whenever there is any conviction for an offence punishable with death or in the alternative with imprisonment for life, or imprisonment for a term of years the judgement shall state in the case of death special reasons for such sentence. This means, that life imprisonment is now the rule in cases of murder and that capital punishment is only an exception to be resorted to for special reasons that must be given. These special reasons have neither been described nor defined in the Code, no guideline has been furnished either by Parliament or by the highest Court of the land.

Justice James after going through several cases on the point in Dulla and others Vs. The State, opined that while deciding the measure of punishment the court should take into consideration, the nature of the offence, the circumstances in

which it was committed, the degree of deliberations shown by
the offender and his age character and antecedents. In case
of death penalty it has to be "sparingly used", it should be
passed only in the rarest of rare cases, keeping in view the
criminals and not the crime. The courts are required to look
into the character, family history, antecedents, social back-
ground, economic environment and other motivating forces. 4

The review of the Supreme Court judgments and the overall
analysis of the other cases indicate that the age, 5 antecedents, 6
character and family background, 7 of the accused, nature of the
crime, 8 criminal not the crime, 9 duration of the trial, 10 role
of the victim, 11 surrounding, circumstances, consequences of the
sentence, and like factors must figure prominently in shaping
the sentence, where reform of the individual, rehabilitation in
the society and other measures to prevent recurrance are weighty
factors. No formulae is possible that would provide a reasona-
ble criterion for infinite variety of circumstances that may
affect the gravity of the crime of murder. The impossibility of
laying down standards is at the very core of the criminal law as
administered in India, which invests the judges with a very wide
discretion in the matter of fixing the degree of punishment. 12

4. Supra Chap.IV Note 10.
9. Supra Chap.IV Note 27
10. Supra Chap.IV Note 27
However, the judiciary hesitates to "lay down any" sentencing guide, as no hard and fast rule can be laid down in order to meet the exigencies of each case. The superior courts, when faced with the problem of unjust and inadequate sentences, direct the lower courts to exercise their discretion along with the judicial line. They hold that the discretion must be exercised according to the principle and not according to the humour of the judge, arbitrarily or fancifully. Even prior to the Criminal Law Amendment Act, 1973 the Supreme Court had not laid down any exhaustive standard for imposing capital punishment. Justice Agrawala in the case further observed that the principle upon which discretion is to be exercised not being fixed by any statute, may be interpreted progressively in accordance with the spirit of times, so that real and not technical justice may be secured. Furthermore, he observed:

"To my mind the true principle of exercising the discretion of imposing either the penalty of death or of transportation of life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and sentence of transportation for life is imposed in all other cases. Now in Jagmohan Singh Vs. State of Uttar Pradesh the Supreme Court showed impossibility of laying down any exhaustive standard for providing death sentence in the following words:

"The impossibility of laying down standards (in the matters of sentencing) is at the very core of criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment and this discretion in the matter of sentence is liable to be corrected by superior courts..."

15. Supra Chap. IV Note 8.
Section 302 of the Indian Penal Code provides two kinds of punishment for murder, death and imprisonment for life. But the section does not specify which one of the two punishments should be imposed in which situations. It is obvious that out of these two punishments the minimum punishment is imprisonment for life.

The discretion to impose either of the sentences is not very wide. After all Section 354(3) has narrowed down this discretion. Death sentence is ordinarily ruled out and can only be imposed for "special reasons". Judges are left with the task of discovering "special reasons". In keeping with the current penological view, now the Criminal Procedure Code, 1973 makes imprisonment for life a rule, and death sentence an exception in the matter of awarding punishment for murder. Now, if a death sentence is to be awarded to a person found guilty of murder, the court awarding it has to justify it by giving special reasons. In Krishna Matu Ram Vs. State, the Punjab High Court while imposing death penalty on the accused observed:

"As the murder was cold blooded and calculated and the object of vengeance in the person of Sham Lal was so callously chosen, we see no reason to exercise clemancy by imposing the lesser sentence..."

The question of punishment under this section is really not one of adequacy of the punishment, but is one of the alternative

punishment. The normal rules of adequacy will not apply because there is no latitude given by this section in regard to adequacy of sentence.18 As to when, as between alternative sentences, death sentence should be given and when imprisonment for life, courts have taken various views not always reconciliable with one another. On the other hand there are observations to the effect In re Samba ji Lakshumanna,19 the Madras High Court had observed:

"It is no part of the duty of the Sessions Judge to be influenced by public feeling. His duty is to administer the law. The state of public feeling is not an admissible reason for refraining from passing the sentence of death. Nor is it permissible to refrain from sentencing the murderers to death merely because their numbers exceeded the number of their victims. The question is one of the conforming to the precepts of the law. We must, therefore, express our strongest disapproval of the pretexts which the learned Session Judge has put forward for failing to do his duty in this case. The proper sentence and the only sentence that can legally be imposed in this case on those who are guilty is the sentence of death".

In Karnail Singh Vs. State of Punjab,20 there was no provocation at all from the side of the deceased. It was a clear case of murder falling under clause third of Section 300, Indian Penal Code, where the act was done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The manner in which the shot was fired at the deceased showed that the offence committed was deliberate, diabolical, callous and wanton act. It was held that there was no

extenuating circumstances which might justify the award of the lesser sentence provided under Section 302, Indian Penal Code.

