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

Reserved on: 24th December, 2014

% Date of Decision: 06th February, 2015

+ CRL.A.910/2008

VIKAS YADAV ..... Appellant

Through: Mr.Sumeet Verma, Adv. with Mr.Amit Kala,Adv.

versus

STATE OF UP ..... Respondent

Through : Mr.Rajesh Mahajan, Adv. with Ms. Shinjan Jain, Adv. for State. Mr.P.K. Dey, Adv. with Mr.Kaushik Dey, Mr. Abhijeet, Mr. Vijay Pal Singh and Mr. Andleeb Naqvi, Advs. for complainant.

+ CRL.A.741/2008

VISHAL YADAV ..... Petitioner

Through: Mr. Sanjay Jain and Mr. Vinay Arora, Advs.

versus

STATE GOVT. OF UP ....Respondents

Through : Mr.Rajesh Mahajan, Adv. with Ms. Shinjan Jain, Adv. for State. Mr.P.K. Dey, Adv. with Mr.Kaushik Dey, Mr. Abhijeet, Mr. Vijay Pal Singh and Mr. Andleeb Naqvi, Advs. for complainant.

\+ **CRL.A.958/2008**

STATE ..... Appellant

Through : Mr.Rajesh Mahajan, Adv. with Ms. Shinjan Jain, Adv. for State.
Ms. Ritu Gauba, APP for State.

versus

VIKAS YADAV and ANR. .... Respondents

Through: Mr.Sumeet Verma, and Mr.Amit Kala, Advs. for Mr.Vikas Yadav.
Mr.P.K. Dey, Adv. with Mr.Kaushik Dey, Mr. Abhijeet, Mr. Vijay Pal Singh and Mr. Andleeb Naqvi, Advs. for complainant.

\+ **CRL.REV.P. No.369/2008 and Crl.M.A.Nos. 1168/2012, 1313/2012, 4073/2012, 13951/2012 and 13952/2012**

NILAM KATARA ..... Appellant

Through : Mr.P.K. Dey, Adv. with Mr.Kaushik Dey, Mr. Abhijeet, Mr. Vijay Pal Singh and Mr. Andleeb Naqvi, Advs. for complainant.

versus

STATE GOVT. OF NCT OF DELHI & ORS. ..Respondents

Through: Mr.Rajesh Mahajan, Adv. with Ms. Shinjan Jain, Adv. for State.
Ms. Ritu Gauba, APP for State.

Mr.Sumeet Verma with Mr.Amit Kala, Advs. for Mr.Vikas Yadav.
Mr. Sanjay Jain, Adv. for Mr. Vishal Yadav.

\+ **CRL.A. 1322/2011**

STATE ..... Appellant
Through: Mr.Rajesh Mahajan, Adv. with Ms. Shinjan Jain, Adv. for State.
Ms. Ritu Gauba, APP for State.

versus

SUKHDEV YADAV ALIAS PEHLWAN ..... Respondent
Through: Mr.Chaman Sharma, Adv. for Mr.Sukhdev Yadav.

\+ **CRL.A. 145/2012**

SUKHDEV YADAV ..... Appellant
Through: Mr.Chaman Sharma, Adv.

versus

STATE and ANR. .... Respondents
Through: Mr.Rajesh Mahajan, Adv. with Ms. Shinjan Jain, Adv. for State.
Ms. Ritu Gauba, APP for State.

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

GITA MITTAL, J.

"Sentencing justice is a facet of social justice, even as redemption of a crime-doer is an aspect of restoration of a whole personality. Till the new Code recognised

statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and provided a second stage for bringing in such additional materials, the Indian Courts had, by and large, assigned an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age."

[(1977) 3 SCC 287 (para 19), Mohd. Giasudden v. State of A.P.]

1. Vikas Yadav and Vishal Yadav were convicted by a judgment dated 28th May, 2008 passed by the learned Additional Sessions Judge for commission of offences under Section 302/364/201 read with Section 34 IPC in SC Case No.78 of 2002 arising out of FIR No.192/02. By an order dated 30th May, 2008, they were sentenced to life imprisonment as well as fine of one lakh each under Sections 302 of the IPC and in default of payment of fine, to undergo simple imprisonment for one year. They were sentenced to rigorous imprisonment for ten years and fine of Rs.50,000/- each for their conviction under Section 364/34 IPC, in default to undergo simple imprisonment for six months and rigorous imprisonment for five years and fine of Rs.10,000/- each under Section 201/34 IPC, in default, simple imprisonment for three months. All sentences were to run concurrently.

2. By an order dated 6th of July 2011 in SC No.76 of 2008, Sukhdev Yadav @ Pehalwan was also found guilty for commission of the same offences under Sections 302/364/34 and Section 201 of the IPC. Consequently, by an order dated 12th July, 2011, Sukhdev

Yadav @ Pehalwan was sentenced to undergo life imprisonment and fine of Rs.10,000/- for commission of the offence under Section 302 IPC, in default to undergo rigorous imprisonment for two years; rigorous imprisonment for seven years and fine of Rs.5,000/-, for commission of the offence under Section 364 IPC, in default rigorous imprisonment for six months; rigorous imprisonment for three years and fine of Rs.5,000/- for his conviction under Section 201 IPC, in default, rigorous imprisonment for six months. All sentences were directed to run concurrently.

Legal History

3. The learned trial judges in the instant case, have not imposed the death sentence which was the maximum sentence prescribed for commission of the offence under Section 302 IPC. In the case of Vikas Yadav and Vishal Yadav, they have been sentenced to life imprisonment and fine of Rs.1,00,000/- has been imposed. In default of payment of fine, simple imprisonment of one year is stipulated. Sukhdev Yadav @ Pehalwan, though has been sentenced to life imprisonment, however fine of merely Rs.10,000/- has been imposed. Furthermore, in default of payment of fine, rigorous imprisonment for two years has been ordered.

4. For commission of the offences under Section 364 IPC as well, the maximum sentence has not been imposed in both cases. By the order dated 30th May, 2008, passed in the case of Vikas Yadav and Vishal Yadav, they have not been given the maximum

sentence of imprisonment of life but have been sentenced to imprisonment for a term of ten years and fine of Rs.50,000/- each. In default of payment, each of them is required to undergo simple imprisonment of six months. For commission of the same offence under Section 364 IPC, Sukhdev Yadav @ Pehalwan has been sentenced by the order dated 12th July, 2011 to undergo rigorous imprisonment of merely seven years and fine of Rs.5,000/-. In default of payment of fine, Sukhdev Yadav is required to undergo six months rigorous imprisonment.

5. So far as the commission of the offence under Section 201 of the IPC is concerned, Vikas Yadav & Vishal Yadav have been sentenced to undergo rigorous imprisonment for five years and fine of Rs.10,000/-. In default, they are required to undergo three months simple imprisonment. For the same offence, Sukhdev Yadav has been sentenced to undergo rigorous imprisonment of only three years and fine of Rs.5,000/-. In default of payment, he is required to undergo rigorous imprisonment for six months.

6. During the pendency of Crl.App.Nos.741/2008 and 910/2008, assailing the convictions and sentences by Vikas Yadav and Vishal Yadav respectively, the State filed Crl.A.No.958/2008 entitled State v. Vikas and Vishal Yadav under Section 377 of the Cr.P.C. seeking enhancement of the sentence imposed on them by the learned Additional Sessions Judge by the order dated 30th May, 2008.

7. Sukhdev Yadav filed Crl.App.No.145/2012 assailing his conviction and sentence. The State also filed Crl.A.No.1322/2011,

State v. Sukhdev Pehalwan seeking enhancement of the sentence imposed by the order dated 12th July, 2011, pursuant to conviction.

8. Additionally, the complainant – Nilam Katara (mother of deceased Nitish Katara) has also filed Crl.Rev.P.No.369/2008 praying for enhancement of the sentences on Vikas Yadav and Vishal Yadav which has been directed to be heard along with the other cases.

9. In view of the pendency of the appeals before the Division Bench, the Registrar (Judicial) directed that the revision petition be heard along with the appeals which was also consequently placed before us. The appeals filed by the prisoners as well as the State appeal and the complainant's revision were all being taken up together. Inasmuch the appeals against the orders dated 28th May, 2008 and 6th July, 2011 were pending, it was directed on 24th May, 2013 that the State appeal and the criminal revision be listed after the pronouncement of the judgment on the appeals against the conviction.

10. Thus Vikas Yadav, Vishal Yadav and Sukhdev Yadav are appellants in Crl.App.Nos. 910/2008, 741/2008 and 145/2012 and are respondents in Crl.App.Nos.958/2008 and 1322/2011 and Crl.Rev.P.No.369/2008. We propose to refer to the convict persons as defendants in this judgment.

11. It is noteworthy that in the two State appeals as well as the revision petition filed by the complainant, the prayer is for enhancement of the sentence of life imprisonment handed out to imposition of the death penalty on the defendants.

12. This court has upheld the conviction of Vikas Yadav, Vishal Yadav and Sukhdev Yadav by the common judgment dated 2nd April, 2014 whereby the two appeals of Vikas Yadav and Vishal Yadav assailing their conviction by the judgment dated 28th May, 2008 as well as the third appeal of Sukhdev Yadav assailing his conviction by the judgment dated 6th July, 2011 in the two cases arising out of FIR No.192/02 registered by P.S. Kavi Nagar, Ghaziabad were dismissed. It is noteworthy that protracted arguments were heard on the legality and validity of these two judgments alone and judgment was reserved thereon which was pronounced on 2nd April, 2014.

As such the question of the validity of the orders on sentence which came to be imposed by the order dated 30th May, 2008 (in the case of Vikas Yadav and Vishal Yadav) and 12th July, 2011 (in the case of Sukhdev Pehalwan) was kept aside in their appeals for consideration by this court with the State appeals.

13. So far as Crl.App.No.1322/2011 is concerned, seeking enhancement of the sentence imposed on Sukhdev Yadav @ Pehalwan, on the 22nd of March 2012, on a statement by his counsel that they contest the appeal on merits and do not oppose the application by the State seeking condonation of delay, the delay was condoned and the appeal was admitted for hearing. Sukhdev Yadav @ Pehalwan has been represented on all dates by counsel whose submissions in this appeal are noted hereafter. The appeal was listed on all dates with the other appeals and the criminal revision.

14. On 16th May, 2014, in Crl.A.Nos.958/2008 and 1322/2011, notice was issued by this court under Section 377(3) of the Cr.P.C. for enhancement of sentences. Opportunity has been afforded to the defendants to show cause. Notices stand accepted in court by counsel on behalf of the defendants. The defendants Vikas Yadav, Vishal Yadav as well as Sukhdev Yadav have been duly represented by counsel who have appeared and opposed the enhancement on every date of hearing before this court.

15. In the proceedings on 16th May, 2014, Mr. Sumeet Verma, learned counsel pointed out that formal notice had not been issued in Crl.Rev.P.No.369/2008 which was being listed on all dates along with the above criminal appeals. Counsels had been appearing in this revision as well. However, on the 16th May, 2014, to avoid any kind of technical objection, formal notice was issued to the defendants - Vikas Yadav and Vishal Yadav to show cause against enhancement of the sentences which were imposed upon them by the learned Additional Judge by the order dated 30th May, 2008 which were accepted by Mr. Sumeet Verma, Advocate and Mr. Sanjay Jain, Advocate respectively on their behalf.

16. Vikas Yadav filed a response dated 23rd May, 2014 to the notice to show cause for enhancement of sentence in Crl.App.No.958/2008. Additionally a brief synopsis dated 22nd April, 2014 has been filed in Crl.App.No.958/2008 by Vishal Yadav while a similar synopsis has been filed on behalf of Vikas Yadav.

17. We have received nominal rolls in respect of all three prisoners. In addition thereto, voluminous written submissions and judicial precedents have been placed before us in support of their opposition.

18. The above narration discloses that in two trials arising out of the same complaint, for commission of the same offences and convictions, based on identical evidence, two different sets of convicts have been differentially sentenced by the two learned Additional Sessions Judges before whom the trials proceeded to judgment. Even the default sentences are different. We propose to deal with the challenges on behalf of the defendants to the sentences handed out to them as well as the prayers made before us for enhancement of the sentences as well as the reasoning for the differential sentences for commission of the same offence by the two judges in the orders of sentences dated 30th May, 2008 and 12th July, 2011.

19. The defendants before us do not dispute that they were given an opportunity of hearing in accordance with the provisions of Section 235(2) of the Cr.P.C. by the trial courts.

20. On the issues under examination before us, extensive written submissions running into several volumes on the jurisdiction of this court to exercise any sentencing option as well as on the propriety of sentences, submissions on the factual merits of the prayers for enhancement of sentence as well as on award of compensation with judicial precedents and literature on each submission have been filed by Mr. Sumeet Verma, Advocate (for Vikas Yadav), Mr.

Sanjay Jain, Advocate (for Vishal Yadav), Mr. Rajesh Mahajan, Additional Standing Counsel (for the State) and Mr. P.K. Dey, learned counsel for the complainant.

21. On the 17th of November 2014, Mr. Chaman Sharma, learned counsel representing Sukhdev Yadav @ Pehalwan made a statement to the effect that he adopts the arguments on sentencing of Mr. Sumeet Verma and Mr. Sanjay Jain, learned counsels for Vikas Yadav and Vishal Yadav respectively and that he had nothing to add to the same.

22. During the pendency of the appeals, the attention of this court was brought by the Registry to the judgment of the Supreme Court reported at ***(2013) 6 SCC 770, Ankush Shivaji Gaikwad v. State of Maharashtra*** wherein the Supreme Court had noted with anguish the failure of the courts to abide by the mandate of Section 357 of the Cr.P.C. on the subject of compensation despite several judicial precedents.

This is an important aspect of a criminal trial which is largely ignored by the courts or, if not, insufficiently applied.

23. In the present case as well, while passing the judgments and sentences, the learned trial judges had failed to even refer to, let alone consider or exercise their jurisdiction under Section 357 of the Cr.P.C. It is also to be noted that neither in the criminal appeal by the State nor the criminal revision petition filed by the complainant, there is a specific prayer invoking Section 357 of the Cr.P.C. seeking award of reasonable compensation under Section 357 of the Cr.P.C. No specific prayer for enhancement of the fine

which was imposed by the Sessions Court has been made. It therefore, became necessary for this court to consider what was permissible in order to comply with the statutory and judicial mandate. Was it permissible for this court as the appellate or revisional court to pass an order under Section 357 of the Cr.P.C., given the failure of the trial courts to do so as well as in the absence of such a prayer by the State or the complainant?

24. We may note that in the instant case, the defendants stand convicted for causing death of a young boy of 23 years. While considering the prayers for enhancement of sentence which includes 'fine' as well as the appropriate order under Section 357 of the Cr.P.C., the question which would also require to be answered is as to whether he left any dependant(s) and whether any compensation is payable to his family members. It would also be necessary to ascertain the loss caused by the offence and the extent of compensation payable to them thereof.

25. In the proceedings on 16th May, 2014, we had found that the legislature had anticipated such eventuality as well and provided for the power of the appellate or the revisional court to do so. In this order it was observed as follows :-

> "11. It is also necessary to note the judicial pronouncements by one of us (J.R. Midha, J) dated 11th October, 2013 in Crl.Rev.Petition No.338 of 2009 Satya Prakash vs. State. This judgment (reported at 2013 (203) DLT 652) is premised on the above pronouncements by the Supreme Court. The entire conspectus of the law on Section 357 of the Cr.P.C., its contours, parameters and the necessary summary inquiry prescripted to be

conducted by every criminal court while passing an order of conviction against the persons arrayed for trial or the High Court while upholding or finding a conviction in a criminal case, has been laid down.

12. In the present case, it is not disputed that both the learned Additional Sessions Judges have failed to consider Section 357 of the Cr.P.C. or pass any orders thereunder. The statutory mandate, which stands re-enforced by repeated judicial pronouncements, is that this provision of law cannot be ignored and has to be mandatorily considered in every criminal case. In fact, the judicial pronouncements noted above of the Supreme Court have mandated upon the criminal court that in case Section 357 Cr.P.C. is not invoked or applied, reasons must be given for not doing so.

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20. Notice in Crl.Appeal Nos.958/2008 and 1322/2011 was issued by this court under Section 377 of the Cr.P.C. and an opportunity has been afforded to the respondents therein to show cause. Notices by counsel on behalf of the respondents stand accepted in court. The respondents have been duly represented by counsel. It is, hereby, clarified that the notices in the appeals were issued under Section 377 (3) for enhancement of the sentences, which were accepted on behalf of the respondents by their counsel who have appeared on every date of hearing before this court.
21. It is pointed out by Mr.Sumeet Verma, learned counsel appearing for Mr.Vikas Yadav, respondent no.2 that formal notice has not been issued in Crl.Rev.No.369/2008. We proceed to do so hereafter to avoid any technical objection.

22. Notice is issued to the respondents to show cause against enhancement of the sentence which was imposed upon them by the learned Additional Sessions Judge by the order dated 30th May, 2008. Mr.Sumeet

> Verma, Advocate on behalf of Mr.Vikas Yadav and Mr.Sanjay Jain, Advocate on behalf of Mr.Vishal Yadav accept notice on behalf of the respondents.
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> xxx xxx xxx
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> Therefore while considering both appeals against the orders of sentence as well as appeals for enhancement of sentence, in addition to the prayers made therein for which notice to show cause stands issued, this court is adequately empowered to vary the sentence, or to make any consequential or incidental order as may be just and proper, provided that, if this court is making an order of enhancement of sentence, the same can be done only after the accused has had an opportunity of showing cause against such enhancement."

26. Keeping in view the legislative mandate as well as the several directions of the Supreme Court of India noted above on the procedure to be followed by the court before passing an order under Section 357 of the CrPC, on the 16th May 2014, we had issued the following directions:

> " 28. Section 357 postulates that the whole or any part of the fine which is recovered, be applied inter alia for defraying the expenses properly incurred in the prosecution; and payment to any person for compensation for any loss or injury caused; when compensation is in the opinion of the court recoverable by such person in a civil court. How does the court compute the extent of the fine which must be imposed upon a convict or what would be just, reasonable and proper compensation or what was the expenses properly incurred for the prosecution? How does the court assess or compute the amount including extent of the loss caused to any person? Under Section 386 of the Cr.P.C.

in a any matter of enhancement of sentence, the convict is entitled to reasonable opportunity of showing cause against the enhancement of sentence. For making an appropriate order under Section 357 of the Cr.P.C., it is necessary to ascertain the paying capacity of the convict; expenses incurred on the prosecution of the case; loss suffered because of the actions or omissions of the persons convicted."

In view of the above, we directed as follows :

"(i) Notice is issued to Vikas Yadav, Vishal Yadav and Sukhdev Yadav to ***show cause as to why the sentence imposed upon them be not enhanced in terms of Section 386 of the Cr.P.C.*** Mr.Sumeet Verma, Advocate on behalf of Mr.Vikas Yadav; Mr.Sanjay Jain, Advocate on behalf of Mr.Vishal Yadav and Mr.Chaman Sharma, Advocate on behalf of Sukhdev Yadav@Pehalwan accept notice. Let reply, if any, be filed on or before the next date of hearing.

(ii) We hereby appoint Mr. S.S. Rathi (OSD), Delhi State Legal Services Authority (DLSA) to conduct a ***summary inquiry with regard to the means and paying capacity of Vikas Yadav, Vishal Yadav and Sukhdev Yadav@Pehalwan; the loss suffered by the family of Nitish Katara*** on account of the offences for which these three persons have been convicted.

(iii)Mr. S.S. Rathi shall also conduct an ***inquiry on the amount incurred on conduct of the prosecution of the case.***

(iv) Vikas Yadav and Sukhdev Yadav@Pehalwan shall be produced in custody before Mr. S.S. Rathi, (OSD), DLSA (the Enquiry Officer) on 20th May, 2014 at 2:30 p.m. and all other dates as may be directed by Mr. S.S. Rathi, (OSD) DLSA. Let production warrants of Vikas Yadav and Sukhdev Pehalwan be issued to that effect.

(v) For the purpose of the present inquiry, Vishal Yadav who has been given parole shall also appear before the Enquiry Officer on 21st May, 2014 and on all dates as may be directed by Mr. S.S. Rathi.

(vi) A ***direction is issued to Vikas, Vishal and Sukhdev Pehalwan to place all relevant material with regard to the inquiry*** to be conducted by Mr. S.S. Rathi.

(vii) An appropriate inquiry shall be done by Mr. S.S. Rathi in terms of the principles, appropriately modified, as have been laid down in ***Satya Prakash***.

(viii) It shall be ***open for Mr. S.S. Rathi to make inquiry from any person or authority*** as may be concerned or deemed necessary in the matter to submit the report to us. Copies of the response of the convicts to the notice to show case issued under Section 386 of the Cr.P.C. shall be placed before Mr. S.S. Rathi as well.

(ix) The State shall assist Mr. S.S. Rathi in making the above inquiry and place complete details and record relating to the expenses of the prosecution."

27. We had directed copies of the order dated 16th May, 2014 to be served upon the three defendants who are in custody.

28. On request of Shri S.S. Rathi, learned Additional Sessions Judge, who was appointed as inquiry officer on 27th May, 2014, time to complete the inquiry was extended by our order dated 27th May, 2014 by three weeks.

29. We have heard learned counsels for the parties at length and given our considered thought to the several issues urged. We also hereafter, in compliance with the dictum of ***Ankush Shivaji***

Gaikwad and the statutory mandate of Section 357 Cr.P.C., shall examine the permissibility of passing orders under Section 357 of the Code of Criminal Procedure against the defendants in the present case.

30. Given the lack of any guidance in the statute on the issue of an appropriate sentence, for the purposes of the present adjudication, we have to be guided by the principles and procedure laid down by the Supreme Court in the judicial precedents.

31. We propose to decide the issues pressed before us in the following manner :

I. ***Statutory provisions and jurisprudence regarding imposition of the death penalty*** *(paras 32 to 53)*

II. ***Death sentence jurisprudence - divergence in views*** *(paras 54 to 80)*

III. ***Life imprisonment - meaning and nature of*** *(paras 81 to 92)*

IV. ***Is it permissible to judicially regulate the power of the executive to remit the sentence of the defendant? In other words, can the sentencing court, while imposing a life sentence, direct minimum term sentences in excess of imprisonment of more than 14 years?*** *(paras 93 to 172)*

V. ***Questions referred and pending before the Constitution Bench of the Supreme Court*** *(paras 173 to 174)*

VI. ***If there are convictions for multiple offences in one case, does the court have the option of directing that the sentences imposed thereon shall run consecutively***

prayer for enhancement of the sentence
(paras 689 to 694)

XIX. ***Factual consideration in present case***
(paras 695 to 841)

XX. ***If not death penalty, what would be an adequate sentence in the present case?*** *(paras 842 to 862)*

XXI. ***Appropriate government for the purposes of Section 432 of the Cr.P.C. in the present case***
(paras 863 to 867)

XXII. ***What ought to be the fines in the present case***
(paras 868 to 880)

XXIII. ***Result*** *(paras 881 to 882)*

We now propose to discuss the above issues in seriatim :

I. *Statutory provisions and jurisprudence regarding imposition of the death penalty*

32. In the administration of criminal justice, sentencing is as important a function to be discharged by the court as adjudication of culpability. Before considering the adequacy of the sentences imposed in the present cases, we may briefly notice the principles for sentencing. The sentences which the trial court may impose stand prescribed under the Indian Penal Code in the several provisions conferring discretion on the sentencing court with regard to the punishment which may be handed out to the convict.

33. So far as the conviction for the offence of murder is concerned, under Section 302 IPC, a sentence of death or imprisonment for life is prescribed. The statute also mandates that the convict "*shall also be liable to fine*".

34. For commission of the offence of kidnapping or abducting in order to murder, Section 364 IPC prescribes that the convict shall be punished with imprisonment for life or rigorous imprisonment which may extend to 10 years and shall also be liable to fine. Section 34 of the IPC is concerned with acts done by several persons in furtherance of their common intention and mandates that the person, who is one of several persons who have committed a criminal act in furtherance of the common intention of all, is liable for that act in the same manner as if it was done by him alone.

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

If evidence of commission of an offence punishable with imprisonment for life or with imprisonment which may extend to ten years has been caused to disappear, the convict shall be

punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

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

37. Another amendment of the Code of Criminal Procedure came into effect on the 1st of April, 1974 (what came to be known as Code of Criminal Procedure, 1973) whereby Section 354(3) was incorporated into the law. After this amendment, the following statutory provision came to be added into the enactment:

> "354 (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the

sentence awarded, and, in the case of sentence of death, the ***special reasons*** for such sentence."

(Emphasis by us)

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

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

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

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

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

(iii) An adequate safeguard with respect to the exercise of sentencing discretion existed as the Cr.P.C. provided the right to

appeal and, therefore, if an error was committed by the court in exercise of the such discretion, the appellate court would correct the error.

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

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

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

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

43. In the judgment of the Constitution Bench in **(*1980) 2 SCC 684, Bachan Singh v. State of Punjab***, the challenge to the constitutionality of the death penalty was rejected. The court held

that sentencing discretion in the context of the death penalty is not unguided. The court expanded the meaning of the expression '*well recognized principles*' (noted in ***Jagmohan Singh***) to mean '*aggravated and mitigating circumstances'* identified by the court in its previous decisions. The court recast the propositions (iv)(a) and (v)(b) in ***Jagmohan*** stating thus:

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

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

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

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

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

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

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

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

(b) If the murder involves extreme depravity;

(c) If the murder is of a member of the police or the armed forces, and is committed when the person was on

duty, or in consequence of the public servant actions in the course of his/her duty;

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

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

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

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

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

d) That the accused can be reformed and rehabilitated;

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

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

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

48. Of course a clarification had been given by the Bench in ***Bachan Singh*** that the above lists are not exhaustive but were

relevant and that it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water tight compartments. The need for principled sentencing based on special reasons has been strongly emphasized.

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

49. The exercise of identifying the guidelines (from which the court refrained in ***Bachan Singh***) was undertaken by the Supreme Court in the judgment reported at ***(1983) 3 SCC 470, Machhi Singh and Ors. v. State of Punjab (paras 32 – 39)*** which was decided by a three judge bench of the Supreme Court. Reference was made to this formulation as the "*rarest of rare case*" principle holding that if certain factors were present in a particular case, the court would have to impose the death penalty since the collective conscience of the community would be shocked. Thus, we see the evolution of the "*balance sheet*" approach. The five factors (extracted from paras 32 to 37 of the pronouncement) would include:

(i) If the crime is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner;

(ii) When the murder is committed with a motive that evinces total depravity and meanness;

(iii) When the crime is of an anti-social or socially abhorrent nature;

(iv) When the crime is enormous in proportion

(v) When the victim is a child, a helpless woman or an old/infirm person, when the victim a person vis-a-vis whom the murderer is in a position of trust or authority, when the victim is a public figure who has been murdered because of political or similar reasons.

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

(i) The death sentence should be imposed only in the gravest cases;

(ii) The circumstances of the offender also need to be taken into consideration, and not only the circumstances of the crime;

(iii) Life imprisonment is the rule, and death sentence the exception. The death sentence should be imposed if the court finds that life imprisonment is an altogether inadequate punishment in the light of the nature and circumstances of the crime;

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

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

52. The Supreme Court has expressed grave concern with the manner in which question of sentence is dealt with by the courts in the judgment reported at ***(1994) 4 SCC 381, Anshad & Ors. v. State of Karnataka (para 17),*** the court criticized the cryptic manner in which the trial court dealt with the question of sentence as, after pronouncing the order of conviction, on the same day itself it passed a one paragraph order dealing with the question of sentence. In para 17, the Supreme Court observed that this

exposed the lack of sensitiveness on the part of the Sessions Judge while dealing with the question of sentence. In para 14, the court also faulted the reasons given by the High Court for awarding the death sentence and observed that for determining the proper sentence in a case like the one under consideration, the court while taking into account the aggravating circumstances should not overlook or ignore the mitigating circumstances.

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

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

attending circumstances are relevant facts which would enter into the area of consideration."

(Underlining by us)

Death sentence jurisprudence - divergence in views

The discussion on this subject is being considered under the following sub-headings:

(i) Consideration of aggravating and mitigating circumstances

I. Cases where the Supreme Court imposed the death penalty

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

54. Unfortunately, the Indian judicial system has not been able to develop legal principles as regards sentencing and superior courts have repeatedly made observations with regard to the purport, object for and manner in which punishment is imposed on an offender.

55. In the judgment reported at (***2007) 12 SCC 288, Swamy Shraddananda v. State of Karnataka,*** the two Judges Bench of the Supreme Court differed on whether the appellant should be given the death sentence or sentenced to imprisonment for life. As a result, a Bench of three Judges of the Supreme Court was constituted to decide the issue of sentence. In para 42 of the judgment reported at ***(2008) 13 SCC 767, Swamy Shraddhananda v. State of Karnataka,*** it was again observed that the two earlier Constitution Benches had resolutely refrained from the standardization and classification of the circumstances in which

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

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

56. In the judgment reported at ***(2007) 12 SCC 230, Aloke Nath Dutta v. State of West Bengal,*** the Supreme Court reviewed a series of cases where the option to impose the death sentence was

available to the Supreme Court. It was noted that in cases with similar facts, while death sentence was imposed in some of the cases, in other cases with similar facts, life imprisonment was imposed. The court listed various cases where the murder is committed in a brutal manner. In some of these cases, the Supreme Court had imposed death penalty whereas in others, life imprisonment was imposed on the convicted person. Similarly in cases involving rape and murder, while death sentence was imposed in some cases, the offenders were sentenced to life imprisonment in others.

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

58. In the judgment reported at ***(2008) 7 SCC 550, State of Punjab v. Prem Sagar & Ors***., the Supreme Court expressed serious concern in this behalf pointing out the recommendations of committees as the Madhava Menon Committee & the Malimath Committee for framing of sentencing guidelines. It was, however, observed that while awarding a sentence, whether the court would take recourse to the principles of deterrence or reform, or invoke the doctrine of proportionality, would depend upon the facts and circumstances of each case. While the nature of the offence

committed by the accused plays an important role, the sociological background and the age of the convicts, the circumstances in which the crime has been committed, his mental state are also relevant factors in awarding the sentences.

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

59. Strong articulation for the essentiality of a proper pre-sentencing hearing is to be found in the pronouncement of the Supreme Court reported at ***(2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra.*** The Supreme Court has been deeply concerned about emphasizing three broad points on death penalty i.e. the difficulty on account of judge centric sentencing (**paras 46 to 52**); the importance of the "rarest of rare case" (**paras 53 to 59**) formulation which placed "extreme burden" on a court and the requirement of the court to conform to the highest standards of judicial rigor and thoroughness to ensure pre-sentencing (**paras 90 to 93**). The court held that an effective compliance of sentencing procedure under Section 354(3) and Section 235(2) Cr.P.C and existence of sufficient judicial discretion is a pre-condition. A scrupulous compliance with these statutory provisions is essential so that an informed selection of an adequate sentence could be based on information collected at the pre-sentencing stage.

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

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

61. At this stage, it is necessary to refer to the two Judge Bench pronouncement of the Supreme Court reported at ***(2013) 2 SCC 452 : (2012) 11 SCALE 140, Sangeet & Anr. v. State of Haryana*** wherein the court held that the considerations for mitigating and aggravating circumstances are distinct and unrelated elements and cannot be compared with each other. In para 29 of the report, it was clearly stated by the Bench that a "*balance sheet cannot be drawn up of two distinct and different constituents of an incident*". The judgment further notes that there was lack of evenness in the sentencing process; that the rarest of rare principle as well as the balance sheet approach has been followed on a case by case basis which has not worked sufficiently well. In para 33, the court also

observed that even though ***Bachan Singh*** intended "*principled sentencing"*, the sentencing had become judge-centric as had also been highlighted in ***Swamy Shraddananda (2)*** and ***Santosh Kumar Satishbhushan Bariyar.***

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

63. In this evaluation of the jurisprudence, it is essential to note the pronouncement of the Supreme Court reported at ***(2013) 5 SCC 546, Shankar Kisanrao Khade v. State of Maharashtra*** in which the appellant, a man of 52 years, had been convicted for murder and strangulation of an 11 year old minor girl with intellectual disability after repeated rape and sodomy. Despite the satisfaction of the crime test, the criminal test and the rarest of rare case test, the court was of the view that the extreme sentence of death penalty was not warranted. The court therefore, directed the life sentence awarded for rape and murder to run consecutively. It was noted in the judgment of Radhakrishnan, J. that in similar circumstances of rape and murder of minor girls, there had been inconsistency in the award of death penalty. While in 10 cases,

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

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

> **"52.** Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is ***any circumstance favouring the accused***, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-

> centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."
>
> (Emphasis supplied)

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

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

66. It has been pointed out that though ***Dharam Deo Yadav*** refers to the crime test, criminal test as well as R.R. test but the 0%

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

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

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

> **"31.** A reference to several other pronouncements made by this Court at different points of time with regard to what could be considered as mitigating and aggravating circumstances and how they are to be reconciled has

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

(Emphasis by us)

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

70. In a recent pronouncement dated 26th November, 2014 of a three Judge Bench of the Supreme Court in Criminal Appeal Nos.2486-2487 of 2014 (Arising out of SLP(Crl.)No.330-331 of 2013), ***Vasant Sampat Dupare v. State of Maharashtra,*** the court

has noted with approval the two Judge Bench judgment reported at ***(2011) 12 SCC 56, Haresh Mohandas Rajput v. State of Maharashtra*** dealing with a situation where the death sentence was warranted. We may usefully extract the relevant portion culling out the principles in ***Haresh Mohandas Rajput*** (which have been quoted in para 45 of ***Vasant Sampat Dupare*** as well) which read thus:

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

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

71. It is the law laid down by the Constitution Bench in ***Bachan Singh,*** followed in three Judge Bench pronouncement in ***Mahesh Dhanaji Shinde*** which has to bind this court. It is therefore,

unnecessary to advert in detail to the judgments wherein para 52 of ***Shankar Kisanrao Khade*** has been followed. We have however, extracted all the judgments hereafter while listing the based on consideration of relevant circumstances in the several precedents.

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

> **"100.** In light of the above judgments, we would now ascertain what factors which we need to take into consideration while deciding the question of sentence. Undoubtedly, we must locate the aggravating and mitigating circumstances in this case and strike the right balance. We must also consider whether there is anything uncommon in this case which renders the sentence to life imprisonment inadequate and calls for death sentence. It is also necessary to see whether the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender.
>
> **101.** We notice from the above judgments that mere brutality of the murder or the number of persons killed or the manner in which the body is disposed of has not always persuaded this Court to impose death penalty. Similarly, at times, in the peculiar factual matrix, this Court has not thought it fit to award death penalty in cases, which rested on circumstantial evidence or solely on approver's evidence. Where murder, though brutal, is committed driven by extreme emotional disturbance and

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

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

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

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

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

(i) *Consideration of aggravating and mitigating circumstances*

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

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

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

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

(i) *Burning the victims alive*

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

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

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

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

(ii) *Multiple stab injuries*

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

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

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

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

(iii) *Rape and murder*

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

(b) ***(2011) 5 SCC 317, Md. Mannan v. State of Bihar :*** The appellant, a 43 year old man, was convicted of raping and murdering an eight year old girl. He was working as a mason in the victim's uncle's house and therefore, when asked to do so, she willingly accompanied the appellant. "Breach of trust" was considered an aggravating factor. The victim also had multiple injuries on her face which indicated the brutality of the crime. The vulnerability of the victim who was of a small built was also factored by the court and it was held that the appellant was a

"menace to the society" and could not be reformed. Hence death sentence was imposed.

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

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

(e) ***(1996) 6 SCC 250, Kamta Tiwari v. State of M.P. :*** An innocent hapless girl of 7 years was lured by biscuits as a prelude to his sinister design of brutal rape and gruesome murder as testified by the numerous injuries on her dead body which was dumped in a well. The sentence of death by the trial judge for commission of offences under Sections 363, 376, 302 and 201 IPC was affirmed by the High Court as well as Supreme Court holding that the "*such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man*". The motivation of a perpetrator, the vulnerability of the victim, the enormity of the crime, the execution

thereof persuaded the court to hold that this was the 'rarest of rare case'.

(iv) *Gun shot injuries*

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

(B) *PRIOR CRIMINAL HISTORY*

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

(C) *PRE-MEDITATED ACTS*

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

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

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

(D) CASES BASED ON CIRCUMSTANTIAL EVIDENCE

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

> "27. The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentences are awarded for rape and murder and the like, there is practically no scope for having an eyewitness. They are not committed in the public view. But the very nature of things in such cases, the available evidence is ***circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect.*** The plea of the learned amicus curiae that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable."

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

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

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

(E) *TERRORIST ATTACKS*

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

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

(F) *REJECTION OF YOUNG AGE AS A MITIGATING FACTOR*

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

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

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

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

(c) ***(1994) 2 SCC 220, Dhananjoy Chatterjee v. State of West Bengal (para 12)*** : The appellant was a married man of 27 years posted as a guard of the building where the victim, aged 18 years, who was raped and murdered was living. Death sentence was awarded to him.

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

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

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

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

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

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

Single blow

(j) ***AIR 1931 Lahore 749, Sultan v. Emperor :*** This judgment was rendered prior to the amendment to Section 354 of Cr.P.C.

The Bench did not agree with the appellant that because a single blow was dealt, a capital sentence was not called for.

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

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

(A) *YOUNG AGE AS A MITIGATING FACTOR*

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

(b) ***(2014) 4 SCC 292, Mahesh Dhanaji Shinde v. State of Maharashtra :*** In this case, nine persons were brutally murdered. It was held by the Supreme Court that the four convicts were young in age (i.e. 23 - 29 years) at the time of commission of the

offence; belong to the economically, socially and educationally deprived section of the population. They were living in acute poverty which possibly led to a yearning for quick money and these circumstances had led to commission of the crimes. The court also noted their conduct in the jail when they had enrolled themselves for further education and were on the verge of acquiring the B.A. degree. Three of the appellants had participated in different programmes of Gandhi and thoughts and had been awarded certificates of such participation. One of the convicts in association with another appellant had written a book. The court noted that there was ***no material or information to show any condemnable or reprehensible conduct on the part of the appellants during their period of custody.*** It was noted that these ***circumstances pointed to the possibility of the appellants being reformed and living a meaningful and constructive life*** if they were given a second chance. It was therefore, held that the ***option of life sentence "was not unquestionably foreclosed"*** and the sentence of death was commuted to life imprisonment, the custody of the appellants for the rest of their lives would be subject to remissions, if any, strictly subject to provisions to Sections 432 and 433A of the Cr.P.C.

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

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

confirmed by the High Court. It was ruled that the appellant **should not be released until he serves a 30 year prison term**.

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

(f) ***(2012) 4 SCC 257, Ramnaresh v. State of Chhattisgarh :*** In this case, the appellant (with his friends) had committed gang rape of his sister-in-law and murdered her. The court held that this was not a "rarest of rare" case since there was possibility of the convicts being reformed; since they were young (being between 21 to 30 years old); did not have a prior criminal record; and that they could not be considered a menace to society. They were therefore, sentenced to imprisonment for life.

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

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

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

(j) ***(2010) 1 SCC 775, Dilip Premnarayan Tiwari v. State of Maharashtra :*** In this case, the motive for murder was the ***inter-caste marriage of the sister of one of the appellants*** despite resentment and disapproval by the girl's family. Three men including the girl's brother attacked the girl's husband and his

family, killing four people including the husband. The Supreme Court considered the young age of the brother as a mitigating circumstance observing that the brother must have been upset because of his sister's decision to marry outside her caste. ***It sentenced the appellants to imprisonment for 25 years***.

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

(B) *POSSIBILITY OF REFORM*

The consideration that young age may be considered as a mitigating factor rests on the theory of rehabilitation of the criminal and that if he/she is younger, the possibility of reforming is higher. It has been repeatedly held that the possibility of reformation is a mitigating factor. In ***Bachan Singh***, it was laid down that death penalty should only be imposed if the court reaches a conclusion that a person is beyond reform. This was a primary reason which weighed with the court in not imposing the death penalty on offenders despite brutality in commission of the crimes in the following cases:

(a) ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura :*** The court observed that the appellant was a tribal, stated to be a member of an extremist group raging war against the minority settlers, apprehending perhaps they might snatch away their livelihood and encroach upon their property, possibly such frustration and neglect might have led them to take arms, thinking they are being marginalized and ignored by the society. Viewed from this perspective, it was held that this was not

a "rarest of rare" case for awarding the death sentence. The death sentence was altered to that of imprisonment of life for a fixed term of imprisonment for 20 years without remission, over and above the period of imprisonment already undergone.

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

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

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

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

(e) ***(2011) 13 SCC 706, Rajesh Kumar v. State (N.C.T. of Delhi) :*** The appellant was convicted for murder of two children aged 4½ years and 8 months, who were related to him, who offered no provocation or resistance to the appellant's brutal act in a brutal and barbaric manner. Motivation for the crime was the refusal by their father to lend more money to the appellant. The court held that the brutal and inhuman manner of committing the murder alone could not justify the death sentence and that the court's consideration should not be confined to principally or mere circumstances connected with a particular crime but should also considered the circumstances of the criminal. In the absence of any evidence to show that the appellant was a continuing threat to society and was beyond reform and rehabilitation, the death sentence imposed by the Sessions Judge, affirmed by the High Court, could not be sustained.

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

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

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

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

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

(C) *CASE OF CIRCUMSTANTIAL EVIDENCE*

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

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

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

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

(a) ***(2013) 3 SCC 294, Mohinder Singh v. State of Punjab :*** When the appellant was out on payroll in a prior conviction for raping his daughter, he murdered his wife and the daughter. The court ruled that revenge being the motive for the murder, rendered it insufficient to bring it within the "rarest of rare" case. It was

further held that the appellant was not a dangerous man and sparing his life would not cause danger to the community. The fact that the appellant had spared the life of one of his other daughters who was at home at the time of the incident, was considered a mitigating factor.

(b) ***AIR 2012 SC 968, Absar Alam v. State of Bihar :*** The Supreme Court noted that the appellant was an illiterate, rustic man who cut off his mother's head as he believed that she was responsible for his wife's desertion. The mental condition of the appellant was held to be a relevant factor for not imposing a death sentence.

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

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

which five were in the death cell. The court also noted that while enhancing the sentence, the High Court had not assigned adequate and acceptable reasons while the trial court had opportunity of noting the demeanour of witnesses as well as the accused. The court therefore, restored the sentence imposed by the trial court.

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

(E) AGGRAVATING FACTORS NEGATIVED

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

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

(b) ***(2009) 14 SCC 31, State of Punjab v. Manjit Singh :*** Although the Supreme Court held that the ***murder of four people*** while they were sleeping by the appellant had been committed in a

cruel and barbaric manner, other circumstances could not be lost sight of and the appellant was sentenced to imprisonment for life.