In furtherance of their common intention accused Vikram caused the death of Gauri Shankar the peon and Budh Prakash the guard and injured Ali Jan by gun shots and accused Dharampal removed the case belonging to the Bank containing Rupees seven lakhs and the gun belonging to Budh Prakash the guard. It was held that Vikram committed an offence under Section 302, 304, 326 of the Indian Penal Code and 27, Indian Arms Act and that Dharampal committed an offence under Section 302, read with Section 34, Indian Penal Code, and 394 Indian Penal Code. The sentence of death awarded to the appellants Vikram and Dharampal was considered proper. There was no distinction between the cases of the two accused. There was no mitigating circumstances in favour of either of them. The entire incident was an outcome of a well-chalked out and preconcere ted plan in which each of the two participants was to play a definite role. The primary object was to rob the cash of the Bank. The part played by each of them was equally important to achieve the object. In a way the more important part of the plan was the removal of the cash and this was done by Dharampal. The Crime was committed in a most outrageous manner, the guard and the peon were killed in a ruthless and cold-blooded manner and there is hardly any extenuating circumstance to mitigate the offence justifying the lesser penalty of life imprisonment. 21

However, in *Dudh Nath Vs. State of Utter Pradesh*, a young college going boy was murdered because he was trying to wean away his sister from the influence of the accused who was said to have set his heart upon her. In this case the accused for the following two reasons was not sentenced to death:

First the accused was emarring under the insult hurled at him by the deceased, previous evening. As stated in the F.I.R., when the accused proclaimed his determination to marry her, one deceased retorted: "you are a man of two paisas worth. How can you dare to marry my sister. I will break your hand and feet". A poor motor car driver that the accused was he must have been offended enormously that his poverty was being put up as the reason why the sister would not be allowed to marry him. The dispute thus assumed the proportions of a feud over social justice. And it was evident that he believed, rightly or wrongly, that she was not unwilling to take him as a husband. The mental turmoil and the sense of being socially wronged through which the accused was passing cannot be overlooked while deciding which is the appropriate sentence to pass, the rule being that for the offence of murder the normal sentence is the sentence of life imprisonment and not of death.

Secondly, the eye witnesses do not appear to have revealed the whole truth to the court. The death of the brave, young lad

which has deprived the family of the success or of its only male member is to be deeply lamented. But if witnesses on whose evidence the life of an accused hangs in the balance, do not choose to reveal the whole truth, the Court, while dealing with the question of sentence has to step in interestingly and take into account all reasonable possibilities, having regard to the normal and natural course of human affairs. The Supreme Court considered it unsafe to sentence the accused to the extreme penalty, imprisonment for life was considered the only appropriate sentence to be imposed in this case.

The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious preoccupations should be strictly disregarded. The court must keep in mind the necessity of proportion between an offence and the penalty. The modern penology leans less towards severe penalty and winds of criminological change blow over Indian statutory thought. The Supreme Court in *Vivian Rodrick Vs. The State of West Bengal*, *Chawla Vs. State of Haryana*, *Ediga Anamma Vs. The State of Andhra Pradesh*, and *Ram Shankar Vs. State of Madhya Pradesh*, after taking an overall view of the antecedents, family backgrounds of the accused and circumstances in which the crime was

24. AIR 1971 SC 114.
27. AIR 1981 SC 644.
committed, reduced the sentences to that of a lesser one. Further, the court observed that the maximum penalty for any offence is meant for only the worst cases. In Jagmohan Singh Vs. State of Uttar Pradesh,\(^{28}\) in addition to the Constitutional issues the next contention was that by providing in Section 302 of the Indian Penal Code, that one found guilty thereunder is liable to be punished either with death sentence or imprisonment for life, the legislature abdicated its essential function in not providing by legislative standards as to in what cases the judge should sentence the accused to death and in what cases he should sentence him only to life imprisonment. The court nega-
tived the contention and held:

"Deprivation of life is constitutionally permissible provided it is done according to procedure established by law. The death sentence thus cannot be regarded as unreasonable or not in public interest. The policy of the law in giving a very wide discretion in the matter of punishment to the judges has its origin in the impo-
ssibility of laying down standards. Any attempt to lay down standards why in one case there should be more punishment and in the other less punishment would be an impossible task".\(^{29}\)

The court agreed that though no formal procedure for producing evidence with reference to the sentence is specifi-
cally provided yet the reason is that the relevant facts and circumstances impinging upon the nature and circumstances of the crime are already before the court. All such facts and

\(^{28}\) Supra Chap. IV Note 8.
\(^{29}\) Ibid at p.959.
circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act regulated by the Criminal Procedure Code. Section 235(2) of the Criminal Procedure Code provide the procedure for the judge to decide on the guilt and punishment. The death sentence imposed after trial and in accordance with the procedure provided by the said provisions was therefore held to be valid. The court further held that the Law Commission of India is of the opinion that capital punishment should be retained in the present state of the country. On the basis of its conclusion it will be difficult to hold that capital punishment as such is unreasonable or not required in the public interest.