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

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

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

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

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

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

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

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

(j) ***(2002) 1 SCC 622, State of Maharashtra v. Bharat Fakira Dhiwar :*** A three year old girl was raped and murdered by the accused who was convicted and awarded the death sentence. The High Court set aside the conviction. On scrutiny, the Supreme Court illustrated the conviction observing that "*we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime*". It was further held that in spite of the fact that the case was "*perilously near the region of rarest of the rare cases*", the Supreme Court was refraining from

imposing the extreme penalty once the accused was stood acquitted by the High Court. Placing reliance on ***Bachan Singh,*** it was observed that the lesser option was not unquestionably foreclosed and so the sentence was "*altere*d" in regard to the offence under Section 302 to imprisonment for life.

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

(F) PRIOR CRIMINAL HISTORY

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

75. The various decisions bring out one or the other circumstances, listing out the same to be an aggravating or mitigating. The task thus for a judge to balance mitigating and

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

> **"80.** The circumstances can be listed under six different heals:
> (i) Circumstances personal to the offender.
> (ii) Pre-offence conduct of the offender and in particular the motive.
> (iii) Contemporaneous conduct of the offender while committing the offence.
> (iv) Post offence conduct of the offender.
> (v) Role of the victim in commission of the crime.
> (vi) Nature of evidence.

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

1. CIRCUMSTANCES PERSONAL TO THE OFFENDER—

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
1.	Lack of prior criminal record. *Re Butters*. [2006] EWHC 1555 (QB), [2006] All ER (D) 128 (Jul) *Williams* v. *Ozmint*, 494 F.3d 478, 2007 U.S. App. LEXIS 17934	Previous convictions. *Re Miller*, [2008] EWHC 719 (QB), [2008] All ER (D) 357 (Apr)
2.	Character of the offender as perceived in the society by men of social standing. *Reyes* v. *The Queen*, [2002] UKPC 11, [2002] 2 AC 235; *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24;	Future danger/threat of accused, menace to the society considering aspects like criminal tendencies, drug abuse, lifestyle, etc. *Renuka Bai @ Rinku @ Ratan* v. *State of Maharashtra*;, (2006) 7 SCC 442 : AIR 2006 SC 3056; *Re Miller*, [2008] EWHC 719 (QB), [2008] All ER (D) 357

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

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

Sr. No.	MITIGATING FACTORS	AGGRAVATING FACTORS
1.	A belief by the offender that the murder was an act of mercy. *Janki Dass* v. *State (Delhi Administration)*, 1994 Supp (3) SCC 143	When the murder is committed for a motive which evince total depravity and meanness for instance. Motive of the crime being financial gain. *Machhi singh* v.*State of Punjab*, (1983) 3 SCC 470;*Williams* v. *Ozmint*, 494 F.3d 478,; 2007 U.S. App. LEXIS 17934
2.	That the accused believed that he was morally justified in committing the offence. *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24	Significant degree of planning or premeditation. *Holiram Bordoloi* v.*State of Assam*, (2005) 3 SCC 793 : AIR 2005 SC 2059. *In Re Rock*, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb)
3.	Offence at the spur of the moment/lack of premeditation.	A. *Devendran* v. *State of Tamil Nadu*, (1997) 11 SCC 720 : AIR 1998 SC 2821 Re Rahman, [2008] EWHC 36 (QB), [2008]

		All ER (D) 50 (Jan)
4.	The offender was provoked (for example by prolonged stress) in a way not amounting to a defence of provocation.	Re *Rahman*, [2008] EWHC 36 (QB), [2008] All ER (D) 50 (Jan)
5.	That the accused acted under the duress of domination of another person.	

3. CONTEMPORANEOUS CONDUCT OF THE OFFENDER WHILE COMMITTING THE OFFENCE

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

4. POST OFFENCE CONDUCT OF THE OFFENDER

	CONDUCT OF OFFENDER	CONDUCT OF OFFENDER
1.	Guilty Plea/Voluntary surrender.	Concealment, destruction or dismemberment of the body. In Re Rock, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb); *State of*

		Maharashtra v. *Haresh Mohandas Rajput*, (2008) 110 BOMLR 373;
2.	Genuinely remorseful. In *Re Butters*, [2006] EWHC 1555 (QB), [2006] All ER (D) 128 (Jul)	Lack of any actual remorse. *Holiram Bordoloi* v. *State of Assam*, (2005) 3 SCC 793 : AIR 2005 SC 2059 In *Re Rock*, [2008] EWHC 92 (QB), [2008] All ER (D) 290 (Feb)

5. ROLE OF THE VICTIM IN COMMISSION OF THE CRIME

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

6. NATURE OF THE EVIDENCE

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

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

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

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

79. In the judgment reported at ***(2012) 8 SCC 537, State of U.P. v. Sanjay Kumar***, so far as balancing the aggravating and mitigating factors and circumstances are concerned, the Supreme

Court has applied the "*doctrine of proportionality*" directing as follows:

> "23. The survival of an orderly society ***demands the extinction of the life of a person who is proved to be a menace to social order and security.*** Thus, the courts for the purpose of deciding just and appropriate sentence to be awarded for an offence, have to ***delicately balance the aggravating and mitigating factors and circumstances in*** which a crime has been committed, in a dispassionate manner. In the absence of any ***foolproof formula*** which may provide a basis for reasonable criteria to correctly assess various circumstances germane for the consideration of the gravity of the crime, discretionary judgment, in relation to the facts of each case, is the only way in which such judgment may be equitably distinguished. The Court has primarily dissected the principles into two different compartments—one being the "***aggravating circumstances***" and, the other being the "***mitigating circumstance***". ***To balance the two is the primary duty of the court.*** The principle of proportionality between the crime and the punishment is the principle of "*just deserts*" that serves as the foundation of every criminal sentence that is justifiable. In other words, ***the "doctrine of proportionality" has valuable application to the sentencing policy under the Indian criminal jurisprudence.*** While determining the quantum of punishment the court always records sufficient reasons. (Vide *Sevaka Perumal* v. *State of T.N.* [(1991) 3 SCC 471 : 1991 SCC (Cri) 724 : AIR 1991 SC 1463] , *Ravji* v. *State of Rajasthan* [(1996) 2 SCC 175 : 1996 SCC (Cri) 225 : AIR 1996 SC 787], *State of M.P.* v. *Ghanshyam Singh* [(2003) 8 SCC 13 : 2003 SCC (Cri) 1935] , *Dhananjoy Chatterjee* v. *State of W.B.* [(2004) 9 SCC 751 : 2004 SCC (Cri) 1484 : AIR 2004 SC 3454], *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* [(2012) 4 SCC 37 : (2012) 2 SCC (Cri) 30]

and *Brajendrasingh* v. *State of M.P.* [(2012) 4 SCC 289 : (2012) 2 SCC (Cri) 409 : AIR 2012 SC 1552])"
(Emphasis by us)

80. The aforesaid enumeration of cases would show that apart from death sentence, while imposing life sentence the Supreme Court, has been directing mandatory minimum term of sentence before which the executive would exercise the power of remission of sentences. Several instances in cases involving convictions for multiple offences have been noted above wherein the Supreme Court has directed that the sentences for different offences would run consecutively. In view of the challenge to the permissibility of such an option being available to this court, in the present case, we propose to take these three options in *seriatum* hereafter.

III. Life imprisonment - meaning and nature of

81. So far as sentencing is concerned, Section 302 of the IPC mandates imposition of imprisonment for life or the death sentence, with fine. What is the meaning and nature of a life sentence?

82. We have noted above Section 53 of the Indian Penal Code defining the punishments under the Code, which include (i) death; (ii) imprisonment for life; (iii) imprisonment which is of two descriptions namely, rigorous i.e. with hard labour, and simple; (iv) forfeiture of property and; (v) fine.

83. Section 45, the Indian Penal Code defines '***life***' as the life of the human being unless a contrary intention appears from the context.

84. '***Imprisonment***' is not defined under the Indian Penal Code. However, Section 3(27) of the General Clauses Act, 1897 states that '*imprisonment'* shall mean imprisonment of either description as defined in the Indian Penal Code.

85. In para 5 of the judgment of the Constitution Bench reported at ***AIR 1961 SC 600 : (1961) 3 SCR 440, Gopal Vinayak Godse v. State of Maharashtra,*** following the decision of the Privy Council reported at ***AIR 1945 PC 64, Pandit Kishori Lal v. King Emperor,*** the Supreme Court observed as follows :

> "4. xxx xxx xxx
>
> 5. ... A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."
>
> (Underlining by us)

86. This position was followed by the Supreme Court in ***AIR 2005 SC 3440, Md. Munna v. Union of India.*** It was also reiterated by the Supreme Court in para 67 of ***Swamy Shraddananda (2)*** wherein it was observed thus:-

> "67. On a perusal of the seven decisions discussed above and the decisions referred to therein it would appear that this Court modified the death sentence to imprisonment for life or in some cases imprisonment for

> a term of twenty years with the further direction that the convict must not be released from prison for the rest of his life or before actually serving out the term of twenty years, as the case may be, mainly on two premises; one, an imprisonment for life, in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner and two, a convict undergoing life imprisonment has no right to claim remission. In support of the second premise reliance is placed on the line of decisions beginning from *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] and coming down to *Mohd. Munna* v. *Union of India* [(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] .
>
> xxx xxx xxx
>
> 76. It is equally well settled that Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. (See *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440] and *Ashok Kumar* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845] .) The object and purpose of Section 57 will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code.
>
> (Underlining by us)

87. Apart from the above, the Supreme Court has reiterated the position by a catena of decisions that the punishment of imprisonment for life handed down by the courts means a sentence of imprisonment for the convict for the remainder of his life. (**Ref: *Dalbir Singh v. State of Punjab [(1979) 3 SCC 745 : 1979 SCC***

(Cri) 848], Maru Ram v. Union of India [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] (Constitution Bench), Naib Singh v. State of Punjab [(1983) 2 SCC 454 : 1983 SCC (Cri) 536], Ashok Kumar v. Union of India [(1991) 3 SCC 498 : 1991 SCC (Cri) 845], Laxman Naskar v. State of W.B. [(2000) 7 SCC 626 : 2000 SCC (Cri) 1431], Zahid Hussein v. State of W.B. [(2001) 3 SCC 750 : 2001 SCC (Cri) 631], Kamalanantha v. State of T.N. [(2005) 5 SCC 194 : 2005 SCC (Cri) 1121], Mohd. Munna v. Union of India[(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] and C.A. Pious v. State of Kerala [(2007) 8 SCC 312 : (2007) 3 SCC (Cri) 544]

88. In para 75 of ***Swamy Shraddananda (2)*** also, it was settled that awarding a life sentence means life and not a murderer's 14 years in jail.

89. We find that even in the Constitution Bench pronouncement decided on 2nd September, 2014 in ***W.P.(Crl.)No.77/2014, Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Ors.***, it was observed that spending 13½ years in jail (he was arrested on 25th December, 2000; convicted by the Sessions Judge on 31st October, 2005; appeal dismissed by the High Court on 13th September, 2007; dismissal of appeal by the Supreme Court on 10th August, 2011; review petition having been dismissed on 28th August, 2012 and curative petition filed in 2013 which was dismissed on 23rd January, 2014) did not mean that the petitioner had undergone a sentence for life.

90. A further question which arises is as to what is the nature of imprisonment if a convict is sentenced to life imprisonment? This question has been answered by the Supreme Court in the judgment reported at ***AIR 1983 SC 855, Naib Singh v. State of Punjab & Ors.***. We find that in this case, in para 18, the Supreme Court declared the position in law as regards the nature of punishment involved in a sentence for imprisonment for life. The Court held thus :

> "18. However, for the reasons discussed above and in view of the authoritative pronouncements made by the Privy Council and this Court in *Kishori Lal case [Kishori Lal v. Emperor, AIR 1945 PC 64 : 72 IA 1 : 219 IC 350]* and Gopal Godse case [*Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600 : (1961) 3 SCR 440 : (1962) 1 SCJ 423 : (1961) 1 Cri LJ 736*] respectively, it will have to be held that the position in law as regards the nature of punishment involved in a sentence of imprisonment for life is well settled and the ***sentence of imprisonment for life has to be equated to rigorous imprisonment for life.*** In this view of the matter, the recommendation of the Law Commission contained in its 39th and 42nd Reports suggesting a suitable amendment in the Indian Penal Code will have to be regarded as having been made only for a purpose of removal of doubts and clarifying or declaring the existing legal position. Presumably for that reason the suggested amendment has not been regarded as absolutely necessary and therefore not put through so far."
>
> (Underlining supplied)

91. In the judgment of the Supreme Court reported at ***(2013) 5 SCC 546, Shankar Kisanrao Khade v. State of Maharashtra*** also,

the court reiterated the position that imprisonment for life is to be treated as rigorous imprisonment for life.

92. On this aspect, in ***(2005) 7 SCC 417, Md. Munna v. Union of India/Kartick Biswas v. State of West Bengal*** also the Supreme Court held thus :

> "10. ... Imprisonment for life is a class of punishment different from ordinary imprisonment which could be of two descriptions, namely, "rigorous" or "simple". It was unnecessary for the legislature to specifically mention that the imprisonment for life would be rigorous imprisonment for life as it is imposed as punishment for grave offences."
>
> (Underlining by us)

Imprisonment for life therefore, entails rigorous imprisonment for the whole life of the convict.

IV. Is it permissible to judicially regulate the power of the executive to remit the sentence of the defendant? In other words, can the sentencing court, while imposing a life sentence, direct minimum term sentences in excess of imprisonment of more than 14 years?

The discussion on this subject is being considered under the following sub-headings:

(i) Sentencing jurisdiction of courts.

(ii) Does a convict have an absolute right to claim remission?

(iii) Experience of exercise of power of remission of sentence.

(iv) Submission that a fixed term for life sentence which is in excess of fourteen years imprisonment can be ordered only by the Supreme Court restricted to cases where death

sentence is being commuted to life and the power of courts to curtail remission is not available to all courts.

93. In the present cases, this court is considering the adequacy of the sentences of life imprisonment on the three defendants. The State has sought imposition of death sentences on all the defendants while the complainant seeks enhancement of the sentence on two of them to death. The question that this court is therefore, called upon to answer is as to whether the case falls in the rarest of rare category or, as noted in para 92 of ***Swamy Shraddananda (2)*** above, whether the case is an ordinary murder or the case "just falls short of the rarest"? If the case just falls short of rarest of rare category, whether imposition of the sentence of life imprisonment subjected to normal remissions etc., working out to a total term of 14 years of imprisonment, be adequate to meet the ends of justice or would it be permissible to impose a mandatory prison term sentence beyond fourteen years before an application for remission on behalf of the defendants could be considered?

94. Mr. Sumeet Verma, learned counsel for Vikas Yadav has emphatically contended that only Supreme Court has the power to impose mandatory term imprisonments restricted to those cases where the court is commuting a death sentence to life. Mr. Verma emphatically argued that mandatory term sentences by the High Courts are legally impermissible, resting his submission on the pronouncements of the Supreme Court reported at ***(2013) 9 SCC 778, Sahib Hussain @ Sahib Jain v. State of Rajasthan*** and ***(2013) 10 SCC 631 (2013) : 10 SCALE 671 (*****D.O.D. 26th August,**

2013*), Gurvail Singh @ Gala v. State of Punjab*. In other words, Mr. Verma presses an absolute right of a defendant to seek and secure remission after undergoing the statutory minimum period of imprisonment.

95. Contesting the position, Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State has also placed before this Court the decision dated 17th April, 2014 in ***Death Sentence Ref.No.5/2012, State v. Om Prakash*** whereby the Division Bench of this court did not confirm the death sentence. Instead after considering the entire jurisprudence on award of term sentence, the court was of the considered opinion that the ends of justice would be met if two of the convicted appellants were awarded a ***sentence of imprisonment for life which would not be less than 20 years actual***. The third appellant being a young man who was not married, was awarded a sentence of imprisonment of life subject to remissions as available.

96. Mr. Mahajan has also pointed out that in Death Sentence Ref.No.4/2013, ***State v. Surender & Kalwa*** decided on 23rd July, 2014 and Death Sentence Ref.No.7/2013, ***State v. Bharat Kumar*** decided on 18th September, 2014, this court has awarded imprisonment of 25 years without remission to the convicts.

Mr. Sumeet Verma, learned counsel for Vikas Yadav would however submit that in this case also death sentence awarded by the Trial Court was up for confirmation in High Court and it was only in exercise of its power to commute the sentence, the fixed term sentence was imposed.

Let us examine the statute and law on this issue.

(i) *Sentencing jurisdiction of courts*

97. Inasmuch as the respondents have pressed a restriction on the jurisdiction of the High Court to award a term sentence or a sentence exceeding 14 years of rigorous imprisonment, we may first and foremost set out the relevant statutory provisions concerned with sentencing powers of the court, trial court aas well as High Courts as are contained in Sections 28, 377 and 386 (repeated here also for convenience) of the Code of Criminal Procedure, 1973, which read as follows:-

> **"*28. Sentences which High Courts and Sessions Judges may pass.***
> ***(1) A High Court may pass any sentence authorized by law.***
>
> ***(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law***; but any sentence of ***death passed*** by any such Judge shall be ***subject to confirmation by the High court.***
>
> (3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years."
>
> ***"377. Appeal by the State Government against sentence.***
>
> (1) Save as otherwise provided in sub- section (2), the ***State Government may***, in any case of conviction on a ***trial held by any Court other than a High Court***, direct the Public Prosecutor to present an ***appeal to the High***

Court against the sentence ***on the ground of its inadequacy***.

(2) if such ***conviction is in a case*** in which the offence has been ***investigated by the Delhi Special Police Establishment***, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, 1 the ***Central Government may also direct] the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.***

(3) When an ***appeal has been filed against the sentence*** on the ***ground of its inadequacy***, the ***High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement*** and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence."

"***386. Power of the Appellate Court.***

After ***perusing such record and hearing the appellant or his pleader***, if he appears, ***and the Public Prosecutor*** if he appears, and in case of an appeal under section 377 or section 378, ***the accused***, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or ***may***-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an ***appeal from a conviction***-

(i) ***reverse*** the finding ***and sentence*** and acquit or discharge the accused, or order him to be re- tried by a

Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) ***alter the finding, maintaining the sentence***, or

(iii) with or without altering the finding, ***alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same****;*

(c) ***in an appeal for enhancement of sentence-***

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, ***alter*** the nature or the extent, or the nature and extent, of the ***sentence, so as to enhance or reduce the same****;*

(d) in an appeal from any other order, alter or reverse such order;

(e) ***make any amendment or any consequential or incidental order that may be just or proper; provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence*** which in its opinion the accused has committed, ***than might have been inflicted for that offence by the Court passing the order or sentence*** under appeal."

98. Remission of the sentence means reduction of the quantum of punishment without changing its character (say the term of imprisonment awarded or the amount of fine imposed). The court has also the power to reduce the sentence which is known as commutation and means alteration of sentence of one kind into a

sentence of less severe kind. For instance, a death sentence is commuted to a life imprisonment.

99. While undergoing imprisonment, for their good conduct or for doing certain specified duties, etc., under the Prison Acts and the Rules framed thereunder, prisoners are given prescribed sentence remission on monthly, quarterly or annual basis. The days of remissions earned are added to the period of the actual imprisonment while calculating the term of the sentence undergone by the prisoner.

100. Let us now examine the executive power to grant remission of the sentence and statutory restriction thereon. Sections 432 and 433 of the Cr.P.C. as well as Section 55 of the Indian Penal Code are relevant in this behalf. Section 432 of the Cr.P.C. deals with the power of the appropriate government to suspend or remit sentences; while Section 433 is concerned with the power to commute sentences. We set down hereunder Sections 432 and 433 of the Cr.P.C. which are as follows:

> **"432. Power to suspend or remit sentences.-** (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
>
> (2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as

to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, In the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with: Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

> (a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or
>
> (b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub- sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression" appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub- section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence.- The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine."

101. As noted above, Section 53 of the IPC enumerates punishments which can be imposed, the first of these being death and, the second, imprisonment for life. Sections 54 and 55 give the

power of commutation of sentence of death and the sentence of imprisonment for life respectively to the appropriate government. Section 55A defines the '*appropriate government*'. Section 57 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years.

102. In addition to the above statutory power of remission and commutation of sentences, Articles 72 and 161 of the Constitution of India deal with the clemency power of the President and the Governor respectively to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.

103. In ***(1973) 1 SCC 20, Jagmohan Singh v. State of U.P.,*** the Constitution Bench of the Supreme Court commenting on whether the death penalty deserved to be abolished, had inter alia made the following observations with regard to life imprisonment because of the exercise of power of remission:

> "14. xxx xxx xxx In the context of our Criminal Law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. We have not been referred to any large-scale studies of crime statistics compiled in this country with the object of estimating the need of protection of the society against murders. xxx xxx xxx"

104. Five years after the pronouncement of ***Jagmohan Singh***, Section 433A was inserted by the amendment Act of 1978 with

effect from 18th December, 1978, imposing a restriction on the powers of remission or commutation in certain cases. Section 433A of the Cr.P.C. reads as follows:

> "**433A. Restriction on powers of remission or Commutation in certain cases**.- Notwithstanding anything contained in section 432, ***where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments*** provided by law, ***or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for*** life, such person ***shall not be released from prison unless he had served at least fourteen years of imprisonment.***]"
>
> (Emphasis supplied)

105. What is the impact of remissions earned by a prisoner while undergoing a life sentence? In the judgment reported at ***AIR 1961 SC 600, Gopal Vinayak Godse v. State of Maharashtra***, the Constitution Bench was seized of a *habeas corpus* petition by the petitioner who sought his release from prison claiming that he had justly served his sentence. In para 5, it was held that there was no provision of law whereunder a sentence for life imprisonment without any formal remission by the appropriate government, can be automatically treated as one for a definite period. A sentence of imprisonment for life must prima facie be treated as imprisonment for the whole of remaining period of convict's natural life. It has been further held in para 8 that unless that the sentence of life imprisonment is commuted or remitted by the appropriate

authority, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison.

Therefore, it is well settled that life imprisonment means that the prisoner will remain in prison for the rest of his life. It is only if imprisonment is for a definite period, that credit for remission given or awarded has a meaning. Since life imprisonment is for an indefinite period, remissions earned or awarded are really theoretical.

106. The above view in Constitution Bench pronouncement in ***Gopal Vinayak Godse*** was reiterated in the judgment reported at ***(1981) 1 SCC 107, Maru Ram v. Union of India.*** In para 25 of ***Maru Ram***, it was observed as follows:

> "25. ... *The* ***nature of a life sentence is incarceration until death****, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. ...*"

(ii) *Does a convict have an absolute right to claim remission?*

107. Before proceeding to deal with the argument raised, it is necessary to consider whether a convict has an absolute right to claim remission. This issue has been answered by the courts when convicts pressed for entitlement to remission upon expiry of the period of 14 years or 20 years of imprisonment before the courts. Reference can usefully be made to the pronouncement of the Judicial Committee of the Privy Council in ***AIR (32) 1945 PC 64,***

Kishori Lal v. King Emperor wherein the Privy Council observed as follows :

> "16. xxx xxx xxx
>
> > "Assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed but, in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission."

108. This judgment was cited with approval by the Supreme Court in the judgment reported at ***(2005) 7 SCC 417, Md. Munna v. Union of India/Kartick Biswas v. State of West Bengal.***

It is therefore, well settled that a convict is not as of right entitled to remission of the sentence. A convict is therefore, only entitled to a non-arbitrary consideration of his application for remission based on all relevant concerns.

109. It is equally well settled that the exercise of the power of remission has to be by a decision which is fair to all concerned, well informed and reasonable, that it cannot be exercised arbitrarily **(Ref :** ***(2013) 2 SCC 452 : (2012) 11 SCALE 140, Sangeet & Anr. v. State of Haryana*** and ***(2000) 3 SCC 394, State of Haryana v. Mohinder Singh***).

110. In ***Sangeet,*** the court extensively examined the powers of the government under Section 432 of the Cr.P.C. and in para 63 observed that exercise of such power by the appropriate

government under Section 432(1) "cannot be *suo motu* for the simple reason that this sub-section is only an enabling provision". The section is set into motion only on receipt of an application for remission by the convict or on his behalf. Each release requires a case by case scrutiny. In paras 65 and 66 of ***Sangeet***, the court dealt with the substantive check on arbitrary remissions by virtue of Section 433A of the Cr.P.C. which mandated the requirement of a minimum 14 years incarceration relaxable only in exercise of the constitutional power under Article 72 or Article 161 of the Constitution and Section 433 of Cr.P.C.

(iii) *Experience of exercise of power of remission of sentence*

111. The working of the power of remission is best stated by the Supreme Court in ***(1981) 1 SCC 107, Maru Ram v. Union of India.*** The Court reiterated the position that a sentence for life would enure till the life time of accused as it was not possible to fix particular period of the prisoner's death and the remissions given under the rules could not be regarded as substitute for the sentence for transportation for life. It was observed that the inevitable conclusion was that Section 433A only dealt with life sentences and that remission vests no right to release when sentence is life imprisonment nor is any vested right to remission cancelled by the compulsory 14 years jail life. Since a life sentence is a sentence for life, thus the remissions lead nowhere and cannot entitle the person to release. This position was stated by the Supreme Court in para

23 of the judgment reported at ***(1981) 1 SCC 107, Maru Ram v. Union of India*** wherein it was held as follows:-

> "23. Sentencing is a judicial function but the execution of the sentence, after the courts pronouncement, is ordinarily a matter for the executive under the Procedure Code, going by Entry 2 in List III of the Seventh Schedule. Keeping aside the constitutional powers under Articles 72 and 161 which are "untouchable" and "unapproachable" for any legislature, let us examine the law of sentencing, remission and release. Once a sentence has been imposed, the only way to terminate it before the stipulated term is by action under Sections 432/433 or Articles 72/161. And if the latter power under the Constitution is not invoked, the *only* source of salvation is the play of power under Sections 432 and 433(*a*) so far as a "lifer" is concerned. No release by reduction or remission of *sentence* is possible under the corpus juris as it stands, in any other way. The legislative power of the State under Entry 4 of List II, even if it be stretched to snapping point, can deal only with Prisons and Prisoners, never with truncation of judicial sentences. Remissions by way of reward or otherwise cannot cut down the sentence as such and cannot, let it be unmistakably understood, grant final exit passport for the prisoner except by government action under Section 432(1). The topic of Prisons and Prisoners does not cover release by way of reduction of the sentence itself. That belongs to criminal procedure in Entry 2 of List III although when the sentence is for a fixed term and remission plus the period undergone equal that term the prisoner may win his freedom. Any amount of remission to result in manumission requires action under Section 432(1), read with the Remission Rules. That is why Parliament, tracing the single source of remission of sentence to Section 432, blocked it by the non-obstante clause. ***No remission, however long, can set the***

prisoner free at the instance of the State, before the judicial sentence has run out, save by action under the constitutional power or under Section 432. So read, the inference is inevitable, even if the contrary argument be ingenious, that Section 433-A achieves what it wants — <u>arrest the release of certain classes of "lifers" before a certain period</u>, by blocking Section 432. Articles 72 and 161 are, of course, excluded from this discussion as being beyond any legislative power to curb or confine."

(Emphasis supplied)

112. In para 84 of the judgment reported at ***(2010) 3 SCC 508, Mulla v. State of U.P.,*** noted the discussion in ***(2010) 1 SCC 573 Ramraj v. State of Chhatisgarh,*** as follows :-

"84. This question came up again recently before this Court in *Ramraj* v. *State of Chhattisgarh* [(2010) 1 SCC 573 : (2010) 1 SCC (Cri) 842 : (2009) 14 Scale 533] where this Court considered the variance in precedents and ruled as follows: (SCC pp. 580-81, paras 21-25)

"*21*. What ultimately emerges from all the aforesaid decisions is that life imprisonment is not to be interpreted as being imprisonment for the whole of a convict's natural life within the scope of Section 45 of the aforesaid Code. The decision in *Swamy Shraddananda case* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] was taken in the special facts of that case where on account of a very brutal murder, the appellant had been sentenced to death by the trial court and the reference had been accepted by the High Court. However, while agreeing with the conviction and confirming the same, the Hon'ble Judges were of the view that however heinous the crime may have been, it did not come within the definition of 'the rarest of rare cases' so as to merit a death sentence.

Nevertheless, having regard to the nature of the offence, Their Lordships were of the view that in the facts of the case the claim of the petitioner for premature release after a minimum incarceration for a period of 14 years, as envisaged under Section 433-A CrPC, could not be acceded to, since the sentence of death had been stepped down to that of life imprisonment, which was a lesser punishment.

22. On a conjoint reading of Sections 45 and 47 (*sic* Section 57) of the Penal Code and Sections 432, 433 and 433-A CrPC, it is now well established that a convict awarded life sentence has to undergo imprisonment for at least 14 years. While Sections 432 and 433 empower the appropriate Government to suspend, remit or commute sentences, including a sentence of death and life imprisonment, a fetter has been imposed by the legislature on such powers by the introduction of Section 433-A into the Code of Criminal Procedure by the amending Act of 1978, which came into effect on and from 18-12-1978. By virtue of the non obstante clause used in Section 433-A, the ***minimum term of imprisonment in respect of an offence where death is one of the punishments provided by laws or where a death sentence has been commuted to life sentence, has been prescribed as 14 years***.

23. In the various decisions rendered after the decision in *Godse case* [AIR 1961 SC 600 : (1961) 1 Cri LJ 736] , 'imprisonment for life' has been repeatedly held to mean imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the powers vested in the Governor under Article

> 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the authorities concerned to determine the actual length of imprisonment having regard to the gravity and intensity of the offence."

113. The discussion in the concurring judgment in ***(2013) 5 SCC 546, Shanker Kisanrao Khade v. State of Maharashtra***, by Justice Madan B. Lokur on the question being considered by us is illuminating and deserves to be extracted in extenso. It reads as follows:

> "82. My learned Brother Radhakrishnan, J. has put in great efforts in analysing a ***species of cases*** (of which I am sure there would be many more) in which the victim was raped and murdered. These cases fall in ***two categories, namely, those in which the death penalty has been confirmed by this Court and those in which it has been converted to life imprisonment. In my view, there is a third category consisting of cases (which cannot be overlooked in the overall context of a sentencing policy)*** in which this Court has, ***while awarding a sentence of imprisonment for life, arrived at what is described as*** a ***via media*** and in which a ***fixed term of imprisonment*** exceeding 14 or 20 years (with or without remissions) has been ***awarded instead of a death penalty, or in which the sentence awarded has been consecutive and not concurrent.***"
>
> (Emphasis by us)

114. Thus the Supreme Court unequivocally declared the third category of cases where a fixed sentence of imprisonment was awarded as a via media instead of life imprisonment.

115. In the judgment reported at ***(2010) 1 SCC 573 : AIR 2010 SC 420, Ram Raj v. State of Chhattisgarh***, also the Supreme Court was concerned with the issue of duration of the sentences. The court observed that the convict had undergone about 14 years of actual imprisonment which with remission amounted to about 17 years. In para 5, the court discussed the ratio of the judgment in ***Gopal Vinayak Godse*** and ***Dalbir Singh*** in para 6 wherein the option of the convicting court to impose a sentence of imprisonment which shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. In this case also, it was found that it was not a fit case for release on completion of 14 years. The petitioner's case for premature release was directed to be taken up by the authorities concerned after he had completed 20 years imprisonment including remissions.

116. On the same aspect in ***(2012) 8 SCC 537, State of U.P. v. Sanjay Kumar***, after considering the jurisprudence on the issue of imposing a fixed term sentence in cases where the court was empowered to impose a death sentence, in para 24, the Supreme Court held thus:

> "24. In view of the above, we reach the inescapable conclusion that the submissions advanced by the learned counsel for the State are unfounded. The aforesaid

judgments make it crystal clear that this Court has merely found out the ***via media***, ***where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life.*** ..."

(Emphasis supplied)

117. In ***Sanjay Kumar,*** the 'third category' (***Khade)*** is referred to as the sentencing via media found by the court wherein the case does not fall in the rarest of rare category but imprisonment of 14/20 years would be inadequate.

118. In ***(2014) 3 SCC 421 : 2014 (2) SCALE 293, Birju v. State of M.P.*** as well as ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura*** also the Supreme Court awarded the appellants imprisonment for 20 years over and above the period already undergone without remission.

119. In the judgment of the Supreme Court reported at ***(2008) 13 SCC 767, Swamy Shraddananda (2) v. State of Karnataka,*** the Supreme Court was examining the validity of death sentence imposed upon the appellant by the High Court. The facts of this case may usefully be recounted. The conviction of Swamy Shraddananda (2) under Section 302 for offence of murder resulted in the sentence of death by the Sessions Judge which was confirmed by the Karnataka High Court. The matter was first heard by a Bench of two Judges in the Supreme Court, one of

whom held that in the facts and circumstances of the case, the punishment of live imprisonment, rather than death would serve the ends of justice. A further declaration was made that the appellant would not be released from prison till the end of his life. The other Judge had affirmed the death sentence. The matter was consequently placed before the three Judge Bench which judgment is being referred to herein.

The three judge Bench of the Supreme Court considered the provisions of Sections 432, 433 and 433A of the Cr.P.C. which deal with the power to suspend or remit the sentences and commented upon the same in the following terms:-

> "56. But this leads to a more important question about the ***punishment commensurate to the appellant's*** crime. The ***sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable.*** As a matter of fact, Mr Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that **by virtue** of the provisions relating to ***remission***, the ***sentence of life imprisonment, without any qualification or further direction*** would, in all likelihood, ***lead to his release from jail*** in the first quarter of 2009 since he has already completed more than 14 years of incarceration. ***This eventuality is simply not acceptable to this Court.*** What then is the answer? ***The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court.*** This Court, therefore, must lay down a good and sound legal basis for **putting the *punishment of imprisonment for life, awarded as***

substitute for death penalty, beyond any remission *and* ***to be carried out as directed by the Court*** so that it may be ***followed***, ***in appropriate cases as a uniform policy not only by this Court but also by the High Courts***, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in ***Dalbir Singh* v. *State of Punjab [(1979) 3 SCC 745 : 1979 SCC (Cri) 848]*** . In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

> "*14*. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*[*Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646 : 1979 SCC (Cri) 749] . Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, ***at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts,*** *where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large*. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."
>
> (emphasis added)

We think that it is time that the ***course suggested in Dalbir Singh*** [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] should ***receive a formal recognition by the Court***.

57. As a matter of fact there are ***sufficient precedents*** for the Court to take such a course. In a number of cases this Court has substituted death penalty by life imprisonment or in some cases for a term of twenty years with the further direction that the convict would not be released for the rest of his life or until the twenty-year term was actually served out."

(Emphasis supplied)

120. In ***Swamy Shraddananda (2),*** the Supreme Court has also noted precedents where death sentences were substituted for term imprisonment sentences in the following terms:

> **"66.** In ***Nazir Khan*** **v.** ***State of Delhi*** **[(2003) 8 SCC 461** : 2003 SCC (Cri) 2033] , three of the appellants before the Court were sentenced to death for committing offences punishable under Section 364-A read with Section 120-B IPC. They were also convicted under the provisions of the Terrorist and Disruptive Activities (Prevention) Act (TADA) with different terms of imprisonment for those offences. This Court, however, commuted the death sentence of the three appellants but having regard to the gravity of the offences and the dastardly nature of their acts directed for their incarceration for a period of 20 years with the further direction that the accused-appellants would not be entitled to any remission from the term of 20 years. Reference was made to the earlier decisions in ***Ashok Kumar*** **v.** ***Union of India*** **[(1991) 3 SCC 498** : 1991 SCC (Cri) 845] and ***Sat Pal*** **v.** ***State of Haryana*****[(1992) 4 SCC 172** : 1992 SCC (Cri) 866] .
>
> **67.** On a perusal of the ***seven decisions discussed above*** and the ***decisions referred to therein*** it would appear that this ***Court modified the death sentence to imprisonment for life or in some cases imprisonment for a term of twenty years with the further direction that the convict must not be released from prison for the rest of his life or before actually serving out the term of twenty years***, as the case may be, mainly on two premises; one, an imprisonment for life, in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner and two, a convict undergoing life imprisonment has no right to claim remission. In support of the second premise reliance is placed on the line of decisions beginning from *Gopal Vinayak Godse* v. *State*

of Maharashtra [AIR 1961 SC 600 : (1961) 3 SCR 440] and coming down to *Mohd. Munna* v. *Union of India*[(2005) 7 SCC 417 : 2005 SCC (Cri) 1688]."

(Emphasis supplied)

121. The Supreme Court considered the working of the provisions of commutation/remission, etc. contained in the Code of Criminal Procedure, the Prisons Acts as well as the rules framed by the different States, in the pronouncement in ***Swamy Shraddananda (2) v. State of Karnataka*** i.e. excluding the State's sovereign power under Constitution of India observing as follows:

> "88. It is thus to be seen that both in Karnataka and Bihar remission is granted to life convicts by ***deemed conversion of life imprisonment into a fixed term*** of 20 years. The deemed conversion of life imprisonment into one for fixed term ***by executive orders issued by the State Governments*** apparently flies in the face of a long line of decisions by this Court and we are afraid no provision of law was brought to our notice to sanction such a course. It is thus to be seen that life convicts are granted remission and released from prison on completing the fourteen-year term without any sound legal basis. One can safely assume that the position would be no better in the other States. This Court can also take ***judicial notice of the fact*** that remission is allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. The grant of remission is the rule and remission is denied, one may say, in the rarest of rare cases."
>
> (Emphasis by us)

122. The court placed reliance on the observations by the Constitution Bench in para 156 of ***Bachan Singh*** on this aspect and reiterated the observations in ***Jagmohan*** in para 89 of ***Swamy Shraddananda (2)***, the Supreme Court concluding as follows:-

> "89. ... Thus all that is changed by Section 433-A is that before its insertion an imprisonment for life in most cases worked out to a dozen years of imprisonment and after its introduction it works out to fourteen years' imprisonment. But the observation in *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947] that ***this cannot be accepted as an adequate substitute for the death penalty still holds true.***"
>
> (Emphasis by us)

123. The submission of Mr. Sumeet Verma, learned counsel appearing for Vikas Yadav rests on the following observations by the court in para 91 of ***(2008) 13 SCC 767 (page 804), Swamy Shraddananda (2) v. State of Karnataka***:

> "91. The legal position as enunciated in *Pandit Kishori Lal* [(1944-45) 72 IA 1 : AIR 1945 PC 64] , *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440], *Maru Ram* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] , *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] and *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to ***make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.***"
>
> (Emphasis supplied)

124. This submission however, fails to consider the examination undertaken by the court in paras 92 to 94 of the report which read thus:-

> "92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that ***the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time***, having regard to the nature of the crime, ***the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate***. What then should the Court do? ***If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty***. Such a course would indeed be disastrous. A ***far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death***. It needs to be emphasised that the Court would take recourse to the ***expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all***.
>
> 93. Further, ***the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it***

as little as possible, really in the rarest of rare cases. This would only be ***a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684*** *:* 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a ***good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as*** specified in the order, as the case may be."

(Emphasis by us)

125. On the aspect of exercise of the power of the executive under Section 432 Cr.P.C. to grant remissions and its curtailment by courts handing out mandatory terms sentences, we find that in ***(2013) 2 SCC 452 : (2012) 11 SCALE 140, Sangeet & Anr. v. State of Haryana***, the two Judge Bench of the Supreme Court referring to the larger Bench decisions of the Supreme Court, noted thus:

"52. *Swamy Shraddananda* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] and some of the decisions referred to therein have taken us to Phase III in the evolution of a sound sentencing policy. The focus in this phase is on criminal law and sentencing, and we are really concerned with this in the present case. The ***issue*** under consideration in this phase is the ***punishment to be given in cases where the death penalty ought not to be awarded, and a life sentence is inadequate given the power of remission*** available with the appropriate Government under Section 432 CrPC. ***In such a***

<u>situation, what is the punishment that is commensurate with the offence</u>?

xxx xxx xxx

55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in *Swamy Shraddananda* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] and several other cases, by giving a sentence in a capital offence of 20 years' or 30 years' imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason."

(Emphasis by us)

126. In para 68 of ***Sangeet***, the court placed reliance on the Constitution Bench pronouncement in ***AIR 1961 SC 600, Gopal Vinayak Godse v. State of Maharashtra*** observing as follows:

"68. Briefly stated the legal position is this: Before Act 26 of 1955 a sentence of transportation for life could be

undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. ***Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison.*** The rules framed under the Prisons Act enable such a prisoner to earn remissions—ordinary, special and State—and the said remissions will be given credit towards his term of imprisonment. ***For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable an appropriate Government to remit the sentence under Section 401 [now Section 432] of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned.***"

(Emphasis supplied)

127. In para 69 of ***Sangeet***, the Bench considered the issue as to whether there is any provision of law whereunder the sentence of life imprisonment, without any final remission by the appropriate government, can be automatically treated as one for the definite period? It was observed in ***Gopal Vinayak Godse*** that no such provision was to be found in the Indian Penal Code, Code of Criminal Procedure or the Prisoner's Act. The Constitution Bench

had also ruled in ***Gopal Vinayak Godse*** that a prisoner sentenced for transportation for life had no indefeasible right to unconditional release on the expiry of a particular term including the remissions. It was declared in ***Gopal Vinayak Godse*** that "the rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life".

128. In para 70 of ***Sangeet***, the court has set out the reiteration of the view taken in ***(1976) 3 SCC 470, State of Madhya Pradesh v. Rattan Singh*** wherein (following ***Gopal Vinayak Godse***), it was observed as follows:

> "70. ... In other words, this Court has clearly held that a sentence for life would enure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death and ***remissions*** given under the Rules ***could not be regarded as a substitute [of a lesser sentence] for a sentence of transportation for life***. In these circumstances, therefore, it is clear that the ***High Court was in error in thinking that the respondent was entitled to be released as of right on completing the term of 20 years including the remissions.***"
>
> (Emphasis by us)

129. From paras 74 to 79 of ***Sangeet***, the court considered the application of Section 432 of the Cr.P.C. and held as follows:-

(i) There is a misconception that a prisoner serving a life sentence has an indefeasible right to release on completion of either 14 years or 20 years. (para 70)

(ii) A convict undergoing life imprisonment is expected to remain in custody till the end of his life subject to any remission granted by the appropriate government under Section 432 of the Cr.P.C. (para 71)

(iii) The grant of remissions is statutory. Section 432 of the Cr.P.C. has a limited application to a convict and its applicability to a convict serving a definite term imprisonment is different from one undergoing life imprisonment. (paras 75 and 76)

(iv) The power under this section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 CrPC can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment. (para 77.6)

(v) In case of a convict undergoing life imprisonment, he will be in custody for an indeterminate period. Therefore, remissions earned by or awarded to such a life convict are only notional. To reduce the period of such incarceration, a specific order under Section 432 of the Cr.P.C. will have to be passed by the appropriate government. Such reduced period cannot be less than 14 years as per Section 433A of the Cr.P.C.

(vi) However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced. (para 80 sub para 77.5)

(vii) Before actually exercising the power of remission under Section 432 CrPC the appropriate Government ***must obtain the opinion (with reasons) of the Presiding Judge of the convicting or confirming Court.*** Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner." (para 77.7)

130. We note below some cases where the Supreme Court has directed postponement of consideration of remission of the sentence of life imprisonment for 20 years or other terms:

(i) ***(1991) 3 SCC 498, Ashok Kumar v. Union of India :*** Held that the petitioner had not completed 14 years of actual incarceration and he cannot invoke Sections 432 and 433 of Cr.P.C. His detention was consistent with Section 433A Cr.P.C. Hence writ of mandamus dismissed.

(ii) ***(1992) 4 SCC 172, Satpal v. State of Haryana :*** Appellant having undergone 13 years and 6 months' actual imprisonment and over 17 years' imprisonment including remission, not entitled to be released on ground that government must be deemed to have commuted his sentence to 14 years.

(iii) ***(2002) 2 SCC 35, Prakash Dhawal Khairnar (Patil) v. State of Maharashtra :*** The court directed that the accused shall not be released from prison unless he had served at least 20 years of imprisonment including the period already undergone by the appellant.

(iv) ***(2002) 6 SCC 686, Ram Anup Singh & Ors. v. State of Bihar :*** The court sentenced the appellants - Lallan Singh and Babban Singh to suffer rigorous imprisonment for life with the condition that they shall not be released before completing an

actual term of 20 years including the period undergone by them. There was no interference with the appeal of the appellant - Ram Anup Singh in whose case the High Court had given life imprisonment.

131. There are several other instances where *enhancement of the sentence of life imprisonment to death penalty was sought* before the Supreme Court. Instead, the Supreme Court gave term imprisonments.

132. Some of the cases where term sentences have been imposed, not an exhaustive list, have been placed by Mr. Rajesh Mahajan, learned Additional Standing Counsel are listed below :

I. Rest of life without remission

(i) ***(2008) 13 SCC 767, Swamy Shraddananda (2) v. State of Karnataka*** : Rest of life without remission for killing wife for property.

(ii) ***(2010) 1 SCC 58, Sebastian @ Chevithiyan v. State of Kerala*** : Rest of life in terms of ***Shraddananda's*** case for rape and murder of two year old minor.

(iii) ***(2001) 4 SCC 458, Subhash Chandra v. Krishan Lal*** : Rest of life without remission for gunning down entire family due to enmity.

(iv) ***(2001) 10 SCC 109, Jayawant Dattatraya Suryarao v. State of Maharashtra*** : In the case of terrorist convict committing brutal murder of two police constables who were on duty to guard person who they wanted to kill, held not entitled to any commutation or premature release.

(v) In the judgment reported at ***JT (2005) 8 SC 294, Reddy Sampath Kumar v. State of Andhra Pradesh,*** it was directed that

the appellant shall not get the benefit of any remission either by the State or by the Government of India on any auspicious occasion.

(vi) In ***(2001) 4 SCC 458, Subash Chander v. Krishan Lal***, Trial Court had awarded death sentence but the High Court had commuted the same to life imprisonment. Subash Chander, a witness before the Trial Court filed the appeal praying for setting aside the order by the High Court of acquittal of some of the accused persons and sought awarding of death sentence to the convicted persons, in other words, sought restoration qua them of the judgment of the Trial Court. In this case, counsel for the main accused made a statement that instead of depriving him of his life, the court could pass appropriate orders to deprive him of his liberty throughout his life and that if sentenced to life imprisonment, he would never claim his premature release or the commutation of his release on any ground. The court had passed such sentence in view of the said statement.

II. <u>20 years/21 years/25 years</u>

(i) ***(2014) 5 SCC 509, Dharam Deo Yadav v. State of Uttar Pradesh :*** Imprisonment of 20 years without remission over and above the period already undergone for the murder of a foreign tourist lady by the appellant who was a tourist guide.

(ii) ***(2014) 3 SCC 421 : 2014 (2) SCALE 293, Birju v. State of M.P. :*** Sentence of 20 years imprisonment, over and above the period already undergone without remission for killing a child, motive was for getting money from child's grandfather for consuming liquor. Accused was involved in 24 criminal cases.

(iii) ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura*** : Imprisonment of 20 years without remission in the case of armed extremists setting fire to 20 houses belonging to linguistic minority leaving 15 dead.

(iv) ***(2010) 1 SCC 775, Dilip Premnarayan Tiwari v. State of Maharashtra*** : Sentence of 20 and 25 years rigorous imprisonment

in the case of honour killing of husband of young sister and his family members over intercaste marriage of younger sister.

(v) ***(2012) 4 SCC 257, Ramnaresh v. State of Chhattisgarh :*** Imprisonment of 21 years for gang rape and murder.

(vi) ***(2012) 4 SCC 289, Brajendrasingh v. State of M.P. :*** Sentence of 21 years for killing wife suspecting illicit relations and his three young children.

(vii) ***(2010) 1 SCC 573, Ramraj v. State of Chhattisgarh :*** Imprisonment of 20 years including remission for killing wife with stick.

(viii) ***(2010) 9 SCC 42, State v. Ajit Seth :*** 20 years prison term for burning of two children.

(ix) ***JT 2005 (8) SC 294, Reddy Sampath Kumar v. State of Andhra Pradesh :*** Jail Term in terms of Section 57 IPC (20 years) without any remission (death of father-in-law, mother-in-law and their three minor children caused due to poisoning with the intention to grab property).

(x) ***(2003) 8 SCC 461 : AIR 2003 SC 4427, Nazir Khan v. State of Delhi :*** Prison sentence of 20 years without remission over and above the sentence already undergone (case of terrorist acts).

(xi) ***(2002) 2 SCC 35, Prakash Dhawal Khairnar v. State :*** Imprisonment of 20 years (dispute with regard to partition of land, one brother led one brother to annihilate entire family of his brother and also committed murder of his own mother).

(xii) ***(2002) 6 SCC 686, Ram Anup Singh v. State :*** Sentence of 20 years.

(xiii) ***(2201) 6 SCC 296, Shri Bhagwan v. State :*** Prison sentence of 20 years for murder of five persons of a family for robbery.

III. <u>30 years/35 years</u>

(i) ***2014 (8) SCALE 113, Amar Singh Yadav v. State of U.P. :*** Imprisonment of 30 years without remission for burning in a vehicle of wife and four children, where wife and two daughters died.

(ii) ***2014 (58) SCALE 525, Alber Oraon v. State of Jharkhand :*** Sentence of 30 years imprisonment without remission in addition to sentence already undergone for murder of woman and two children on property/land dispute.

(iii) ***2014 (7) SCALE 571, Md. Jamuluddin Nasir v. State of West Bengal :*** Appellant Nasir awarded 30 years without remission for attack at American Centre, Calcutta.

(iv) ***2014 (2) JCC 1217, Rajkumar v. State :*** Prison term of 35 years without remission for rape and murder of a 14 year old girl.

(v) ***(2013) 10 SCC 631 (2013), Gurvail Singh @ Gala v. State of Punjab:*** Sentence of 30 years without remission for murder of four persons.

(vi) ***2012 (5) SCALE 766, Neel Kumar v. State of Haryana :*** Prison term of 30 years without remission for rape and murder of a four year old daughter by father.

(vii) ***(2012) 6 SCC 107, Sandeep v. State of U.P. :*** Sentence of 30 years without remission for murder of pregnant girlfriend and unborn child.

(viii) ***(2009) 15 SCC 551, Haru Ghosh v. State of West Bengal :*** Imprisonment of 35 years without remission for double murder and attempt to murder.

(ix) ***2014 (4) SCALE 54,Anil Anthony v. State of Maharashtra*** : Sentence of 30 years without remission in addition to sentence

already undergone for strangulation of minor boy aged 10 years after subjecting him to carnal intercourse.

The judicial pronouncements noticed by us show that the Supreme Court has extensively exercised the option of directing a fixed term of imprisonment before exercise of the discretion by the executive under Section 432 Cr.P.C.

(iv) *Submission that a fixed term for life sentence which is in excess of fourteen years imprisonment can be ordered only by the Supreme Court restricted to cases where death sentence is being commuted to life and the power of courts to curtail remission is not available to all courts*

133. Let us now examine the power of the courts (other than the Supreme Court) to impose sentences. The power of the courts to award sentences is governed by Section 28 of the Cr.P.C. whereunder the High Court is competent to award any sentence authorized by law. The Sessions Court is also so empowered, except for the requirement of confirmation of the death sentence imposed by it.

134. By virtue of Section 386 of the Cr.P.C., in exercise of its appellate jurisdiction which includes the power to consider enhancement of a sentence awarded by the trial court, as well, the High Court is competent to pass any sentence which may be imposed by law or enhance the sentence awarded by the trial court, after notice to the convict and affording reasonable opportunity of showing cause against such enhancement. Similar power is available to the High Court in its revisional jurisdiction.

135. The restriction on powers of remission or commutation prescripted in Section 433A of the Cr.P.C. relates to cases where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is **one of the punishments** provided by law, **or** where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life.

It is evident that by virtue of Section 433A, the legislature has restricted the power to release a person sentenced to life imprisonment from prison in two eventualities. The first being if he has been sentenced to imprisonment for life for an offence for which death is one of the punishments provided by law. The second is where a sentence of death imposed on a person has been commuted under Section 433 into one of the imprisonments for life. The statute therefore, draws no distinction as is urged by learned counsel for the convict.

136. The following observations of the Constitution Bench in ***(1980) 2 SCC 684, Bachan Singh v. State of Punjab*** support the above position:

> "156. It may be recalled that in *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433-A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432 and 433, so that a person who is sentenced to imprisonment for life ***or*** whose death sentence is

commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years."

(Emphasis by us)

Therefore, while considering an offence for which death is one of the punishments, the legislature itself has equated the considerations for imposition of life imprisonment to a case where a death sentence has been commuted to life imprisonment.

137. The defendants do not dispute that the High Court is competent to enhance a sentence of imprisonment awarded by the Trial Court to a death sentence. In fact, a death sentence awarded by the trial judge has to be referred for confirmation by the High Court under Section 28(2) of the Code of Criminal Procedure.

138. It also cannot be disputed that a fixed term sentence or minimum imprisonment prescription is a lesser sentence than the death sentence. It has been so observed in several cases by the Supreme Court (including ***Swamy Shraddananda (2) v. State of Karnataka***) wherein it is recognized as a third option.

139. In the given circumstances, in view of the principles laid down in ***Swamy Shraddananda (2)***, does a convicting and sentencing court not have three sentencing options instead of two? We have discussed above the several precedents wherein the court has carved out a third category of cases, one being an ordinary murder case where sentence of life imprisonment seems to be adequate punishment for the offence of murder; the second being a case which falls in the rarest of rare category inviting the death penalty and the third which falls just short of 'rarest of rare' but

would be more heinous than an ordinary murder, for which the normal sentence of life imprisonment subject to remissions etc. would not be adequate punishment.

140. In para 92 of ***Swamy Shraddananda (2)***, the Supreme Court noted that if the court's option is limited only to two punishments, one being a sentence of imprisonment which practically works to not more than 14 years and the other is death, more courts would be pursuaded into endorsing death penalty which would work grave injustice. The court thus provided the third option as the vast hiatus between 14 years' imprisonment and death as "*special category of sentence*" (**para 92**). We also find that the Supreme Court has carefully referred to *this court* as well as the court clearly underlining the fact that the third option was available to any court which is undertaking the exercise of sentencing (**para 94**). It is also recognized that the sentencing court would be empowered to direct that the convict would not be released from the prison "*for the rest of his life*" or "*for the actual term as specified in the order*", as the case may be.

141. In exercise of power under Section 28 of the Cr.P.C., the High Court also has the power to commute death sentence to life imprisonment. If this be the statutory power of the High Court, then it certainly has the power to impose a term sentence which, though lesser than the death sentence, is graver than a sentence of life imprisonment which is subjected to the application of Section 433A of the Cr.P.C.

142. The submission of the respondents, therefore, is that though the High Court is competent to award the death sentence, it cannot award the lesser sentence of a fixed term imprisonment! Such a submission certainly is beyond logic and is completely unreasonable.

143. It is trite that a larger or wider power necessarily includes the lesser, narrower, incidental or ancillary power **[Ref. : *(1997) 3 SCC 346 (para 4), Mohinder Singh v. State of Punjab; (2009) 2 SCC 1 (para 37), Mahamadhusen Abdulrahim Kalota Shaikh(2) v. Union of India & Ors.*].**

144. In this regard, the observations of the Supreme Court in para 14 of the pronouncement reported at ***(1979) 3 SCC 745, Dalbir Singh v. State of Punjab*** are relevant and deserve to be considered in extenso. Para 14 thereof reads as follows:

> "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years ***may***, at the option of the ***convicting court***, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."
>
> (Emphasis supplied)

145. If it were held that the trial court or the high courts did not have the power to grant such lesser sentence, the consequences could be drastic. As observed in para 92 of ***Swamy Shraddananda (2)***, if sentencing courts did not have a third option and had to choose between a 14 year life sentence and the death punishment, for a serious crime, more courts would be persuaded to impose the death sentence.

146. Let us examining the two precedents heavily relied upon by Mr. Verma, learned counsel for the defendant. In the judgment reported at ***(2013) 9 SCC 778, Sahib Hussain @ Sahib Jain v. State of Rajasthan***, the Supreme Court was called upon to decide inter alia whether the High Court was justified in ordering that the appellants should be sentenced to 20 years of actual imprisonment without remissions. The Supreme Court noted the decisions in some cases where the court had awarded minimum years of imprisonment of 20, 25, 30 or 35 years. The Supreme Court took judicial notice of the fact that remission is allowed to life convicts in a most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the earlier release of the particular convict on the society. We also set down para 29 of the judgment hereunder as it cites the precedent in ***(2009) 15 SCC 551, Haru Ghosh v. State of West Bengal*** wherein, it was the High Court which commuted the death sentence to life imprisonment which decision of the High Court was upheld. We also extract paras 36 and 37 of the report which refer to other precedents hereafter:

"29. In *Haru Ghosh* v. *State of W.B.* [(2009) 15 SCC 551 : (2010) 2 SCC (Cri) 682] , this Court held as under: (SCC p. 565, paras 43-45)

> "*43.* That leaves us with a question as to ***what sentence should be passed. Ordinarily, it would be the imprisonment for life***. However, that would be ***no punishment*** to the appellant-accused, as he is already under the shadow of sentence of imprisonment for life, though he has been bailed out by the High Court. Under the circumstance, in our opinion, ***it will be better to take the course taken by this Court in Swamy Shraddananda*** [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] where the Court referred to the ***hiatus between the death sentence on one part and the life imprisonment, which actually might come to fourteen years' imprisonment. ...***

xxx xxx xxx

36. It is clear that in ***Swamy Shraddananda*** [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , this Court noted the observations made by this Court in *Jagmohan Singh* v. *State of U.P.* [*Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169] and five years after the judgment in *Jagmohan case* [*Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169] , Section 433-A was inserted in the Code imposing a restriction on the power of remission or commutation in certain cases. ***After the introduction of Section 433-A*** another Constitution Bench of this Court in ***Bachan Singh* v. *State of Punjab*** **[*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580]**, with reference to power with regard to Section 433-A which restricts the power of remission and commutation conferred on the appropriate Government, noted *various* provisions of the Prisons Act, Jail Manual, etc. and ***concluded that reasonable and proper course would be to expand the option***

between 14 years' imprisonment and death. The larger Bench has also emphasised that: [*Swamy Shraddananda (2) case* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , SCC p. 805, para 92]

> *"92.* … the Court would take recourse to the ***expanded option*** primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

In the light of the detailed discussion by the larger Bench, we are of the view that the observations made in Sangeet case [(2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] are not warranted. Even otherwise, the above principles, as enunciated in *Swamy Shraddananda* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] are applicable only when death sentence is commuted to life imprisonment and not in all cases where the Court imposes sentence for life.

37. Taking note of the fact that the prosecution has established the guilt by way of circumstantial evidence, analysed and discussed earlier, and of the fact that in the case on hand five persons died and also of the fact that the ***High Court commuted the death sentence into life imprisonment imposing certain restrictions, the decision of the High Court cannot be faulted with*** and in the light of well-reasoned judgments over a decade, ***we agree with the conclusion arrived at by the High Court including the reasons stated therein.***"

(Emphasis by us)

147. The above extracted judgment in ***Sahib Hussain @ Sahib Jain*** does not support the contention on behalf of the defendants. On the contrary, it reiterates the position that the High Court also has available a third sentencing option so far as a murder case falling in the 'rare' description (i.e. more heinous than the ordinary

murder but falling short of the rarest of rare category), a third category of cases. This third option ('via media') enables the court to impose a life imprisonment sentence beyond 14 years imprisonment (at which cases of life convicts may be considered for commutation) or beyond twenty years. In this case, it was not the Supreme Court which was commuting a death sentence to life. It was the High Court which had committed the sentence to life imprisonment with condition. The Supreme Court was considering a challenge by the appellant to the imposition by the High Court of the sentence of the life imprisonment with restrictions. The challenge was repelled by the Supreme Court. This decision reiterates the legal position that so far as sentencing is concerned, all courts, be it trial courts, the Sessions Courts, the High Courts as well as the Supreme Court have the same powers, of course subject to statutory restrictions regarding limits and procedural requirements (as confirmation of the death sentence by the High Court if imposed by the trial court).

148. Mr. Sumeet Verma has also placed strong reliance on the Supreme Court pronouncement reported at ***(2013) 10 SCC 631 : (2013) 10 SCALE 671 (D.O.D. 26th August, 2013) Gurvail Singh @ Gala v. State of Punjab*.** Upon the petitioner's conviction for killing four persons, the trial court sentenced Gurvail Singh to death which was affirmed by the High Court. In the criminal appeal, the Supreme Court affirmed the conviction while converting the death sentence into life imprisonment with the direction that the petitioner shall serve 30 years in jail without

remission. His review petition in this regard was also rejected. The petitioner then filed a writ petition in the Supreme Court seeking a direction to convert the sentence of 30 years in jail without remission to a sentence of simple life imprisonment and further to declare that the Supreme Court was not competent to fix a particular number of years (with or without remission) when commuting the death sentence to life imprisonment while upholding the conviction of the accused under Section 302 of the IPC. The court extracted para 29 of ***Sahib Hussain @ Sahib Jain*** (also reproduced by us) and dismissed the writ petition.

149. Before us, in support of his submission that curtailment of remissions can be done only by the Supreme Court, which power is also restricted to cases where the court is commuting the death sentence to life. Mr. Verma, learned counsel for the convict has extensively relied on the following observations contained in para 12 of ***Gurvail Singh @ Gala***:

> "**12.** Thus, it is evident that the issue raised in this petition has been considered by another Bench and after reconsidering all the relevant judgments on the issue the Court found that the observations made in *Sangeet* [(2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] were unwarranted i.e. no such observations should have been made. This Court issued orders to deprive a convict from the benefit of remissions only in cases where the death sentence has been commuted to life imprisonment and it does not apply in all the cases wherein the person has been sentenced to life imprisonment."

150. There can be no dispute with the submission of Mr. Sumeet Verma, learned counsel for Vikas Yadav, that the law declared by the Supreme Court is binding on all courts under Article 141 of the Constitution of India.

151. It is at the same time necessary to point out that the issue being considered by us has not been raised in any of the judicial pronouncements placed before us. In the precedents placed before us, the courts have discussed the factual matrix and imposed the minimum imprisonment sentences or directed postponement of remission.

152. In both ***Sahib Hussain @ Sahib Jain*** and in ***Gurvail Singh @ Gala***, there was no issue about the power of the High Court to postpone remission or impose a fixed term imprisonment.

153. We also find that in both these judgments, the court noted the pronouncement of the larger Bench of Supreme Court in ***Swamy Shraddananda (2) v. State of Karnataka*** that the observations in ***Sangeet*** on the power of the court to curtail remission were not warranted. Furthermore in ***Sahib Hussain***, the Supreme Court has upheld the order of the High Court curtailing remission.

154. In ***Swamy Shraddananda (2),*** the three Judge Bench of the Supreme Court has "*formally recognized*" the recommendation in ***Dalbir Singh*** of the third sentencing option available to the "*convicting court*" that life imprisonment shall last as long as the life of the convict lasts, where there are "*exceptional indications of murderous recidivism and the society cannot run the risk of the*

convict being at large". This third sentencing option is apart from "*one a sentence of life imprisonment which for all intents and purposes is of not more than 14 years and the other death*" (reference to powers under Section 432 to 433A). The court has also noted with approval award of fixed term sentences by the sentencing court whereby release on exercise of powers of remission stands interdicted.

155. It needs no elaboration that it is the pronouncement by the larger Bench in ***Swamy Shraddananda (2)*** on the issue which has to bind adjudication.

156. We may also consider the formulation by the Division Bench of this court on the above principles with regard to the third category of cases in the judgment reported at ***(2009) VIII AD (Delhi) 262, State v. Shree Gopal @ Mani Gopal.*** The Trial Court had imposed the penalty of death on the respondent which was referred to the High Court for confirmation. This court imposed an actual sentence of 20 years without remission on the respondent Shree Gopal. The court considered several judgments on the issue and termed the just short of 'rarest of rare' case as a 'rare' case in the following terms :

> "43. We may only add that the said decisions throw light of drawing distinctions between what would be rare and what would be the rarest of the rare. ***A sentence of life imprisonment can thus be classified in two categories i.e. the ordinary category whereby the Court leaves the exercise of executive power at the discretion of the executive, to be so exercised after 14 years of imprisonment*** and grant remission; and a ***higher***

> ***category***, where the Court, ***in a rare case, but not the rarest of the rare***, would clip said benefit being extended by directing that the accused shall undergo an actual sentence for a higher period or even for the remainder of his life. ***Such kinds of cases can be put in the category of rare cases with appropriate direction of not being entitled to the benefit of remission till a fixed term of imprisonment is undergone***. Only after carrying out such an exercise should the Court take resort to the extreme action in a case which would be in the category of the rarest of the rare."
>
> (Emphasis supplied)

157. The above jurisprudence would show that the Supreme Court has noted that on several occasions, while a murder may not fall in the rarest of rare category, it is just short of it, or, is certainly more serious than what has been termed as an '*ordinary murder case*'. The Supreme Court has thus categorized murder cases into 'ordinary' and 'rarest of rare'. It has also recognized an in between category of just short of 'rarest of rare' cases. Thus murder cases, for sentencing purposes can be classified into three categories – '*ordinary*', '*rarest of rare*' and a third category '*just short of rarest of rare*' i.e. '*rare*' category. The sentence of life imprisonment also is classified into two categories. The first is the ordinary category whereby the executive has the discretion to grant remission after 14 years of imprisonment. The courts have the jurisdiction, in a case falling 'just short of rarest of rare' (or rare) category, to make an appropriate direction that the offender will not be entitled to the benefit of remission till he has undergone a fixed term of imprisonment.

158. Mr. Verma, learned counsel for Vikas Yadav, presses that a distinction be drawn between a case where a death sentence stands imposed and a challenge thereto is being considered, that too by no court other than the Supreme Court as against a case where the court is considering imposition of any appropriate sentence. The distinction being drawn by Mr. Verma, to say the least, is an erroneous reading of the jurisprudence on the issue. First and foremost, imposition of a minimum prison term would arise only in cases where life imprisonment is an option and the court formed a view that if the case was taken up for remission under Section 432 in accordance with Section 433A of the Cr.P.C., the fourteen year imprisonment would not be commensurate with the gravity of the offence. This issue would also arise where the court is called upon to consider whether an offence of murder falls in the rarest of rare category or it does not.

159. It has been categorically held in para 85 of ***(2010) 3 SCC 508, Mulla v. State of U.P.*** that "***it is open to the sentencing court to prescribe the length of incarceration***". The Supreme Court further observed that this was "***especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will suffice the offence committed. In the case in hand, it was observed that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life imprisonment***".

The Supreme Court has thus clearly stated that the length of incarceration has to be fixed by the "*sentencing court*".

160. Will not the considerations for commuting death to life be the same when considering imposition of the sentence in an appeal for enhancement? Or for that matter, by the trial court when imposing the sentence upon returning the finding of guilt?

161. It is essential to note that the first level of consideration of the aptness of the sentence is at the trial court. It is the trial judge who is required to hear the accused after pronouncing conviction, and conclude on the gravity of the offence and adequacy of the sentence. In a trial for offences punishable with death, it is the trial judge who would consider whether the case falls in the rarest of rare formulation and also whether a prison term is commensurate with the offence? The trial judge also has to examine the length of the prison term to befit the offence.

162. The parameters on which a case is evaluated from the perspective of whether the capital punishment is warranted, remains the same, be it any court in the country. It is also necessary to point out that there is no difference between the parameters on which the power to commute the death sentence to life imprisonment would be exercised by the Supreme Court or the High Court or in the scope of consideration while doing so.

163. While examining the legality, proportionality and adequacy of the sentence, the consideration by the high court as the appellate court into the sentencing, has to remain the same. It would be preposterous to thus hold that the power to hand down a fixed term

sentence beyond 14 years is not available to the trial courts or the high court or that even the power of the Supreme Court to do is confined to cases of commutation of the death sentence to life imprisonment.

164. The submission as pressed by learned counsel for the defendants would require us to hold that the trial court can impose a life sentence for an ordinary murder, the death sentence for the rarest of rare case but it has no jurisdiction to consider as to whether the case falls in the intermediate 'rare' category inviting mandatory tenure imprisonment as an adequate sentence. Or that, on the same facts and evidence, the trial court (or for that matter, the high court) has no power to do so, and that only the Supreme Court has the jurisdiction to do so, which jurisdiction is also limited to when it is commuting a death sentence to life not to restrict power of the executive to remit the sentence. Such is not the legislative intent.

165. There is no dichotomy between the power of the High Court when confirming a death sentence and its power when considering an appeal for enhancement under Section 377 read with Section 386 of the Cr.P.C.

166. It is also important to note that as per ***Swamy Shraddananda (2),*** the third option is available to the "*convicting court*" (as recommended in ***Dalbir Singh***) which is not only the Supreme Court but also the High Courts and the trial courts.

167. We therefore, conclude that a third sentencing option is available to the sentencing court in all cases where death penalty is

one of the options. It would be exercised if the court is of the view that death sentence ought not to be imposed and that, given the power of remission of the life sentence, if exercised on completion of fourteen years of imprisonment, the imprisonment would be inadequate. The court is therefore, free to determine the length of imprisonment which would be commensurate for the offence.

168. Mr. Sanjay Jain, learned counsel for Vishal Yadav has placed the pronouncement of the Supreme Court reported at ***(2011) 10 SCC 259, A.B. Bhaskara Rao v. Inspector of Police, CBI Vishakapatnam; (2000) 1 SCC 278, M.S. Ahlawat v. State of Haryana & Anr. ; (2001) 2 SCC 186, E.S.P. Rajaram & Ors. v. Union of India & Ors.; (1996) 4 SCC 453, Union of India & Anr. v. Kirloskar Pneumatic Co. Ltd.*** to contend that every judgment has to be consistent with the relevant substantive provisions of the relevant statutory laws. In order to do complete justice, the order of the Supreme Court cannot be inconsistent with the substantive provisions of the relevant statutory laws (***Prem Chand Garg; E.S.P. Rajaram; M.S. Ahlawat)***

169. In para 101 of ***Kirloskar Pneumatic Co. Ltd.*** case, it was held that even under Article 226, no direction to act contrary to law can be given. There can be no dispute at all with this well settled principle. In fact, it is premised on this principle that we have held that the power to impose a fixed term sentence on the convict is derived from Section 28 of the Cr.P.C. The argument of the defence that the High Court cannot give such fixed tenure imprisonment sentence and the same is permissible only if the

Supreme Court is commuting death sentence to life imprisonment is clearly contrary to this well settled principle.

170. Thus the restriction on the power of the courts which Mr. Verma is pressing is unwarranted. It is not supported by either the statutory provisions or the judicial precedents. It is clearly permissible for the sentencing court to judicially regulate the power of the executive to remit the sentence of the convict and while imposing a life sentence, direct a minimum term of imprisonment which may be in excess of fourteen years imprisonment depriving the convict of the benefit of remissions till expiry of such period. It can also be lawfully awarded by the High Court while commuting the death sentence awarded by the trial court upon conviction for such offence. In the light of the above discussion, we also find no legal prohibition upon the high court in handing out such sentence when adjudicating upon a prayer for enhancement of the sentence by the prosecution or the complainant/victim.

171. Mr. Sanjay Jain, learned counsel has also urged that the High Court does not have any power to interfere with the discharge of the executive function to grant remission. Mr. Rajesh Mahajan, learned Additional Standing Counsel has drawn our attention to paras 68, 72 and 91 of ***Swamy Shraddananda(2)*** as well as the pronouncements in ***Sahib Hussain @ Sahib Jain*** and ***Gurvail Singh @ Gala*** wherein similar doubts have been laid to rest.

172. From the jurisprudence on the subject and statutory position, the alternate sentencing framework available to any sentencing court can be summed up thus:

(i) A convict sentenced to imprisonment for life will remain imprisoned for his entire life unless remission of the sentence in accordance with Section 433A CrPC is granted for good reasons, on an application by the convict. The convicting or confirming court retains the power to recommend to the government that the sentence be not remitted till a fixed term of imprisonment has been undergone or consideration of the remission be postponed.

(ii) A prisoner serving a life sentence does not have an indefeasible right to release under Section 432 CrPC after serving out, either a 14 or 20 years of his prison term.

(iii) Before actually exercising the power of remission of the Cr.P.C., the appropriate government must obtain the opinion (with reasons) of the presiding Judge of the convicting or confirming court. The remissions, therefore, be given only on a case by case basis and not for a wholesale manner [***Sangeet*** *para 80(7)*].

(iv) The exercise of power of an appropriate government to curtail the duration of the life sentence thus has to be in the above manner and on the parameters laid down by the court.

V. Questions referred and pending before the Constitution Bench of the Supreme Court

173. The diverse views on the subject regarding the scope of statutory power of remission and the legality of the orders to commute the death penalty and imprisonment for life in some cases

and deny remission in other cases is amongst the several questions which was considered by an order dated 25th April, 2014 passed by the Supreme Court in ***W.P.(Crl.) No.48/2014, Union of India v. V. Sriharan @ Murugan and Ors.*** as well as the connected matters (reported at ***(2014) 5 SCALE 600***).

In this writ petition, the correctness of the views of the three Judge Bench in ***Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767*** were doubted before the court. In this regard, in para 42 the court notes that it may not be appropriate for a three Judge Bench to examine and decide the correctness of the previous judgments and consequently refer the matter to a five Judge Bench to reconcile the dispute. The court was also of the view that the question as to whether after the Supreme Court commutes the death sentence to life imprisonment, when the executive exercises its remission power by the executive had wide ramifications and therefore placed this question as well before the Constitution Bench. In para 48, the following amongst other questions have been framed for consideration before the Constitution Bench :

> "(i) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of ***Swamy Shraddananda (supra)***, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for

a term in excess of fourteen years and to put that category beyond application of remission?

(ii) Whether the "appropriate Government" is permitted to exercise the power of remission Under Section 432/433 of the Code after the parallel power has been exercised by the President Under Article 72 or the Governor Under Article 161 or by this Court in its Constitutional power Under Article 32 as in this case?

xxx xxx xxx

(vi) Whether *suo motu* exercise of power of remission Under Section 432(1) is permissible in the scheme of the section if, yes whether the procedure prescribed in Sub-clause (2) of the same Section is mandatory or not?

xxx xxxx xxx"

We note that these issues are pending consideration before the Supreme Court. It is noteworthy that there is no order by the Supreme Court interdicting the courts from passing any orders on sentence.

174. Mr. Rajesh Mahajan has drawn our attention to the judgment dated 21st May, 2014 reported at ***2014 (7) SCALE 571, Md. Jamuluddin Nasir v. State of West Bengal*** wherein, even after the reference, the Supreme Court has given a term imprisonment of 30 years to one convict and of imprisonment till the end of his life to the other. Mr. Mahajan has also drawn our attention to the judgment of Supreme Court reported at ***2014 (8) SCALE 113, Amar Singh Yadav v. State of U.P.,*** decided on 1st July, 2014,

wherein the Supreme Court has imposed a 30 year imprisonment sentence on the convict.

There is therefore, as of now, no prohibition on this court to impose a fixed term sentence of imprisonment on the defendants.

VI. If there are convictions for multiple offences in one case, does the court have the option of directing that the sentences imposed thereon shall run consecutively and not concurrently?

175. An examination of the law and the jurisprudence on the subject of sentencing options shows that in a case involving multiple offences, there is one more option available to the court. A person may stand convicted for multiple offences in a single case and each conviction carries a separate sentence. How are the sentences to run? Is it permissible for the court to direct that all or some of the specified sentences would run consecutively?

176. Again an absolute proposition is pressed by Mr. Sumeet Verma, learned counsel for Vikas Yadav to the effect that, upon conviction of a person for multiple offences in a single trial, if life imprisonment is one of the punishments imposed upon him, all other sentences of imprisonment have to run concurrently and that there is no option at all available to the court in the matter. Mr. Verma, submits that the court is barred from making a direction that the sentences would run consecutively by virtue of Section 31 of the Cr.P.C. and the pronouncements of the Supreme Court reported at ***(2006) 12 SCC 37 : 2006 (12) SCALE 381, Chatar Singh v. State of M.P.; (2012) 11 SCC 629, Ramesh Chilwal @***

Bambayya v. State of Uttarakhand *and;* ***2014 SCC OnLine SC 512 : 2014 (8) SCALE 96, Duryodhan Rout v. State of Orissa.***

177. This submission is opposed with some vehemence by both Mr. Rajesh Mahajan for the State as well as Mr. P.K. Dey, learned counsel for the complainant who submit that the argument of learned counsel on the other side rests on a mis-reading of both the statutory provisions as well as the judicial precedents on the subject.

178. Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State has contended that there is no such prohibition under Section 31 on the powers of the High Court or Sessions Court to direct that sentences of imprisonment shall run consecutively even in a case where life imprisonment is one of the sentences awarded to a convict. Mr. Mahajan and Mr. Dey have relied on the above statutory provision as well as several judicial precedents wherein the courts have even if cases where life sentence was one of the punishment directed that sentences would run consecutively.

179. Before proceeding any further, we may at the outset extract Section 31 of the Cr.P.C. which reads as follows:

> **"31. Sentence in cases of conviction of several offences at one trial.**
>
> (1) When a person is ***convicted at one trial of two or more offences,*** the court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments, prescribed therefor which such court is competent to inflict; ***such punishments when consisting of imprisonment to commence the one after***

the expiration of the other ***in such order as the court may direct,*** ***unless the court directs that such punishments shall run concurrently.***

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being ***in excess of the punishment, which it is competent to inflict*** on conviction of a single offence, ***to send the offender for trial before a higher court:***

Provided that-

(a) ***in no case shall such person be sentenced to imprisonment for a longer period than fourteen years****;*

(b) the ***aggregate punishment shall not exceed twice the amount of punishment***, which the ***court is competent to inflict for a single offence***.

(3) For the purpose of 'appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

180. As per the legislative scheme, Section 31 has been placed in Chapter 3 of the Code of Criminal Procedure which is concerned with the "Power of Courts".

181. Let us firstly examine the law on the subject. Our attention has been drawn also to the pronouncement of the Supreme Court reported at ***(1996) 9 SCC 287, Raja Ram Yadav & Ors. v. State of Bihar*** wherein the Supreme Court upheld the conviction of the appellant for the offence of murder of six persons to take revenge of a carnage involving his kith and kin. The court *commuted the death sentence of the appellants to the sentence of life*

imprisonment and additionally awarded the *sentence of six years rigorous imprisonment* to each of the appellants for the offence *under Section 436* read with Section 149 as well as a composite fine of Rs.15,000/- against each of the appellants for the offences under Section 302 and 436 read with Section 149 of the IPC. It was further directed that "***the sentence of life imprisonment for the offence of murder and the sentence of six years rigorous imprisonment for the offence under Section 436 read with Section 149 IPC will run consecutively***".

182. In ***(2005) 5 SCC 194, Kamalanantha & Ors. v. State of T.N.,*** 13 girls of an ashram were raped by its founder, A-1, which rapes were systematically abetted by the co-accused. The victims were orphans entirely dependant on the founder. The conviction of A-1 under Section 376(2)(c) and ***sentence of life imprisonment with fine of Rs.5,10,000/- on each count to run separately and consecutively*** was found justified by the Supreme Court. Also the conviction of the co-accused under Section 376/106 and sentence of life imprisonment (except in the case of A-3 who was awarded R.I. for the period already undergone with fine of Rs.10,000/-) to run separately and consecutively was also upheld by the Supreme Court holding as follows:

> **"76.** The ***contention of Mr Jethmalani that the term "imprisonment" enjoined in Section 31 CrPC does not include imprisonment for life is unacceptable.*** The term "***imprisonment***" is ***not defined*** under the Code of Criminal Procedure. ***Section 31 of the Code falls under Chapter III of the Code which deals with power of***

courts. Section 28 of the Code empowers the High Court to pass any sentence authorised by law. Similarly, the Sessions Judge and Additional Sessions Judge may pass any sentence authorised by law, except the sentence of death which shall be subject to confirmation by the High Court. ***In our opinion the term "imprisonment" would include the sentence of imprisonment for life.***

77. In the aforesaid facts and circumstances, we see no infirmity in the well-merited findings concurrently recorded by the two courts below, which do not warrant our interference. The appeals are, accordingly dismissed.

78. Having regard to the amplitude of the gravity of the offence, perpetrated in an organised and systematic manner, the nature of the offence and its deleterious effects not only against the victims, but the civilised society at large, needs to be curbed by a strong judicial hand. We are inclined to ***confirm the sentence*** and conviction as ***recorded by the trial court and confirmed by the High Court. The order of the trial court that any remission of sentence or amnesty on any special occasions announced or to be announced either by the Central or the State Government shall not apply to the sentence and imprisonment imposed on all the accused, is also maintained."***

(Emphasis by us)

The Supreme Court has thus upheld the order of the trial court interdicting the benefit of any remissions which may be announced by the State.

183. In yet another pronouncement reported at ***(2013) 2 SCC 479, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra,*** the appellant stood convicted for causing of a grievous murder and a

rape of the pregnant daughter-in-law of the deceased besides committing robbery. The convict was under the influence of alcohol at the time of the offence which was committed in a brutal manner. The trial court convicted the appellant under Sections 302, 307, 394, 397 and 376(e) and awarded the death sentence for his conviction under Section 302 along with imprisonment sentences for his other crimes. The court was persuaded to hold that the appellant had entered the house of the deceased with the mind of committing robbery. He was drunk and therefore, may not have been exactly aware of the consequences of his acts in injuring the deceased and committing the offences on PW-2. For these reasons, while upholding the convictions of the appellant, the Supreme Court commuted the death sentence upon his conviction for murder to that of rigorous imprisonment of life. The sentences for the other convictions were maintained. It was also directed that the life imprisonment *"shall be for life and the sentences shall run consecutively"*.

184. We may notice yet another pronouncement placed by Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State which has been reported at ***(2013) 3 SCC 52*** : ***(2013) 2 SCALE 505, Sanaullah Khan v. State of Bihar*****.** In this case, the appellant was found culpable for three offences of murder and was sentenced to death by the trial court. The Supreme Court however, found the evidence insufficient to establish the gravest case of the extreme culpability of the appellant. It also did not have the evidence to establish the circumstances of the appellant. Therefore, for each of

the murders, he was sentenced to life imprisonment with the following directions:

> "**23.** We have, however, sufficient evidence to establish the culpability of the appellant for three offences of murder as defined in Section 300 IPC, and for each of the three offences of murder, the appellant is liable under Section 302 IPC for imprisonment for life if not the extreme penalty of death. Section 31(1) CrPC provides that:
>
> > "**31. (1)** When a person is convicted at one trial of two or more offences, the court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently."
>
> ***Thus, Section 31(1) CrPC empowers the Court to inflict sentences of imprisonment for more than one offence to run either consecutively or concurrently***. In *Kamalanantha* v. *State of T.N.* [(2005) 5 SCC 194 : 2005 SCC (Cri) 1121] this Court has held that the ***term "imprisonment" in Section 31 CrPC includes the sentence for imprisonment for life***. Considering the facts of this case, we are of the opinion that the ***appellant is liable under Section 302 IPC for imprisonment for life for each of the three offences of murder*** **under Section 300 IPC and the** ***imprisonments for life should not run concurrently but consecutively*** and ***such punishment of consecutive sentence of imprisonment for the triple murder*** committed by the appellant will ***serve the interest of justice.***

> **24.** In the result, we maintain the conviction of the appellant for three offences of murder under Section 302 IPC, but convert the sentence from death to sentence for rigorous imprisonment for life for each of the three offences of murder and direct that the ***sentences of imprisonment for life for the three offences will run consecutively and not concurrently.*** Thus, the appeals are allowed only on the question of sentence, and dismissed as regards conviction."
>
> (Emphasis by us)

185. It is important to note that the court has directed not mere imprisonment sentences, but three sentences - each for life imprisonment - to run consecutively. The effect would be that upon a favourable consideration of an application for remission of one sentence, the second life sentence would commence. Given the prohibition under Section 433A, the second application could at the earliest be made after 14 years of further imprisonment. If this was favourably considered, the third life imprisonment sentence would commence.

186. Mr. Mahajan has also drawn our attention to the pronouncement of the Supreme Court on sentence in the case reported at ***(2013) 5 SCC 546, Shankar Kisanrao Khade v. State of Maharashtra***. This was a case where the appellant, a man of 52 years was found guilty of murder by strangulation after repeated rape and sodomization of a minor girl of 11 years with intellectual disability. The Supreme Court discussed the entire case law including the several cases where term sentences have been imposed including several judicial precedents where sentences had been ordered to run consecutively.

187. In para 2 of the judgment reported at ***(2013) 5 SCC 546, Shanker Kisanrao Khade v. State of Maharashtra*****,** the legal history reads as follows:

> **"2.** xxx xxx xxx The Additional Sessions Court in Sessions Case No. 165 of 2006 convicted the first accused and sentenced him to death under Section 302 IPC, subject to confirmation by the High Court and was also awarded imprisonment for life and to pay a fine of Rs 1000 in default to suffer rigorous imprisonment (for short "RI") for six months for offences under Section 376 IPC, further seven years' RI and to pay a fine of Rs 500 in default to suffer RI for three months under Section 366-A IPC and five years' RI and to pay a fine of Rs 500 in default to suffer RI for one month for the offences punishable under Section 363 IPC read with Section 34 IPC. The second accused, his wife, was convicted for the offences punishable under Section 363-A read with Section 34 IPC and sentenced to suffer RI for five years and to pay a fine of Rs 500 in default and to suffer RI for one month. Accused 2 had already suffered the punishment, hence did not file any appeal against the order of the Sessions Judge. The accused preferred Criminal Appeal No. 512 of 2007 before the High Court and the Court heard the appeal along with Confirmation Case No. 1 of 2007. The High Court dismissed [*State of Maharashtra* v. *Shankar*, (2008) 6 AIR Bom R 43] the appeal and the reference made by the Sessions Court was accepted and the death sentence was confirmed. The appellant has preferred these two appeals against those orders."

After a detailed consideration, the court concluded that the case did not fall in the rarest of rare category and set aside the death sentence ordering as follows:

"78. The criminal appeals stand dismissed and the death sentence awarded to the accused is converted to that of rigorous imprisonment for life and that all the sentences awarded will run consecutively."