The Supreme Court's approach in this case has the shades of the Gopalan's positivism, as the court held the view that if the procedure for criminal trial under the Criminal Procedure Code for arriving at a sentence of death is followed the imposition of death will be a procedure established by law. In other words, one can say that the view of the court was that a procedure established by law can never be unconstitutional. This particular view has already been rejected by the Supreme Court in the Maneka Gandhi's case which requires a law to be fair, just and reasonable. It is not true that the courts particularly the Supreme Court was unaware of the policy changes effected by the amendment of 1973 in the Criminal Procedure Code leaving in favour of life imprisonment. In fact the apex court was seized of the matter within no time of the amendment as the law came in for
interpretation hardly a year later in the case of Ediga Anamma Vs. State of Andhra Pradesh,\(^{30}\) where a village shephard was philandering simultaneously with two village wives: Ediga Anamma, a mother of a ten years old boy, and Ansuya, a mother of an eighteen month old girl, when Ediga Anamma became aware of her rival, she lured her into the fields; stabbed her and her baby daughter to death with a chisel; wrapped both bodies in her own clothing; partially burnt Ansuya's face and body to hinder identification; and buried the baby in a sandbank beside the village stream. The accused was convicted of murder and the conviction of murder was confirmed by appellate courts. Then arose, what Justice Krishna Iyer called, "the punitive dilemma":

"The prisoner is a young woman of 24 flogged out of her husband's house by the father-in-law, living with her parents with her only child, sex-starved and single. The ethos of rural area where the episode occurred does not appear to have been too strict or inhibitive in matters of sex, for the deceased and the accused were both married and still philandered out of wedlock with a middle aged widower who made no bones about playing the freelance romant- cer simultaneously with them. Therefore, the accused incautiously slipped down into the sex net spread by P.W.16, and while entangled and infatuated, discovered in the deceased a nascent rival, with the reckless passion of a jealous mistress she planned to liquidate her competitor and cruelly performed the double murder, most foul. Perhaps it may be a feeble extenuation to remember that the accused is a young woman who attended routinely to the chores of domestic drudgery and allowed her flesh to assert itself salaciously when invited by uncensed opportunity for lonely meetings. It may also be worth mentioning that, a part from her youth and womanhood. She has a young boy to look after. What may perhaps be an extrinsic factor but recognised by the court as of human significance in the sentencing context is the

\(^{30}\) Supra Chap.IV Note 26.
brooding horror of hanging which have been haunting the prisoner in her condemned cell for over two years, the prolonged agony has ameliorative impact...

"The criminal's social and personal factors are less harsh and her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy—these individually in conclusive and cumulatively marginal facts and circumstances—tend towards the award of life imprisonment. We realise the speculative nature of the correlation between crime and punishment in this case, as in many others and conscious of fallibility dilute the death penalty." In right earnest it is submitted that this case marked the first formal attempt of the Supreme Court to lay down guidelines in the exercise of discretion in awarding death or life imprisonment to an accused convicted of murder. This case thus gives us guidelines regarding the circumstances in which death sentence should not be imposed.

The choice of punishment in this case reflects a reformist mood, and a willingness to build the new Criminal Procedure Code (which although at that time not yet in force and received the President's assent, and thus became the law, about two weeks earlier). Justice Iyer welcomed the new provision in Section 235(2), requiring separate procedural consideration of the question of sentence. He warmly endorsed the sharp distinction thus implied in the question of guilt and the question of sentence. While imposing life imprisonment under Section 302 of the Indian Penal Code in place of death sentence he said:

The Supreme Court has changed its outlook towards the abolition of capital punishment. The court now thinks that a legal policy on life or death cannot be left for adhoc mood or

32. Ibid, p. 806.
individual predilection and as the court has sought to objec-
tify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life.\textsuperscript{33} Indian justice and the Constitutional order are centu-
ries ahead of the barbarities of Judge Jeffreys of bloody 
Assizes fame and ideologically. The deprivation of life under
our system is fundamental and is to be permitted save on the 
graviest ground and under the strictest scrutiny, if justice, 
dignity, fair procedure and freedom so provide.

In order to award a proper sentence, the higher courts
have also shown the tendency to evolve the supplementary provi-
sions. Justice Krishna Iyer, while delivering the judgment in
Rajendra Prasad Vs. State of Uttar Pradesh,\textsuperscript{34} observed:

"When the legislative text is too bold to self acting or
suffers Zig Zag distortion in action, the primary obliga-
tion is on Parliament to enact necessary clauses by appro-
priate amendments to the provisions in question. But, if
legislative undertaking is not in sight, judges who have
to implement the code, cannot fold up their professional
hands but must make the provision viable by evolution of
supplementary principles, even if it may appear to possess
the flavour of law making".

The primitive end of Law was merely to keep peace. Now it
has totally been changed in its concept and spectrum. Similarly
in the function of sentencing, judges too have changed in their

\textsuperscript{33} Supra Chap.IV Note 10,p.\textsuperscript{922}.
\textsuperscript{34} Ibid,p.\textsuperscript{920}. 
nature and fabric. It has been rightly said that under the primitive system of law, a judge functioned more or less like an Umpire, whose function was to give 'out' or 'not out', to the "How is that" of the players in the game of pleadings. But in the native system of law, the responsibility of the Judge is high and his task extensive.\textsuperscript{35} He has to do justice according to law, but it must be in the mind of every judge, that he has his own share of law making and has an important role to play in the process of interpretation of the provisions of the institution or a statutory enactment, the application of a precedent and laying down of a rule, where the matter is not governed by the statutory provision or case law.\textsuperscript{36} The sentencing judge has a very important role to play so far as the correction of the offenders is on the cards. The sentencing judge by awarding a proper sentence of course within the limits of the penal statutes, can make maximum contribution to the resocialization of the social deviants.

In Rajendra Prasad case efforts were made to abolish capital punishment judicially. The court was of the view that retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea. Justice Iyer wanted special attention of the Courts to wards

human rights and present Constitutional dimensions. He
observes:

"It is far to mention that the humanistic imperatives of
the Indian Constitution, as paramount to the punitive
strategy of the Penal Code, have hardly been explored by
the courts in this field of 'life or death' at the hands
of the law. The main focus of our judgement is on this
poignant gap in human rights jurisprudence within the
limits of the Penal Code, impregnated by the Constitution."

The current methods, with its strong emphasis on human
rights and against death penalty, together with the ancient
strains of culture spanning the period from Buddha to Gandhi
must ethically inform the concept of social justice which is
paramount principle and cultural paradigm of our Constitution.
Social justice, projected by Article 38, colours the concept of
reasonableness in Article 19 and non-arbitrariness in Article 14.
This complex of Articles validates death penalty in a limited
class of cases.

Special reasons under Section 354(3) of the Code
necessary for imposing death penalty must relate, not to the crime as such
but to the criminal. The crime may be shocking and yet the cri-
minal may not deserve death penalty. The crime may be less
shocking than other murders and yet the callous criminal that is,
a lethal economic offender may be jeopardizing societal existence
by his act of murder. Likewise, a hardened murderer or dacoit or

37. Supra Chap.IV Note 10, p. 921.
39. Supra Chap.IV Note 12.
armed robber who kills and relishes killing and raping and murdering to such an extent that he is beyond rehabilitation within a reasonable period according to current psychotherapy or curative techniques may deserve the terminal sentence.

In Rajendra Prasad case the Court seems to have handed down a well reasoned commutation decision, which has relied upon certain recognised factors like suitability for reform, danger to fellow citizens, period of waiting pending trial and other personal and social factors relevant to the sentencing issue. By spelling out the reasons for their commutation decision, the court has complied not only with the general requirement of giving a reasoned judgement, but at so followed the lead given in Ediga Anamma where the Supreme Court for the first time attempted to rationalise the sentencing rules by requiring reference to "positive indicators".

After Rajendra Singh's case the most important and leading case on the subject of "special reasons" for inflicting capital punishment is that of Bachan Singh Vs. State of Punjab. The efforts for abolishing capital punishment in the country were further tightened. Justice Bhagwati in his dissenting judgement said that old practice in social interest now needs no more to be followed. If the rule of stare decisis were followed blindly and

40. Supra Chap. IV Note 26.
41. AIR 1962 SC p.1324.
mechanically it would do away and restrict the growth of the law and affect its capacity to adjust itself to the changing needs of the society. If we look at the legislative history of the relevant provisions of the Indian Penal Code and the Criminal Procedure Code, we find that in our country there has been a gradual shift against the imposition of death penalty. The legislative development, through several successive amendments has shifted the punitive centre of gravity from life taking to life sentence.

Regarding the Interpretation of the expression "special reasons" under Section 354(3) of the Criminal Procedure Code, 1973. The opinion of Justice Krishna Iyer in Rajendra Prasad's case that it was constitutionally permissible to swing a criminal out of corporeal existence only if the security of state and society, public order and the interest of general public compelled that course as provided in Article 19(2) to (6) was rejected in Bachan Singh Vs. State of Punjab. The genesis of this case was that, earlier a bench of two judges were constituted to look into the matter. Kailasam, J. pointed out that the majority decision in Rajendra Prasad was contrary to the Constitution bench ruling in Jagmohan Singh's case. He requested that the papers be placed before the Chief Justice to constitute a larger bench to reconcile the conflict. As a result several persons convicted of

42. Ibid, p.1341.
43. Supra Chap.IV Note 10.
44. Supra Chap.IV Note 11.
murder and sentenced to death presented writ petitions challenging the constitutional validity of the death penalty. The case was then heard and decided by Chandrachud, C.J., Bhagwati, Sarkaria, Gupto and Untwalia JJ. The court by a vote of 4:1 (Bhagwati J. dissenting) upheld the opinion and was delivered about two years later. In this case the court while agreeing with the observations in Jagmohan's case that "standardisation" of the sentencing process is well nigh impossible Justice Sarkaria observed:

In Jagmohan, this court had held that this sentencing discretion is to be exercised judicially or with well recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By 'well recognised principles' the court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in these cases. The legislative changes since Jagmohan do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from section 354(3) and 235(2), namely: (1) the extreme penalty can be inflicted only in gravest cases of extreme culpability; (2) in making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.