188. In ***Shankar Kisanrao Khade,*** while upholding the conviction of the appellant, the court had directed that the sentences of the appellant should run consecutively holding as follows:

> ***"Consecutive sentence cases***
> **138.** ***Ravindra Trimbak Chouthmal*** **v.** ***State of Maharashtra*** [(1996) 4 SCC 148 : 1996 SCC (Cri) 608], is perhaps among the earliest cases where ***consecutive sentences were awarded***. This was not a case of rape and murder but one of causing a dowry death of his pregnant wife. It was held that it was not the "rarest of rare" cases "because dowry death has ceased to belong to *that* species of killing". The death sentence was, therefore, not upheld. Since the accused had ***attempted to cause disappearance of the evidence*** by severing the head and cutting the body into nine pieces, ***this Court directed that he should undergo the sentence for that crime after serving out his life sentence***. It was held: (SCC p. 151, paras 10-12)
>
> > "*10.* We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the 'rarest of the rare' type. This is so because dowry death has ceased to belong to *that* species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a

despicable character like the appellant before us. We, therefore, commute the sentence of death to one of RI for life.

11. But then, it is a fit case, according to us, where, for the offence under ***Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in*** view of what had been done to cause disappearance of the evidence relating to the commission of murder—the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. ***Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body.*** To these sentences, we do not, however, desire to add those awarded for offences under Sections 316 and 498-A/34, as killing of the child in the womb was not separately intended, and Section 498-A offence ceases to be of significance and importance in view of the murder of Vijaya.

12. The result is that the appeal stands allowed to the extent that the sentence of death is converted to one of imprisonment for life. But then, ***the sentence of seven years' RI for the offence under Sections 201/34 IPC would start running after the life imprisonment has run its course as per law."***

(emphasis in original)

Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what this decision mandates is that if the convict is to be released earlier by the competent authority for any reason, in accordance with procedure established by

law, then the second sentence will commence immediately thereafter.

139. *Ronny* v. *State of Maharashtra* [(1998) 3 SCC 625 : 1998 SCC (Cri) 859] is also among the earliest cases in the recent past ***where consecutive sentences were awarded.*** The three accused, aged about 35 years (two of them) and 25/27 years had committed three murders and a gang rape. This Court converted the death sentence of all three to imprisonment for life since it was not possible to identify whose case would fall in the category of the "rarest of rare" cases. However, after awarding a sentence of life imprisonment, this Court directed that they would all undergo punishment for the offence punishable under Section 376(2)(*g*) IPC consecutively, after serving the sentences for other offences. It was held: (SCC p. 654, para 47)

> "*47.* Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way; having regard to the ***nature of offences and circumstances*** in which they were committed, it is not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years old, A-2 is 35 years old and A-3 is 25 (sic 27) years old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. ***From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the 'rarest of the rare' cases, it would serve the ends of justice if***

> ***the capital punishment is commuted into life imprisonment.*** Accordingly, we modify the sentence awarded by the courts below ***under Section 302 read with Section 34 from death to life imprisonment. <u>The sentences for the offences for which the appellants are convicted, except under Section 376(2)(g) IPC, shall run concurrently; they shall serve sentence under Section 376(2)(g) IPC consecutively, after serving sentence for the other offences.</u>*** *"*
>
> xxx xxx xxx
>
> **142.** These decisions clearly suggest that this Court has been seriously reconsidering, though not in a systemic manner, <u>awarding life sentence as an alternative to death penalty</u> by applying (though not necessarily mentioning) the "***<u>unquestionably foreclosed" formula</u>*** laid down in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580]."
>
> (Emphasis by us)

189. The Supreme Court has expressed grave concern about the exercise of power of remission or commutation of the life sentences in very serious offences resulting in serious offenders being set at liberty after incarceration of 14 years which was grossly inadequate when balanced against the nature of the crime. In ***(2013) 10 SCC 721 : 2013 (12) SCALE 200, State of Rajasthan v. Jamil Khan,*** the High Court declined to confirm the death sentence imposed by the trial court and instead the respondent had been awarded life imprisonment under Section 302 of the IPC. For his conviction under Section 376 of the IPC, he had been awarded life imprisonment while the third substantive sentence of imprisonment of three years and fine of Rs.500/- awarded by the

Sessions Court under Section 201 of the IPC which were maintained by the High Court. The sentences had been ordered to run concurrently. The Supreme Court had observed as follows:

> **"35.** xxx ***The sentence of life imprisonment is till the end of one's biological life. However, in view of the power of the State under Sections 432 and 433 CrPC, in the present case, we are of the view that the sentences shall run consecutively, in case there is remission or commutation***. We further make it clear that the remission or commutation, if considered in the case of the respondent, shall be granted only after the mandatory period of fourteen years in the case of offence under Section 302 IPC.
>
> **36.** Section 433-A CrPC has imposed a restriction with regard to the period of remission or commutation. It is specifically provided that when a sentence of imprisonment for life, where death is also one of the punishments provided by law, is remitted or commuted, such person shall not be released unless he has served at least fourteen years of imprisonment. ***In the case of the respondent herein, second life imprisonment*** is ***under Section 376(2) IPC***. A minimum sentence under Section 376(1) IPC is seven years. Death is not an alternate punishment. However, the sentence may even be for life or for a term which may extend to ten years. Of the ***three options*** thus ***available***, in view of the brutal rape of a minor girl child, the Sessions Court has chosen to impose the extreme punishment of life imprisonment on the respondent.
>
> xxx xxx xxx
>
> **37.** Punishment has a penological purpose. Reformation, retribution, prevention, deterrence are some of the major factors in that regard. Parliament is the collective conscience of the people. If it has mandated a minimum

sentence for certain offences, the Government being its delegate, cannot interfere with the same in exercise of their power for remission or commutation. Neither Section 432 nor Section 433 CrPC hence contains a non obstante provision. Therefore, the minimum sentence provided for any offence cannot be and shall not be remitted or commuted by the Government in exercise of their power under Section 432 or 433 CrPC. Wherever the Penal Code or such penal statutes have provided for a minimum sentence for any offence, to that extent, the power of remission or commutation has to be read as restricted: otherwise the whole purpose of punishment will be defeated and it will be a mockery on sentencing.

38. ***Having regard to the facts and circumstances of the present case, we make it clear that in the event of the State invoking its powers under Section 432 or 433 CrPC, the sentence under Section 376(2) IPC shall not be remitted or commuted before ten years of imprisonment. In other words, in that eventuality, it shall be ensured that the respondent will first serve the term of life imprisonment under Section 302 IPC. In case there is any remission after fourteen years, then imprisonment for a minimum period of ten years under Section 376(2) IPC shall follow and thereafter three years of rigorous imprisonment under Section 201 IPC. The sentence on fine and default as awarded by the Sessions Court are maintained as such."***

(Emphasis by us)

In this case, the Supreme Court clearly declared that in case the Executive exercises its power under Section 432 or 433 of the Cr.P.C., and grants remission in the sentence of life imprisonment, the other sentences would run consecutively.

190. We find that in ***(2014) 1 SCC 129, Sunil Damodar Gaikwad v. State of Maharashtra,*** the court sentenced the appellant to life

imprisonment for the offence under Section 302 IPC. He was sentenced to imprisonment of 7 years for the conviction for the offence under Section 307 IPC. In para 30, it was however, clarified that "***in case the sentence of imprisonment for life is remitted or commuted to any specified period (in any case, not less than fourteen years in view of Section 433-A Cr.P.C.), the sentence of imprisonment under Section 307 IPC shall commence thereafter.***"

191. We may consider the pronouncement in ***(2006) 12 SCC 37 : 2006 (12) SCALE 381, Chatar Singh v. State of M.P.*** relied on by Mr. Sumeet Verma, Advocate. In this case**,** the learned trial judge convicted the appellant for commission of offences punishable under Sections 364 and 365 read with Sections 120B and 201 of the IPC imposing the following sentences:

"Under Section 364 IPC	RI for 10 years,
Under Section 364 IPC	RI for 10 years,
Under Section 365 IPC	RI for 4 years,
Under Section 365 IPC	RI for 4 years,
Under Section 120-B IPC	RI for 5 years,
Under Section 120-B IPC	RI for 5 years,
Under Section 201 IPC	RI for 2 years."

The sentences were ordered to run concurrently. On appeal, the High Court upheld the conviction and directed that the sentences in respect of the offence under Section 364 of the IPC should run consecutively. However, the sentence in respect of the other offences would be concurrent. The consideration of Section

31 of the Criminal Procedure Code by the Supreme Court in this case requires to be examined in detail and is consequently extracted below:

> **"5.** We, although, appreciate the anxiety on the part of the learned Sessions Judge as also the learned Judge of the High Court not to deal with such a matter leniently, but, unfortunately, it appears that the attention of the learned Judges was not drawn to the provision contained in Section 31 of the Criminal Procedure Code. xxx xxx
>
> **6.** Provisos appended the said section clearly mandate that the accused could not have been sentenced to imprisonment for a period longer than fourteen years.
>
> **7.** Learned Sessions Judge as also the High Court, in our opinion, thus, committed a serious illegality in passing the impugned judgment.
>
> **8.** In ***Kamalanantha* v. *State of T.N.*** [(2005) 5 SCC 194 *:* 2005 SCC (Cri) 1121] , this Court although held that even the life imprisonment can be subject to consecutive sentence, but it was observed: (SCC p. 229, para 75)
>
> > "*75*. Regarding the sentence, the trial court resorted to Section 31 CrPC and ordered the sentence to run consecutively, subject to proviso (*a*) of the said section."
>
> **9.** Although, the power of the court to impose consecutive sentence under Section 31 of the Criminal Procedure Code was also noticed by a Constitution Bench of this Court in ***K. Prabhakaran* v. *P. Jayarajan*** [(2005) 1 SCC 754 : 2005 SCC (Cri) 451] , but, therein the question of construing proviso appended thereto did not and could not have fallen for consideration.
>
> **10.** The question, however, came up for consideration in ***Zulfiwar Ali* v. *State of U.P.*** [1986 All LJ 1177 :

(1986) 3 Crimes 199] wherein it was held: (All LJ p. 1181, para 25)

> "*25*. The opening words 'In the case of consecutive sentences' in sub-section (2) of Section 31 make it clear that this sub-section refers to a case in which 'consecutive sentences' are ordered. After providing that in such a case if an aggregate of punishment for several offences is found to be in excess of punishment which the court is competent to inflict on a conviction of single offence, it shall not be necessary for the court to send the offender for trial before a higher court. After making such a provision, proviso (*a*) is added to this sub-section to limit the aggregate of sentences which such a court pass while making the sentences consecutive. That is this proviso has provided that in no case the aggregate of consecutive sentences passed against an accused shall exceed 14 years. In the instant case the aggregate of the two sentences passed against the appellant being 28 years clearly infringes the above proviso. It is accordingly not liable to be sustained."

11. In view of the proviso appended to Section 31 of the Criminal Procedure Code, we are of the opinion that the High Court committed a manifest error in sentencing the appellant for 20 years' rigorous imprisonment. The maximum sentence imposable being 14 years and having regard to the fact that the appellant is in custody for more than 12 years. Now, we are of the opinion that interest of justice would be subserved if the appellant is directed to be sentenced to the period already undergone."

192. The pronouncement of the Supreme Court in ***(2005) 1 SCC 754***, ***K. Prabhakaran v. P. Jayarajan*** [referred to in para 9 of ***Chatar Singh***] was concerned with the date of election and

scrutiny of nomination under the Representation of People Act, 1951 in the context of fixation of the date by reference to which the disqualifications under Sections 8(1)(2) and (3) of the said Act is to be considered. As noted by the Supreme Court as well, no question of construing the proviso to Section 31 arose therein.

193. So far as the pronouncement of the Allahabad High Court reported at ***1986 All. LJ 1177 : (1986) 3 Crimes 199, Zulfiqar Ali & Anr. v. State of U.P.*** [referred to in para 10 of ***Chatar Singh***] is concerned, this was also not a case involving imposition of life imprisonment. Upon conviction, the appellants in this case had been sentenced by the Sessions Judge to 14 years rigorous imprisonment under Section 120B of the IPC; to another term of 14 years rigorous imprisonment under Section 3 of the Official Secrets Act. The Sessions Judge had directed that the sentences of the appellants shall run consecutively. The appellants did not assail the findings of the Trial Court. They however, urged that the offences proved against them did not warrant the maximum sentences for offences for which they had been convicted and that, in any case, the sentences ought not to have been directed to run consecutively when the result of such a direction is that the appellant's sentence of imprisonment exceeds 14 years rigorous imprisonment which is the longest period of imprisonment for a person for any offence. In para 13 of ***Zulfiqar Ali***, the court observed that "*it is no doubt true that the normal rule for punishment as provided in Section 31(1) is that the sentences should run consecutively but it is also provided in Section 31(1) itself that in appropriate cases it can be made*

concurrent". The Division Bench of the Allahabad High Court extracted Section 31 (1) and observed as follows:

> "13. xxx xxx xxx
>
> The Words "***unless the Court directs that such punishment shall run concurrently***" occur in the Section for some object. These words clearly indicate that the punishments can be directed to run concurrently in an appropriate case. In other words, there may be a case where only concurrent punishments can meet the ends of justice. Therefore, it has to be examined in this case whether on the facts proved in the case, concurrent punishment is called for. If ***once*** it is ***concluded*** that ***this case warrants concurrent punishments***, the order of the trial Judge directing the punishments to be consecutive cannot be upheld."
>
> (Emphasis by us)

It is noteworthy that the Allahabad High Court held that evaluation of the facts of the case had to be undertaken to conclude whether the sentences should run concurrently. The court also did not consider any precedent in which life imprisonment had been awarded.

194. So far as the present consideration is concerned, the submission on behalf of the State in para 20 and the findings of the court in paras 21 and 22 of ***Zulfiqar Ali*** deserve to be extracted and read as follows:

> "20. It has been urged in this connection that proviso (a) is appended to sub-section (2) of Section 31, and therefore, it will not govern the provisions of sub section (1) of Section 31 which contains the normal rule that the sentences should be consecutive. Since this sub-section does not prescribe any maximum term of imprisonment

that can be passed in a trial, a proviso appended to sub-section (2) will not govern this sub-section.

21. We do not subscribe to the above view. Sub-section (1) of Section 31 no doubt says that the sentences should normally be consecutive but it has further provided that in appropriate cases the sentences may be made to run concurrently. The object of this sub-section is clearly to emphasise that the court must expressly direct whether the sentences awarded in a trial are to run concurrently or consecutively. This has been emphasized by providing that normally the sentences should be made to run consecutively and they may be made to run concurrently only if there is a reason for giving such a direction. By making such a provision, this sub-section has not provided any maximum term of punishment when the court directs the sentences to run consecutively. This is, as seen below, is provided in the following sub-section (2).

22. The opening words "In the case of consecutive sentences" in sub-section 31(2) make it clear that this sub-section refers to a case in which "consecutive sentences" are ordered. After providing that in such a case if an aggregate of punishment for several offences is found to be in excess of punishment which the Court is competent to inflict on a conviction of single offence, it shall not be necessary for the Court to send the offender for trial before a higher Court. After making such a provision, proviso (a) is added to this sub-section to limit the aggregate of sentences which such a Court passes while making the sentences consecutive. That is this proviso has provided that in no case the aggregate of consecutive sentences passes against an accused shall exceed 14 years. In the instant case the aggregate of the two sentences passed against the appellant being 28 years clearly infringes the above proviso. It is accordingly not liable to be sustained."

195. The competency of a court to award sentences is governed by clear statutory provisions which cannot be ignored. We are compelled to point out that unfortunately in both ***Chatar Singh*** and ***Zulfikar Ali,*** a primary submission that sub-section 2 of Section 31 was restricted in its applicability to courts with limited competency, that is to say, that Section 31(2) refers to a sentencing court which is not competent to impose life imprisonment (which means that the remainder of the person's life and therefore, has no outside limits), was not placed before the court. In ***Zulfikar Ali,*** the court had proceeded to hold that it was not just and appropriate that the sentences be made to run consecutively in the facts and circumstances of the case.

196. In the other judgment reported at ***(2012) 11 SCC 629, Ramesh Chilwal @ Bambayya v. State of Uttarakhand*** also placed by Mr. Sumeet Verma before us**,** the appellant stood convicted for commission of offences under Section 302 IPC; Sections 2/3[3(1)] of the Gangsters Act and Section 27 of the Arms Act. For the conviction under Section 302 IPC, he was sentenced to rigorous imprisonment for life and fine; for the conviction under the Gangsters Act to rigorous imprisonment for 10 years and fine and for the conviction under Section 27 of the Arms Act, he was sentenced to rigorous imprisonment for 7 years and fine. The Supreme Court issued notice in the appeal confined to whether the sentences were to run concurrently. It was in this context, it directed that "*the trial judge has awarded life sentence for an*

offence under Section 302, in view of Section 31 of the Code of Criminal Procedure, 1973, we make it clear that all the sentences imposed under IPC, the Gangsters Act and the Arms Act are to run concurrently". The Supreme Court has therefore, reiterated the principle that life imprisonment means remainder of a person's life.

197. The pronouncement reported at ***(2014) 2 SCC 153 (D.O.D. 9th December, 2013) Manoj @ Panu v. State of Haryana*** has also been placed before us to buttress the arguments of Mr. Verma on the permissibility of consecutive running of sentences upon convictions for offences under Section 307 IPC as well as Sections 25 and 27 of the Arms Act. For the offence under Section 307, the appellant was sentenced to R.I. of 10 years and fine of Rs.5,000/-; under Section 25 of the Arms Act to R.I. for three years and fine and under Section 27 to R.I. of three years and fine of Rs.2,000/-. The sentences were ordered to run consecutively on the ground that the appellant was a previous convict for committing an identical offence and that in the present case, he had committed the heinous crime of shooting in court premises. The appellant's appeal against conviction and sentence was dismissed by the High Court. In the appeal before the Supreme Court, learned senior counsel for the appellant placed reliance on the pronouncements reported at ***(2006) 12 SCC 37, Chatar Singh v. State of M.P.; (1988) 4 SCC 183, Mohd. Akhtar Hussain v. Collector of Customs and (2009) 5 SCC 238, State of Punjab v. Madan Lal*** and drew the attention of the court to the tender age of the appellant to contend that as per the law laid down in these judgments, the punishment and sentence for

the offences under the single transaction should have run concurrently and that the consecutive sentences awarded in the present case were disproportionate to the facts of the case. The Supreme Court accepted this submission of learned senior counsel for the appellant observing in para 14 as follows:

> "**14.** xxx xxx In view of the aforesaid legal position laid down by this Court regarding concurrent and consecutive sentences, the sentences imposed upon the appellant for different offences to run consecutively under IPC and the Arms Act, is erroneous in law, as the same is contrary to law laid down by this Court as per the cases referred to supra upon which reliance has been rightly placed by the learned Senior Counsel on behalf of the appellant.
>
> **15.** Further, having regard to the age of the appellant at the time of committing the offences, we feel it would not be just and proper to allow the sentences to run consecutively. As the offences committed by the appellant have been committed under a single transaction, it is well-settled position of law that the sentences must run concurrently and not consecutively.
>
> **16.** Hence, the appellant is entitled to the relief as prayed for in this case and the sentences are modified to run concurrently and not consecutively and for this reason, we hold that the sentence must be reduced to 10 years in total with regard to the aforesaid settled position of law, as also keeping in view the tender age of the appellant on the date of the offence."
>
> (Underlining by us)

198. Mr. Sumeet Verma has lastly placed the pronouncement of the Supreme Court at ***2014 SCC OnLine SC 512 : 2014 (8) SCALE 96, Duryodhan Rout v. State of Orissa*** in support of his

submission that it is impermissible to direct sentences to run consecutively. The trial court had found the appellant guilty for commission of offences under Section 376(f)/302/201 IPC. He was sentenced to death for the offence punishable under Section 302 IPC; to undergo R.I. for 10 years and fine of Rs.5,000/- for the offence under Section 376(f) and R.I. for one year and fine of Rs.1,000/- for commission of the offence punishable under Section 201 of the IPC. The High Court of Orissa in the appeal and death reference, upheld the conviction. So far as the sentences were concerned, the High Court commuted the capital sentence to life imprisonment under Section 302 of the IPC while rest of the sentences were maintained. The High Court also maintained the direction of the trial court that the substantive sentences would run consecutively. In para 11, the Supreme Court framed the question as to whether the judgment of the trial court, as affirmed by the High Court, that the sentences were to run consecutively was contrary to the proviso to Sub-Section 2 of Section 31 of the Code of Criminal Procedure? The Supreme Court placed reliance on several pronouncements holding that a person sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentences commuted by the appropriate government in terms of Sections 55, 433 and 433A of the Code of Criminal Procedure. Thereafter the court construed Section 31 of the Cr.P.C as follows:

> "**27.** Section 31 of Cr.P.C. relates to sentence in cases of conviction of several offences at one trial. Proviso to

> Sub Section (2) to Section 31 lays down the embargo whether the aggregate punishment of prisoner is for a period of longer than 14 years. In view of the fact that life imprisonment means imprisonment for full and complete span of life, the question of consecutive sentences in case of conviction for several offences at one trial does not arise. Therefore, in case a person is sentenced of conviction of several offences, including one that of life imprisonment, the proviso to Section 31(2) shall come into play and no consecutive sentence can be imposed."
>
> (Underlining supplied)

199. In para 28, 29 and 30, the Supreme Court noted the above extracted pronouncements in ***Kamalanantha & Ors.; Chatar Singh and Ramesh Chilwal***. The Supreme Court has noted that a sentence of imprisonment for life means a sentence for the entire life of the prisoner. One of the sentences handed down to the appellant was life imprisonment. It was consequently held that in view of the above discussions and decisions, the trial court was not justified in imposing consecutive sentences and that the High Court also failed to address the issue. It is noteworthy that in ***Chatar Singh***, the Supreme Court was not considering award of punishment of life sentence.

200. We find that the issue raised before us was referred to a three Judge Bench of the Supreme Court of India in ***Crl.A.No.2387/2014 (arising out of SLP(Crl.)No.2487/2014, O.M. Cherian @ Thankachan v. State of Kerala & Ors.)***. The Bench considered the question as to whether the sentences running consecutively is the rule, unless the court directs that they will run concurrently. The

judgment was rendered on 11th November, 2014. In this case, upon conviction, the appellant was sentenced under Section 498A IPC to undergo two years rigorous imprisonment and fine of Rs.5,000/- as well as for the offence under Section 306 IPC, to undergo rigorous imprisonment for 7 years and to pay fine of Rs.50,000/-. The Trial Court had directed the substantive sentences of the appellant to run consecutively. Notice in the appeal was issued limited to the question as to whether the sentence can be made to run concurrently instead of running consecutively. In the referral order dated 18th July, 2014, it was observed by the two Judge Bench that Section 31 of the Cr.P.C. was not noticed in its prior judgment reported at ***(1988) 4 SCC 183, Mohd. Akhtar Hussain @ Ibrahim Ahmed Bhatti v. Asstt. Collector of Customs (Prevention) Ahmedabad & Anr.*** Consequently, this question was referred for consideration to a larger bench in order to settle the law. It appears that apart from the judgment in ***Mohd. Akhtar Hussain @ Ibrahim Ahmed Bhatti***, the appellant was placing reliance on the judgment reported at ***(2014) 2 SCC 153, Manoj @ Panu v. State of Haryana.*** In the referral order dated 18th July, 2014, Section 31(1) of the Cr.P.C. was extracted and the court had observed that the "***statutory stipulation is clear that normally sentences in such cases are to run consecutively. Hence we find it difficult for us to accept the statement of law made in the above mentioned two cases***". The matter was therefore, placed before the larger bench which has passed the judgment dated 11th November, 2014. So far

as sentences other than life sentence are concerned, the court held as follows:

(i) "Section 31 Cr.P.C. says that subject to the provisions of Section 71 IPC, Court may pass separate sentences for two or more offences of which the accused is found guilty, but the aggregate punishment must not exceed the limit fixed in the proviso (a) and (b) of sub-section (2) of Section 31 Cr.P.C. In Section 31(1) Cr.P.C., since the word "*may*" is used, in our considered view, when a person is convicted for two or more offences at one trial, the ***court may exercise its discretion in directing that the sentence for each offence may either run consecutively or concurrently subject to the provisions of Section 71 IPC***. But the aggregate must not exceed the limit fixed in proviso (a) and (b) of sub-section (2) of Section 31 Cr.P.C. that is - (i) it should not exceed 14 years and (ii) it ***cannot exceed twice the maximum imprisonment awardable by the sentencing court for a single offence***." (para 10)

(ii) "The words "***unless the court directs that such punishments shall run concurrently***" occurring in ***sub-section (1) of Section 31***, make it clear that ***Section 31 Cr.P.C. vests a discretion in the Court to direct that the punishment shall run concurrently, when the accused is convicted at one trial for two or more offences***. It is manifest from Section 31 Cr.P.C. that the Court has the power and discretion to issue a direction for concurrent running of the sentences when the accused is convicted at one trial for two or more offences. Section 31 Cr.P.C. authorizes the passing of concurrent sentences in cases of substantive sentences of imprisonment. ***Any sentence of imprisonment in default of fine has to be in excess of, and not concurrent with, any other sentence of imprisonment*** to which the convict may have been sentenced." (para 11)

(iii) "***Discretion to order running of sentences concurrently or consecutively is judicial discretion of the Court which is to be exercised as per established law of sentencing***. The court before exercising its discretion under Section 31 Cr.P.C. is required to consider the totality of the facts and circumstances of those

offences against the accused while deciding whether sentences are to run consecutively or concurrently." (para 12)

(iv) "Section 31(1) Cr.P.C. ***enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other.***" (para 13)

201. The Supreme Court separately noted the working out of the sentences ***if upon conviction for several offences, in a single trial, one of the punishments imposed on the convict is a life sentence***. The discussion, findings and the law laid by the Supreme Court in this regard deserve to be extracted and read thus:

> "13. ... ***Difficulties arise when the Courts impose sentence of imprisonment for life and also sentences of imprisonment for fixed term***. In such cases, if the Court does not direct that the sentences shall run concurrently, ***then the sentences will run consecutively by operation of Section 31(1) Cr.P.C***. There is no question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment for fixed term and any such direction would be unworkable. ***Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment***. In such case, it will be in order if the ***Sessions Judges exercise their discretion*** in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, Court has to direct those sentences to run concurrently.
>
> 14. The opening words "in the case of consecutive sentences" in sub-section (2) of Section 31 Cr.P.C. make it clear that this sub-section refers to a case in which "consecutive sentences" are ordered. The provision says that if an aggregate punishment for several offences is

found to be in excess of punishment which the Court is competent to inflict on a conviction of single offence, it shall not be necessary for the Court to send the offender for trial before a higher court. Proviso (a) is added to sub-section (2) of Section 31 Cr.P.C. to limit the aggregate of sentences - that in no case, the aggregate of consecutive sentences passed against an accused shall exceed fourteen years. "***Fourteen years rule" contained in clause (a) of the proviso to Section 31(2) Cr.P.C. may not be applicable in relation to sentence of imprisonment for life, since imprisonment for life means the convict will remain in jail till the end of his normal life.***

15. In *Ramesh Chilwal* v. *State of Uttarakhand* (2012) 11 SCC 629, the accused was convicted under ***Section 302*** IPC and ***sentenced to undergo imprisonment for life***. Accused was also convicted under Sections 2/3 [3(1)] of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 and sentenced to undergo rigorous imprisonment for ten years and under Section 27 of the Arms Act sentenced to further undergo rigorous imprisonment for seven years. ***Considering the fact that the trial court had awarded life sentence under Section 302 IPC, this Court directed that all sentences imposed under Section 302 IPC***, Sections 2/3 [3(1)] of the Gangsters Act and Section 27 of the Arms Act ***to run concurrently***."

(Emphasis by us)

202. Clause (a) of the proviso to Section 31(2) of the Cr.P.C. stands thus clarified by the Supreme Court in para 14 when it has declared that the restriction therein would not apply to life imprisonment.

203. We find that in para 15 of ***O.M. Cherian@ Thankachan***, it is noted that the court in ***Ramesh Chilwal v. State of Uttarakhand,***

(2012) 11 SCC 629, considered the fact that the trial court had awarded life sentence under Section 302 and as such, the sentences imposed on the convict were directed to run concurrently.

204. In para 16 (of ***O.M. Cherian***), the court noted that in ***V.K. Bansal v. State of Haryana & Anr. (2013) 7 SCC 211***, it was observed thus:

> "… we may say that the legal position favours ***exercise of discretion*** to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor."

205. The judgment in ***V.K. Bansal*** thus offers guidance in cases as cheques bouncing. Where the prosecution is based on a single transaction, it may not matter that different complaints in relation thereto may have been filed. The judgment notes that judicial discretion would be exercised to the benefit of the prisoner in such cases where the prosecution is based on a single transaction. The court also noted that ***Mohd. Akhtar Hussain @ Ibrahim Ahmed Bhatti*** as well as ***(2014) 2 SCC 153, Manoj @ Panu v. State of Haryana*** cases did not arise out of conviction at one trial in two or more offences. It was pointed out that the reference to Section 31 of the Cr.P.C. in those cases was not necessitated.

206. It is important to note that by the judgment in ***O.M. Cherian@ Thankachan***, the Supreme Court has not taken away the judicial discretion in awarding a concurrent or consecutive

sentence in case of conviction for multiple offences. On the contrary, in para 20 of the pronouncement, the Supreme Court has noted the object, spirit and intendment of Section 31 of the Cr.P.C. in the following terms:

> "20. ***Under Section 31 Cr.P.C. it is left to the full discretion of the Court to order the sentences to run concurrently*** in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. ***Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically***.
>
> 21. Accordingly, we answer the Reference by holding that ***Section 31 Cr.P.C. leaves full discretion with the Court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances***. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, ***if the Court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the Court may direct.*** We also do not find any conflict in earlier judgment in *Mohd. Akhtar Hussain* and Section 31 Cr.P.C."
>
> (Emphasis by us)

Paras 20 and 21 of ***O.M. Cherian @ Thankachan*** thus unequivocally declare that it has been left to the full discretion of the court awarding the sentences to direct that they would run concurrently or consecutively.

207. It is also manifest from the above that if by exercise of judicial discretion, a sentence of life imprisonment is imposed upon a convict for commission of one out of several offences, then the court would not direct the multiple sentences to run consecutively as life imprisonment actually means imprisonment for the remainder of a person's life. Inherent therein is the jurisdiction of the court that, if life imprisonment is not for the remainder of the person's life, because of intervention of the event of the exercise of the discretion under Sections 432, 433 and 433A of the Cr.P.C. resulting in remission or the commutation of the life sentence, the sentencing court can anticipate such an eventuality and direct a mandatory minimum sentence of imprisonment before the appellant's case for remission or commutation in exercise of the statutory power, could be considered by the authorities of the State. There is nothing in Section 31 which prohibits the court from doing so.

208. The above conclusion is supported by some important features of Section 31 which have otherwise escaped notice. When examined closely, the drafting and the statutory scheme of Section 31 reveals important aspects of the legislative intent and objective. Let us examine the proviso contained in Section 31. Does the proviso govern both sub-section 1 as well as sub-section 2 or is it

restricted in its application to sub-section 2 thereof? The legislature has affixed punctuations carefully in this enactment. We find that a full stop is affixed at the end of sub-section 1 manifesting the legislative intent that the sub-section was complete by itself. As against this, at the end of sub-section 2, before the incorporation of the proviso, the legislature has used a colon, thereby unequivocally declaring that the sub-section had not concluded but was governed by the proviso which follows. This intent is also manifested from the contents of the proviso as would be evident from the following discussion.

209. Are we placing unnecessary importance on punctuation? On the question of significance of punctuation for statutory interpretation, in the pronouncement of the Supreme Court reported at ***AIR 1952 SC 369, Aswini Kumar Ghose & Anr. v. Arabinda Bose & Anr.,*** the court observed as follows:

> "56. ... Punctuation is after all a minor element in the construction of a statute, and very little attention is paid to it by English courts. Cockburn, C.J. said in *(1861) 1 B & Sp. 101, Stephenson* v. *Taylor.* "On the Parliament Roll there is no punctuation and we therefore are not bound by that in the printed copies." It seems, however, that in the Vellum copies printed since 1850 there are some cases of punctuation, and when they occur they can be looked upon as a sort of *contemporanea exposition.* When a statute is carefully punctuated and there is doubt about its meaning, a weight should undoubtedly be given to the punctuation. I need not deny that punctuation may have its uses in some cases, but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text."
>
> (Underlining by us)

210. In the judgment reported at ***(2005) 2 SCC 591, Jamshed N. Gujdar v. State of Maharashtra & Ors.,*** the court noted the above enunciation of principles in ***Aswini Kumar Ghose & Anr.*** as well as Full Bench judgment of the Punjab and Haryana High Court reported at ***AIR 1972 Calcutta 160, Rajinder Singh v. Kultar Singh.*** In this case, the court was concerned with the use of a 'semicolon' and it was held that the punctuation should not be discarded as being inappropriate and that the punctuation has been put with a definite object of making the topic as distinct and not having relation only to the topic that follows thereafter. The expression "administration of justice" in Entry 3 List II (now Entry 11A of List III) of the Constitution of India. Therefore, the use of the 'full-stop' after sub-section 1 of Section 31 and the 'colon' at the end of sub-section 2 have to be given their correct and complete import.

211. Justice G.P. Singh in the 9th edition of the authoritative text "***Interpretation of Statutes***", has noted at page 158 that "*with respect to modern statutes, that <u>if the statute in question is found to be carefully punctuated, punctuation, though a minor element, may be resorted to for purposes of construction</u>*". This text notes the judgment of the Supreme Court reported at ***AIR 1979 SC 564, Mohd. Shabbir v. State of Maharashtra*** where Section 27 of the Drugs and Cosmetics Act, 1940 came up for construction. By this section whoever 'manufactures for sale, sells, stocks or exhibits for sale or distributes' a drug without a licence, is liable for

punishment. In holding that mere stocking is not an offence within the section, the Supreme Court pointed out the presence of comma after 'manufactures for sale' and 'sells' while there is absence of any comma after 'stocks'. It was, therefore, held that only stocking for sale could amount to offence and not mere stocking.

212. We also find the reference to the pronouncement reported at ***AIR 1988 SC 1841, M.K. Salpekar (Dr.) v. Sunil Kumar Shamsunder Chaudhari*** in this authoritative text. In this case, the court was construing Clause 13(3)(v) of the C.P. and Berar Letting of Houses and Rent Control Order. This provision permits ejectment of a tenant on the ground that "the tenant has secured alternative accommodation, or has left the area for a continuous period of four months and does not reasonably need the house". In holding that the requirement that the tenant '*does not reasonably need the house*' has no application when he '*has secured alternative accommodation*' the court referred and relied upon punctuation, the comma after the words alternative accommodation.

213. It is manifest that while punctuation alone shall not control the construction of legislation, however, assistance can certainly be taken from it in construing the prescription and intent of the legislature. The full stop at the end of sub-section (1) of Section 31 of the Cr.P.C. and the colon at the end of the sub-section (2) thereof therefore, must receive their necessary importance and meaning. Punctuations in Section 31 clearly point out that the

proviso governs only sub-section (2) of Section 31 and not sub-section (1).

214. We now propose to advert to a second imperative aspect of Section 31, which is the jurisdictional limitation on the hierarchy of courts in the criminal justice system, a very important factor which in our view is at the core of the interpretation and working of Section 31 of the Cr.P.C. The power of courts in the criminal justice system is delineated in Chapter 3 of the Code of Criminal Procedure, 1973. Section 26 thereof prescribes that subject to other provisions of the Code, any offence under the IPC may be tried by the High Court or the court of session or any other court by which such offence is shown in the First Schedule to be triable. The legislature has stipulated that the offences specified in the proviso shall be tried as far as practicable by a court presided over by a woman.

215. Under sub-section 1 of Section 28, a High Court may pass any sentence authorized by law. Under sub-section 2, a Sessions Judge or Additional Sessions Judge is also empowered to pass any sentence authorized by law; but any sentence of death passed by such judge shall be subject to confirmation by the High Court. By virtue of sub-section 3, the Additional Sessions Judge is empowered to pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 10 years.

216. So far as magistrates are concerned, the sentences which they are authorized to pass are prescribed in Section 29. Under

sub-section 1 thereof, the Chief Judicial Magistrate is authorized to pass any sentence of imprisonment up to 7 years. The court of magistrate of the first class is empowered by virtue of sub-section 2 to pass a sentence of imprisonment for a term not exceeding 3 years or of fine not exceeding Rs.10,000/- or of both. Under sub-section 3, the court of magistrate of the second class is empowered to pass a sentence of imprisonment for a term not exceeding one year or of fine not exceeding Rs.5,000/- or of both. Section 29(4) also clarifies that the court of Chief Metropolitan Magistrate shall have the same powers as the court of Chief Judicial Magistrate while that of Metropolitan Magistrate shall have those of the court of Magistrate of the first class.

It is evident from the above, that as per the statutory scheme, there is limitation on the power to impose imprisonment on all magistrates.

217. It is significant that Section 31 of the Cr.P.C. is placed in Chapter III which is captioned "*Power of Courts*". Section 31 is placed just after the aforenoticed statutory provisions setting out the limits on sentencing powers of the courts. It is extremely pertinent that sub-section 1 of Section 31 of the Cr.P.C. makes no reference to a maximum sentence which the court in question may award. On the other hand, sub-section 2 makes a clear reference to competency of the court to impose a sentence. It further refers to the aggregate punishment for the several offences being in "*excess of the punishment which the trial court had the competency to*

inflict". Competency has to relate to a limit on the power to impose punishment.

218. The sub-section (2) also refers to "***trial before higher court***". Such limit on competency is obviously relatable only to offences which are punishable with term imprisonments not extending to life as life means the rest of the convicts' life or death penalty. There is therefore, no "limit" on punishment if the court is competent to hand out the life sentence. The concept of "*excess ....of competency...*" would therefore, not apply to trials and convictions for offences punishable with life sentences and consequently to trials by Sessions Courts. For this reason as well, sub-section (2) of Section 31 refers to trials by the Magistrates while sub-section 1 of Section 31 clearly refers to Sessions trials.

219. Even para 27 of ***Duryodhan Rout*** notes that the proviso in Section 31 is relatable to sub-section (2) of Section 31. We find that if the absolute prohibition urged by Mr. Verma was accepted, sub-section (1) of Section 31 would be rendered otiose which cannot be the legislative intent.

220. There is yet another reason for so construing these sub-sections of Section 31. Under the Cr.P.C., trials are conducted either before the Magistrate or the Sessions Judge. Some trials may be placed before the Chief Metropolitan Magistrate. Sub-section 2 refers to a "***trial before a higher court***" (which given the scheme of the Cr.P.C., could be the court of the Chief Metropolitan Magistrate or Sessions court). Sub-section 1 of Section 31 on the other hand makes no such reference to any higher court. In the

hierarchy of courts (below the high court) conducting criminal trials, the Sessions Court stands at the highest. It is therefore, apparent that sub-section (2) of Section 31 is confined in its application to courts other than Sessions courts.

221. We now propose to examine yet another reason to support the view which we have taken. It is settled law that life imprisonment means imprisonment for the remainder of the person's life unless remitted under the Section 433 etc. of the Cr.P.C. Proviso (a) in Section 31 restricts the sentence of imprisonment for a period up to fourteen years. If it were held that proviso (a) applies to cases of life imprisonment it would follow that even for committing multiple offences punishable with death (where life was awarded) or life sentences, the convict could undergo a maximum of 14 years imprisonment only. Any such restriction is contrary to the several provisions of the Indian Penal Code, the Cr.P.C. as well as binding judicial pronouncements which we have noticed above. Therefore, proviso (a) is not concerned with life imprisonments.

222. So far as proviso (b) is concerned, it refers to "*amount of punishment which the court is competent to inflict for a single offence*". The proviso (b) restricts the maximum imprisonment to twice the amount of such punishment. This obviously also does not refer to the life imprisonment which means remainder of the person's life. If life means remainder of the person's life, there can certainly be no "twice" of such life imprisonment.

223. The proposition pressed by Mr. Sumeet Verma results in the completely unacceptable position for one more reason. While trying a single offence attracting the punishment up to 20 years imprisonment, (say the offence under Section 376A of the IPC which prescribe a minimum sentence of 20 years), the Sessions Court would have the power to incarcerate the convict for 20 years imprisonment. However, if the Sessions Court was concerned with the case involving the multiple offences of rape under Section 376 as well as the offence of murder for which life imprisonment was considered appropriate, the Sessions Court would be empowered to impose a maximum sentence of 14 years. This could never have been the legislative intent.

224. The absurd result on accepting the proposition pressed on behalf of the convicts is also illustrated in a case involving a conviction for offence under Section 376 which prescribes a minimum sentence of 10 years which may extend to imprisonment for life meaning imprisonment for the remainder of the person's life and the conviction for the offence under Section 326 of the IPC. To accept the proposition that the proviso under Section 31(2) applies to the sessions trial, the Sessions Court would be empowered to award a maximum of 14 years imprisonment. This is in clear contradiction to the statutory prescription.

For all these reasons as well, the proviso in Section 31 does not govern sub-section 1 of Section 31 whereunder life imprisonment is imposed. The proviso is restricted to sub-section

2 of Section 31 which refers to other imprisonments referable to limits.

225. Mr. Sumeet Verma has placed reliance on Section 427 of the Cr.P.C. which for the sake of convenience also deserves to be extracted and reads as follows:

> "**427. Sentence on offender already sentenced for another offence.**
>
> (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence: Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.
>
> (2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run con-currently with such previous sentence."
>
> (Emphasis supplied)

226. Section 31 of the Cr.P.C. is concerned with multiple offences committed by a person with which he is charged in the same trial. The legislature has anticipated the aspect of recidivism by a convict who commits a second offence while undergoing the

sentence in a prior conviction. Such situation has been considered in Section 427 of the Cr.P.C. In fact, judicial discretion for awarding consecutive sentence for a repeat offender while undergoing a sentence in a prior conviction has been taken away.

227. Sub-section 1 of Section 31 of the Cr.P.C. which stipulates that punishments for imprisonment for the second sentence shall commence at the expiry of the imprisonment under the previous sentence "*unless the court directs that such punishments shall run concurrently*".

228. ***Bachan Singh*** has suggested the option of imposing death punishment as a penalty of last resort when any other alternative punishment would be futile. The options of awarding either fixed term prison sentences or directing that the sentences would run consecutively, in fact, tantamounts to following the dictum in ***Bachan Singh*** opting for the alternative punishment.

229. By virtue of Section 31, the sentences shall run concurrently ***only if the court so directs.*** If not so directed, the sentences would run consecutively.

230. The pronouncements in ***(2006) 12 SCC 37 : 2006 (12) SCALE 381, Chatar Singh v. State of M.P., 2014 SCC OnLine SC 512 : 2014 (8) SCALE 96, Duryodhan Rout v. State of Orissa*** and ***(2014) 2 SCC 153 (D.O.D. 9th December, 2013) Manoj @ Panu v. State of Haryana*** did not consider the various issues and aspects considered by the larger Bench of the Supreme Court in ***O.M. Cherian @ Thankachan v. State of Kerala & Ors.*** The various aspects noted by us above were also not placed before the

courts. It is the larger Bench decision which thus has to guide adjudication in the present case.