In Jagmohan Vs. State of Uttar Pradesh the court has held that if a murder is diabolically conceived and cruelly executed, it would justify the imposition of the death penalty on the murderer. In Ediga Anamma also the same principle was substantially reiterated by mentioning that the weapons used and the

45. Ibid, p. 942.
manner of their use, the horrendous features of the crime and helpless state of the victims and the like, steal the heart of the law for a sterner sentence. 46

Drowing upon the penal statutes of the states in U.S.A. framed after, Furman Vs. Georgia, in general and clauses 2(a), (b), (c) and (d), of the Indian Penal Code (Amendment) Bill passed in 1978 by Rajya Sabha in particular, Dr. Chitale has suggested the following "aggravating circumstances":

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

(b) If the murder involves exceptional depravity; or

(c) If the murder is of a member of any of the armed forces of the union or of a member of any police force or of any public servant and was committed-

(i) While such member or public servant was on duty or

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

(d) If the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a public officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said code. 47

Dr. Chitale also agreed that the following are "undoubtedly relevant circumstances and must be given great weight in the

46. Ibid, p.919.
47. Ibid, p.943.
determination of sentence:

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

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

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

(4) The probability that the accused can be reformed and rehabilitated. The state shall by evidence prove that the accused does not satisfy the condition (3) and (4) above.

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

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

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

The Court accepted these indicators but observed that as the court has already indicated, "we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other". The court further observed that "we cannot obviously feed into a judicial computer all such situations since they are astrological impounderables in an imperfect and undulating society".

Soon after Bachan's case the Supreme Court decided a very important case in the name of Kuljeet Singh Vs. Union of India.

49. Supra Chap.IV, p.949.
50. Ibid, p.751.
51. Supra Chap.IV Note 86.
popularly known as Ranga Billa case. The accused Ranga and Billa hatched a plan that they would offer a lift in their car to some young children, try to extract ransom from their parents by kidnapping them and put the children to death in the event of any impediments arising in the execution of their plan. These two accused Kuljeet Singh alias Ranga Khus and Jasbir Singh alias Billa did accordingly and were sentenced to death for committing murder of two young Chopra children: Geeta Chopra and her brother Sanjeev Chopra. The Supreme Court upholding their death sentence held that there was preplanned motivation behind the crime.

The accused after a savage plan which bears a professional stamp killed the Chopra children. They deserve no sympathy even in terms of the evolving standards of decency of maturing society. There is no room for treating the one differently from the other. They were well in glove with each other.

Similarly in Chandra Kant Vs. Krishna Banker, the Supreme Court considered the death penalty as the only adequate and appropriate penalty. In this case the accused acquired a gun and within a week or two committed a multiple murders including that of a woman aged about fifty years.

Munawar Shah, popularly known as the Joshi Abhyankar Massacre case is another gruesome murder wherein the Supreme

52. 1982 Cr.L.J., 742.
Court also applied the criterion laid down in the Bachan Singh's case. In this case, the accused petitioners committed serious murders during the month of January, 1976 and March 1977. The Supreme Court upheld the imposition of the sentence of death thus:

"Having regard to the magnitude, the gruesome nature of the offence, and the manner of perpetrating them, this case in all facts and circumstances must be regarded as falling within the rarest of the rare category and the extreme penalty of death is clearly called for".

Again in Javed Ahmad Abdul Hamid Pawala case, the Supreme Court believing the case as truly one of the rarest of rare in which the court has no option but to confirm the sentence of death observed thus:

"The appellant, we see, acted like a demon showing no mercy to his helpless victims, three of whom were helpless children and one woman. The motive was gain and the murders were perpetrated in a cruel, callous and fiendish fashion. There is no way to show him any mercy".

In these lines of cases one thing that can be said with some certainty is that an accused gets death sentence confirmed by the Supreme Court if the murder is preplanned with a motive and executed in a cruel manner and also where it involves not one but multiple murders in the offence charged.

Mahesh and other Vs. State of Madhya Pradesh case the Supreme Court where the accused, father and son, axed to death

54. AIR 1983 SC 594.
55. AIR 1987 SC 1346.
a person, his wife, mother and daughter and his neighbour who questioned as to why the accused were doing such acts, merely because the daughter of the person in question married a Harijan, the Supreme Court refused to interfere with the death sentence imposed on the accused. The Court observed that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render justicing system of the country suspect. The common man will lose faith in courts. In such cases, it understands and appreciates the language of deterrence more than the reformatory jargon. The Court further observed that when it says so it does not ignore the need for a reformatory approach in the sentencing process but in the instant case, the court has no alternative but to confirm the death sentence.

The Doctrine of the "Rarest of the Rare":

The first question which strikes in the mind is- what are the criteria that influence the award of death sentence by a court? The Supreme Courts decision in Bachan Singh's case has an infra effect besides setting at rest any doubts on the constitutionality of death sentence, of reiterating the recognised principles to be considered in award of the extreme punishment. The decision is famous for its high sounding judicial rhetoric. It was a case that advanced the doctrine of the rarest of the rare. What the Supreme Court sought to impress here upon all
sentencing courts in the country is that not every murder deserves the extreme penalty of death, but that when the case is of extreme and diabolical execution then only the sentence of death may be called for. The court emphasised:

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

This is the root of the 'rarest of rare' doctrine that has become a yardstick for assessing cases and arriving at cases deserving the extreme penalty or the lesser sentence of life imprisonment in cases of murders. The doctrine marks a conscious judicial exposition of the Legislative shift in Section 354(3) Criminal Procedure Code, 1973 earlier enunciated by Krishna Iyer, J. in Rajendra Prasad Case. Bachan Singh's decision achieved two things:

Firstly, it set to rest the doubts and controversy about the constitutionality of the sentence of death about which this case arose. Secondly, it laid down the 'rarest of rare' doctrine
by which the courts shall hesitate in the award of capital
sentence of death, except in those brutal and heinous murders
which foreclose the alternative option of sentence of life
imprisonment.

Moreover, in Pooran Singh Vs. State of Utter Pradesh, the Supreme Court quoting Bachan Singh's case observed:

"Judges should never be blood thirsty. A real and abiding concern for the dignity of human life pastulates the
resistance to taking a life through laws instrumentality. That ought not to be done save in the rarest of rare cases
when the alternative option is unquestionably foreclosed".

Sarkaria, J. failed to elucidate as to what kind of murders can qualify as 'rarest of rare'. This was challenged before the
court in Machhi Singh Vs. State of Punjab. In this case was an attempt however, to define a 'rarest of rare' case. In this
case four men were awarded death sentence by the Session Court and the High Court for shooting down seventeen persons including men, women and children within their homes at night, in five incidents. The motive was a family feud. The Supreme Court upheld the death sentence of three of the four persons. Justice Thakkar speaking for the court was impelled to attempt a definition of the 'rarest of rare' case as under:

"The community may entertain such a sentiment when the
crime is viewed from the platform of the motive for, or
the manner of commission of the crime, or the anti-social

57. Supra Chap. IV Note 48.
or aberrant nature of the crime". 58

The Supreme Court has laid down five instances in detail in which death penalty seems to be very necessary for a murder: Manner of commission, motive of commission, anti social or socially aberrant nature of crime, magnitude of crime and personality of victim. 59 After a keen perusal of the aggravating and mitigating circumstances for imposing sentence and rarest of the rare case paraphernalia, it can be concluded that the death penalty is not abolished but it may be inflicted only in the circumstances well narrated in judicial context.

However, in V.K. Saxena Vs. State of Uttar Pradesh, the Supreme Court gave a 'go up' principle in the case and rendered the whole idea of guidelines a nullity and inadequacy. As per prosecution evidence Dr. V.K. Saxena had illicit relations with his nurse Bhagwati Singh. Dr. Saxena and Bhagwati Singh hatched an evil plan to kill Sudha, the wife of Dr. Saxena, who was an obstacle, between them in keeping their relations continued. Dr. Saxena after committing the murder of his wife put her dead body in a box and tried to throw the box over a bridge from a running train. But the box containing the body fell on the railway track where it was discovered. The trial court found Dr. Saxena guilty of the murder and sentenced him to death. But on

58. Ibid p. 475.
59. See detail in Constitutionality of Capital Punishment.
appeal, two judges of the High Court differed; one believing the prosecution evidence and the other believing the defence. On reference to the third judge Dr. Saxena's conviction for murder was upheld but the third judge preferred sentence of life imprisonment. On appeal, the Supreme Court agreed with the proof of guilt but held that the sentence of death awarded by the trial court could not be restored. The Supreme Court remarked that if the High Court had upheld the sentence of death justifiably imposed by the trial court, it would have not interfered. With due respect this is rather a funny remark in view of the test of 'rarest of the rare' propounded by the Supreme Court in Bachan Singh's case.

Further, the correct approach of the court in this case should have been to ask itself the question formulated in Machhi Singh's case as to whether there is something uncommon about the crime which renders life imprisonment inadequate and thus calling for death sentence. It is submitted that on account of prosecution evidence believed by the Supreme Court, the sentence of death should have been upheld against the accused. Both from the point of view of motive, manner of commission and relationship of the accused and the deceased, the case is such that the sentence of death should have certainly been warranted.

In Wuthu Vs. State of Punjab, appears to have set confusion on had declared Section 302 of the Indian Penal Code, 1860

60. Supra Chap. II Note 64
as unconstitutional the court therefore was left with confusion as to impose capital punishment on the accused. In fact if any offender should deserve the sentence of death it should be a convict on parole or in imprisonment and committing murder during such period.

However, in *Ranjit Singh Vs. Union Territory of Chandigarh*\(^{61}\) inspite of the Supreme Court observation that the accused who should have behaved more properly like a law abiding citizen while on parole indulged within the category of 'rarest of rare', the court felt bound to commute the death sentence to life imprisonment.

From the study of the case the Supreme Court seems to be applying this formula mechanically which should not have been so. Section 303 Indian Penal Code has been declared unconstitutional does it mean that such cases do not deserve the sentence of death? What the court ought to do in these category of cases is to examine further, notwithstanding the unconstitutionality of Section 303, if the case of an accused falling or convicted under this section deserves the sentence of death. This section needs amendment by giving choice between death penalty or life imprisonment.