231. It is therefore, trite that while awarding a sentence of imprisonment for life, the court can direct a fixed term of imprisonment exceeding 14 or 20 years with or without remissions instead of a death sentence. In a trial where the defendant has been tried for multiple offence, the sentencing court has another option to direct sentences for different offences to run consecutively.

232. The jurisprudence extracted above, most importantly also illustrates that, if a person stands convicted for several offences, each of which is punishable with death or life imprisonment, if the life sentence means the remainder of the convicts' life, two life sentences could also be directed to run concurrently.

233. If the executive is considering remittance of the remainder of a life sentence imposed on a convict at any stage, in order to ensure a minimum imprisonment, the sentencing court is also amply empowered to direct that the punishment for other convictions including two life sentences, shall run consecutively. (**Ref. :** ***(2013) 3 SCC 52*** : ***(2013) 2 SCALE 505, Sanaullah Khan v. State of Bihar*** wherein two life sentences stood imposed.) The court is thereby able to ensure adequacy of the punishment for grievous offences.

234. To conclude, therefore, so far as sentencing for offences punishable with death or life imprisonment is concerned, four options of punishments are recognised: the ***first***, death penalty; the ***second***, life imprisonment subject to Sections 432 to 433A of

Cr.P.C.; the ***third***, life meaning, either the whole of the remainder of life, or, a mandatory fixed term of imprisonment before which an application for remission and a ***fourth***; upon conviction for multiple offences, the sentences awarded shall run consecutively, not concurrently.

VII. Honour killing – whether penalty of only the death sentence

235. We now turn to the submissions premised on the motive for the crime as an indicator for imposition of the death penalty. This time an absolute proposition is urged by Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State and Mr. P.K. Dey, learned counsel appearing for the complainant – Nilam Katara. Their contention is that the murder of Nitish Katara falls in the class of offences categorized as "*honour killing*". Such a killing does not stop at being a criminal offence but is a sufficient evil sans rationale or logic. It is submitted that the killing of Nitish Katara rested in the sense which obtained with the defendants that he had to be killed to save the "honour of their family". Our attention is drawn to paras 2012 to 2026 (pages 1106 to 1116) of our judgment dated 2nd April, 2014 as well as para 32 of the trial court judgment wherein it has been held that Nitish's killing fell in the honour killing category.

236. Mr. Dey would urge that this offence falls in the category of the extreme social evils which include bride burning; dowry death; untouchability; sati; human sacrifices. It epitomises prejudices and social structures which have to be broken. Learned counsel has

reminded us of our finding that the murder of Nitish Katara in fact violated Bharti Yadav's absolute right to choose her life partner, an integral part of her right to life apart from also violating the right to life of the deceased.

237. Mr. Dey urges that the killing for honour in the instant case *ipso facto* thus falls into the category of rarest of rare cases and that the convicts have displayed extreme depravity which is not only extremely revolting for the immediate family but has shocked the collective conscience of the society. Given the caste structure which the convicts were trying to protect, it is urged that their acts in abducting; throttling; brutally murdering Nitish Katara and thereafter burning his dead body beyond identification in the name of honour was a gruesome, merciless and brutal act for which death penalty was inevitable. In support of this submission, learned counsel has placed reliance on the pronouncements reported at ***(2007) 12 SCC 654, Mayakaur Baldevsingh Sardar & Anr. v. State of Maharashtra; (2011) 6 SCC 396, Bhagwan Dass v. State (NCT of Delhi); (2011) 6 SCC 405, Arumugam Servai v. State of Tamil Nadu; (2011) 14 SCC 401, Ajitsingh Harnamsingh Gujral v. State of Maharashtra.***

238. On the other hand, Mr. Sumeet Verma, learned counsel arguing for the defendant– Vikas Yadav has contended that none of these judgments support the submissions propounded by learned counsel for the complainant. It is contended that either the case does not relate to honour killing, or, where the case relates to

honour killing, the court has not awarded or approved of an award of death sentence.

239. We propose to consider these cases in the *seriatum* as submitted by learned counsel before us. In ***(2007) 12 SCC 654, Mayakaur Baldevsingh Sardar & Anr. v. State of Maharashtra***, enraged by the victim girl's secret marriage with a boy belonging to a lower caste despite resistance and threats by her parents, members of her parental family came to her in-laws house in a pre-planned manner where she was living. On 30th May, 1999, after recovering the jewellery which she had taken with her, they made a murderous attack on her and killed other members of the house including her husband. In this attack, Rajvinder Kaur, though grievously hurt but survived in the incident, went crawling to the house of a neighbour, and informed him of the assault on her family on which he called the police. By the judgment dated 21st December, 2001, the Additional Sessions Judge awarded death sentence to four of the accused. The Division Bench of the High Court of Judicature at Bombay gave divergent judgments on 26th February, 2003 when the case was heard for confirmation of the death sentence. The judgment of the third judge was delivered on 25th April, 2003 reaffirming the sentences which directed the convicts to undergo imprisonment for life under Sections 302/34 IPC. In these circumstances, all the convicts who were undergoing life sentences imposed by the High Court, challenged their conviction and sentences. The State also filed an appeal praying for award of death sentence before the Supreme Court. The

observations of the court on the imposition of death penalty, its efficacy especially in the context of the honour killing involved, deserve to be extracted and read as follows :

> "25. We have something to say on this aspect. The efficacy or otherwise of the death penalty is a matter of much debate in legal circles—with two diametrically opposite views on the subject. However, as the Penal Code visualises the imposition of this penalty, the circumstances under which it should be imposed are also a matter of discussion, the broad principle being its award in the rarest of rare cases. Undoubtedly also while categorising a case the facts would predominate but the predilection of a judge, is a human factor (and a factor whose importance cannot be minimised) but as judges applying the law we must also be alive to the needs of society and the damage which can result if a ghastly crime is not dealt with in an effective and proper manner.
>
> 26. We also notice that while judges tend to be extremely harsh in dealing with murders committed on account of religious factors they tend to become more conservative and almost apologetic in the case of murders arising out of caste on the premise (as in this very case) that society should be given time so that the necessary change comes about in the normal course. Has this hands-off approach led to the creation of the casteless utopia or even a perceptible movement in that direction? The answer is an emphatic 'No' as would be clear from mushrooming caste-based organisations controlled and manipulated by self-appointed commissars who have arrogated to themselves the right to be the sole arbiters and defenders of their castes with the licence to kill and maim to enforce their diktats and bring in line those who dare to deviate. Resultantly the idyllic situation that we perceive is as distant as ever. In this background is it appropriate that we throw up our

> hands in despair waiting ad infinitum or optimistically a millennium or two for the day when good sense would prevail by a normal evolutionary process or is it our duty to help out by a push and a prod through the criminal justice system? We feel that there can be only one answer to this question."

240. So far as the nature of the crime was concerned and as to whether it fell under the category of awarding death sentence, in para 30 of the judgment, the court held as follows:

> "30. We are of the opinion that strictly speaking the ***present case would fall within the parameters visualised in Bachan Singh*** [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and ***Machhi Singh*** [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] **cases**. The diabolical nature of the crime and the murder of ***helpless individuals*** *committed with* ***traditional weapons*** *with* ***extreme cruelty*** *and* ***premeditation*** is exacerbated by the fact that Maya Kaur and Nirmal Kaur had come upstairs and recovered the jewellery and clothes from Rajvinder Kaur just before the actual murders."
>
> (Emphasis supplied)

The Supreme Court, therefore, examined beyond the caste basis for the crime and then concluded that the crime fell in the 'rarest of rare' category. The premeditation, the manner in which it was committed, the nature of weapons used, the helpless state of the victims, the extreme cruelty perpetrated were some of the circumstances which persuaded the court to so conclude.

Despite these observations, in para 31, the court noted the time which had gone since the death sentence had been awarded to four of the convicts by the trial court which weighed with it. The

court therefore, held that '*in the peculiar circumstances that we now face*', the Supreme Court was '*not inclined to reverse the life sentences awarded by the High Court and to reimpose the death penalty on the accused*'.

An evaluation of each case thus has to be conducted on the facts and circumstances of each case.

241. On the issue of honour killings in inter-caste marriages, in paras 17 and 18, of ***(2006) 5 SCC 475, Lata Singh v. State of U.P. & Anr.,*** the court had observed as follows:

> "16. Since several such instances are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent in matters of great public concern, such as the present one.
>
> 17. ***The caste system is a curse on the nation and the sooner it is destroyed the better.*** In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, ***inter-caste marriages are in fact in the national interest as they will result in destroying the caste system.*** However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-

caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

18. We sometimes hear of "***honour" killings*** of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but ***barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment***. Only in this way can we stamp out such acts of barbarism."

(Emphasis supplied)

242. We may now examine the pronouncement of the Supreme Court in ***(2011) 6 SCC 405, Arumugam Servai v. State of Tamil Nadu.*** This case arose in the context of an offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In para 12, the following observations were made in this judgment:

> "12. We have in recent years heard of "Khap Panchayats" (known as "Katta Panchayats" in Tamil Nadu) which often decree or encourage ***honour killings*** or other atrocities in an institutionalised way on ***boys and girls of different castes and*** religion, who ***wish to get married or have been married, or interfere with the personal lives of people.*** We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. .."

243. In ***Arumugam Servai***, the Supreme Court reiterated its observations in ***(2006) 5 SCC 475, Lata Singh v. State of U.P. & Anr.*** in the following terms:

> "12. … As already stated in ***Lata Singh case [(2006) 5 SCC 475 : (2006) 2 SCC (Cri) 478]*** , there is nothing honourable in ***honour killing or other atrocities*** and, in fact, it is nothing but ***barbaric and shameful murder***. Other ***atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment.*** Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal."
>
> (Emphasis by us)

244. We now come to the fourth pronouncement relied upon by Mr. P.K. Dey reported at ***(2011) 14 SCC 401, Ajitsingh Harnamsingh Gujral v. State of Maharashtra.*** In this case, the appellant burnt his wife and three grown up children in his flat by splashing petrol on them. A quarrel between the appellant and his wife was heard by some persons sleeping outside prior to the fire in the house between 4:00 A.M. to 4:30 A.M. The appellant and his car were found missing. A plastic can containing the residual petrol was recovered. The appellant was arrested four days after

the incident in another city and a large amount of cash (more than Rs.7,00,000/-) and other belongings were found on him at the time of his arrest. It was these facts which indicated that the appellant had made necessary preparation to flee. The bucket with which petrol was splashed upon the victims was also recovered at appellant's instance and his alibi was found incredible. The court considered the entire jurisprudence on award of death sentences. In para 91, the court observed that "*a person like the appellant who instead of doing his duty of protecting his family kills them in such a cruel and barbaric manner cannot be reformed or rehabilitated. The balance sheet is heavily against him and accordingly we uphold the death sentence awarded to him*".

In para 93, the court reiterated the enunciation of principles in its prior judicial precedent as follows:

> "93. In our opinion a ***distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous***. While life sentence should be given in the former, the latter belongs to the category of the rarest of rare cases, and hence death sentence should be given. This distinction has been clarified by a recent judgment of my learned brother Hon'ble C.K. Prasad, J. in *Mohd. Mannan* v.*State of Bihar* [(2011) 5 SCC 317 : (2011) 2 SCC (Cri) 626] , wherein it has been observed: (SCC pp. 322-23, paras 23-24)
>
> > "*23.* It is trite that death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and-fast rule and parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as the rarest of rare cases

and although certain comprehensive guidelines have been laid to adjudge this issue but no hard-and-fast formula of universal application has been laid down in this regard. ***Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue.*** Nevertheless it is widely accepted that in deciding this question the ***number of persons killed is not decisive***.

24. Further, the ***crime being brutal and heinous itself does not turn the scale towards the death sentence***. When the ***crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence***. But this is not the end. ***If these factors are present the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and a just balance is to be struck***. ***So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty.*** These are the ***broad guidelines*** which this Court had laid down for imposition of the death penalty."

(Emphasis by us)

245. The reiteration of the above as well as the observations of the court on the meaning of 'rarest of rare' cases in paras 94 and 97 of ***Ajitsingh Harnamsingh Gujral*** also deserve to be considered extenso and read thus:

> "94. We ***fully agree with the above view*** as it has clarified the meaning of the expression the "rarest of rare cases". To take a ***hypothetical case***, supposing *A* murders *B* over a land dispute, this may be a case of ordinary murder deserving life sentence. However, if in addition to murdering *B, A* goes to the house of *B* and wipes out his entire family, then this will come in the category of the "rarest of rare cases" deserving death sentence. The expression the "***rarest of rare cases" cannot, of course, be defined with complete exactitude***. However, the ***broad guidelines*** in this connection have been explained by various decisions of this Court. ...
>
> xxx xxx xxx
>
> 97. ***This Court has also held that honour killing vide Bhagwan Dass v. State (NCT of Delhi) [(2011) 6*** SCC 396 : (2011) 2 SCC (Cri) 985 : AIR 2011 SC 1863], fake encounter by the police vide *Prakash Kadam* v. *Ramprasad Vishwanath Gupta*[(2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] and dowry death vide *Satya Narayan Tiwari* v. *State of U.P.* [(2010) 13 SCC 689 : (2011) 2 SCC (Cri) 393] ***comes within the category of the "rarest of rare cases***". Hired killing would also ordinarily come within this category."
>
> (Emphasis supplied)

246. We agree with Mr. Sumeet Verma's submission that ***Ajitsingh Harnamsingh Gujral*** does not relate to honour killing. However, the Supreme Court has pointed out the factors which ought to weigh with the court while awarding a death sentence.

The Supreme Court has reiterated the recommendation in precedents that amongst others, honour killings, where the motive for killing tantamounts to reinforcing caste structures in society, falls in the category of "*rarest of rare cases*" which deserves the ultimate sentence i.e. of death penalty.

247. Mr. Sumeet Verma has vehemently urged that the judgment of the Supreme Court in ***(2011) 6 SCC 396, Bhagwan Dass v. State (NCT of Delhi)*** does not relate to imposition of a death sentence. According to learned counsel, this judgment is *per incuriam* for the reason that it ignores the Constitutional Bench pronouncement in ***Bachan Singh***. Learned counsel would also submit that this pronouncement ought not to be considered by this court for the reason that it is a solitary case which has not been relied upon in any subsequent pronouncements of the Supreme Court except the above reference in ***Ajitsingh Harnamsingh Gujral***.

248. In ***Bhagwan Dass***, the case of the prosecution was that the appellant was very annoyed with his daughter, who had left her husband Raju and was living in an incestuous relationship with her uncle, Sriniwas. This had infuriated the appellant as he believed that his daughter Seema's conduct had dishonoured his family. The appellant therefore, strangulated her with an electric wire. The court reiterated the observations in para 8 of ***Arumugam Servai*** as well as those in para 9 of ***Lata Singh***. We set out hereunder the observations of the court in para 28 of the pronouncement which

we propose to deal with in some detail at a later stage in this pronouncement:

> "28. Before parting with this case we would like to state that "***honour" killings*** have become commonplace in many parts of the country, particularly in Haryana, western Uttar Pradesh and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have ***held in Lata Singh case [(2006) 5 SCC 475*** : (2006) 2 SCC (Cri) 478] that there is nothing "honourable" in "honour" killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal minds. ***In our opinion honour killings, for whatever reason, come within the category of the rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilised behaviour. All persons who are planning to perpetrate "honour" killings should know that the gallows await them***."
>
> (Emphasis supplied)

The Supreme Court thus upheld the conviction of the appellant as well as the death sentence imposed on him**.** We find that the Supreme Court in fact directed that the copy of the judgment be sent to the Registrar General/Registrars of all High Courts for circulation to all judges as well as copies of the same to all Sessions Judges/Additional Sessions Judges in States as well as the Union Territories apart from Chief Secretaries, Home Secretaries and police authorities.

249. Learned counsel for Vikas Yadav has placed reliance on a decision of the Division Bench of this court dated 17th April, 2014 in ***Death Sentence Ref.No.5/2012 State v. Om Prakash & Ors.*** and connected appeals. We find the court considered all relevant factors and did not impose death sentence. In this judgment, the question under consideration was not raised for adjudication.

250. Mr. Sumeet Verma has also placed before us the decision of the Division Bench dated 1st October, 2014 in ***Crl.A.No.1165/2012, Onkar @ Mody v. Govt. of NCT of Delhi***, a case involving a murder of Meenu, daughter of the appellant who was having a love affair with Sandeep, a person who belonged to the same village and same community. This relationship was not approved of by her parents resulting in her murder. The trial court had imposed the sentence for life imprisonment for the offence punishable under Section 302 of the IPC which was upheld by the court. No principle of law is either discussed or laid down in this case.

251. We must also deal with Mr. Sumeet Verma's arguments that in para 52 of ***Sangeet***, the court said that there must be no standardization/categorization of crimes. It is argued that to hold that a death sentence must be imposed in every case involving an honour killing is therefore, impermissible.

252. So far as the murder which is referred to as an honour killing is concerned, it refers to the motive for the offence. The offence emanates from a perverted bias of the offender/convict against persons of a particular caste, community or economic strata

resulting in a heinous crime. The bias obviously is in favour of the particular caste or group to which the convict belongs.

253. We may note that standardization or categorization of crimes for which death sentence must be mandatorily imposed is unconstitutional and legally impermissible for the reason that it absolutely excludes the judicial discretion in sentencing for such crimes. Statutory provisions mandating the death sentence have been struck down as unconstitutional being violative of Articles 14 and 21 of the Constitution by the Constitution Bench pronouncement of the Supreme Court reported at ***(1983) 2 SCC 277, Mithu v. State of Punjab*** and the recent decision reported at ***(2012) 3 SCC 346, State of Punjab v. Dalbir Singh***. There can be no dispute that the proposition that no standardization or categorization of offences inviting death penalty mandatorily is constitutionally permissible.

254. We have noted above that a misplaced sense of 'honour' in a caste structure is the motive in the crime labelled as an 'honour killing'. Therefore, the question which arises is as to what is the relevance of this motive for commission of murder so far as sentencing is concerned?

255. In ***Machhi Singh,*** reprisal was motive for commission of the crime. A feud between two families resulted in murders in which 17 lives (including men, women and children related to one Amar Singh and Piaro Bai) were tragically lost in a course of series of five incidents occurred in quick succession in five different villages in the vicinity of each other, in Punjab, on the night intervening

12th/13th August, 1977. The murderers, Machhi Singh and his eleven companions, close relatives and associates were prosecuted in the imposition of death sentence on Machhi Singh.

256. Amongst the circumstances which so shock the collective conscience of the community that it would expect holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, several circumstances have been enumerated including "*motive for commission of murder*". In para 34 of the judgment, the circumstance that a "*murder is committed for a motive which evince total depravity and meanness*" is noted which is illustrated when the crime is "*a cold-blooded murder*"..... "*with a deliberate design*" ..... in order to "*gain control over 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*".

257. Another circumstance to so shock the collective conscience of the community is the "*anti-social or socially abhorrent nature of the crime*". Under this heading, murders of a scheduled caste or minority community committed in circumstances which arouse social wrath as well as cases of bride burning and what are known as dowry death have been cited. The court has also referred to "*magnitude of crime*" as such a circumstance enumerating multiple murders, say of large number of persons of a particular caste or community. We also find that in ***Machhi Singh,*** reference is made to "*personality of victim of the murde*r" which is illustrated by the

victim of a murder being one who "*has not provided even an excuse, much less a provocation, for the murder*".

258. We have extracted the above opinion of the Supreme Court about the divisive effect of the caste system and that it deserves to be destroyed at the earliest. The Supreme Court has noted that intercaste marriages were in fact in national interest as they would have the effect of removing caste barriers leading to social integration. It is therefore, apparent that honour killings arise out of deep sense of caste affiliations and indubitably reinforce such divisions in social structures. Such crimes not only violate the constitutional mandate but also impinge on Article 21 rights of two individuals to choose their life partners. It is in this background, that the Supreme Court has considered the caste basis of the honour killing as motivating the crime to be an important circumstance for imposing the harsh punishment of death sentence. Such an offence has been labelled as an "*act of barbarism and feudal mentality*".

259. The judicial precedents noted above have considered all relevant factors including the brutality of the crime, etc. including its motive being to prevent intercaste alliance or to stamp out an intercaste relationship before concluding whether the crime fell within the rarest of rare category in terms of the Constitution Bench pronouncements. We therefore, find no illegality in considering a murder motivated by the consideration that murdered person/persons must be eliminated because they belong/(do not belong) to a particular caste is an important circumstance for

ascertaining as to whether the case would fall in the rarest of rare category.

The same is constitutionally and legally permissible and cannot be faulted. The objections on behalf of the defendants are therefore, devoid of any legal merit.

VIII. Contours of the jurisdiction of the High Court to enhance a sentence imposed by the trial court and competency to pass orders under Section 357 of the Cr.P.C. in the appeal by the State or revision by a complainant seeking enhancement of sentence

260. Appellate powers are derived from Section 386 of the Cr.P.C. which is concerned with the jurisdiction of the appellate court. The relevant portion concerned with enhancement of the sentence reads as follows:

> "**386. Power of the Appellate Court -** After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-
>
> (a) xxx xxx xxx
> *(b)in an appeal from a conviction-*
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
> (ii) alter the finding, maintaining the sentence, or
> (iii)with or without altering the finding, *alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;*

(c)*in an appeal for enhancement of sentence-*
(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or
(ii) alter the finding maintaining the sentence, or
(iii) *with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;*
(d) xxx xxx xxx
(e) ***make any amendment or any consequential or incidental order that may be just or proper;***

Provided that the ***sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement*:**

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

(Emphasis by us)

261. So far as the parameters of the powers of the court exercising appellate under Section 386 of the Cr.P.C. and the revisional powers of the High Court for enhancement of sentence are concerned, the same have been clearly delineated in the pronouncement of the Supreme Court reported at ***(1990) 4 SCC 718, Govind Ramji Jadhav v. State of Maharashtra***, the relevant portion of which may usefully be extracted and reads as follows:

"6. *'Let punishment fit the crime'* is one of the main objects of the sentencing policy. *To achieve this object, the Code of Criminal Procedure empowers the High Court to enhance the sentence in appropriate cases where the sentence* awarded by the subordinate

courts is *grossly inadequate or unconscionably lenient or flea-bite or is not commensurate with the gravity of the offence.* ***The High Court enjoys the power of enhancing the sentence either in exercise of its revisional jurisdiction*** under Section 397 read with Section 401 ***or in its appellate jurisdiction under Section 377 read with Section 386(c) of the Criminal Procedure Code*** (hereinafter referred to as the 'Code') ***subject to the provisos (1) and (2) to Section 386 of the Code. It may be stated in this connection that it is permissible for the High Court while exercising its revisional jurisdiction under Section 397 read with Section 401 IPC to exercise the power of a court of appeal under Section 386(c) for enhancement of sentence.***

7. This Court in ***Bachan Singh v. State of Punjab*** [(1979) 4 SCC 754: 1980 SCC (Cri) 174: (1980) 1 SCR 645] while dealing with the revisional powers of the High Court has ruled thus: (SCC pp. 756-57, paras 10 and 11)

"... ***in respect of the petition*** which was filed under Section 401 CrPC for the exercise of the High Court's ***power of revision, it was permissible for it to exercise the power of a court of appeal under Section 386 for enhancement of the sentence...*** The ***High Court's power of revision*** in the case of any proceeding the record of which has been called for by it or which otherwise comes to its knowledge, has been stated in Section 401 CrPC to which reference has been made above. That ***includes the power conferred on a court of appeal under Section 386 to enhance or reduce the sentence.***"

8. Under Section 377(1) of the Code, the State Government in any case of conviction on a trial held by any court other than the High Court is empowered to direct the public prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy. Under sub-section (2) of Section 377, the

Central Government under the circumstances stated therein is empowered to direct the public prosecutor to present an appeal to the High Court for enhancement of sentence. Before the introduction of this Section 377 on the recommendation of the Law Commission in its 41st Report, any error in sentencing could be remedied only by the exercise of the revisional power of the High Court. However, ***the High Court notwithstanding the exercise of its powers under the appellate jurisdiction in an appeal preferred under Section 377 of the Code have powers to act suo motu to enhance the sentence in appropriate cases while exercising its revisional jurisdiction even in the absence of an appeal against the inadequacy of the sentence*** as provided under Section 377.

9. In ***Nadir Khan v. State (Delhi Administration) [(1975) 2 SCC 406: 1975 SCC (Cri) 622]*** wherein a ***question*** was ***raised*** that the High Court, in revision under Section 401 CrPC has ***no jurisdiction or power to enhance the sentence*** in ***the absence of an appeal against the inadequacy of sentence under Section 377***, Goswami J. characterised that question as an unmerited doubt on the ***undoubted jurisdiction of the High Court*** in ***acting suo motu in criminal revision*** in appropriate cases and said "The attempt has to be nipped in the bud." Dealing with that question, he observed as follows: (SCC pp. 407-08, paras 4 and 5)

"It is well known and has been ever recognised that the ***High Court is not required to act in revision merely through a conduit application*** at the instance of an aggrieved party. ***The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law***. The character of the offence and the nature of

disposal of a particular case by the subordinate court prompt remedial action on the part of the High Court for the ultimate social good of the community, even though the State may be slow or silent in preferring an appeal provided for under the new Code. The ***High Court*** in a given ***case of public importance*** e.g. in now too familiar cases of food adulteration, reacts to public concern over the problem and ***may act suo motu on perusal of newspaper reports disclosing imposition of grossly inadequate sentence upon such offenders***. This position was true and extant in the old Code of 1898 and this salutary power has not been denied by Parliament under the new Code by rearrangement of the sections. ***It is true the new Code has expressly given a right to the State under Section 377 CrPC to appeal against inadequacy of sentence which was not there under the old Code. That however does not exclude revisional jurisdiction of the High Court to act suo motu for enhancement of sentence in appropriate cases. What is an appropriate case has to be left to the discretion of the High Court.***...

Section 401 expressly preserves the power of the High Court, by itself, to call for the records without the intervention of another agency and has kept alive the ancient exercise of power when something extraordinary comes to the knowledge of the High Court. ***The provisions under Section 401 read with Section 386(c)(iii) CrPC are clearly supplemental to those under Section 377*** whereby appeals are provided for against inadequacy of sentence at the instance of the State Government or Central Government, as the case may be."

10. See also Lingala Vijay Kumar v. Public Prosecutor [(1978) 4 SCC 196: 1978 SCC (Cri) 579].

11. In ***Surjit Singh v. State of Punjab [1984 Supp SCC***

518 : 1985 SCC (Cri) 90] the facts disclosed that the High Court ***while*** *disposing an appeal* preferred under Section 374 sub-section (2) *enhanced the sentence* by imposing additional sentence of a fine of Rs 5000 with a default clause in addition to the sentence of life imprisonment inflicted by the trial court without issuing show-cause notice and without affording an opportunity to be heard. This Court while allowing the appeal held thus: (SCC p. 519, para 3)

"Rules of natural justice as also the prescribed procedure require that the sentence imposed on the accused cannot be enhanced without giving notice to the appellants and the opportunity to be heard on the proposed action."

12. In a recent judgment in ***Sahab Singh v. State of Haryana [(1990) 2 SCC 385***: 1990 SCC (Cri) 323: JT (1990) 1 SC 303] it has been observed: (SCC p. 388, para 5)

"If the ***High Court was minded to enhance the sentence the proper course was to exercise suo motu powers under Section 397 read with Section 401 of the Code by issuing notice of enhancement and hearing the convicts on the question of inadequacy of sentence. Without following such procedure, it was not open to the High Court in the appeal filed by the convicts to enhance the sentence by enhancing the fine.*** The High Court clearly acted without jurisdiction."

13. Section 386 of the Code deals with the power of the appellate court in disposing of an appeal preferred under Section 374 and also in case of an appeal under Section 377 or Section 378 of the Code.

14. Under clause (b)(iii) of Section 386, the appellate court may in an appeal from a conviction with or without

altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same. ***Under clause (c)(iii) of Section 386, the appellate court may in an appeal for enhancement of sentence with or without altering the finding, alter the nature or the extent or the nature and extent, of the sentence so as to enhance or reduce the same.***

15. From the above discussion, it is clear that the High Court both in exercise of its revisional jurisdiction under Section 397 read with Section 401 CrPC and its appellate jurisdiction under Section 377 read with Section 386(c) of CrPC in matters of enhancement of sentence should give the accused a reasonable opportunity of showing cause against such enhancement as contemplated under the first proviso to Section 386 as well under sub-section (3) of Section 377 of the Code. As pointed out in Surjit Singh case [1984 Supp SCC 518 : 1985 SCC (Cri) 90] , the rules of natural justice as also the prescribed procedure require issuing of notice to the appellant and affording an opportunity to be heard on the proposed action for enhancement of sentence."

(Emphasis supplied)

262. In a recent precedent reported at ***(2012) 1 SCC 10, Prithipal Singh v. State of Punjab,*** the Supreme Court has reiterated the legal position that the High Court is competent to ***suo motu enhance the sentence, albeit only after granting adequate opportunity of hearing to the accused***. The Supreme Court had laid down the applicable law thus:

"**Scope of Section 386(e) CrPC**

35. In *Eknath Shankarrao Mukkawar v. State of Maharashtra [(1977) 3 SCC 25 : 1977 SCC (Cri) 410 : AIR 1977 SC 1177*] this Court held: (SCC p. 28, para 6)

"6. We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, suo motu. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. The High Court's power of enhancement of sentence, in an appropriate case, by exercising suo motu power of revision is still extant under Section 397 read with Section 401, Criminal Procedure Code, 1973, inasmuch as the High Court can 'by itself' call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of Section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. ***Such a legal bar under Section 401(4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which continues as before in the new Code."***

xxx xxx xxx

37. In *Jayaram Vithoba v. State of Bombay [AIR 1956 SC 146 : 1956 Cri LJ 318]* this Court held that the suo motu powers of enhancement under revisional jurisdiction can be exercised only after giving notice/opportunity of hearing to the accused.

38. ***In view of the above, the law can be summarised that the <u>High Court in exercise of its power under Section 386(e) CrPC is competent to enhance the sentence suo motu</u>. However, such a course is permissible only after giving opportunity of hearing to the accused."***

(Emphasis supplied)

263. From a conjoint reading of the applicable statutory provisions with the above judicial pronouncements, there can be no

manner of doubt that if satisfied that the sentence awarded by the trial court is not commensurate with the gravity of the offence, the High Court is empowered to either on an appeal by the State or revision under Section 401 of the Cr.P.C. or to even *suo motu* enhance the sentence of a convict. It needs no elaboration that the High Court can do so only after issuing a specific show cause notice and grant of hearing to the convict. While exercising appellate power under Section 386, the notice would be issued in terms of the proviso to Section 386 of the Cr.P.C., in the event that any enhancement of the sentence was being contemplated. It is also trite that there is no distinction between the appellate power of the High Court and the revisional power of the court to enhance the sentence in a befitting case, in a likewise manner.

264. In the present cases, thus so far as the State appeals on the one hand and the revision by the complainant seeking enhancement of the sentence on two of the defendants are concerned, this court is competent to enhance the sentences on them, after giving opportunity to show cause against enhancement of punishment.

(IX) Sentencing procedure and pre-sentencing hearing-nature of

265. What is the procedure to be followed by a judge post returning a finding of guilt? By the Amendment Act 26 of 1955, a significant statutory change effected was the introduction of Section 235(2) which provided that if the accused is convicted and the judge did not propose to release the convict on probation of

good conduct or after admonition, it was mandatory upon the trial judge to hear the accused on the question of sentence and then pass a sentence on him according to law.

266. This very question was posed by the Supreme court in para 10 of the pronouncement reported at ***(1989) 3 SCC 5 Allauddin Mian and Ors. v. State of Bihar***. Making a reference to the requirements of Section 235(3), in para 10 of the judgment the court held as follows:

> "10. ...The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime?
>
> ... The requirement of hearing the accused is intended to satisfy the rule of natural justice. ...To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by ***according to the accused an opportunity of being heard*** on the question of sentence and at the same time ***helps the court to choose the sentence to be awarded.*** Since the provision is intended to ***give the accused an opportunity to place before the court all the relevant material*** having a bearing on the question of sentence there can be no doubt that the **provision is** salutary and must be strictly followed. It is clearly **mandatory** and should ***not be treated as a mere formality***. ....We think as a ***general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence*** to be imposed on the offender. xxx"

(Emphasis by us)

267. In ***(1991) 3 SCC 471 Sevaka Perumal, etc. v. State of Tamil Nadu,*** the court further elaborated on the scope of the opportunity under Section 235(2) of the Code of Criminal Procedure holding thus:

> "12. Undoubtedly under Section 235(2) of Cr.P.C., the ***accused is entitled to an opportunity to adduce evidence and if need be the case is to be adjourned to another date. It is illegal to convict, an accused and to impose sentence on the same day***. It is true as contended for the State that under Section 309, third proviso brought by Amendment Act, 1978 that no adjournment should be granted for the purpose only of enabling the accused person to show cause against sentence to be imposed upon him. Under ***Section 235(2)*** when the accused has been given right to be heard on the question of sentence it is a ***valuable right***. To make that right meaningful the procedure adopted should be suitably moulded and the ***accused given an opportunity to adduce evidence*** on the nature of the sentence. ***The hearing may be on the same day if the parties are ready or be adjourned to a next date but once the court after giving opportunity propose to impose appropriate sentence again there is no need to adjourn the case any further thereon.*** No doubt the Sessions Judge needed to adjourn the case under Section 235(2) to next date but ***in the High Court the counsel was directed to show any additional grounds on the question of sentence***. The High Court observed that the counsel was unable to give any additional ground. xxx xxx xxx"
>
> (Emphasis by us)

268. In ***(1976) 4 SCC 190, Santa Singh v. The State of Punjab*** the appeal was limited to the question of sentence and the principal argument advanced on behalf of the appellant was that in not giving an opportunity to the appellant to be heard in regard to the sentence to be imposed upon him upon conviction, the learned Session Judge committed a breach of Section 235(2) of the Cr.PC. After examining in para 2 the nature of the hearing on sentence under Section 235(2), the following observations of Bhagwati, J in para 3 of this pronouncement are illuminating:

> "3. xxx The reason is that a proper sentence is the ***amalgam of many factors such as the nature of the offence, the circumstances--extenuating or aggravating--of the offence, the prior criminal record', if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender***, the prospects for the rehabilitation of the offender, the ***possibility of return of the offender to a normal life*** in the community, the ***possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court*** in deciding upon the appropriate sentence, and there- fore, the legislature felt that, for this purpose, ***a separate stage should be provided after conviction when the court can bear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused.*** Hence the new provision in section 235(2)."
>
> (Emphasis by us)

269. The court in ***Santa Singh*** further discussed the question as to what would constitute full and adequate material as well as the meaning of the expression "*hearing the accused*" in Section 235 in the following terms:

> "4. ...We have set out a large number of factors which go into the alchemy which ultimately produces an appropriate sentence and full and adequate material relating to these factors would have to be brought before the court in order to enable the court to pass an appropriate sentence. This ***material may be placed before the court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, an opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing such material on record. The hearing on the question of sentence***, would be rendered devoid of all meaning and content and it would become ***an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors*** bearing on the question of sentence, and if necessary, ***to lead evidence*** for the purpose of placing such material before the court. This was also the opinion expressed by the Law Commission in its Forty Eighth Report where it was stated that "the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process." The Law Commission strongly recommended that if a request is made in that behalf by either the prosecution or the accused, an opportunity for leading "evidence on the question" of sentence "should be given". ***We are, therefore, of the***

> ***view that the hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same.*** Of course, care would have to be taken by the court to see that this hearing on the question of sentence is ***not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings."***
>
> (Emphasis supplied)

270. Exercise of judicial discretion for examining a just punishment cannot be unguided. The question as to what material should be examined by the Judge while exercising such discretion has come up for consideration in the judicial pronouncement reported at ***(2013) 7 SCC 545 Gopal Singh vs. State of Uttarakhand*** which has been placed by Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State. In para 18, the court set out the issues which must be examined while the duty of the court was spelt out in para 19 in the following terms:

> "18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of

proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. ***In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal*** *in future,* ***capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect-propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crim****e* and ***his conduct in the interregnum*** bearing in mind the nature of the offence, the ***relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors***. Needless to emphasize, these are certain ***illustrative aspects*** put forth in a condensed manner. We may hasten to add that there ***can neither be a strait-jacket formula nor a solvable theory in mathematical exactitude***. It would be dependant on the ***facts of the case and rationalized judicial discretion***. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to ***weigh the circumstances in which the crime has been committed and other concomitant factors*** which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A Court, ***while imposing sentence, has to keep*** in view the ***various complex matters in mind. To structure a methodology relating to sentencing is***

> ***difficult to conceive of***. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. ***In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstance****s*. Hence, ***the duty of Court*** in such situations becomes a complex one. The same has to be performed with due reverence for Rule of Law and the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion."
>
> (Emphasis supplied)

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

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

272. It is necessary to note the importance of the pre-sentence hearing; recording of special reasons and the role of the courts in awarding the death sentence, as stands emphasized by the Supreme

Court in ***(2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra.*** We may usefully borrow the words of the Supreme Court in paras 55 and 56 of this pronouncement which read as follows:

> ***"Pre-sentence hearing and "special reasons"***
> 55. Under **Sections 235(2) and 354(3)** of the Criminal Procedure Code, there is a mandate as to a ***full-fledged bifurcated hearing and recording of "special reasons"*** if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, ***it is incumbent on the sentencing court to oversee comprehensive compliance with both the provisions. A scrupulous compliance with both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage***. Please see *Santa Singh* v. *State of Punjab* [AIR 1956 SC 256] , *Malkiat Singh* v. *State of Punjab* [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] , *Allauddin Mian* v. *State of Bihar* [(1989) 3 SCC 5 : 1989 SCC (Cri) 490 : AIR 1989 SC 1456], *Muniappan* v. *State of T.N.* [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , *Jumman Khan* v. *State of U.P.* [(1991) 1 SCC 752 : 1991 SCC (Cri) 283] and *Anshad* v. *State of Karnataka* [(1994) 4 SCC 381 : 1994 SCC (Cri) 1204] on this.
>
> ***Nature of information to be collated at pre-sentence hearing***
> 56. At this stage, *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] informs the content of the sentencing hearing. The court ***must play a proactive role to record all relevant information at*** this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This

information would include aspects relating to the ***nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor.*** For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission.

57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this context, Guideline 4 in the list of mitigating circumstances as borne out by *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] is relevant. The Court held: (SCC p. 750, para 206)

> "*206*. (*4*) The probability that the accused can be reformed and rehabilitated.
>
> The State shall by evidence prove that the accused does not satisfy Conditions (*3*) and (*4*) above."

In fine, *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing."

(Emphasis by us)

273. In ***(2013) 10 SCC 421, Deepak Rai v. State of Bihar,*** the Supreme Court has held "*that it cannot be accepted that the failure on the part of the court which has convicted the accused and heard him on the question of sentence but failed to express the "special reasons", in so many words must necessarily entail a remand to that court for elaboration upon its conclusion in awarding the*

death sentence for the reason that while exercising appellate jurisdiction the Supreme Court cannot delve into such reasons".

274. Mr. Rajesh Mahajan, learned Additional Standing Counsel has placed reliance on the recent pronouncement of the Supreme Court reported at ***(2014) 3 SCC 421 : 2014 (2) SCALE 293, Birju v. State of M.P.*** wherein the court has considered the impact of previous criminal record of the accused on sentencing. In this case, Birju was involved in 24 criminal cases of which three were filed for the offence of murder. The court awarded sentence of 20 years rigorous imprisonment without remission over the period he had already undergone. It was observed that the motive for committing the murder in the case was for getting money to consume liquor for which a child of one year became casualty. The trial court had imposed death sentence upon the appellant which was confirmed by the High Court holding that there was no probability that the accused would not commit the act of violence in future and his presence would be a continuing threat to the society. The High Court had also taken a view that there was no possibility of reformation or rehabilitation of the accused (**para 4**). So far as prior record of implication in criminal cases is concerned, in para 15, the court observed as follows:

> "15. ...May be, in a given case, the ***pendency of large number of criminal cases*** against the accused person might be a ***factor which could be taken note of in awarding a sentence*** but, in any case, ***not a relevant factor for awarding capital punishment.*** True, when there are more than two dozen cases, of which three

relate to the offence of murder, the usual plea of false implication by the defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused could be a continuing threat to the society and hence calls for longer period of incarceration."

(Emphasis supplied)

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

> **"17.** We have in *Shankar Kisanrao Khade case* [*Shankar Kisanrao Khade* v.*State of Maharashtra*, (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402] dealt with the question as to whether the ***previous criminal record*** of the accused would be an ***aggravating circumstance*** to be taken note of while awarding death sentence and held that the ***mere pendency of few criminal cases, as such, is not an aggravating circumstance*** to be taken note of while awarding death sentence, since the accused is not found guilty and convicted in those cases. In the instant case, it was stated, that the accused was involved in 24 criminal cases, out of which three were registered against the accused for murder and two cases of attempting to commit murder and, in all those cases, the accused was charge-sheeted for trial before the court of law. No materials have been produced before us to show that the accused stood convicted in any of those cases. The ***accused has only been charge-sheeted and not convicted***, hence, that factor ***is not a relevant factor*** to be taken note of while applying the R-R test so as to award capital punishment. ***Maybe, in a given case, the***

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

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

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

offence was committed, while the offender was engaged in the commission of another serious offence. This is a situation where the accused is engaged in the commission of another serious offence which has not ended in conviction and attained finality."

(Emphasis by us)

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

276. So far as the role and responsibility of the courts i.e. the trial court or the High Court are concerned, the following enunciation in para 69 of the pronouncement in ***(2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra*** by the Supreme Court sheds valuable light and reads thus:-

"2(D) Role and responsibility of courts

69. *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] ***while enunciating*** *the rarest of rare doctrine,* ***did not deal with the role and responsibility of sentencing court and the appellate court separately.*** For that matter, this Court did not specify any review standards for the High Court and the Supreme Court. In that event, ***all courts, be it the trial court, the High Court or this Court, are duty-bound to ensure that the ratio laid down therein is scrupulously followed. Same standard of rigour and fairness are to be followed by the courts.*** If anything, inverse pyramid of responsibility is applicable in death penalty cases.

70. In *State of Maharashtra* v. *Sindhi* [(1975) 1 SCC 647 : 1975 SCC (Cri) 283] this Court reiterated, with emphasis, that ***while dealing with a reference for***

confirmation of a sentence of death, the ***High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge."***

(Emphasis supplied)

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

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

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

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

(iv) The court further held that the weight that the sentencing court gives to each individual aggravating or mitigating factor might vary from case to case. However, it is imperative that the sentencing court provide legal reasons for

the weight that it has accorded to each such aggravating or mitigating factor. The court opined that this exercise may point out excessiveness, and at the same time reduce arbitrariness in sentencing. The court further noted that this exercise should definitely be undertaken in cases where the sentencing court opts to impose the death sentence on the convicted person.

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

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

given a finding as to a possible rehabilitation of the accused and the probability that the accused can become a useful member of the society in case the accused is given a chance to do so. The relevant portion of the judgment is as follows:

> **"9.** Both the Hon'ble Judges have relied extensively on *Dhananjoy Chatterjee case* [(1994) 2 SCC 220 : 1994 SCC (Cri) 358]. In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so."
>
> (Underlining by us)

279. The above issue has been deliberated at length by the Division Bench of this court in the decision dated 17th April, 2014 in ***Death Sentence Ref.No.1/2013, State v. Bharat Singh*** and the connected appeals filed by Bharat Singh. The court had upheld the conviction and after a detailed consideration of the aforenoticed pronouncements found that no material had been placed by the State before the court with regard to probability as to whether the convict would be likely to indulge in criminal activity or whether there is any possibility of his being reformed or rehabilitated. The court had accordingly directed the Secretary, Home Department of the Government of NCT of Delhi to assign one Probationary

Officer to submit a report on these aspects specifically to the court. In para 69, the court had noted certain points for guidance of the probation officer about the manner in which he should go for his task of preparing and presenting his report and in para 70 had pointed out the handbook on the "*Prevention of Recidivism and Social Integration of Offenders*" brought out by United Nations Office on Drugs and Crimes in December, 2012 as well as other documents which would be useful in ascertaining the recent trend in assessment of an offender's risk of re-offending and the "*risk-needs-responsivity framework*" which helps such evaluation.

280. It is therefore, an important part of the sentencing function of the State in the trial as well as the court to ensure that the State places materials before the trial court regarding the probability that the convict could be reformed and rehabilitated and that he would not commit criminal acts. However, the State may, as in most cases, fail to do so. What is the court required to do? This issue has been deliberated upon by the Supreme Court in ***Birju*** wherein guidance on the manner in which the court may obtain additional material relevant for sentencing is given. In this case, the Supreme Court has made it mandatory for the courts to call for a report from the probationary officer in the following terms wherein the court observed as follows:

> **"20.** In the instant case, the High Court took the view that there was no probability that the accused would not commit criminal acts of violence and would constitute a continuing threat to the society and there would be no probability that the accused could be reformed or

rehabilitated. xxx xxx xxx We find, in several cases, the trial court while applying the Criminal Test, without any material on hand, either will hold that there would be no possibility of the accused indulging in commission of crime or that he would indulge in such offences in future and, therefore, it would not be possible to reform or rehabilitate him. Courts used to apply reformative theory in certain minor offences and while convicting persons, the courts sometimes release the accused on probation in terms of Section 360 CrPC and Sections 3 and 4 of the Probation of Offenders Act, 1958. Sections 13 and 14 of the Act provide for appointment of Probation Officers and the nature of duties to be performed. Courts also, while exercising power under Section 4, call for a report from the Probation Officer. In our view, ***while awarding sentence, in appropriate cases, while hearing the accused under Section 235(2) CrPC, courts can also call for a report from the Probation Officer,*** while applying the Criminal Test Guideline 3 [**Ed.**: *See* para 49 of *Shankar Kisanrao Khade* v. *State of Maharashtra*, (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402 under heading "Mitigating circumstances — (Criminal test)(*1*)-(*2*)***(*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."] , as laid down in *Shankar Kisanrao Khade case* [*Shankar Kisanrao Khade* v. *State of Maharashtra*, (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402] . Courts can ***then examine whether the accused is likely to indulge in commission of any crime*** or there is any probability of the accused being reformed and rehabilitated."

(Emphasis by us)

281. On the aspect of failure by the State instrumentalities to place materials regarding the possibility of reformation, the court

unequivocally declared the manner in which criminal courts must proceed in the judgment of the Supreme Court reported at ***(2014) 4 SCC 69, Anil @ Anthony Arikswamy Joseph v. State of Maharashtra***. It was held as under:

> **"33.** In *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] this Court has categorically stated, "the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society", is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in *Santosh Kumar Satishbhushan Bariyar* [*Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150]. Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. ***The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials.*** We, therefore, ***direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.*** *"*
>
> (Emphasis supplied)

282. In para 53 of ***Bariyar***, the Supreme Court observed that the sentencing procedure deserves an "*articulate and judicial*

administration". It was further observed that "all courts are equally responsible". The consideration by the Supreme Court in para 53, 55, 56 and 57 of the report shed valuable light on the concerns arising and the principles which must be followed by the sentencing courts which read as under:-

> "53. The analytical tangle relating to sentencing procedure deserves some attention here. ***Sentencing procedure deserves an articulate and judicial administration. In this regard, all courts are equally responsible. Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty***. The selection of penalty must not require a judge to reflect on his/her personal perception of crime.
>
> 54. In *Swamy Shraddananda (2)* v. *State of Karnataka* [(2008) 13 SCC 767 : (2008) 10 Scale 669] (SCC p. 790, para 51), the Court notes that the awarding of sentence of death "depends a good deal on the personal predilection of the Judges constituting the Bench". This is a serious admission on the part of this Court. Insofar as this aspect is considered, there is inconsistency in how *Bachan Singh*[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] has been implemented, as ***Bachan Singh***[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] ***mandated principled sentencing and not judge-centric sentencing***. There are two sides of the debate. It is accepted that the *rarest of the rare* case is to be determined in the facts and circumstance of a given case and there is no hard-and-fast rule for that purpose. There are ***no strict guidelines***. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of the *rarest of rare* dictum. ***Therefore, it is to be read with Articles 21 and 14****."*
>
> (Emphasis supplied)

283. The pronouncements in ***Santosh Kumar Satish Bhushan Bariyar, Shankar Kisanrao Khade, Birju & Anr.*** and ***Anil @ Anthony Arikswamy Joseph Anthony*** state the manner in which the criminal court must proceed.

284. In ***Death Sentence Ref.5/2012, State v. Om Prakash***, decided on 17th April, 2014, the Division Bench of this court has observed that though there were aggravating circumstances in terms of the Supreme Court pronouncements, no material had been placed on record by the State to show that the convicts were persons who cannot be reformed or are a menace to the society. In para 56, the Division Bench of this court has observed that indubitably even if no such material had been placed during the trial the same could have been placed in the present proceedings (the death reference as well as the appeals against the conviction and sentence by the convicts). The Division Bench has observed as follows:

> "56. Indubitably, even ***if no such material had been placed during the trial the same could have been placed in the present proceedings***. In ***Deepak Rai v. State of Bihar*** the Supreme Court expressly held that it cannot be accepted that the failure on the part of the Court which has convicted an accused and heard on the question of sentence but failed to express the "special reasons" in so many words must necessarily entail remand to that Court for elaboration upon its conclusion in awarding the death sentence for the reason that while exercising appellate jurisdiction, the superior Court could have dealt into such reasons. ***Further the proceedings before this Court are a continuation of the***

trial as the death sentence can be awarded only if this Court answers the reference positively and confirms the death sentence. Thus, even at this stage, the State or the accused is at liberty to place on record material to show if any of the aggravating or mitigating factor has been ignored. However, we find that there is no additional material on record placed by the State in the present proceedings. ***In case the State fails to produce any material, the Court could ascertain from the material on record if there are any mitigating factors favouring the accused***. xxx xxx xxx"

(Emphasis supplied)

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

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

286. Therefore, Section 235(2) confers a valuable right on the convict upon conviction, of a meaningful hearing and grant of an opportunity to place necessary material even by leading evidence to enable the sentencing court to impose an appropriate sentence on him, keeping not only the nature of offence but all relevant circumstances in mind. Upon pronouncing the judgment of

conviction, the sentencing court is required to adjourn the matter for this purpose. Care is required to be taken to ensure that the opportunity of hearing Section 235(2) is not abused by the convict and the hearing is not unduly protracted.

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

287. A deep analysis of the judicial pronouncements has been effected by a coordinate Bench in the decision dated 17th April, 2014 in ***Death Sentence Ref.No.1/2013, State v. Bharat Singh*** and the connected appeals filed by Bharat Singh and others.

288. Sentencing procedure for which all courts are equally responsible deserves an articulate and judicial administration. Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty. ***[Ref.: (2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra (para 53)]***

289. The procedure must be non-arbitrary and should conform to the requirements of Articles 14 and 21 of the Constitution of India

ensuring the rights of the convict under Article 21 of the Constitution of India.

290. We may note that no methodology is provided by the statute with regard to the manner in which the court is to proceed at the stage of sentencing. Learned counsels appearing in the case have incisively taken us through the judicial precedents on the above subject. We feel it our duty to cull out the principles laid down therein which would guide courts at the stage of conducting the sentencing hearing to comply with the requirement of Section 235(2) of the Cr.P.C. We set down hereafter the methodology from the judicial pronouncements noted by us above:

> (i) After returning a finding of guilt for the commission of offences with which person is charged, the trial court is required to give an opportunity to the convict under Section 235(2) Cr.P.C. to make submissions, which is a valuable right, on the question of a sentence.
>
> (ii) The hearing may be on the same day if the parties are ready or the case be adjourned to a next date. **[Ref.** ***(1991) 3 SCC 471 Sevaka Perumal, etc. v. State of Tamil Nadu)]***
>
> (iii) The opportunity under Section 235(2) is not confined merely to hearing oral submissions. It is also intended to give an opportunity to the prosecution as well as the convict to bring facts and material relating to his circumstances as well as various factors bearing on the question of sentence on record. If such material and factors are contested by either side, then they are entitled to produce evidence for the purposes of establishing the same. (**Ref. :** ***(1976) 4 SCC 190, Santa Singh v. State of Punjab)***
>
> (iv) The relevant material may be placed before the court by means of affidavits. If either party disputes the correctness or veracity of the material sought to be produced by the either side, an opportunity would have to be given to

the party concerned to lead evidence for the purposes of bringing such material on record.

(v) It is for the court to ensure that the hearing on the sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of the proceedings.

(vi) Once the court after giving opportunity, proposes to impose an appropriate sentence, there is no need to adjourn the case any further.

(ix) Some illustrative aspects of what could be guiding factors for sentencing purposes, include nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, possibility of his reformation and to lead an acceptable life in the prevalent milieu, the propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream. **[Ref. :** ***(2013) 7 SCC 545 Gopal Singh vs. State of Uttarakhand (para 18)].***

(x) Certain additional factors which have to be taken into account include the nature of the offence, the circumstances--extenuating or aggravating-of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. **[Ref.:** ***(1976) 4 SCC 190, Santa Singh v. The State of Punjab (para 3)]***

(xi) The relevant information for sentencing hearing would include the aspects relating to nature, motive and impact of crime, culpability of convict, etc. The quality of evidence adduced is also relevant. ***[Ref.: (2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra]***

(xii) In case the trial court has failed to adjourn the case to comport to the requirements of Section 235(2), the appellate court may grant such opportunity.

(xiii) If imposing the death penalty, the court must return a finding that the convict is incapable of reformation and rehabilitation and record 'special reasons' for imposing the extreme penalty.

(xiv) The failure of the trial court to record 'special reasons' in terms of Section 354(3) of the Cr.P.C. must not necessarily entail remand to that court for elaboration upon its conclusions in awarding the death sentence. If no such material had been placed during the trial, the same can be placed in the reference proceedings before the High Court. In case, the State fails to produce any material, the court could ascertain from the material on record, if there are any mitigating factors favouring the accused, for instance, the nominal roll with regard to overall conduct in jail. ***[Ref.: Death Sentence Ref.5/2012, State v. Om Prakash,*** **decided on *17th April, 2014*** **by the Division Bench of this court]**

(xv) While weighing circumstances for imposing an adequate sentence, the court has to perform this duty with *"due reverence for Rule of Law*; *the collective conscience on the one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion.*" ***[Ref. : (2013) 7 SCC 545 Gopal Singh vs. State of Uttarakhand (para 19)]***

291. In addition to the above, we would like to reiterate the points emphasised by the Division Bench of this court in the decision

dated 17th April, 2014 in ***Death Ref.No.1/2013, State v. Bharat Singh*** in the decision authored by our learned brother, Dr. S. Muralidhar, J. Adding our suggestions to these points, it is directed that the trial courts deliberating on the question of sentence to be awarded to a convict for commission of an offence which is punishable with the death penalty, after pronouncing the judgment of conviction, before the sentencing hearing, shall undertake the following :

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

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

(ii) To inter alia make the following enquiries in his proceedings:

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

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

(c) The PO shall consult and seek specific inputs from two professionals with not less than ten years'

experience from the fields of Clinical Psychology and Sociology.

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

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

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

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

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

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

It is after complying with the above, that the trial court should proceed with pronouncing the order on the sentence.

X. ***Concerns for the victims - award of compensation to heal and as a method of reconciling victim to the offender***

The discussion on this subject is being considered under the following sub-headings:

(i) Compensation is in addition to the sentence imposed upon the convict, not ancillary to it.

(ii) Powers of the appellate court to pass compensation orders.

(iii) Persons entitled to compensation.

(iv) 'Fine' and 'compensation' – distinction, if any.

(v) Procedure to be followed and principles for fixation of fine and compensation.

(vi) Can a compensation order impact the severity of the sentence imposed?

(vii) Quantification of compensation.

(viii) Public law remedies for established violations of constitutional rights and principles for determining compensation.

292. In ***(1981) 1 SCC 107***, ***Maru Ram v. Union of India,*** Krishna Iyer, J. declared that while "*social responsibility of the criminal to restore the loss or heal the injury is part of the punitive exercise but the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty. Victimology... must find fulfilment, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender, but by lessening the loss of the forlorn*".

293. It is necessary to understand the spirit, object and intendment of the award of compensation under the Cr.P.C. Section 545 of the Cr.P.C. (Act 5 of 1858) corresponds to the current Section 357 of the Cr.P.C. Section 545 was amended by Act 18 of 1923 and Act 26 of 1955. The legislative intent was noted by the Supreme Court in its judgment reported at ***(1978) 4 SCC 111, Sarwan Singh & Ors. v. State of Punjab*** when it extracted the following statement of the Joint Select Committee:

> "10. The law which enables the Court to direct compensation to be paid to the dependants is found in Section 357 of the Code of Criminal Procedure, 1973 (Act 2 of 1974). The corresponding provision in the 1898 Code was Section 545. Section 545 of Code of Criminal Procedure, 1898 (Act 5 of 1898) was amended by Act 18 of 1923 and by Act 26 of 1955. The amendment which is relevant for the purpose of our discussion is 545(1)(*bb*) which, for the first time inserted by Act 26 of 1955. By this amendment the court is enabled to direct the accused, who caused the death of another person, to pay compensation to the persons who are, under the Fatal Accidents Act, entitled to recover damages from the persons sentenced, for the loss resulting to them from such death. In introducing the amendment, the Joint Select Committee stated "***when death has been caused to a person, it is but proper that his heirs and dependants should be compensated, in suitable cases, for the loss resulting to them from such death, by the person who was responsible for it.*** The Committee proceeded to state that though Section 545 of the Code as amended in 1923 was intended to cover such cases, the intention was not however very clearly brought out and therefore in order to focus the attention of the courts on this aspect of the question, the Committee have amended Section 545 and ***it has been made clear that a fine may***

form a part of any sentence including a sentence of death and it has also been provided that the persons who are entitled under the Fatal Accidents Act, 1855, to recover damages from the person sentenced may be compensated out of the fine imposed. It also expressed its full agreement with the suggestion that at the time of awarding judgment in a case where death has resulted from homicide, the court should award compensation to the heirs of the deceased. The Committee felt that this will result in settling the claim once for all by doing away with the need for a further claim in a civil court, and avoid needless worry and expense to both sides. The Committee further agreed that in cases where the death is the result of negligence of the offender, appropriate compensation should be awarded to the heirs. By the introduction of clause (*bb*) to Section 545(1), ***the intention of the legislature*** was made clear that, in suitable cases, ***the heirs and dependants should be compensated for the loss that resulted to them from the death, from a person who was responsible for it***. The view was also expressed that the court should award compensation to the heir of the deceased so that their claims would be settled finally. This object is sought to be given effect to by Section 357 of the new Code (Act 2 of 1974). xxx xxx xxx"

(Emphasis by us)

294. Section 357 of the Code of Criminal Procedure is therefore, concerned with the powers of the trial court as well as the appellate court to order payment of compensation to victims as well as persons who suffered because of the crime. Before proceeding any further, we may firstly set out the provisions of Section 357 of the Cr.P.C. which read thus:

"**357. Order to pay compensation.** - (1) When a *Court* imposes *a sentence of fine* or a sentence (including a

sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied -

(a) in *defraying the expenses properly incurred in the prosecution*;

(b) in the *payment to any person of compensation* for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a *Court imposes a sentence*, of which *fin**e** does not form a part, the Court* ***may***, when passing judgment, order the *accused person to* ***pay***, by way of

compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An *order* under this section *may also be made* by an *Appellate Court* or by the *High Court* or *Court of Session* when exercising its powers of *revision*.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

(Underlining by us)

295. Apart from Section 357 of the Cr.P.C., the power to grant compensation is specifically conferred in inter alia the following statutory provisions:

(i) Under Section 5 of the *Probation of Offenders Act*, the court is empowered to require a release of offender to pay compensation and cost.

(ii) Section 22 of the *Protection of Women from Domestic Violence Act, 2005* enables the Magistrate, in addition to other reliefs that may be granted under this Act, on an application by the aggrieved person, to pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence.

(iii) In the *Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989*, a scale is given in the schedule annexed as Annexure '1' to Rule 12 for providing minimum relief in cash or

kind or both to victims of atrocities, their families or dependants. In case of murder or death of a non-earning member of the family, a minimum amount of relief is specified at Rs.2,50,000/- while in the case of an earning member of the family, the minimum amount is stated at Rs.5,00,000/-.

296. It is apparent from the above that Section 357 of the Cr.P.C. envisages two contingencies, the first being when the court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part. In such eventuality, under Sub-Section (1), the court stands empowered to, when passing judgment, order that the whole or any part of the recovered fine to be utilized in the manner set down in Sub- Section (1). The legislation contemplates a second contingency, that is, when a sentence is imposed on the person of which fine does not form a part. This is provided for under Sub-Section (3) of Section 357 of the Cr.P.C. Sub-Section (3) of Section 357 empowers the court when passing the judgment to order the accused person to pay a specific amount by way of compensation to the person who has suffered any loss by reason of the act for which the accused person has been so sentenced.

297. The statutory intent is obviously to compel the convict to compensate the victim for the consequences resulting from such offence which, could be of tremendous deprivation especially in a case where either life is lost or impaired or where a person has been disabled subjected to or violence.

298. The following inherent limitations in Section 357 have been noted by the Supreme Court in para 21 of ***(2014) SCC Online SC 952, Suresh & Anr. v. State of Haryana:***

> "(i) Section 357 can be invoked only upon conviction, that too at the discretion of the judge and subject to financial capacity to pay by the accused.
>
> (ii) The long time taken in disposal of the criminal case whereas victims need immediate relief and cannot wait for conviction which could be time consuming.
>
> (iii) Compensation depends upon financial capacity of the accused to compensate for which evidence is rarely collected.
>
> (iv) Victims are unable to make a representation for compensation for want of legal aid or otherwise.
>
> (v) Conviction rates being low, Section 357 is hardly adequate to address the needs of the victims."

299. Expressing concerns for the victims of crime, in the judgment reported at ***(1998) 7 SCC 392, State of Gujarat v. Hon'ble High Court of Gujarat,*** the Supreme Court suggested that the State should make a law for setting apart a portion of wages earned by prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed a sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in another feasible mode. The entitlement of reparation, restitution and safeguard of the rights of the victim was noted. It was pointed out that if justice was not done to the victim of the crime, criminal justice would

look hollow. Reiterating that a life which is lost or snuffed out could not be recompensed, that monetary compensation would at least provide some solace, the Supreme Court observed as follows:

> "46. One area which is totally overlooked in the above practice is the ***plight of the victims***. It is a recent trend in the sentencing policy to listen to the wailings of the victims. Rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A glimpse at the field of victimology reveals two types of victims. The first type consists of ***direct victims***, i.e., those ***who are alive and suffering*** on account of the harm inflicted by the prisoner while committing the crime. The ***second*** type comprises of ***indirect victims*** who are ***dependants of the direct victims of crimes*** who undergo sufferings due to deprivation of their breadwinner.
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> xxx xxx xxx
>
> "99. In our efforts to look after and protect the ***human rights of the convict***, we cannot forget the ***victim or his family*** in case of his death or who is otherwise incapacitated to earn his livelihood because of the criminal act of the convict. ***The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime.*** The subject of victimology is gaining ground while we are also concerned with the rights of the prisoners and prison reforms. ***A victim of crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation, etc. An honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.***
>
> xxx xxx xxx

> 101. ***Reparation*** is taken to mean the ***making of amends by an offender to his victim***, or to ***victims of crime generally***, and may take the form of ***compensation***, the ***performance of some service*** or the ***return of stolen property (restitution)***, these being types of reparation which might be described as practical or material. The term can also be used to describe more intangible outcomes, as where an offender makes an apology to a victim and provides some ***reassurance that the offence will not be repeated***, thus repairing the psychological harm suffered by the victim as a result of the crime.
>
> (Emphasis supplied)

300. We may usefuly also refer to a pronouncement of the High Court of Madhya Pradesh reported at ***2007 (2) JabLJ 207***, ***Subhash Yadav*** v. ***State of M.P.*** wherein the concerns of the victim in order to do complete justice have been articulated in the following terms:

> "10. …In the name of free and speed delivery of justice, the agony and anguish of the victim cannot be kept at bay. It cannot be conceived that in the adjudicatory system of criminal trial, the victim is to be forgotten or kept in the oblivion. A crime in essence mostly always is against the collective and the cry of the collective cannot be marginalized. Not for nothing it had been said when the cry of the collective is curbed or marred, one sees cracks in the City Halls. The justness of justice has to be jealously guarded by the protectors of law. She cannot be allowed to suffer the ignominy at any cost. Beacon light of justice has to illuminate the society. The laser beam has to remove the concavities, for 'law is the safest helmet' – to borrow the phrase from Sir Edward Coke."

301. In the present cases, this court is considering the adequacy of the sentences imposed by the trial courts as against the prayers for their enhancement by the State and complainant. Some fines stand imposed against the defendants. The question is as whether the fine is adequate. In addition, the trial courts have also not made any orders for disbursements. No order of compensation has been made in terms of Section 357 of the Cr.P.C. What would be the options available to this court while considering the appropriate order to be passed? Is it open to this court in appeal revision to enhance the fine and make appropriate order for its disbursement under Section 357 (1) of the Cr.P.C.? Or would it be permissible and more appropriate to substitute the fine imposed under Section 357(1) of the Cr.P.C. with an appropriate order of reasonable and just compensation under Section 357 (3) of the Cr.P.C.? Would the second option require recalling the order of sentences to the extent that it imposes a fine and, after making the summary inquiry postulated by law, to award reasonable and fair compensation in accordance with law. We propose to consider these questions, related aspects and options available to the courts hereafter.

(i) *Compensation is in addition to the sentence imposed upon the convict, not ancillary to it*

302. What is the order to be passed upon conviction of the accused? Section 53 of the Indian Penal Code provides for the hierarchy of sentences which may be imposed. These range from

fine, forfeiture of property, imprisonment (rigorous and simple) for varying periods going upto life and the ultimate punishment of imposition of death penalty. The scheme of Section 357 of the Cr.P.C. clearly shows that the payment of compensation is irrespective of imposition of even the death penalty or a sentence of imprisonment or imposition of a fine upon conviction. This is apparent from the scheme of the statute which permits a court imposing a fine to direct that a portion thereof may be paid towards compensation. Sub-Section 3 takes into its fold, payment of compensation in a case where the sentence of fine is not imposed upon the convict.

303. The Supreme Court has repeatedly criticised the courts for not exercising jurisdiction under Section 357 of the Cr.P.C. In ***(1979) 4 SCC 719, Rattan Singh v. State of Punjab,*** it was held that the courts should be liberal while using Section 357 of the Cr.P.C.

304. In the judgment reported at ***(1988) 4 SCC 551, Hari Singh v. Sukhbir Singh,*** the Supreme Court has again reminded that the provisions of Section 357 of the Cr.P.C. to award compensation to the victim should be liberally used to meet the ends of justice as a measure of responding appropriately to the crime and reconciling the victim with the offender observing as follows:

> "10. ...Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. ...It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to

> award compensation to victims while passing judgment of conviction. ***In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system.*** It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way."
>
> (Emphasis by us)

305. The Supreme Court had occasion to consider an appeal wherein the appellant had not only murdered his own mother but his elder brother, nephew and niece and their friends leaving behind only his brother's wife in the judgment reported at ***(1994) 4 SCC 29, Balraj v. State of U.P.*** It was noted that the deceased brother's widow was left without any support for maintenance and was without any family. The court was of the view that it was a fit case where the court should award compensation to her. So far as the power of the court to award compensation is concerned, the court observed as follows:

> "11. xxx xxx xxx Section 357(3) CrPC provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision and it must also be noted ***that power to award compensation is not ancillary to other sentences but it is in addition***

> ***thereto.*** To the same effect are the decisions of this Court in *Sarwan Singh* v. *State of Punjab* [(1978) 4 SCC 111 : 1978 SCC (Cri) 549 : AIR 1978 SC 1525] and *Hari Singh* v. *Sukhbir Singh*[(1988) 4 SCC 551 : 1988 SCC (Cri) 984] . In the instant case the records show that the appellant Balraj has property and also some means."

306. This was reiterated by the Supreme Court in para 44 of the judgment reported at ***(2007) 6 SCC 528, Dilip S. Dahanukar v. Kotak Mahindra Co.***

307. Again in ***(2010) 6 SCC 230, K.A Abbas H.S.A. v. Sabu Joseph,*** the Supreme Court reminded courts of the importance of Section 357 of the Cr.P.C. in the following terms:

> "18. In this case, we are not concerned with sub-section (1). We are concerned only with sub-section (3). ***It is an important provision but the courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. It may be noted that this power of the courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all the courts to exercise this power liberally so as to meet the ends of justice in a better way.***"
>
> (Emphasis supplied)

308. In para 66 of the pronouncement at ***(2013) 6 SCC 770 Ankush Shivaji Gaikwad v. State of Maharashtra***, reference is made to the '*question of sentence and compensation'*. It is therefore trite that compensation is in addition to the sentence which may be imposed upon the convict and that the consideration of compensation is at the post conviction stage, when the court is considering the question as to imposition of an adequate and proper sentence on the accused.

(ii) Powers of the appellate court to pass compensation orders

309. We are herein considering this issue at the appellate stage. Is it permissible for the appellate court to pass an order against the defendants for payment of compensation. Sub-section 4 of Section 357 unequivocally declares that an order for compensation may be made by the appellate court or by the High Court or Session Court in exercise of its power of revision.

310. In para 12 of ***(2008) 8 SCC 225, Manish Jalan v. State of Karnataka***, the court reiterated that the power vested in the appellate court or the High Court or the Court of Session (Revision) to award compensation under sub-section 3 of Section 357 Cr.P.C. is wide and is in addition to any other sentence which may be awarded on conviction of a person. It was further stated in para 11 that compensation was not a substitute for a sentence on conviction. The court also lamented the fact that courts have not directed compensation despite the power to do so observing thus:

> "12. Though a comprehensive provision enabling the court to direct payment of compensation has been in existence all through but the experience has shown that the provision has rarely attracted the attention of the courts. Time and again the courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not very heartening."

311. In the judgment reported at ***(2012) 3 SCC 221, Roy Fernandes v. State of Goa***, the court observed as follows:

> "41. The provision of payment of compensation has been in existence for a considerable period of time on the statute book in this country. Even so, the criminal Courts have not, it appears, taken significant note of the said provision or exercised the power vested in them thereunder. ..."

312. The Registry has circulated the judgment reported at ***(2013) 6 SCC 770, Ankush Shivaji Gaikwad v. State of Maharashtra.*** In this matter, the prosecution case is that the deceased and his wife were guarding their sugarcane crop in their field, when their dog started barking at the appellant and his two companions. The barking of the dog provoked the appellant into beating the dog with a rod. The deceased took objection to the beating of the dog, least anticipating that the same would escalate into a serious fight in the heat of the moment. The exchange of hot words culminated in hte deceased being hit with the rod, unfortunately on a vital part like the head, and died. The appellant was convicted for commission of an offence under Section 302 IPC. The expression of anguish by the Supreme Court in this judgment regard to the failure of the

courts to pass orders for payment of compensation and to abide by the mandate of Section 357 of the Cr.P.C., despite the plethora of prior judicial precedents, deserves to be extracted in extenso and reads as follows:

> "28. The only other aspect that needs to be examined is whether any compensation be awarded against the appellant and in favour of the bereaved family under Section 357 of the Code of Criminal Procedure, 1973. This aspect arises very often and has been a subject-matter of several pronouncements of this Court. The same may require some ***elaboration to place in bold relief certain aspects that need to be addressed by the courts but have despite the decisions of this Court remained obscure and neglected by the courts at different levels in*** this country.
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> 48. The question then is whether the plenitude of the power vested in the courts under Sections 357 and 357-A, notwithstanding, the courts can simply ignore the provisions or neglect the exercise of a power that is primarily meant to be exercised for the benefit of the victims of crimes that are so often committed though less frequently punished by the courts. In other words, ***whether courts have a duty to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them***?"
>
> (Emphasis by us)

313. The Supreme Court discussed the entire gamut of case law on the subject emphasising the "***mandatory duty***" of the courts to consider the question of awarding "***compensation***" in "***every criminal case***" as follows:

> "54. ***Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision***

confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision.

xxx xxx xxx

61. ***Section 357 CrPC confers a duty on the court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the court must disclose that it has applied its mind to this question in every criminal case.***

xxx xxx xxx

66.***To sum up: while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. xxx"***

(Emphasis by us)

314. After a detailed discussion of the facts of the case, finally in para 67, the court noted that both the trial court as well as the High Court had remained "ignorant" ("oblivious") of the provisions of Section 357. However, given the time lag since the offence was committed, the Supreme Court did not consider remand of the case for the purpose to be a good option.

315. In the judgment reported at ***(1982) 1 SC 608, Girdhari Lal v. State of Punjab,*** it has been held that when there is no sentence of fine or where the convict has been let off on probation, there can be no direction under Section 357(1)(a).

316. There is therefore not only statutory empowerment under Section 357(3) of the Code of Criminal Procedure of the appellate court to make an appropriate order regarding compensation but the mandatory duty of every court, at the trial stage as well as the appellate court to consider and pass an order of fair and reasonable compensation on relevant factors.

(iii) Persons entitled to compensation

317. A bare reading of Section 357 of the Cr.P.C. makes evident the farsightedness of the legislature in including the '*costs incurred in prosecution'* (**Section 357 (1a))**; '*any person*' who has suffered loss or injury by the offence **(Section 357(1b))**; '*persons'* who are entitled, under the Fatal Accidents Act, 1855 to recover damages from the person sentenced **(Section 357(1c))**; a '*bonafide purchaser*' of property involved in an offence **(Section 357(1d)),** as entitled to compensation.

318. We may usefully make a reference also to the ***United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (United Nation General Assembly, 1985)*** which describes '*victims*' as including the following:

> *"1. "**Victims**" means persons who, individually or collectively, have suffered harm, including physical or*

mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

319. So far as the descriptions of persons entitled to compensation are concerned, the *Justice Malimath Committee* on *Reforms of the Criminal Justice System* (March, 2003) (appointed by the Government of India) has made the following recommendations:

"i) The victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the charge is punishable with 7 years imprisonment or more.

ii) In select cases notified by the appropriate government, with the permission of the court an approved voluntary organization shall also have the right to implead in court proceedings.

iii) The victim has a right to be represented by an advocate of his choice;

provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer.

iv) The victim's right to participate in criminal trial shall, inter alia, include:

a) To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence
b) To ask questions to the witnesses or to suggest to the court questions which may be put to witnesses
c) To know the status of investigation and to move the court to issue directions for further to the investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth.
d) To be heard in respect of the grant or cancellation of bail
e) To be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution
f) To advance arguments after the prosecutor has submitted arguments
g) To participate in negotiations leading to settlement of compoundable offences
v) The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.
vi) Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.
vii) Victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organised in a separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration.
viii) The Victim Compensation law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court. It may specify offences in

which compensation may not be granted and conditions under which it may be awarded or withdrawn."

(Underlining by us)

320. The present case is concerned with the offence of murder resulting in the death of Nitish Katara who at that time was succeeded by his ailing father Nishit M. Katara who died on 3rd August, 2003, barely a year after the murder; mother Nilam Katara and; brother Nitin Katara. The mother of the deceased falls within the definition of the expression 'legal heir'. However, the father and brother of the deceased would have suffered grave loss, certainly emotional and mental, even if not financial upon his death.

321. In ***(1996) 1 SCC 490, Bodhisattwa Gautam v. Subhra Chakraborty (Ms.),*** the appellant had sought quashing of a complaint under Sections 312/420/493/496/498A IPC (filed by the respondent, a victim) for developing a sexual relationship with her on false assurance of marriage; later going through a semblance of a secret marriage after having impregnated her twice; compelled her to undergo abortion both times and ultimately deserting her. The Supreme Court dismissed the special leave petition and on being prima facie satisfied about the allegations and compelled the appellant to pay Rs.1,000/- per month interim maintenance to the victim during the pendency of the criminal case. Discussing the wide jurisdiction of the court under Article 32 of the Constitution of India regarding enforcement of fundamental rights, in para 8, the court reiterated its prior declaration that "right to life" does not

merely mean animal existence but means something more, namely, the right to live with human dignity. Right to life would, therefore, include all those aspects of life which go to make a life meaningful, complete and worth living. We may borrow the following words of the Supreme Court in para 9 wherein reference is made to the plight of women and violation of their fundamental rights:

> **"9.** Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. <u>They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish</u> as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world."
>
> (Underlining by us)

Violation of these fundamental rights of the respondent persuaded the court to pass orders of interim maintenance in her favour against the appellant.

322. In our judgment dated 2nd April, 2014, we have in paras 2012 to 2026 discussed that an honour killing on account of

objection to woman's life partner is the gravest violation of a fundamental right to life.

323. We have discussed at length as to how Bharti Yadav is also a victim of the honour killing. However, in the circumstance brought out during hearings, it appears that she is well settled in life now. Whether we award compensation or not in this particular case, it needs no further elaboration that the person/partner surviving in an honour killing is definitely a victim of the crime who would be entitled to compensation under Section 357 of the CrPC.

324. The judgment reported at ***(1978) 4 SCC 111, Sarwan Singh & Others v. State of Punjab*** has noted the recommendation by the Joint Select Committee while introducing the amendment of the CrPC to incorporate Section 357. The Joint Select Committee had recommended that when death has been caused to a person, "his heirs and dependants, in suitable cases" for the loss which has resulted to them from such death. This is an important aspect in as much as a dependant may not necessarily be an heir of the deceased. Therefore, so far as the person who would entitled to compensation is concerned, it would include all those who suffer loss and damage from the death of the person.

(iv) 'Fine' and 'compensation' – distinction, if any.

325. Section 357 of the CrPC empowers the court to make directions towards which a fine may be applied which includes towards paying compensation. Section 357(1)(b) also enables the

court to direct payment of compensation, if a sentence of fine has not been imposed. Section 357(3) what then is the difference between a '*fine*' and '*compensation*'. Light is thrown on this issue by the pronouncement of the Supreme Court reported at ***(2007) 6 SCC 528, Dilip S. Dahanukar v. Kotak Mahindra Co.***. This case arose under the Negotiable Instruments Act in the context of dishonouring of a cheque. The court considered the import of the different sub-sections of Section 357, the issue of the difference between fine and compensation as well as the recoverability thereof and observed as follows:

> "11. A statute must be read harmoniously. An amount of ***compensation directed to be paid may not form part of a fine***. It may be ***awarded separately***. It may be recoverable ***as if it is a fine*** in terms of Section 431 of the Code but by reason thereof it would not become automatically recoverable forthwith. The legal position, however, must be considered keeping in view the purport and object of the Act.
>
> xxx xxx xxx
>
> 26. The ***distinction between sub-sections (1) and (3)*** of Section 357 is apparent. ***Sub-section (1)*** provides for ***application of an amount of fine while*** imposing a sentence of which fine forms a part; whereas ***sub-section (3)*** calls for a situation ***where a court imposes a sentence of which fine does not form a part*** of the sentence.
>
> **27.** ***Compensation is awarded towards sufferance of any loss or injury by reason of an act for which an accused person is sentenced. Although it provides for a criminal liability, the amount which has been awarded as compensation is considered to be recourse of the victim in the same manner which may be granted in a civil suit.*** So far as Appellant 2 is concerned, no fine has been imposed on him. He was directed to pay compensation.

28. The question is as to whether the matter would come within the purview of sub-section (3) and if so, whether sub-section (2) of Section 357 would automatically be attracted.

29. The purposes for application of fine imposed has been set out in Clauses (a) to (d) of sub-section (1) of Section 357. Clause (b) of sub-section (1) of Section 357 provides for payment of compensation out of the amount of fine. The purpose enumerated in Clause (b) of sub-section (1) of Section 357 is the same as sub-section (3) thereof, the difference being that whereas in a case under sub-section (1) fine imposed forms a part of the sentence, under sub-section (3) compensation can be directed to be paid whence fine does not form a part of the sentence.

30. xxx xxx xxx When, however, ***fine is not imposed, compensation can be directed to be paid for loss or injury caused to the complainant by reason of commission of the offence.*** Clause (*b*) of sub-section (1) of Section 357 only provides for application of amount of fine which may be in respect of the entire amount or in respect of a part thereof. Sub-section (3) of Section 357 seeks to achieve the same purpose.

31. ***We must, however, observe that there exists a distinction between fine and compensation, although, in a way it seeks to achieve the same purpose. An amount of compensation can be directed to be recovered as a "fine" but the legal fiction raised in relation to recovery of fine only, it is in that sense "fine" stands on a higher footing than compensation awarded by the court.***

xxx xxx xxx

33. In *Rachhpal Singh* v. *State of Punjab* [(2002) 6 SCC 462 : 2002 SCC (Cri) 1362] this Court held: (SCC p. 469, para 12)

> "A perusal of the operative part of the judgment of the High Court clearly shows that so far as the punishment under Section 302 is concerned, it has

> disagreed with the Sessions Court and altered the sentence to one of life imprisonment from death. It has nowhere stated that it is also awarding a fine or that it was confirming the fine awarded by the Sessions Court for the offence under Section 302 IPC. In the absence of any such specific recording in our opinion, it should be deemed that the High Court has awarded only a sentence of life imprisonment for an offence under Section 302 IPC. In such ***cases where the court does not award a fine along with a substantive sentence, Section 357(3) comes into play and it is open to the court to award compensation to the victim or his family.*** In our opinion it is in the exercise of this power under Section 357(3) that the High Court has awarded the compensation in question, therefore, it was well within the jurisdiction of the High Court."

326. In ***(2002) 6 SCC 462 Rachpal Singh v. State of Punjab***, the Sessions Judge had found the appellant and three other persons guilty under Section 302 IPC. Appellants 1 and 2 were sentenced to death while others were sentenced to life imprisonment. Varying prison sentences were imposed for commission of other offences. The death sentences were put up for confirmation. Appeals challenging the convictions and sentences were filed by the appellants. The complainant filed a revision petition praying for inter alia compensation. The High Court rejected the challenge to the convictions, but did not agree with the imposition of the death sentence as well as the guilt of the three more persons. It was also concluded that this was a fit case for the exercise of its jurisdiction under section 357 Crl. and directed each of the accused

to pay Rs.2 lakh (totalling Rs.4 lakhs as compensation and in default, imposed a default sentence of 5 years RI on each of the appellants which was to run consecutively with the life sentence.

327. The Supreme Court noted that there was insufficient material regarding paying capacity of the appellants so it modified and reduced the compensation to Rs.1 lakh each.

328. In ***Dilip S. Dahanukar***, the Supreme Court also considered precedents on the issue of the jurisdiction of the High Court in an appeal to award compensation, even if no fine is imposed or vice versa, and noted that though the considerations for fine and compensation are different, the purpose for award thereof is the same in paras 34, 35 and 41 which read as follows:

> "34. Yet again in *State of Punjab* v. *Gurmej Singh* [(2002) 6 SCC 663 : 2002 SCC (Cri) 1460] we may notice, a similar conclusion was arrived at although in a somewhat different fact situation: (SCC pp. 669-70, para 11)
>
> > "*11*. In the present case, sentence of fine has also been imposed, as indicated in the earlier part of this judgment. Out of the fine, a sum of Rs 1000 each had been ordered to be given to the three injured persons, namely, Dalip Singh, Amarjit Kaur and Gurmeet Kaur. The balance amount is to go to the legal heirs of Jagjit Singh. We had heard the learned counsel for both parties on this aspect. Learned counsel for the appellant submitted that Gurmeet Kaur lost both her parents as well as her brother in the incident and now she is alone and would have become of marriageable age or may have to start some work of her own. She would need some money. In case she cannot be compensated, the amount of fine may be enhanced

to some extent. Learned counsel for the respondent has, however, submitted that out of seven acres of land belonging to his father, the same has been divided into three equal shares and some of it is also under mortgage and he has got two daughters and a son and his wife. He has also submitted that whenever the respondent was released on parole he met Gurmeet Kaur and his wife also keeps on going to meet her. Their relations are normal and cordial. If that is so, nothing better can be thought of in the prevailing circumstances. However, we are not considering for awarding any compensation to Gurmeet Kaur under Section 357(3) CrPC but the amount of fine imposed, can in any case be reasonably enhanced."

35. It is, therefore, seen that ***consideration for payment of compensation is somewhat different from payment of fine***. It is, to the said extent applied differently. As would be noticed a little later, it is ***necessary to probe into the capacity of the accused to pay the amount and the purpose for which it is directed to be paid***.

xxx xxx xxx

41. Even in a case where violation of fundamental right guaranteed under Article 21 is alleged, the ***amount of compensation cannot be arbitrary or unreasonable even under public law***."

(Emphasis by us)

329. In paras 32, 42, 45, 46 and 48, the court held that the interdiction to recovery of fine under Section 357(2) during the period for appeal would apply to recovery of compensation under sub-section(3) as well:

"32. If, therefore, under sub-section (2) of Section 357, realisation of fine, at least in respect of the factor(s) enumerated in Clause (1) of sub-section [*sic* sub-section (1) of Section 357 is] to be stayed automatically, we see

no reason as to why the ***legislative intent*** cannot be held to ***apply in relation to the amount of compensation directed to be paid in terms of sub-section (3)***.

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42. In *Sube Singh* v. *State of Haryana* [(2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54] it is stated: (SCC pp. 198-99, para 38)

> "The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."

xxx xxx xxx

45. ***Clause (b) of sub-section (1)*** of Section 357 and ***sub-section (1)*** of Section 357 ***and sub-section (3)*** of Section 357 ***seek to achieve the same purpose***. What is necessary is to find out the intention of the lawmaker and the object sought to be achieved. Sub-section (2) of Section 357 uses the word "fine". It does not say that what would be stayed i.e. application of fine. Sub-section (2) of Section 357, in our opinion, does not contemplate any other interpretation. Even assuming that Mr Lalit was correct in his submission, still then sub-section (3) would be squarely attracted.