The Supreme Court having relied on one or more principles outlined in *Machhi Singh's case* upheld the sentence of death

\(^{61}\) AIR, 1984 SC 45.
in *Mahesh Vs. State of Madhya Pradesh*, 62 In this case the accused father and son had axed to death a man, three other members of his family, and a neighbour who had intervened. Reason for this brutal murders was that the daughter of the deceased man married a harijan. The Supreme Court held that the interference with the sentence was not proper because the act of appellants were extremely brutal, revolting and gruesome which shocks the judicial conscience. Hence deterrent punishment was a social necessity. In the case the remarkable observation of the Supreme Court was:

"It would be mockery of justice to permit the appellants to escape the extreme penalty of law... and to give lesser punishments for the appellants would be to render justicing systems of this country suspect, the common man would lose faith in Courts". 63

The Supreme Court would do well in cases of this nature to confine its justifications for extreme penalty to the brutal, revolting and gruesome nature of the murder instead of giving the impression of being influenced by the common man's lose of faith in courts. Same kind of terror was maintained in *Sharfia Lal and Sons Vs. State of Utter Pradesh*, 64 where to wreck their personal vengeance over the dispute with regard to property matters with the victims mother, the accused committed reprehensible and gruesome murders of two innocent girls on the 14th day of August, 1984. Holding that failure to impose sentence of

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63. Ibid, p.1350.
64. AIR, 1987 SC 1921.
death in grave cases of extreme brutality will bring to naught
the sentence of death as provided under Section 303 Indian
Penal Code, the Supreme Court upheld the sentence of death,
adding that it is the duty of the Court to impose proper punish-
ment depending upon the degree of criminality and desirability
to impose such punishment.

Some how or other, the Supreme Court appears to have taken
the aggravating and mitigating factors as infallible cprinciples.
The inherent difficulty in that approach is as to the balancing
of aggravating and mitigating factors. For instance, is a simple
factor sufficient or how many aggravating factors should justify
the extreme penalty of death? Although Machhi Singh's case laid
down that the mitigating factors should be given more weightage
but it is not as if applying these principles poses no problem.
What the Supreme Court invariably has been doing since Machhi
Singh ruling, amounts to reaching a decision of death or life
imprisonment, and then justifying the decision by a recitation
of one or more of the guidelines of Machhi Singh's case formula-
ation.

In Ranjeet Singh Vs. State of Rajasthan,\textsuperscript{65} the Supreme Court
found extreme brutality in murder. The Court had no difficulty
in maintaining the sentence of death awarded to the accused by
the subordinate Courts. In this case, the accused was prosecuted

\textsuperscript{65} AIR, 1968 SC 672.
and convicted by the lower courts for murder of an entire family consisting of a man and his wife, son and 5 daughters. The murder of the deceased occurred when they were fast asleep in their residence by the appellant and his co-accused. The accused had some grievances against the deceased man who was his real brother, over a dispute relating to land. Dismissing the appeal the Supreme Court held that the manner in which entire family was eliminated indicates that the act was deliberate, diabolical, pre-planned, coldblooded and "absolutely devilish and dastardly". Therefore, the sentence of death was not inappropriate in those circumstances.

The Supreme Court in Kahar Singh Vs. Delhi Administration applied the doctrine of "rarest of rare" propounded in Bachan Singh's case and the ruling of Machhi Singh's case was elaborately quoted. The Supreme Court in this decision revolved around three basic values for not interfering with the sentence of death awarded to the accused:

Firstly, the Supreme Court considered the act of the accused as a threat to the democratic system which, in the opinion of the Court has been working fairly well for over 40 years. Hence the admonition that the ideal mechanism of change was through ballot, not bullet.

Secondly, the relationship of the accused to the deceased was that of a trusted lieutenant. That the accused bore the arms

66. Supra Chap.IV Note 88.
against the deceased was unjust by any standard.

Lastly, the fact that the murder was of an unarmed lady, no less a personality as the Prime Minister of a country and more with a series of bullets at a close range. All these added together, the sentence of death was considered warranted and all alternative punishments were justifiably foreclosed.

**Delay and Commutation:**

Even before the *T.V. Vatheeswaran Vs. State of Tamil Nadu*, 67 and *Sher Singh Vs. State of Punjab*, 68 it has not been unknown to commute the sentence of death to imprisonment for life because of the time lapse between the offence and the final verdict. Yet, there have been differing views on whether the circumstances in the intervening period are relevant, in deciding on the sentence. 69

The *Bachan Singh Vs. State of Punjab* 70 case majority had said that post-mortem, remorse, remitence or repentance may lead to awarding the lesser penalty.

In *T.V. Vatheeswaran Vs. State of Tamil Nadu*, 71 a controversy arose as regard to the effect to delay in execution of death sentence. In this case, a bench of two judges held that a delay of two years in execution of sentence after judgement of the trial

68. Supra Chap.IV Note 49
69. Lawyers Collective, September 91, pp.4-5.
70. Supra Chap.IV Note 11.
71. Supra Note 66.
court will entitle the condemned prisoner to ask for commutation. The court observed:

"Making all reasonable allowance for all time necessary for appeal and consideration on reprieve, we think that delay exceeding two years in execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death".

However, Chief Justice Chandrachud speaking for majority differed with this two years rule in Sher Singh Vs. State of Punjab. The court here held that a prisoner has a right to pursue all legal remedies available to get rid of the sentence passed against him, that delay alone is not enough for commutation and two years rule could not be validly laid down. Adding that various other factors have to be taken into consideration before the sentence of death could be vacated for the reason that its execution is delayed. It is submitted that the Sher Singh’s ruling is more reasonable. There can be no hard and fast criteria in deciding the weightage to be given to delay in opting for life imprisonment in a case where the trial court has after balancing the mitigating and aggravating factors opted for sentence of death. To allow such formula is to create loopholes for forstalling sentence of death by delay tactics.

The Supreme Court had been grappling with the question of delay without laying down any appreciable standard. It was

72. Supra Chap.IV Note 49.
rather conflicting. Earlier in Nethi Sreeramula Vs. State of Andhra Pradesh, the accused's sentence of death was committed to life imprisonment. In State of Utter Pradesh Vs. Lalla Singh, Six years delay was a consideration for not allowing a sentence of death to be executed and in Sadhu Singh Vs. State of Utter Pradesh, three years and seven months was considered a relevant factor for reducing a sentence of death.

Moreover, in Nachhittar Singh Vs. State of Punjab, the court refused the idea of delay as a mitigating factor. In Maghar Singh Vs. State of Punjab, the court held that in view of the preplanned, cold-blooded and dastardly manner of the murder by the accused, delay does not appear to be a good ground to commute his death sentence. But in Lajar Masih Vs. State of Utter Pradesh, the court while confirming the sentence of death observed that the value of such delay as a mitigating factor depends upon the features of a particular case. It cannot be divorced from the diabolical circumstances of the crime itself, which in the instant case fully justify the award of capital sentence for the murder of the deceased.

But now with the decision of a five judge bench in Smt. Triveniben and others Vs. State of Gujrat, the delay contro-

73. 1974 3 SCC 314.
74. 1978 1 SCC 142.
75. 1978 4 SCC 428.
76. 1975 3 SCC 266.
77. 1975 4 SCC 234.
78. 1976 1 SCC 806.
79. Ibid, p.809.
80. 1989 1 SCR 509.
versy is ended. T.V. Vatheeswaran,\textsuperscript{81} is over ruled while Sher Singh,\textsuperscript{82} is affirmed. Agreeing with the ruling in Sher Singh that nature of the offence and other circumstances are relevant, the court held that the inordinate delay may be a significant factor, but they by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself.\textsuperscript{83}

Smt. Triveniben's case also provided an opportunity for the Supreme Court to review almost the entire case law affecting the sentence of death. The case arose with regards to the conflicts in the decision of the court in T.V. Vatheeswaran Vs. State of Tamil Nadu.\textsuperscript{84} Sher Singh and others Vs. State of Punjab\textsuperscript{85} and observations of Chinnappa Reddy J. in Javed Ahmad Abdul Hamid Pawala Vs. State of Maharashtra.\textsuperscript{86}

The conflict in the above cases both as regards delay and legality of three bench judge in Sher Singh to overrule a two judge bench T.V. Vatheeswaran have now been resolved by a constitution bench in the Smt. Triveniben\textsuperscript{87} case. In this case the accused sought to rely on two stages of delay. The first being the time taken for judicial process. It was time taken for parties during trial, appeal, further appeals and review.

\textsuperscript{81} Supra No.66.
\textsuperscript{82} Supra No.67.
\textsuperscript{83} Supra No.78 p.550 (per Shethy, J.)
\textsuperscript{84} Supra No.66.
\textsuperscript{85} Supra Chap. IV Note 49.
\textsuperscript{86} Supra No.53.
\textsuperscript{87} Supra No.79.
The next stage was time taken by exercise and disposal of mercy petition. The five judge Constitution bench in Smt. Triveniben case laid down that the delay which could be considered while considering the question of commutation of sentence of death into one of life imprisonment could only be from the date the judgement of the Apex Court is pronounced i.e. when the judicial process has come to an end. The time that has elapsed from the date of offence till the final decision is taken into account by the courts and often lesser sentence is ordered only on this account by the Supreme Court.\(^88\)

Lastly, it is taken as well to be settled that the delay that is material in commutation of sentence of death to life imprisonment is the delay arising after the end of judicial proceeding which means after the final appeal of the Supreme Court. The court has been of the view that so long as the case is pending in any court, even the person sentenced to death or life imprisonment has a ray of hope and he does not suffer the mental torture like the person who knows that he is to be hanged but waits for the dooms-day. This decision was followed in Madhu Mehata Vs. Union of India,\(^89\) in which the court held that the accused who suffered 8 years mental agony deserves the lesser sentence of life imprisonment as the court found no reasons sufficiently commensurate to justify the long delay. In Khem Chand Vs. State\(^90\)

\(^88\) 1989 1 SC p.509.
\(^89\) 1989 Cri.L.J. 2321.
\(^90\) 1990 Cri.L.J. 2314.
relying on the Smt. Triveniben decision the court commuted to life imprisonment the sentence of death awarded to the accused on ground of inordinate delay in disposal of the mercy petition.