46. The amount of compensation, in view of the legal fiction, may be recovered under Section 421 of the Code. But the amount of compensation, having regard to sub-section (2) of Section 357 of the Code cannot be recovered forthwith unless the period of appeal expires.

xxx xxx xxx

48. Section 421 only provides for a mode of recovery of fine. Section 424 provides for an enabling clause so as to

> enable the court to take recourse to either of the situations provided for therein. The said provisions, however, would be subject to sub-section (2) of Section 357 of the Code. Section 431 of the Code provides for a legal fiction in terms whereof any money other than a fine shall be recoverable as if it were a fine. Even according to Mr Lalit, sub-section (2) of Section 357 of the Code would be attracted in such a situation. There does not appear to be any reason as to why the amount of compensation should be held to be automatically payable, although the same is only to be recovered as if a fine has been imposed."
>
> (Emphasis supplied)

330. It is important to note that the legislature does not impose any limit on the quantum of either the fine under Sub-Section (1) of Section 357 of the Cr.P.C. or of the compensation which may be awarded under Section (3) of Section 357 of the Cr.P.C. So far fines are concerned, a perusal of the Indian Penal Code shows that the quantum of fine does find statutory restriction for some offences. For instance, a fine of Rs.500/- for offences under Sections 171, 171H, 172, 173, 174 and 175 of IPC; Rs.1,000/- for offences of under Sections 176, 177, 178, 179, 182, 188 and 200. The legislature has prescribed different punishments for different offences. While punishment of only imprisonment or only fine for commission of some offences; for others an option of imprisonment and fine is available.

331. The legislature has by Section 63 of the IPC specified that "amount of fine" provided that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is

liable is unlimited, but shall not be excessive. However, no limits are prescribed for compensation.

332. It needs no further elaboration that while a fine is part of the sentence imposed on a convict, compensation is awarded in addition thereto. So, the statutory scheme would show that so far as a fine is concerned, Section 357 has intervened only to the extent that it sets out the purposes of application of the fine in clauses (a) to (d) of sub-section (1) of Section 357. The court can make an order for payment of compensation out of the amount of the fine under clause (b) of sub-section (1) of Section 357. However, if the court does not impose a fine, the court can make the order directing payment of the compensation under sub-section (3) of Section 357. There is however, no difference between spirit, intendment or purpose of an order under clause (b) of sub-section (1) and the order under sub-section 3 of Section 357. While the power to impose a fine may be statutorily limited, no such limits are prescribed for payment of compensation.

This enunciation of law would guide all courts exercising sentencing jurisdiction under the Cr.P.C.

(v) Procedure to be followed and principles for fixation of fine and compensation

333. The legislation has also not stated the manner in which calculation of an adequate compensation shall be effected. This issue gets even more vexed in cases of homicide.

334. In so far as compensation in a unique situation is concerned, borrowing the words of the Supreme Court in ***(1991) 4 SCC 584, Union Carbide Corporation & Ors. v. Union of India (para 13),*** the courts are required to appropriately evolve the applicable principles. It was stated that :

> "13. xxx xxx xxx We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability xxx xxx xxx."

Principles in regard to methodology of assessing compensation have thus to be evolved. Of course judicial precedents on the subject go a long way in providing guidance.

335. We may usefully refer to the pronouncement of the Supreme Court reported at ***(1978) 4 SCC 111 (para 10), Sarwan Singh & Ors. v. State of Punjab*** wherein the Supreme Court had in fact laid down a step by step guide for grant of compensation. It has been mandated that prior to awarding compensation, the court has to first and foremost decide whether the case is a fit one in which compensation has to be awarded.

336. Once the court concludes that compensation should be paid, then, as per ***Sarwan Singh***, the capacity of the accused to pay compensation is to be determined. The purpose will not be served if the accused is unable to pay the compensation awarded.

Obviously, if the accused is in a position to pay the compensation, there would be no reason for the court not to direct payment of such compensation.

The court notes that if a person who caused injury by negligence or vicariously is made to pay compensation (for instance in motor accident cases), then a person who causes injury with mens rea must compensate the victim. In this regard, in para 11 of ***Sarwan Singh & Ors. v. State of Punjab***, the court is further stated thus :

> "10. xxx xxx xxx ***Section 357 (3)*** provides that when a court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount, as may be specified in the order, to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. ***The object of the section therefore, is to provide compensation payable to the persons who are entitled to recover damage from the person sentenced even though fine does not form part of the sentence.*** Though Section 545 enabled the court only to pay compensation out of the fine that would be imposed under the law, by Section 357(3) when a Court imposes a sentence, of which fine does not form a part, the Court may direct the accused to pay compensation. ***In awarding compensation it is necessary for the court to decide whether the case is a fit one in which compensation has to be awarded.*** If it is found that compensation should be paid, then the ***capacity of the accused to pay a compensation has to be determined.*** In directing compensation, the object is to collect the fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation for, imposing a default

> sentence for non-payment of fine would not achieve the object. If the ***accused is in a position to pay*** the compensation to the injured or his dependents to which they are entitled to, ***there could be no reason for the court not directing such compensation.*** When ***a person, who caused injury due to negligence or is made vicariously liable is bound to pay compensation it is only appropriate to direct payment by the accused who is guilty of causing an injury with the necessary mens rea*** to pay compensation for the person who has suffered injury."

323. We find that in ***Sarwan Singh***, the court cautioned against first ascertaining the compensation and then imposing an equivalent fine. In para 11, the Supreme Court further stated the relevant circumstances which must be taken into consideration in the following terms :

> "11. In awarding compensation as cautioned by this Court in *Palianappa Gounder* v. *State of T.N.* [(1977) 2 SCC 634 : 1977 SCC (Cri) 397 : (1977) 3 SCR 132] the ***Court should not first consider what compensation ought to be awarded to the heirs of the deceased and then impose a fine which is higher than the compensation. It is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation***. After consideration of all the facts of the case, we feel that in addition to the sentence of 5 years rigorous imprisonment, a fine of Rs 3500 on each of the accused under Section 304(1) IPC should be imposed. The fine will be paid as compensation to the widow of the deceased, Mewa Singh. In default of payment of fine, the

accused will undergo further simple imprisonment for 6 months."

(Emphasis supplied)

It is therefore, well settled that the courts must conduct an enquiry, even a summary one into, fitness of the case for award of fine and compensation, persons entitled to compensation, paying capacity of the accused and any other relevant factor.

337. We have till here examined the procedure which courts would be required to follow for awarding compensation under Section 357 Cr.P.C. Having found the persons who are entitled to compensation, thereafter having ascertained the means and paying capacity of the defendants, it is necessary to determine quantification of compensation payable to them as would be just and adequate. The legislation gives no guidance at all on this question as well.

338. Let us briefly examine some judicial precedents placed before us regarding quantum of compensation. In para 11, the judgment reported at ***(1988) 4 SCC 551 Hari Singh v. Sukhbir Singh,*** the Supreme Court also stated that the payment by way of compensation must, however, be reasonable; what is reasonable, may depend upon the facts and circumstances of each case. No hard and fast rule can therefore be laid.

339. We may also refer to the pronouncements of the Supreme Court reported at ***(1995) 6 SCC 593, Baldev Singh v. State of Punjab.*** In para 17, for the purposes of sentencing, the court took into consideration the circumstances that the arms possessed by the

accused as not being inherently dangerous to infer their intention was to cause death or that the accused had knowledge that by inflicting the injuries as was done, death was likely to be caused. The court also noted that the appellants had inflicted injuries only on the thigh and at the back and that there was no evidence or finding as to who caused the fatal injuries which resulted in the death of Balbir Singh; that the incident happened almost 11 years ago as well as the fact that the injuries inflicted on the thigh of Amrik Singh resulting in the death of the victim by the appellant were not proved to be serious or fatal and that the incident arose out of a property dispute. In these circumstances, the Supreme Court observed that the widow and children of the deceased, Balbir Singh are the persons to suffer and they should not be forgotten and that by merely maintaining the sentence of imprisonment on the accused, the victim or his heirs are not benefitted. Observing the near relationship of the accused and the victim as well as the fact that the appellants were in a position to pay, the court was of the view that it was a fit case in which Section 357(3) of the Cr.P.C. could be invoked and a just and reasonable compensation given to the family of the deceased. The court accordingly directed the appellants to pay by way of compensation Rs.35,000/- each to the widow of the deceased and the children within three months of the date of order failing which they would be entitled to recover the amount as if the direction to pay compensation was a decree passed against them by the court. In case, the appellants did not pay, the

appellants were liable to undergo the remainder of the sentence awarded by the trial court.

340. We have noted above the statutory position whereunder no outer limit is prescribed for award of compensation. In para 68 of ***(2007) 6 SCC 528, Dilip S. Dahanukar v. Kotak Mahindra Co.*** the Supreme Court has stated that the very fact that the Parliament did not think it fit to put a ceiling in regard to the amount of compensation leviable upon an accused, the discretionary jurisdiction thereto must be exercised judicially. The observations of the Supreme Court throw valuable light on the issue deserve to be extracted in extenso and read as follows:

> **"39.** ***If a fine*** is to be ***imposed*** under the Act, the amount of which in the opinion of Parliament would be more than ***sufficient to compensate the complainant***; can it be said, that an unreasonable amount should be directed to be paid by the court while exercising its power under sub-section (3) of Section 357? The answer thereto must be rendered in the negative. Sub-section (5) of Section 357 also provides for some guidelines. ***Ordinarily, it should be lesser than the amount which can be granted by a civil court upon appreciation of the evidence brought before it for losses which might have reasonably been suffered by the plaintiff.*** Jurisdiction of the civil court, in this behalf, for realisation of the amount in question must also be borne in mind. A ***criminal case*** is ***not a substitution for a civil suit, far less execution of a decree*** which may be passed."
>
> (Emphasis supplied)

It is therefore evident that the quantum of fine and compensation rests on the facts and circumstances of each case. It has to be rationally and reasonably fixed, not in the manner of a civil suit does after appreciation of evidence.

341. In ***(2008) 8 SCC 225, Manish Jalan v. State,*** para 14, the court reiterated the principles laid down in ***Sarwan Singh v. State of Punjab*** in the following terms:

> "14. However, in awarding compensation, it is necessary for the court to ***decide if the case is a fit one*** in which compensation deserves to be awarded. ***If the court is convinced that compensation*** should be paid, then the ***quantum of compensation is to be determined by taking into consideration the nature of the crime, the injury suffered and the capacity of the convict to pay compensation, etc.*** It goes without saying that the ***amount of compensation has to be reasonable, which the person concerned is able to pay.*** If the accused is not in a position to pay the compensation to the injured or his dependents to which they are held to be entitled to, there could be no reason for the court to direct such compensation. (See *Sarwan Singh* v. *State of Punjab*[(1978) 4 SCC 111 : 1978 SCC (Cri) 549] .)"
>
> (Emphasis by us)

342. In para 38 of ***(2007) 6 SCC 528, Dilip S. Dahanukar v. Kotak Mahindra Co.,*** the Supreme Court observed thus:

> "38. The purpose of ***imposition of fine and/or grant of compensation*** to a great extent must be considered having the ***relevant factors*** therefore in mind. It may be compensating the person in one way or the other. The ***amount of compensation*** sought to be imposed, thus, ***must be reasonable and not arbitrary***. Before issuing a direction to pay compensation, ***the capacity of the accused to pay*** the same must be judged. A fortiori,

an ***enquiry*** in this behalf even in a ***summary*** way, may be necessary. ***Some reasons***, which may not be very elaborate, may also have to be assigned; the purpose being that whereas ***the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub-section (3) of Section 357 does not impose any such limitation and*** thus, power thereunder should be exercised only in ***appropriate cases***. Such a jurisdiction ***cannot be exercised at the whims and caprice of a judge.***"

343. In para 66 of ***(2013) 6 SCC 770, Ankush Shivaji Gaikwad v. State of Maharashtra***, the Supreme Court summed up the method to be adopted by the court and principles on which an order for imposition of fine and compensation would be made which reads thus :

"66. xxx xxx xxx Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the ***necessary material*** which it would evaluate to arrive at ***a fair and reasonable conclusion***. It is also beyond dispute that the occasion to consider ***the question of award of compensation*** would logically ***arise only after the court records a conviction of the accused. Capacity of the accused to pay*** which constitutes an important aspect of any order under Section 357 CrPC would involve a certain ***enquiry*** albeit ***summary*** ***unless*** of course the ***facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation*** that it may

in its wisdom decide to award to the victim or his/her family."

(Emphasis by us)

344. We may note that the summary enquiry ought to include into the conditions of the victims and the impact of the crime on them. It would also be essential to enquire into and obtain relevant material regarding the other components of Section 357(1) to enable the court to pass a truly meaningful order.

(vi) *Can a compensation order impact the severity of the sentence imposed?*

345. There is another aspect of sentencing jurisprudence when payment of compensation is directed. Several pronouncements would show that in cases where compensation has been enhanced by the appellate court or the revisional court, notional sentences have been imposed. Can a compensation order be permitted to impact the severity of the sentence imposed? It is contended by Mr. Sumeet Verma, learned counsel for Vikas Yadav as well that if the court is directing payment of a higher amount, then a lesser sentence ought to be imposed on the defendants.

346. We find that this practice has been deprecated by the Supreme Court.

In ***(2013) 9 SCC 516, Hazara Singh v. Raj Kumar & Ors.,*** the court relied on the prior pronouncement reported at ***(1985) 3 SCC 225, Sadha Singh v. State of Punjab (paras 7 and 8)*** and deprecated the practice of lesser imprisonment, against higher

compensation. It held that accepting the submission that compensation stood increased and therefore, sentence of imprisonment should not be enhanced would mean that "***if your pockets can afford, commit serious crime, offer to pay heavy fine and escape tentacles of law. Power of wealth need not extend to overawe court processes***".

347. On this very aspect, in its 42nd Report, the Law Commission of India has observed thus:

> "3.17. We have a fairly comprehensive provision for payment of compensation to the injured party under Section 545 of the Criminal Procedure Code. It is regrettable that our courts do not exercise their salutary powers under this section as freely and liberally as could be desired. The section has, no doubt, its limitations. Its application depends, in the first instance, on whether the ***court considers a*** substantial fine proper punishment for the offence. In the ***more serious cases***, the ***court may think that a heavy fine in addition to imprisonment for a long term is not justifiable, especially*** when the Public Prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf."

348. In the pronouncement reported at ***(2012) 8 SCC 734, Guru Basavaraj v. State of Karnataka,*** the court has specifically ruled that compensation is not a substitute for adequacy sentence**.** This case arose in the context of conviction for an offence punishable under Section 304A of the IPC. The observations of the court in paras 30 and 32 may be usefully extracted and read thus:

> "30. From the aforesaid authorities, it is luminous that this Court has expressed its ***concern on imposition of adequate sentence*** in respect of commission of offences

> regard being had to the ***nature of the offence*** *and* ***demand of the conscience of the society.*** That apart, ***the concern*** has been ***to impose adequate*** sentence for the offence punishable under ***Section 304-A IPC***. It is worthy to note that in certain circumstances, the ***mitigating factors*** have been taken into consideration but ***the said aspect*** is dependent on the facts of each case. xxx xxx xxx ***Grant of compensation under Section 357(3) CrPC with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence.***
>
> xxx xxx xxx
>
> 32. We may note with profit that an ***appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and*** exhibit a careless attitude possibly harbouring the notion that they ***would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the*** sublimity of safety of a human being is given an indecent burial by their rash and negligent act."
>
> (Emphasis supplied)

349. We find that in para 21 of the judgment reported at ***(2010) 6 SCC 230, K.A Abbas H.S.A. v. Sabu Joseph,*** the Supreme Court has relied on the pronouncement reported at ***(1985) 7 Cri APP R(S) 272, R v. Oliver John Huish*** wherein the court had pointed out the possibility of misuse of an order of imposition of a light sentence of imprisonment to enable the defendant to comply with a compensation order. The court has noted that if the defendant does not pay, he has got off with a light sentence and, in effect, no order

to pay compensation. Para 21 of the judgment on the issue reads thus:

> **"21.** This position also finds support in *R.* v. *Oliver John Huish* [(1985) 7 Cri App R (S) 272] . The Lord Justice Croom Johnson speaking for the Bench has observed:
>
> > "When compensation orders may possibly be made the ***most careful examination is required. Documents should be obtained*** and ***evidence either on affidavit or orally*** should be given. The ***proceedings should, if necessary, be adjourned***, in order to arrive at the ***true state of the defendant's affairs.***
> >
> > Very often a ***compensation order is made*** and a ***very light sentence of imprisonment is imposed***, because the court recognizes that if ***the defendant is to have an opportunity of paying the compensation he must be enabled to earn the money*** with which to do so. The result is therefore an extremely light sentence of imprisonment. ***If the compensation order turns out to be virtually worthless, the defendant has got off with a very light sentence of imprisonment as well as no order of compensation.*** In other words, generally speaking, he has got off with everything."
> >
> > (Emphasis supplied)

350. A compensation order is not a part of a sentence. The practice of a heavier compensation order resulting in a small sentence is clearly contrary to the very basis of sentencing. If applied, there is a large possibility of it being misused. It would certainly result in miscarriage of justice. The submissions of Mr. Sumeet Verma, learned counsel for Vikas Yadav, to the effect that

heavy fine or a compensation would be payable only against a lesser imprisonment sentence is clearly untenable and is hereby rejected. It is settled law that compensation is not a substitute to a sentence.

(vii) Quantification of compensation

351. We now come to the critical question - having ascertained the paying capacity of the defendants, the particulars and circumstances of the crime, the victims, dependants and all other relevant information, how is the compensation to be awarded? This question is not unique to Section 357 of the Cr.P.C. No fault liability for compensation is awarded under the Motor Vehicles Act. It is also to be found in the Fatal Accidents Act and Workmen Compensation Act. Public law remedies provide compensation for violation of constitutional rights and even tortious actions of public authorities are legally recognised. There are several judicial precedents wherein compensation stands awarded therein. What was the basis for the orders passed in these jurisdictions? Can we draw on the experience of awarding compensation in these jurisdictions and under these enactments for the purposes of awarding compensation under Section 357 of the Cr.P.C.?

We now propose to examine this very important issue.

(viii) *Public law remedies for established violations of constitutional rights and principles for determining compensation*

352. A public remedy to award compensation for violation of fundamental rights was evolved on application of principles of compensatory justice in ***(1983) 4 SCC 141, Rudul Sah v. State of Bihar & Anr.*** This stands reiterated in several cases of Supreme Court thereafter**.**

353. It is essential to note that in ***(1997) 1 SCC 416, D.K. Basu v. State of W.B.***, the Supreme Court was concerned with custodial violations including torture, rape, death in police custody/lock-up which not only infringed Article 21 rights but also basic human rights and struck a blow on the rule of law. The Supreme Court issued mandatory directions in the shape of 'requirements' for compliance by police personnel while arresting or detaining any person in addition to constitutional and statutory safeguards as well as previous directions of the Supreme Court which were to govern all enforcement agencies. It was while dealing with these issues that the Supreme Court in para 41, observed as follows"

> "41. ... ***Prosecution of the offender is an obligation*** of the State in case of ***every crime*** but the ***victim*** of crime ***needs to be compensated monetarily also.*** The Court, where the ***infringement of the fundamental right is established***, therefore, ***cannot stop by giving a mere declaration***. It must proceed further and give ***compensatory relief***, ***not by way of damages as in a civil action*** but by way of ***compensation under the public law*** jurisdiction for the ***wrong done***, due to ***breach of public***

> ***duty*** by the State of not protecting the fundamental right to life of the citizen. To ***repair the wrong done and give judicial redress for legal injury*** is a compulsion of judicial conscience."
>
> (Emphasis supplied)

354. In para 42 of ***D.K. Basu***, the court also noted that there was no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life and that the court had judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. On the question of relegating a victim of a criminal offence for compensation from the offender to a civil remedy, which is under consideration by us, the following observations of the Supreme Court, though rendered in the context of State responsibility for infringements by public servants are illuminating and would guide our consideration as well:

> "45. The old doctrine of only ***relegating the aggrieved to the remedies available in civil law limits the role of the courts too much***, as the protector and custodian of the ***indefeasible rights of the citizens***. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A court of law cannot close its consciousness and aliveness to stark realities. ***Mere punishment*** of the offender ***cannot give much solace*** to the family of the victim — ***civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen*** is, therefore, ***useful*** and at time perhaps the ***only effective remedy*** to apply balm to the

wounds of the family members of the deceased victim, who may have been the breadwinner of the family.

xxx xxx xxx

54. xxx xxx xxx the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the ***assessment of compensation***, the ***emphasis has to be on the compensatory and not on punitive element***. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as ***awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts*** in which the offender is ***prosecuted, which the State, in law, is duty bound to do***. The award of compensation in the public law jurisdiction ***is*** also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The ***quantum of compensation*** will, of course, depend upon the ***peculiar facts of each case*** and ***no strait-jacket formula*** can be evolved in that behalf. The relief to redress the *wrong for the established invasion of the fundamental rights of the citizen*, under the *public law jurisdiction* is, thus, in ***addition to the traditional remedies*** and not in derogation of them. ***The amount of compensation*** as awarded by the Court and paid by the State to redress the wrong done, ***may in a given case, be adjusted against any amount which may be awarded to the claimant*** by way of damages in a civil suit."

(Emphasis supplied)

355. In the pronouncement of the Supreme Court in ***(2006) 3 SCC 178, Sube Singh v. State of Haryana,*** it was stated thus:

"38. xxx The quantum of compensation will, however, depend upon the facts and circumstances of each case. ***Award of such compensation (by way of public law***

remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."

(Emphasis by us)

356. The court thus held that the award of compensation by way of public law remedy would not impede the criminal court from ordering compensation under Section 357 of the Cr.P.C.

357. In ***(2005) 117 DLT 112, Ashwani Gupta v. Government of India,*** this court was concerned with grant of compensation to the petitioner aged about 19 years who suffered 90% disability of permanent nature as a result of a bomb blast. The court noted that the crime had been committed and wrong had been done to a citizen who had suffered disability. Though concerned with the public law remedy, reliance was placed on the observations of the Supreme Court in ***(1997) 1 SCC 416, D.K. Basu v. State of W.B.*** on the propriety of relegating person so injured seeking reparation against the State to civil remedies.

358. While ***D.K. Basu*** was concerned with murder, torture, rape, etc. of prisoners while in custody as a violation of the right to life Article 21 of the Constitution of India, the defendants before us stand convicted of the offence of murder of a young 23 year old boy whose rights under Article 21 were violated. At the same time, the right to life of witnesses in the case has been interfered with and they are till date living with a threat to life. While the

present case is concerned with violation of constitutional rights not by public servants but by members of the public, the principles laid down in the above judicial pronouncements with regard to compensation would apply to the consideration by the court. Witnesses in the present also are still living under fear and with police protection.

359. Damages are also imposed in tortious claims in an effort to place the claimants in a position that they would have been, had the incident not taken place. These are generally quantified under the heads of general damages and special damages. Punitive damages are intended to reform or to deter the wrongdoer from indulging in conduct similar to that which formed the basis of claim.

360. The modes of determination of compensation remain inchoate, uncertain and inconsistent. A method which ensures unity and consistency and lends predictability today in the decision making stands statutorily recognised in Section 163A of the Motor Vehicles Act. This is the multiplier method of computation which stands followed in jurisprudence arising in exercise of public law remedy; adjudication of claims in tort; iner alia is cases arising under the Fatal Accidents Act as well as the Workmen Compensation Act etc.

361. In a case of a devastating fire which took place at Jamshedpur, the Supreme Court reported at ***(2001) 8 SCC 151, M.S. Grewal & Anr. v. Deep Chand Sood & Ors.,*** a case where school children died due to negligence of school teachers. The

court used the multiplier method for computation of adequate compensation. It was observed as follows:

> "8. Incidentally, this Court in *C.K. Subramania Iyer* v. *T. Kunhikuttan Nair* [(1969) 3 SCC 64] while dealing with the ***matter of fatal accidents*** laid down certain relevant ***guidelines for*** the purpose of ***assessment of compensation***. Para 13 of the Report would be relevant on this score and the same is set out hereinbelow: (SCC p. 70, para 13)
>
> > "13. The law on the point arising for decision may be summed up thus: Compulsory damages under Section 1-A of the Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under Section 2, the measure of damages is the economic loss sustained by the estate. There ***can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case.*** The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of human life. In assessing damages, the ***Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable.*** *As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. In the matter of*

ascertainment of damages, the appellate court should be slow in disturbing the findings reached by the courts below, if they have taken all the relevant facts into consideration."

(emphasis supplied)

"28. Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system — affectation of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact the decision in *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of "justice-oriented approach". Law courts will lose their efficacy if they cannot possibly respond to the need of the society — technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

(Emphasis supplied)

362. In several judicial precedents, under Sections 1(a) and 2 of the *Fatal Accidents Act, 1885*, the plaintiffs have been held entitled to just compensation computed according to the multiplier method [**Ref.** ***: 1962 (1) SCR 929, Gobald Motor Service Ltd. v. Veluswami; AIR 1969 SC 128, Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole; ILR (1968) 1 Delhi 59, Ishwar Devi Malik. v. Union of India; I (1984) ACC 489 (SB), Lachman Singh v. Gurmit Kaur; AIR 1979 P&H 50, Lachman Singh v.***

Gurmit Kaur; AIR 1956 Cal. 555, Bir Singh v. Hashi Rashi Banerjee.]

363. In the case reported at ***(2011) 8 SCC 197, Lata Wadhwa v. State of Bihar,*** a fire broke out in a factory in which 60 people died and 113 got injured. The Supreme Court awarded compensation to the victims on the basis of the multiplier method.

364. This court has applied the multiplier method for computation of compensation in [**Ref.** ***: 164 (2009) DLT 346, Jaipur Golden Gas Victims Association v. Union of India; MANU/DE/0965/2010, Nagrik Sangarsh Samiti v. Union of India; 2007 (97) DRJ 445, Ram Kishore v. MCD; 2009 ACJ 1063, Ashok Sharma v. Union of India***].

365. In ***164 (2009) DLT 346, Jaipur Golden Gas Victims Association v. Union of India & Others***, there was a huge fire at a godown of the respondent no. 5 in which pesticides containing Aluminium Phosphate and Zinc Phosphate. Officials of the fire brigade used water for extinguishing the fire which reacted with the chemicals resulting in emission of phosphine, a poisonous gas. Six people lost their lives while several more were taken unwell as a result of inhaling the poisonous fumes. This court awarded compensation as claimed which was computed by application of the multiplier method under the Motor Vehicles Act.

366. In the case reported at ***2009 ACJ 1063 Ashok Sharma & Others v. UOI & Others***, six NCC cadets and five other children drowned due to release of huge quantity of water into the Yamuna river from the barrage. The court relied upon the judgment

reported at ***114 (2004) DLT 57 Kamla Devi v. Govt. of NCT of Delhi*** wherein the applied the multiplier methodology for computing the compensation.

367. In the case reported at ***(2011) 14 SCC 481, Municipal Corporation of Delhi, Delhi v. Uphaar Tragedy Victims Association & Ors. (paras 100, 105 and 108)***, 59 persons died while 103 were injured in the fire which occurred in the Uphaar cinema hall in Delhi. On the issue of computation of damages, the observations of the court in para 100 of the judgment noting the formula adopted in other cases deserves to be noted in extenso and read as follows:

> "100. In *D.K. Basu v. State of W.B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92]* , a Constitution Bench of this Court held that there is ***no straitjacket formula for computation*** of damages and we find that there is ***no uniformity or yardstick followed in awarding damages*** for violation of fundamental rights. In ***Rudul Sah case*** *[(1983) 4 SCC 141 : 1983 SCC (Cri) 798*] this Court used the terminology "***palliative***" for measuring the damages and the ***formula of "ad hoc"*** was applied. In ***Sebastian Hongray case*** *[(1984) 3 SCC 82 : 1984 SCC (Cri) 407 : AIR 1984 SC 1026*] the ***expression used by this Court for determining the monetary compensation was "exemplary" costs*** and the ***formula adopted*** was "***punitive***". In *Bhim Singh case [(1985) 4 SCC 677 : 1986 SCC (Cri) 47 : AIR 1986 SC 494*] , the expression used by the Court was "compensation" and the method adopted was "tortious formula". In ***D.K. Basu v. State of W.B.*** *[(1997) 1 SCC 416 : 1997 SCC (Cri) 92*] the expression used by this Court for determining the compensation was "***monetary compensation***". The formula adopted was "***cost to cost"***

method. Courts have not, therefore, adopted a uniform criterion since no statutory formula has been laid down."

(Emphasis supplied)

It is noteworthy that even in the ***Uphaar Tragedy Victims Association***, the Supreme Court adopted the multiplier method for computation of the compensation.

368. In ***RFA No.116/2007, Union of India v. Dhyan Singh*** decided on 12th October, 2012 by one of us (J.R. Midha, J.), while cleaning a sceptic tank, three labourers died on account of inhalation of poisonous gasses. Constable Ranbir Singh, who went into the tank to help them, also died due to the toxic gasses. The award of Rs.5,00,000/- by the Trial Court as compensation was challenged in appeal before the High Court. The court discussed the liability under Fatal Accidents Act, 1855 and by application of multiplier method, the compensation was enhanced from Rs.5,00,000/- to Rs.11,00,000/-.

369. It is necessary to note that the determinations in the context of no fault liability or negligence, may or may not have elements of criminal culpability or criminality. So far as computation of compensation under Section 357 of the Cr.P.C. is concerned, it is to be imposed against persons who have been held guilty in criminal trials of commission of serious criminal offences which have been violently committed with premeditation and careful planning. Often, these defendants are well placed in life and may be persons of substantial means. In other words they have the

paying capacity to adequately compensate the victims/dependants for the loss which has enured. Just as in ***Kunal Sah*** award of the strict and conservative compensation which may result by application of the multiplier method, may be inconsequential - it would certainly not have any deterrent effect.

370. In the context of motor accident claims, the multiplier method was approved as back as in the year 1996 in the pronouncement of the Supreme Court reported at ***(1996) 4 SCC 362, U.P. State Road Transport Corporation & Ors. v. Trilok Chandra & Ors.*** as the accepted method for determining and ensuring payment of just compensation which was expected to bring uniformity and certainty of awards made all over the country. (para 15).

371. We find that in India, certain non-pecuniary and non-tangible concerns are also being taken into consideration while determining compensation. This is best illustrated by cases involving computation of compensation to family members of a deceased housewife i.e. a person with no fixed income/salary. In the judgment reported at ***(2010) 9 SCC 218, Arun Kumar Agrawal & Anr. v. National Insurance Co. Ltd. & Ors.,*** the court was considering a claim for compensation by husband and a minor child of the deceased wife/mother. The court discussed the development of the applicable principles in England from award of damages solely on the basis of the pecuniary loss to the family due to the demise of the wife till the departure from this rule in ***(1915) 1 KB 627, Berry v. Humm and Co.*** wherein the court noted that

the pecuniary loss should not be limited to the value of the money lost or the money value of the things lost and why should the monetary loss incurred by replacing services rendered gratuitously by a relative be not considered, if there was a reasonable prospect of their being rendered freely in the future but for the death.

372. In para 24, the following portions were extracted from pronouncements in ***(1976) 1 WLR 305, Regan v. Williamson*** wherein the court was considering the issue relating to quantum of compensation payable to the dependants of a woman who was killed in the road accident:

> "24. xxx xxx xxx
>
> "The weekend care of the plaintiff and the boys remains a problem which has not been satisfactorily solved. The plaintiff's relatives help him to a certain extent, especially on Saturday afternoons. But I formed the clear impression that the plaintiff is often, at weekends, sorely tired in trying to be an effective substitute for the deceased. The problem could, to some extent, be cured by engaging another woman, possibly to do duty at the weekend, but finding such a person is no simple matter. I think the plaintiff has not made extensive enquiries in this regard. Possibly the expense involved in getting more help is a factor which has deterred him. Whatever be the reason, the plain fact is that the deceased's services at the weekend have not been replaced. They are lost to the plaintiff and to the boys.
>
> xxx xxx xxx
>
> "I have been referred to a number of cases in which judges have felt compelled to look upon the task of assessing damages in cases involving the death of a wife and mother with strict disregard to those features of the life of a woman beyond her so-called services, that is to

say, to keep house, to cook the food, to buy the clothes, to wash them and so forth. In more than one case, an attempt has been made to calculate the actual number of hours it would take a woman to perform such services and to compensate dependants upon that basis at so much an hour and so relegate the wife or mother, so it seems to me, to the position of a housekeeper.

While I think that the law inhibits me from, much as I should like to, going all the way along the path to which Lord Edmund-Davies pointed, I am, with due respect to the other judges to whom I have been referred, of the view that the word 'services' has been too narrowly construed. *It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework.* This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded."

373. In para 25, the court cited yet another precedent as follows:

"25. In *Mehmet* v. *Perry* [(1977) 2 All ER 529 (DC)] the pecuniary value of a wife's services were assessed and granted under the following heads:

(*a*) Loss to the family of the wife's housekeeping services.

(*b*) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.

(*c*) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services."

374. So far as the position in India is concerned, we may extract the observations of the Supreme Court in paras 26 and 27 of ***Arun Kumar Agrawal*** which read thus:

> **"26.** In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.
>
> **27.** It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. the husband and children. However, for the purpose of award of compensation to the dependants, some pecuniary estimate has to be made of the services of the housewife/mother. In that context, the term "services" is required to be given a broad meaning and must be construed by taking into account the loss of personal care

> and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier."

375. In para 28, the court referred to the pronouncement of the Supreme Court reported at ***(2001) 8 SCC 197, Lata Wadhwa v. State of Bihar*** wherein attempt was made to determine the compensation on the basis of the multifarious services rendered by the deceased housewives to the house, in the absence of any data and as the wives were not earning any income. The value of the service and the multiplier were varied based on the age of the deceased.

376. The judgment in ***Lata Wadhwa*** was referred to with approval in ***(2001) 8 SCC 151, M.S. Grewal v. Deep Chand Sood.***

377. In several judgments, courts have advocated giving a wider meaning to the word "*services*" in cases relating to the award of compensation to the dependants of the deceased wife/mother.

378. We may note that in para 35 of ***Arun Kumar Agrawal,*** the court observed as follows:

> **"35.** xxx xxx xxx it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependants of a deceased wife/mother, who does not have a regular income, by comparing her services with that of a housekeeper or a servant or an employee, who

> works for a fixed period. The gratuitous services rendered by the wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money the loss of personal care and attention suffered by the husband and children on the demise of the housewife. In its wisdom, the legislature had, as early as in 1994, fixed the notional income of a non-earning person at Rs. 15,000 per annum and in case of a spouse, 1/3rd income of the earning/surviving spouse for the purpose of computing the compensation."

379. In ***Arun Kumar Agrawal***, A.K. Ganguly, J. gave additional reasons to the issue. Reference was made to the Division Bench pronouncement of the Madras High Court reported at ***(2009) 6 MLJ 1005, National Insurance Co. Ltd. v. Minor Deepika*** to the following methodology for assessment of the work of a homemaker:

> **"56.** The Madras High Court in its very illuminating judgment in *Deepika* [(2009) 6 MLJ 1005] has further referred to various methods by which the assessment of work of a homemaker can be made and the relevant portion from para 10 of the said judgment is extracted below: (MLJ p. 1008)
>
> > "*10*. … that there have been efforts to understand the value of a homemaker's unpaid labour by different methods. One is, the opportunity cost which evaluates her wages by assessing what she would have earned had she not remained at home viz. the opportunity lost. The second is, the partnership method which assumes that a marriage is an equal economic partnership and in this method, the homemaker's salary is valued at half her husband's salary. Yet

> another method is to evaluate homemaking by determining how much it would cost to replace the homemaker with paid workers. This is called the Replacement Method."
>
> **57.** Various aspects of the nature of a homemaker's job have been described in para 11 which are very relevant and are extracted below: (*Deepika case* [(2009) 6 MLJ 1005] , MLJ p. 1008)
>
> > "*11*. The role of a housewife includes managing budgets, coordinating activities, balancing accounts, helping children with education, managing help at home, nursing care, etc. One formula that has been arrived at determines the value of the housewife as, value of housewife = husband's income − wife's income + value of husband's household services, which means the wife's value will increase inversely proportionate to the extent of participation by the husband in the household duties. The Australian Family Property Law provides that while distributing properties in matrimonial matters, for instance, one has to factor in 'the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent'."
>
> In para 13, the Division Bench of the High Court has observed and, in my view very rightly, that time has come to scientifically assess the value of the unpaid homemaker both in accident claims and in matters of division of matrimonial properties."

380. We now examine another aspect of non-tangible losses which result upon a death of a family member. Compensation should be just equitable, fair and reasonable with reference to settled principles on assessment of damages. In the judgment

reported at ***(2013) 9 SCC 54, Rajesh & Ors. v. Rajbir Singh & Ors.,*** the court was considering a claim for damages by a widow and three minor children of a deceased victim of a fatal road accident. Referring to the concept of non-pecuniary damages which results on account of a fatal accident including loss of consortium to the spouse and loss of love, care and guidance to the children, it was held as follows:

> **"17.** xxx xxx xxx In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

381. Again in the pronouncement of the Supreme Court reported at ***(2013) 7 SCC 476, Vimal Kanwar & Ors. v. Kishore Dan &***

Ors., it was held that amounts as to provident fund, pension and life insurance, receivable by a claimant under the M.V. Act by reason of the victim's death do not come within the periphery of the M.V. Act and cannot be termed as "*pecuniary advantage*" liable for deduction. Similarly salary receivable by a dependant claimant upon compassionate appointment due to a victim's death would not come within the periphery of the M.V. Act to be termed as "*pecuniary advantage*" liable for deduction. In this case as well, the court provided for the "loss of consortium and loss of estate by providing a conventional sum of Rs.1,00,000/-; loss of love and affection for the daughter at Rs.2,00,000/-; loss of love and affection for the widow and mother at Rs.1,00,000/- each".

382. In the judgment reported at ***(2012) 12 SCC 198, New India Assurance Co. Ltd. v. Gopali & Ors.,*** the deceased had eight dependants including four sons and one daughter. The court minimised the deduction of the amount that such person would be spending on himself keeping in view the amount needed on the expenditure for his family to arrive at a reasonable figure of dependancy.

383. We may usefully set down the principles laid down on quantification of compensation in the decision dated ***11th October, 2013*** in ***Crl.Rev.P.No. 338/2009, Satya Prakash v. State*** by one of us (J.R.Midha, J.) reported at ***203 (2013) DLT 652*** wherein it has been held as follows:

"**Quantum of compensation**

26. Section 357(1)(b) Cr.P.C. empowers the Court to award compensation out of the fine to the victim for any loss or injury caused by the offence when the compensation is, in the opinion of the Court, recoverable by such person in Civil Court. Section 357(1)(c) Cr.P.C. empowers the Court to award compensation out of the fine in death cases where the persons are entitled to recover the same under Fatal Accidents Act, 1855. Section 357(3) Cr.P.C. empowers the Court to award compensation to any person who has suffered loss or injury by reason of the act of the accused. Section 357(5) Cr.P.C. provides that at the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section. The effect of these provisions is that the Court has to compute the compensation which the victims are entitled to claim against the accused under Civil Law. The victims of the road accidents are entitled to compensation under the Motor Vehicles Act, 1988 and therefore, the Court has to take recourse to the principles for computation of compensation under the Motor Vehicles Act, 1988. The Court is also competent to award interest on the compensation.

xxx xxx xxx

28. The multiplier method is based on the pecuniary loss caused to the dependants by the death of the victim of the road accident. The dependency of the dependants is determined by taking the annual earning of the deceased at the time of the accident. Thereafter, effect is given to the future prospects of the deceased. After the income of the deceased is established, the deduction is made towards the personal expenses of the deceased which he would have spent on himself. If the deceased was unmarried, normally 50% of the income is deducted towards his personal expenses. If the deceased was married and leaves behind two to three dependents, 1/3rd

deduction is made; if the deceased has left behind four to six family members, deduction of 1/4th of his income is made and where the number of dependent family members exceeds six, the deduction of 1/5th of the income is made. The remaining amount of income after deduction of personal expenses is taken to be the loss of dependency to the family members which is multiplied by 12 to determine the annual loss of dependency. The annual loss of dependency of the dependants of the deceased is multiplied by the multiplier according to the age of the deceased or victim(s) whichever is higher. A table of multipliers is given in Schedule-II of the Motor Vehicle Act, 1988 but there was some error in the said table which has been corrected by the Supreme Court in ***Sarla Verma v. DTC, 2009 ACJ 1298***.

29. Before awarding any compensation under Section 357(3) Cr.P.C., the Court shall consider whether any compensation has been received by the victim or his family by an award of the Motor Accident Claims Tribunal. If the victim(s) / his family have not received any compensation by an award of the Motor Accident Claims Tribunal, the Court shall, in exercise of its jurisdiction under Section 357(3) Cr.P.C., compute the compensation to which the victim(s) / his family by applying the well settled principles under the Motor Vehicles Act, 1988. However, if the victim / his family have received adequate compensation by an award of the Motor Accident Claims Tribunal, the compensation under Section 357(3) Cr.P.C. shall be restricted to a reasonable conventional compensation in the facts and circumstances of each case. For example, in a case where the deceased aged 36 years working as a telephone operator earning Rs.7,500/- per month dies in a road accident leaving behind his widow and two children; first step would be to add 50% of the income as future prospects and total income for computation of compensation would be taken as Rs.11,250/-. Next step is to deduct 1/3rd towards the personal expenses which

> the deceased would have spent on himself and the loss of dependency of his family would be Rs.7,500/- per month. The annual loss of dependency of Rs.90,000/- is multiplied by the multiplier of 15 to compute the total loss of dependency as Rs.13,50,000/-. Rs.50,000/- is added towards loss of love and affection, loss of consortium, loss of estate and funeral expenses. The total loss would be Rs.14,00,000/- (Rs.7,500/- plus 50% minus 1/3rd X 12 X 15 + Rs.50,000/-)."

It was further held therein that after computation of the compensation, the court would be required to consider whether the victim had received compensation from the Motor Accidents Tribunal.

384. The development of the law in the context of compensation based on the multiplier method in motor accident cases is a useful guideline for computation and award of compensation and damages. Flexibility has been read into the prescribed methodology to provide for imponderables and non-pecuniary elements of compensation. The same has been effectively utilized for award of compensation. Thus, the two components of compensation, i.e., standard compensation and compensation for pecuniary loss of dependancy would be ascertained based on above.

385. It needs no further elaboration that the object of Section 357 of the Cr.P.C., whereby the courts are empowered to award compensation to victims of the criminal offences in respect of the loss or injury suffered or harm caused, is to do justice in a holistic and real manner to the victims of crime. We are herein concerned

with the award of compensation for loss resulting on account of criminal acts committed by defendants after premeditation and planning. This fact would necessarily have to be factored into the compensation awarded so far as quantification of compensation.

XI. State liability to pay compensation

The discussion on this subject is being considered under the following sub-headings:

(i) Recovery of compensation and whether imposition of a default sentence for default in payment of compensation is permissible.

(ii) Impact of undergoing default sentence on liability for payment of fine/compensation.

(iii) Whether award of interim compensation is permissible?

(iv) Power to suspend execution of imprisonment for default of payment of fine; power to apportion compensation liability between multiple defendants, power to grant time and permit instalments for payment.

386. In a case where the offender stands identified and has the capacity to pay compensation, there is no difficulty for the court to make orders. However, what is to happen if the offender was not identified or could not be traced? Or if identified and traced, does not have the paying capacity? There may be a case, where the police decides not to prosecute. Or the case, for some reason, ends in an acquittal. Where would the victim or his dependants stand, so far as compensation is concerned?

387. To meet such eventualities, a statutory amendment was brought into force with effect from 31st December, 2009 and the following Section 357A was incorporated into the Cr.P.C.:

> **"357A. Victim compensation scheme. -** (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
>
> (2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).
>
> (3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.
>
> (4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
>
> (5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

> (6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

388. There was, therefore, statutory recognition of the responsibility of the State as well to ensure compensation to the victim(s) or his dependants who have suffered loss or injury as a result of the crime and who require rehabilitation. It is essential to emphasise that under sub-section (1) the legislation is not restricted to legal heirs or representatives but ensure provision of compensation to '*dependants*' of the victim of crime who has suffered loss or injury as a result and who require rehabilitation. In sub-section (3), the statute has also envisaged situations where compensation awarded under Section 357 may not be adequate for such rehabilitation (for instance when the paying capacity of the offender is insufficient) or when the cases end in acquittal or discharge and the victim has to be rehabilitated. In sub-section (4), provision is made for a case where the victim stands identified, however, the offender is not traced or identified and no trial takes place. In such a case the victim or his dependants may make an application to the State or the District Legal Services Authority for the award of compensation. Time bound compliance has been

mandated and provision has been made of ensuring first-aid or medical benefits as well, to alleviate the suffering of the victim.

389. While sub-section (3) provides that the trial court would make the recommendation for compensation, sub-sections (4), (5) and (6) mandate the State or the District Legal Services Authority to pass appropriate orders thereunder.

390. We are informed that so far as Delhi is concerned, the Government of NCT of Delhi on 2nd February, 2012 has notified the ***Delhi Victims Compensation Scheme*** wherein, in case of loss of life, a minimum of compensation has been stated at Rs.3,00,000/- with the maximum at Rs.5,00,000/-.

391. Taking a strict view with regard to the failure of State governments to adequate provide for victim's compensation in appropriate schemes in compliance with Section 357A of the Cr.P.C., the Supreme Court issued time bound directions in para 14 of the judgment reported at ***(2014) SCC Online SC 952, Suresh & Anr. v. State of Haryana*** which reads as follows:

> **"14.** We are of the view that it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being ***satisfied on an application or on its own motion,*** the Court ought to ***direct grant of interim compensation, subject to final compensation being determined later.*** Such ***duty*** continues ***at every stage of a criminal case*** where compensation ought to be given and has not been given, ***irrespective of the application*** by the victim. At the stage of ***final hearing*** it is ***obligatory on the part of***

> ***the Court*** to advert to the provision and record a finding ***whether a case for grant of compensation*** has been made out and, if so, ***who is entitled to compensation*** and ***how much***. Award of such compensation can be interim. ***Gravity of offence*** and ***need of victim*** are some of the ***guiding factors*** to be kept in mind, ***apart from such other factors*** as may be ***found relevant*** in the facts and circumstances of an individual case. We are also of the view that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify their schemes within one month from receipt of a copy of this order. We also direct that a copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imparted requisite training to make the provision operative and meaningful."
>
> (Emphasis supplied)

392. It is therefore, obligatory on every criminal court to consider the case from the perspective of whether an order under Section 357 Cr.P.C. was called for or not. It is a duty of every court to consider the case for grant of interim compensation at every stage of criminal case where compensation ought to be given and has not been given, without waiting for an application from the victim.

(i) *Recovery of compensation and whether imposition of a default sentence for default in payment of compensation is permissible*

393. Let us firstly examine the modes statutorily prescribed for recovery of fine. In this regard, Section 421 of the Code of Criminal Procedure, 1973 provides as follows:

> "**421. Warrant for levy of fine.-** (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-
> (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
>
> (b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:
>
> Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.
>
> (2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

> (3) Where the Court issues a warrant to the Collector under clause (b) of sub- section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

394. What can be done if a person commits default of payment of fine? The Indian Penal Code statutorily recognises the permissibility of directing imprisonment in default of payment of fine under Section 64 of the Indian Penal Code which specifically provides that the court which sentences an offender, shall be competent to direct that in default of payment of fine, the offender shall suffer imprisonment for a certain term, in which the imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence. So far as the description of such imprisonment for the non-payment of fine is concerned, discretion is given to the court under Section 66 of the IPC which permits the court to impose imprisonment in default of payment of fine to be of any description to which the offender might have been sentenced for the offence. So far as the limits to imprisonment for non-payment of fine are concerned, when imprisonment and fine are awardable, the same are provided in Section 65 and when the offence is punishable with fine only, Section 67 provides the limits. It is noteworthy that under Sections 68 and 69, the legislature has

anticipated payment of the fine or part of the fine and the consequences thereof on the default imprisonment.

395. Though the Code of Criminal Procedure does not provide specific provision for recovery of the amount of compensation under Section 357 of the Cr.P.C., it is necessary to refer to Section 431 in this regard which reads thus:

> "**431. Money ordered to be paid recoverable as a fine.-** Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:
>
> Provided that Section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of section 421, after the words and figures "under section 357", the words and figures "or an order for payment of costs under section 359" had been inserted."

396. An order for payment of compensation by the defendant upon conviction in a criminal trial is certainly an order under Section 357 of the Cr.P.C. and therefore, would be recoverable in accordance with the procedure prescribed under Section 431. Section 431 adverts to Section 421 of the Cr.P.C. As such, the recovery of compensation would be effected in a manner prescribed under Section 421 of the Cr.P.C.

397. The statute has provided for imposition of imprisonment upon default of payment of a sentence of fine. The question which

begs consideration is whether the court has the power to impose a similar imprisonment upon default of payment of compensation.

398. This issue is certainly not res integra and stands considered by the Supreme Court in several judicial pronouncements. In ***(1994) 4 SCC 29, Balraj v. State of U.P.***, the Supreme Court directed that if the appellant did not pay the amount of compensation as ordered, the same may be collected as provided under Section 431 of the Cr.P.C. and paid to the victim.

399. In the pronouncement noted at ***(1999) 7 SCC 510, K. Bhaskaran v. Sankaran Vaidhyan Balan,*** in para 30, while considering Section 357(3) of the Code, the court stated that if the "*Judicial Magistrate of the First Class were to order compensation to be paid to the complainant out of the fine realised, the complainant will be the loser when the cheque amount exceeded the said limit*".

400. Our attention is drawn to ***(2002) 2 SCC 420, Suganthi Suresh Kumar v. Jagdeeshan,*** wherein the Supreme Court reiterated the law laid down in ***(1988) 4 SCC 551 Hari Singh v. State of U.P.*** in this regard observing as follows:

> "5. In the said decision this Court reminded all concerned that it is well to remember the emphasis laid on the need for making liberal use of Section 357(3) of the Code. This was observed by reference to a decision of this Court in ***Hari Singh*** **v.** ***Sukhbir Singh*** [(1988) 4 SCC 551 : 1988 SCC (Cri) 984 : AIR 1988 SC 2127]."

> "10. That apart, ***Section 431*** of the Code has only prescribed that ***any money (other than fine) payable by virtue of an order made under the Code shall be***

> ***recoverable "as if it were a fine". Two modes of recovery of the fine have been indicated in Section 421(1)*** of the Code. The proviso to the sub-section says that if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant for levy of the amount.
>
> 11. When this Court pronounced in *Hari Singh* v. *Sukhbir Singh* [(1988) 4 SCC 551 : 1988 SCC (Cri) 984 : AIR 1988 SC 2127] that a ***court may enforce an order to pay compensation "by imposing a sentence in default***" it is open to all courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a larger Bench of this Court. xxx".
>
> (Emphasis by us)

401. Reference requires to be made to an order of the Supreme Court dated 3rd August, 2007 in Crl.A.No.1013/2007 which has been reported at ***(2009) 6 SCC 660 : (2009) 3 SCC (Cri) 302, Ahammedkutty v. Abdullakoya.*** The Supreme Court ordered that compensation directed to be paid by the court in exercise of its jurisdiction under sub-section 3 of Section 357 cannot be realised as a fine in terms of Section 421.

402. In ***(2009) 6 SCC 652 : (2009) 3 SCC (Cri) 296, Vijayan v. Sadanandan K. & Anr.***, the aforesaid judgment in ***Ahammedkutty*** was relied upon by the party ordered to pay. However, the court noticed the provisions of Sections 421 and 431 CrPC, which dealt with mode of recovery of fine and Section 64 IPC, which empowered the courts to provide for a sentence of imprisonment on default of payment of fine. The court also extensively referred

to the pronouncements of the Supreme Court and declared that the law had been correctly stated in ***Suganthi.*** We set down hereunder the findings and reiteration of the principles laid down in ***Hari Singh*** in para 31 and 32 which read as follows :-

> "*31*. The provisions of ***Sections 357(3) and 431 CrPC***, when read with ***Section 64 IPC***, empower the court, while ***making an order for payment of compensation***, to also ***include a default sentence*** in case of non-payment of the same.
> *32*. The observations made by this Court in *Hari Singh case* [(1988) 4 SCC 551 : 1988 SCC (Cri) 984 : AIR 1988 SC 2127] are as important today as they were when they were made and if, as submitted by Dr. Pillay, recourse can only be had to Section 421 CrPC for enforcing the same, the very object of sub-section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory."
>
> (Emphasis supplied)

403. After considering several preecedents, the Supreme Court in the judgment reported at ***(2010) 6 SCC 230, K.A Abbas H.S.A. v. Sabu Joseph,*** on the question of permissibility of awarding a sentence of imprisonment upon default of payment of compensation observed thus:

> "26. From the above line of cases, it becomes very clear, that, ***a sentence of imprisonment can be granted for default in payment of compensation awarded under Section 357(3) CrPC.*** The whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. ***Sometimes*** the situation becomes such that there is no purpose served by keeping a person behind bars. ***Instead directing the accused to pay an amount of compensation to the victim or***

affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment. Hence on ***default of payment of this compensation, there must be a just recourse.*** Not imposing a sentence of imprisonment would mean allowing the accused to get away without paying the compensation and imposing another fine would be impractical as it would mean imposing a fine upon another fine and therefore would not ensure proper enforcement of the order of compensation. While passing an order under Section 357(3), it is imperative for the courts to look at the ability and the capacity of the accused to pay the same amount as has been laid down by the cases above, otherwise the very purpose of granting an order of compensation would stand defeated.

xxx xxx xxx

32. The learned counsel for the accused has placed reliance on the decision of this Court in *Ahammedkutty* v. *Abdullakoya* [(2009) 6 SCC 660 : (2009) 3 SCC (Cri) 302] , which reiterated the position taken by the Kerala High Court in *Radhakrishnan Nair* v. *Padmanabhan* [(2000) 2 KLT 349] ; wherein it was held that no sentence of imprisonment can be passed on default of paying compensation awarded under Section 357(3). But in light of several decisions reiterating the opposite stand, this case needs to be viewed in isolation and cannot be taken to be against the established position preferred by the Supreme Court on this issue over a period of two decades."

(Emphasis supplied)

404. In para 29 of the pronouncement reported at ***(2012) 8 SCC 721, R. Mohan v. A.K. Vijaya Kumar,*** the court held as follows:

"29. The idea behind directing the accused to pay compensation to the complainant is to give him

> immediate relief so as to alleviate his grievance. In terms of Section 357(3) compensation is awarded for the loss or injury suffered by the person due to the act of the accused for which he is sentenced. If merely an order directing compensation is passed, it would be totally ineffective. It could be an order without any deterrence or apprehension of immediate adverse consequences in case of its non-observance. The whole purpose of giving relief to the complainant under Section 357(3) of the Code would be frustrated if he is driven to take recourse to Section 421 of the Code. Order under Section 357(3) must have potentiality to secure its observance. Deterrence can only be infused into the order by providing for a default sentence. If Section 421 of the Code puts compensation ordered to be paid by the court on a par with fine so far as mode of recovery is concerned, then there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of default in payment of fine under Section 64 IPC. It is obvious that in view of this, in *Vijayan* [(2009) 6 SCC 652 : (2009) 3 SCC (Cri) 296] , this Court stated that the abovementioned provisions enabled the court to impose a sentence in default of payment of compensation and rejected the submission that the recourse can only be had to Section 421 of the Code for enforcing the order of compensation. Pertinently, it was made clear that observations made by this Court in *Hari Singh* [(1988) 4 SCC 551 : 1988 SCC (Cri) 984] are as important today as they were when they were made. The conclusion, therefore, is that the order to pay compensation may be enforced by awarding sentence in default."

405. In the recent pronouncement of the Supreme Court dated 6th May, 2014 in W.P.(Crl.)No.57/2014 reported at ***(2014) 8 SCC 470, Subrata Roy Sahara v. Union of India,*** the Supreme Court reiterated the well settled position "*under the provisions of the*

Cr.P.C., there is an elaborate procedure prescribed whereunder a ***person can be subjected to arrest and detention for the satisfaction of a fine or compensation (i.e. for the recovery of a financial liability)***".

406. It is, therefore, well settled that courts are amply empowered to direct imprisonment for default of payment of fine or compensation. Upon a conjoint reading of Sections 357(3) and 431 of the Cr.P.C. as well as Section 64 of the Indian Penal Code, it is trite that the court making an order under Section 357 of the Cr.P.C. can direct that in default of payment of the compensation, the offender shall suffer imprisonment, for a term and manner for which imprisonment would be imposed for default of payment of a fine.

407. It is important to note that the sentence of imprisonment for default in payment of compensation is different from the regular sentence of imprisonment imposed as a punishment. The description of the imprisonment would be in consonance with Section 66 of the IPC.

408. For the purposes of determining apt imprisonment for default of payment of fine/compensation, while keeping within the limits prescribed in Sections 65 and 67 of the IPC, it is therefore, the duty of the court to keep in view relevant consideration which would again inter alia include the nature of the offence, the circumstances in which it was committed, position of the offender.

(ii) *Impact of undergoing default sentence on liability for payment of fine/compensation*

409. Having held that under Section 357 of the Cr.P.C. the court can impose a default imprisonment for failure to pay compensation, brings us to the next question. What is the impact of undergoing the default sentence on the compensation liability?

410. In the context of execution of an order for payment of maintenance under Section 125 of the Cr.P.C. as well, the Supreme Court in its judgment reported at ***(1989) 1 SCC 405, Kuldeep v. Surender Singh*** has observed that sentencing a person to jail is a *"mode of enforcement"* and not a "*mode of satisfaction*". It was held as follows:

> "6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. ***Sentencing a person to jail is a "mode of enforcement". It is not a "mode of satisfaction" of the liability***. The liability can be satisfied ***only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge.*** *xxx* ***Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability.*** The section does not say so. Parliament in its wisdom has not said so. Commonsense does not support such a construction. From where does the court draw inspiration for persuading itself that the liability arising under the order for maintenance would

> stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is ***only a mode or method of recovery and not a substitute for recovery***. No other view is possible. xxx xxx xxx"
>
> (Emphasis by us)

411. So far as the working and recovery of compensation is concerned, in ***(1998) 7 SCC 392 State of Gujarat v. Hon'ble High Court of Gujarat*** on the experience of a default sentence, it was noted as follows:-

> "48. Section 357 of the Criminal Procedure Code, 1973 provides some reliefs to the victims as the court is empowered to direct payment of compensation to any person for any loss or injury caused by the offence. But ***in practice, the said provision has not proved to be of much effectiveness. Many persons who are sentenced to long-term imprisonment do not pay the compensation*** and instead ***they choose to continue in jail*** in default thereof. It is only ***when fine alone*** is the sentence that the ***convicts invariably choose to remit the fine***. But those are cases in which the harm inflicted on the victims would have been far less serious. Thus the restorative and reparative theories are not translated into real benefits to the victims."
>
> (Emphasis supplied)

412. It is evident, therefore, that too heavy a compensation amount and too trivial the default imprisonment would negate the efficacy of not only the compensation, but also of the length of default imprisonment.

413. So what are the factors which must weigh with the court while undertaking such assessment. This is best stated by the Supreme Court in its pronouncement reported at ***(2007) 11 SCC 243, Shantilal v. State of M.P.*** wherein the court delved into the factors which must weigh with the court before ordering a default sentence for non-compliance of an order of payment of compensation in the following terms:

> "31. ... The term of ***imprisonment in default*** of payment of fine ***is not a sentence***. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. ***A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount.*** He, therefore, ***can always avoid to undergo imprisonment in default of payment of fine by paying such amount.*** It is, therefore, not only the *power*, but the ***duty of the court to keep in view the nature of offence, circumstances under which it was committed,*** the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine."
>
> (Emphasis by us)

414. The default sentence is a method of procuring enforcement of the order and not a method for discharge of liability.

415. Undergoing the default sentence would not discharge the liability to pay the compensation ordered by the court.

(iii) Whether award of interim compensation is permissible?

416. The jurisprudence on the subject of compensation brings out the aspect of grant of interim compensation as well. We find that in para 18 of ***(1996) 1 SCC 490, Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)***, the court referred to the prior decision in ***(1995) 1 SCC 14, Delhi Domestic Working Women's Forum v. Union of India*** wherein the court had laid down the principles for trying cases of sexual assault and made directions with regard to payment of compensation to victims. In para 18, the Supreme Court observed that "*if the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should also be provided in the scheme. On the basis of principles set out in the aforesaid decision, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life*".

417. In para 19, the court additionally observed that it had "*the inherent jurisdiction to pass any order it considers fit and proper in the interest of justice or to do complete justice between the parties*". The jurisdiction to pass such interim order would be inherent in the High Courts as well if the facts of the case so warrant.

418. We see no reason as to why the above principles on award of interim compensation ought not to apply to the every criminal case,

including the present case. The High Court in appellate and revisional jurisdiction, has the substantive power to award compensation under Section 357 of the Cr.P.C. It would therefore, have the power to grant interim compensation in exercise of its inherent power under Section 482 of the Cr.P.C.

419. This issue in the context of a case involving the offences of criminal conspiracy, kidnapping for ransom and murder was considered by the Supreme Court in the judgment reported at ***(2014) SCC Online SC 952, Suresh & Anr. v. State of Haryana.*** The court considered the pronouncement in ***(1985) 4 SCC 337, Savitri v. Govind Singh Rawat*** wherein the court held that it was a duty of the court to interpret the provisions of Chapter IX of the Cr.P.C. (in the context of Section 125) in such a way that the construction placed on them would not defeat the very object of the legislation. It was held that in the absence of any express prohibition, it was appropriate to construe the provisions as conferring an implied power on the Magistrates to direct the person against whom the application under Section 125 is made, to pay some reasonable sum by way of interim maintenance to the applicant. This view was reiterated by the Supreme Court in ***(2008) 9 SCC 632, Shail Kumari Devi v. Krishan Bhagwan Pathak.***

420. So far as the issue of interim compensation to victims of crime was concerned, in ***Suresh v. State of Haryana,*** the Supreme Court held as follows:

> "We are of the view that above observations support the submission that interim compensation ought to be paid at the earliest so that immediate need of victim can be met. For determining the amount of interim compensation, the Court may have regard to the facts and circumstances of individual cases including the nature of offence, loss suffered and the requirement of the victim. On an interim order being passed by the Court, the funds available with the District/State Legal Services Authorities may be disbursed to the victims in the manner directed by the Court, to be adjusted later in appropriate proceedings. If the funds already allotted get exhausted, the State may place further funds at the disposal of the Legal Services Authorities."

421. It is therefore, well settled that the courts are adequately empowered to consider award of interim compensation to a victim of a criminal offence upon the court concluding in favour of the entitlement of a person. A direction to make the payment of the interim maintenance can be made against the Legal Services Authority subject to appropriate orders for adjustment/reimbursement, if deemed appropriate upon final adjudication.

(iv) *Power to suspend execution of imprisonment for default of payment of fine; power to apportion compensation liability between multiple defendants, power to grant time and permit instalments for payment.*

422. It is essential to refer to a statutory provision which confers the power of suspension of execution of the sentence of imprisonment in default of payment of the fine, either

unconditionally or on conditions. In this regard, we set down hereunder Section 424 of the Cr.P.C. which reads as follows:

> "**424. Suspension of execution of sentence of imprisonments. -** (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine and the fine is not paid forthwith, the court may-
>
> (a) Order that the fine shall be payable either in fully on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days;
>
> (b) Suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the court thinks fit, on conditioned for his appearance before the court on the date or dates on or before which payment of the fine or the instalment thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the court may direct the sentence of imprisonment to be carried into execution at once.
>
> (2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the court may at once pass sentence of imprisonment."

Therefore, even while passing an order suspending the sentence of imprisonment for default of payment, it is open to the court to grant time to the defendant to pay the amount or do so in instalments. The legislative intent is clearly to persuade the defendant to comply with the direction to pay.

423. The issues regarding apportionment between multiple convicts, permissibility of payment of differential compensation amongst multiple convicts as well as grant of reasonable time to the convict and mode for payment stand considered in ***(1988) 4 SCC 551 Hari Singh v. Sukhbir Singh,*** when the Court stated thus:

> "11. xxx The ***quantum of compensation*** may be ***determined*** by taking into account the ***nature of crime***, the ***justness of claim*** by the victim and the ***ability of accused to pay***. If there are ***more than one accused*** they may be ***asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments***, may also be given. The court may ***enforce*** the order ***by imposing sentence in default***."
>
> (Emphasis by us)

Orders in respect of apportionment between defendants thus are permissible and could be considered by the court when passing the order of compensation. This would rest on factors as the acts of each of the accused, capacity to pay and such like relevant factors. So far as grant of a period or instalments for payment are concerned, the convict would be required to place material in support of such request. Even while suspending a sentence of

imprisonment for default of payment, the court is empowered to impose conditions in terms of Section 424 of the Cr.P.C., giving opportunity to the defendant to pay the amount.

424. The manner in which the court shall proceed under Section 357 of the Cr.P.C. is well settled. We hereunder sum up the procedure to be followed:

(i) Once a judgment of conviction is returned, or upheld, it is the mandatory duty of every court to consider whether the case is a fit case for award of compensation.

(ii) The court shall first decide as to what should be the quantum of compensation to which the victims or the dependants would be entitled in law and then ascertain the paying capacity of the defendants.

(iii) The court is required to conduct an inquiry even a summary one with into all relevant factors including the paying capacity of the accused. However, such inquiry may not be necessary, if the facts emerging during the trial or otherwise are clear rendering the inquiry unnecessary.

(iv) In fixing the fine and/or compensation, it is the duty of the court to take into consideration all relevant factors inter alia including the nature of the crime, the injury suffered, the persons entitled to be compensated, the justness of the claim for compensation, the capacity of the accused to pay.

(v) The enquiry ought to examine the details of the victims/dependants, impact of the crime on them as well as their circumstances.

(vi) The judge awarding the compensation must exercise the power reasonably. He cannot exercise the power to do so arbitrarily. It is necessary to assign some reasons for the award of fine and compensation by the court.

(vii) Under no circumstance can the fine or compensation be either irrational or exorbitant.

(viii) If there are multiple offenders, the compensation would be required to be rationally distributed between them. It is also permissible to grant time or to direct payment of the compensation in instalments keeping in view the paying capacity of the defendant.

(ix) If recovery of the compensation or any part thereof is not possible from the offender, the court shall proceed to cause the same to be paid in accordance with the provisions of Section 357A Cr.P.C. and any scheme thereunder.

(x) A summary inquiry is essential to determine the compensation under Section 357 unless the facts as emerging in the course of trial are so clear that the Court considers it unnecessary to do so. Some relevant facts/documents could be collected in this regard during the inquiry in the offences are as under:-

Part-I – Circumstances of the offence

a) FIR No., Offence and Police Station
b) Offences as per chargesheet
c) Date, time and place of accident
d) Brief description of how the offence took place.
e) Details of person who reported offence to the police.
f) Who shifted the injured to the hospital and at what time?
g) Name of the hospital(s) where treated?
h) Period of hospitalization
i) Period of treatment
j) Whether injured underwent surgery(s)? If so, give particulars. Also give particulars of future surgery(s), if required?
k) Whether any hospital refused to give treatment to the injured?
l) Whether there was any delay in starting the treatment?

m) Whether the injured was provided cashless treatment by any Insurance Company?

n) Consequences of the accident:-

a. Whether resulted in death or injury or both?
b. Number of persons injured/died.

Part-II – Circumstances of the accused

a) Name and address
b) Age
c) Gender
d) Education
e) Occupation
f) Family
g) Income (monthly)
h) Whether the accused reported the incident to the police?
i) Whether the accused provided any assistance to the victim?
j) If the accused fled from the spot, the date on which he appeared before the police.
k) Whether the accused co-operated in the investigation?

(a) Paying capacity of the accused and his family
(i) Capacity to pay lump-sum compensation.
(ii) Capacity to pay monthly compensation.

(b) Whether the accused has truly disclosed all his assets, income and expenditure on his affidavit?

Part-III – Impact of the offence on the victim(s)

A Death Cases:-

a. Name and address of the deceased
b. Age of the deceased
c. Gender of the deceased
d. Occupation of the deceased
e. Income (Monthly) of the deceased

B Legal heirs/dependants/Guardian:-

a. Name
b. Age
c. Address
d. Relationship
e. Financial status/ condition of the deceased's family/dependants

C Injury Cases:-

a. Name and address of injured
b. Age
c. Gender
d. Occupation
e. Income (Monthly)
f. Nature of injury
g. MLC/Post mortem report and details
h. Whether any permanent disability? If yes, give details
i. Expenditure incurred on treatment, conveyance, special diet, attendant, etc.
j. Whether the injured got reimbursement of medical expenses from employer or under Mediclaim policy.
k. Loss of earning capacity
l. Details of the family/ dependants of the victim.

D Financial/other loss suffered

a. Nature of loss
b. Quantum of loss/damage suffered
c. Expenditure incurred by the victim in making good the loss
d. Future expenses to be incurred.

E Whether the claimants filed a claim before MACT or under any other law or forum? If yes, for how much?

F Whether any compensation has been awarded by any

other court/tribunal/forum? If yes, how much and against whom? Give the break-up of the share of the claimants in the award amount? Enclose a copy of the judgment/award/order.

G Was the compensation awarded after an enquiry on merits or was it an order of Lok Adalat?

H Whether the compensation awarded has been received by the claimant(s)? If yes, enclose a copy of the receipt.

Part-IV – Relevant documents to be collected during Inquiry

a) First Information Report
b) Site plan
c) Photographs
d) MLC
e) Proof of age and income of the injured/deceased
f) Proof of injuries and expenditure on treatment
g) Disability certificate of the injured
h) Proof of reimbursement of medical expenses by employer or under a Mediclaim policy
i) Proof of legal heirs/dependants/guardian of the deceased
j) Judgment/Award/Order, if any granting compensation.
k) Receipt of award, if any
l) Affidavit of assets, income and expenditure of the accused in terms of *Puneet Kaur* v. *Inderjit Singh Sawhney*, 183 (2011) DLT 403.

(xi) It shall be ensured by the court that during the inquiry, no privilege or right constitutionally or statutorily available to the defendants is violated.

XII. Fine and compensation - constituents, reasonability and adequacy

425. Section 357 of the Cr.P.C. confers the power on the courts to impose fine and compensation. The legislation does not enumerate the factors which ought to weigh with the court while assessing appropriate reasonable compensation. There is also very scanty jurisprudence on this aspect. It encompasses expenses properly incurred in prosecution [clause (a)] as well as such payment to any person so as to compensate for any loss or injury caused, when compensation is in the opinion of the court recoverable by such person in a civil court (clause b).

426. Fine is a part of sentence imposed, an award of compensation is in addition thereto. We have noted above the power of the High Court, either on appeal or in revision or also to *suo motu* enhance the sentence if convinced that the same is not adequate in the facts and circumstances of the case.

427. In the present case, Sections 302, 364 and 201 of the IPC do not limit the quantum of fine which the sentencing court may impose.

428. In Chapter XXVII captioned "*The Judgment*" of the CrPC, the legislature has provided Section 357 which empowers the court to make orders of compensation. Some indication as to what must be considered by the court while imposing a fine is to be found in sub-section (1) Section 357 of the Cr.P.C. which enables the court to pass orders for the purposes of which fine (as part of the sentence) may be applied.

429. Clause (a) sub-section (1) of Section 357 permits the courts to direct the fine, or part thereof to be applied for "*defraying the expenses properly incurred in prosecution*".

430. Clause (b) enables the court to apply the fine for payment to "*any person*" within courts of "*compensation*" for "*any loss or injury caused by the offence*" when compensation is in the opinion of the court, recoverable by such person in a civil court.

431. We find that so far as civil proceedings are concerned, the legislature and judicial precedents have provided for recovery of costs of proceedings. The CPC confers discretion on the court to determine by whom, out of which property and to what extent costs are to be paid as well as to give all necessary directions for the purposes. Under Section 35A, the court is enabled to make an order for payment of costs by way of compensation in respect of false or vexatious claims or defences. The courts are empowered to direct that the costs shall form part of the decree.

432. So far as Code of Criminal Procedure is concerned, it makes reference to costs in Section 359 Cr.P.C. which enables the convicting court to order accused to pay to complainant "*in whole or in part, the cost incurred by him in the prosecution*". It also states that "*such costs may include any expenses incurred in respect of process-fees, witnesses and pleader's fees which the Court may consider reasonable*".

433. Some guidance in this regard is discernible from the statutory provisions in other countries and jurisprudence therefrom. We find legislation in this regard in the United Kingdom as well as

New Zealand. The ***Prosecution of Offences Act, 1985*** of the ***United Kingdom*** includes in Part II, "*Costs in Criminal Cases*". The legislation grades costs as per the hierarchy of courts starting from the Magistrates' Court, the Crown Court and the higher courts. Apart from costs which may be awarded in favour of the accused (referred to as the 'defendant'), in Section 17, prosecution costs, with regard to proceedings in respect of indictable as well as proceedings before the Divisional Court of the Queens Bench Division or the Supreme Court. Under Section 18, the award of costs against the accused to be paid to the prosecutor as are considered "*just and reasonable*". If in the particular circumstances of the case, the court considers it right to do so, certain statutory restrictions on the quantum, person to whom, and manner of award are also statutorily prescribed. Under sub-section 4 of Section 18, a Magistrate's court shall not order the accused to pay any cost "*unless in the particular circumstances of the case it considers it right to do so*". There is also a limitation on costs which a person under the age of 18 years can be ordered to pay.

434. Sub-section 3 of Section 19 enables the Lord Chancellor to make regulations to inter alia (a) compensate any witness and any other person who necessarily attends for the purposes of the proceedings otherwise and (b) to give evidence for the "*expense, trouble or loss of time*" properly incurred in or incidental to his attendance.

Additionally, the regulations would cover the proper expenses for an interpreter who may be required; compensate a

duly qualified practitioner, who makes a report with regard to a medical examination, for the expenses properly incurred in or incidental to his reporting to the court. The legislation is farsighted in and even provides the cost for the defence; against legal representatives; against third parties amongst other matters.

435. Pursuant to the statutory requirement, the ***Criminal Cases (General) Regulations, 1986*** made as a result of the above statutory power, came into operation on the 1st of October, 1986. Regulation 3 enables the court to order that all or part of the costs incurred in respect of proceedings by one of the parties as a result of an "*unnecessary or improper omission by or on behalf of another party to the proceedings*" be paid to him by the other party.

436. The regulations provide for the method of determination of costs as well as its payment. The regulations provide a requirement of an application for a cost order.

437. The ***Costs in Criminal Cases Act (Northern Ireland), 1968*** is restricted to the recovery of "***expenses of prosecution***" in Section 1.

438. Reference may usefully be made to the ***Costs in Criminal Cases Act, 1967*** in force in ***New Zealand***. The enactment defines the '*defenda*nt' as "*any person charged with an offence*". Under Section 4, where the defendant stands convicted by any court of any offence, the court is empowered to order him to pay such sum as it thinks "*just and reasonable towards the cost of the prosecution*". The costs which are allowed are required to be

specified in the conviction and may be "*recovered in the same manner as a fine*". Where the prosecution involved a difficult or important point of law, this legislation also provides for payment of defendant's costs, even if convicted, Under Section 10, an order to pay costs on appeal is enforceable as if were a fine by the District Court.

439. Section 12 of the New Zealand law makes it mandatory for the court, before deciding whether to award costs under the Act, to allow any party, who wishes to make submissions or call evidence on the question of costs, reasonable opportunity to do so. So far as the heads of costs that may be ordered to be paid under the enactment; prescription of maximum scale of costs that may be ordered, etc. under Section 13 of the statute, the same are to be prescribed by regulations. Under sub-section (3) of Section 13, even if a maximum scale of costs stands prescribed by regulation, the court is empowered to make an order for payment of costs in excess thereof, if it is satisfied that having regard to the "*special difficulty, complexity, or importance of the case, the payment of greater costs is desirable*".

440. The experience in the United Kingdom has shown that it is impractical to maintain detailed time and costs records and that in any event, the defendant is generally only asked to make a contribution to costs. The tables which have been provided are for the purposes of rendering assistance in calculating the staff costs incurred at different levels of proceedings, called "Scales of Costs" and the advocacy costs at different levels of proceedings.

441. It was held by the England and Wales Court of Appeals in the judgment in ***(2012) EWCA Crim 2029, R v Kesteven*** that the purpose of the costs ordered is to compensate the prosecutor, and not to punish the defendant. The costs should not be grossly disproportionate to the fine. Though the judgment of the court does not make a reference to costs, but the purpose of the order appears to have been compensation for the system for delayed compounding.

442. Have costs been contemplated under the criminal justice system in India? We find that in a case under Section 138 of the Negotiable Instruments Act, the Supreme Court of India in the order dated ***3rd May, 2010*** disposing of ***Criminal Appeal No.963/2010*** [arising out of SLP(Crl.)No.6369/2007], ***Damodar S. Prabhu v. Sayed Babalal H.*** with Criminal Appeal Nos.964-966/2010 [arising out of SLP(Crl.)Nos.6370-6372/2007], observed that the law permitted compounding of an offence. However, parties were choosing compounding as a matter of last resort instead of opting for it as soon as Magistrates take cognizance of complaints. Often parties wait till the matter reaches the Supreme Court in appeal before the defendants accept liability and settles the matter with the complainant. Given this reality of defendants avoiding their liability to pay, the Supreme Court inter alia proposed the following Guidelines for dealing with such cases:

> **"21.** With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay

compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:

THE GUIDELINES

(*i*) In the circumstances, it is proposed as follows:

(*a*) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could ***make an application for compounding of the offences at the first or second hearing of the case*** and that if such an application is made, compounding may be allowed by the court ***without imposing any costs*** on the accused.

(*b*) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, ***compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount*** to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.

(*c*) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the ***accused pays 15% of the cheque amount by way of costs.***

(*d*) Finally, if the application for compounding is made before the Supreme Court, ***the figure would increase to 20% of the cheque amount.***"

(Emphasis by us)

443. We find that costs were also imposed by the Supreme Court in the judgment reported at ***AIR 2014 SC (Criminal) 879: 2014 Cri. L.J. 1575, Padmalayan & Anr. Sarasan Anr.*** wherein the Supreme Court permitted compounding of offences under Section 324 of the IPC. However, for wasting the time of the courts below and the Supreme Court, the costs of Rs.15,000/- was imposed.

444. In the judgment involving a crime of personal gain preceded by calculated design, in the case reported at ***2012 SCC Online Del 3298, Trinity Global Enterprises Ltd. v. Raj Hiremath & Anr.,*** the consideration by the court of the necessity of conditions on bail and the impact of those conditions, throws some light on what may be examined while imposing a sentence. This court held thus:

> "23. The petitioner, therefore, continues to enjoy the fruits of their crime. Such persons who continue to reap the benefit of their crime after committing the offence of personal gain and preceded by calculated design need to be put under some restriction by imposing a reasonable condition so that it does not send a wrong message to the potential offenders that even after committing the crime, they can continue to enjoy the ill-gotten wealth. The Court may impose conditions as specified under Section 438(2) CrPC.
>
> 24. This Court is conscious of the fact that ***criminal Court is not a recovery forum*** but in the given case, it is the ***duty of the Court to safeguard the interest of the society as also of the complainant who has been duped of huge amount***. If some reasonable condition is imposed on the respondent while letting them enjoy the benefit of anticipatory bail, it would have the effect of avoiding unnecessary adjournment and delay in trial at

the behest of respondents who are accused in FIR No. 158/2011, PS EOW."

(Emphasis supplied)

Therefore, even so far as the criminal proceedings are concerned, imposition of costs either for wasting judicial time wasting or compensating the other side is unique neither nor restricted to civil proceedings. It is certainly not a new concept.

445. Though the present case is not concerned with dishonouring of the cheque, or an economic offence, however, the object of imposition and method of computation of costs in criminal proceedings or "expenses incurred in prosecution" even in exercise of power under Section 357(1)(a) of the Cr.P.C. cannot differ.

446. Let us first and foremost examine clause (a) of Section 357(1) of the Cr.P.C. Other than mentioning the expression "*in defraying the expenses properly incurred in the prosecution*", the Cr.P.C. is silent on its composition.

447. The expressions "*defraying*", "*expenses*", "*properly incurred*", "*prosecution*" in clause (a) or "*any person*" in clause "(b)" have not been defined by the legislature.

448. So far as the expression '*defray'* is concerned, no statutory definition is available. Other than its use in Section 357(1)(a) of the Criminal Procedure Code, it has also been used in Rule 2(1) of Order XVI of the Civil Procedure Code, 1908 in the context of expenses of witnesses to be paid into court or applying for summons. This expression is also used in Section 2(22)(e) of the Employees State Insurance Act. In the Code of Civil Procedure,

this statutory provision refers to an amount '*as appear to the court to be sufficient to defray the travelling and other expenses.....*'. The Legal Glossary, 1988 of the Government of India describes the expression "*defray"* as *"to meet the expenses to pay out the expenses"*. The Oxford English Dictionary Vol. III has also defines '*defray'* as follows :-

> "1. To pay out, expend, spend, disburse (money).
> 2. To discharge (the expense or cost of anything) by paying; to pay, meet, settle.
> 3. To meet the expense of; to bear the charge of; pay for.
> 4. To pay the charges or expenses of (a person); to reimburse."

449. It is therefore obvious that *'defray'* as appears in Section 357 has to relate to discharge of all expenses in the prosecution and is intended to be an amount equivalent to meeting the expenses incurred in the prosecution.

450. It is important to note another important facet of the drafting of the statutory provision in India. Unlike the legislations noted by us above as well as the orders of the Supreme Court, we find that clause(a) of sub-section (1) of Section 357 has utilized the expression "*expenses*" instead of only *costs*. Expenses relate to value of all things utilised in doing particular thing which would be beyond simply the actual monetary expenditure. For instance, as per the ***Oxford English Dictionary***, it would include the money paid for meals, fares, etc. by an employee in the course of their work, which they can claim back from the employer. The Black's

Law Dictionary defines the word "*expense*" as "an expenditure of money, time, labor, or resources to accomplish a result; esp., business expenditure chargeable against revenue for a specific period" whereas the word "*cost*" as per Black's Law Dictionary is restricted to "the amount paid or charged for something; process or expenditure". For this reason, the expression "*expenses*" appearing in Section 357(1)(a) would take into its ambit not only the costs of the court proceedings during the criminal trial or in hearing the appeal but also all expenses incurred after the crime till final adjudication including the expenses incurred on investigation, steps taken by the complainant as well as litigation generated.

451. The expression "*properly incurred*" needs no elaboration as it clearly ousts all wasteful and unnecessary expenditure incurred in the prosecution.

452. The expression "*in prosecution*" is also not determinate. We had the occasion to examine the meaning of the expression "*prosecuted*", in the decision dated 21st December, 2012 in ***W.P.(C)No.7325/2010, Bheem Singh Meena v. Govt. of NCT of Delhi & Ors.,*** in the context of service jurisprudence and the failure of a new appointee to disclose on his attestation form that an FIR was registered against him and that a chargesheet was filed in the court of CJM in which he had been acquitted. We have referred to the following meanings of the expression "*prosecute*" and the "*prosecution*" in the Black's Law Dictionary and the Oxford Dictionary :

"Black's Law Dictionary

"*Prosecute - **1.** To commence and carry out a legal action. **2.** To institute and pursue a criminal action against (a person)."*

Oxford Dictionary

"Prosecute - To follow up, pursue; to persevere or persist in, follow out, go on with (some action, undertaking, or purpose) with a view to completing or attaining it. To institute legal proceedings against (a person) for some offence; to arraign before a court of justice for some crime or wrong."

We have noted therefore, that the meaning of expression "*prosecution*" wide enough to include "*anything from registration of a case to conviction and punishment"*. It was also noted that *"challenges/defences to actions for malicious prosecution are premised on the pleading that the plaintiff was never prosecuted as he was not convicted"*, underscoring the restricted interpretations of the expression that are pressed by the legally trained minds in courts that "*prosecuted*" means "*convicted*".

453. The Oxford Dictionary refers to following up, pursuing, persevering or persisting with some action. The Black's Law Dictionary refers to instituting and pursuing criminal action. Both the dictionaries refer separately to legal proceedings.

454. We have examined the *Prosecution of Offences Act, 1985 of the United Kingdom, the Costs in Criminal Cases Act (Northern Ireland) 1968, Criminal Law, England and Wales* as well as the *Costs in Criminal Cases Act, 1967 of New Zealand*. These enactments clearly refer to costs of prosecution. In U.K., the

regulations indicate the Crown Prosecution Service. Section 357(1)(a) also uses the preposition "*in*" and not "*of*" thereby suggesting that the legislative intent and object is not to restrict clause (a) either to court proceedings or the prosecution but would include all expenses "*reasonably incurred in prosecution*" that is from the stage when a crime occurs till final adjudication.

455. The question which remains to be answered is as to whose expenses are to be defrayed under Section 357(1)(a) out of the fine which is imposed?

456. It needs to be borne in mind that the Indian criminal justice system recognizes an important role as well as the rights of the complainant, rights from informing the police to lodging of a complaint at the police station, as well as filing a complaint directly in court (Section 200 Cr.P.C.) instituting an appeal against an acquittal in the case or seeking enhancement of sentence. These are all steps in prosecution of a criminal case, though by a private complainant. For this reason as well the expression "*in prosecution*" as used in Section 357(1)(a) cannot be restricted to the prosecution agency. It would include costs incurred by the complainant.

457. Unlike other legislations, while drafting Section 357(1)(a), instead of "*by*" or "*of"*, the legislature has carefully used the preposition "*in"*. It would thus necessarily encompass all such expenses which have been necessitated for pursuing the matter. The 'expenses' envisaged in clause (a) of sub-section (1) of Section 357 are also therefore, not restricted merely to the expenses which

have been incurred by the prosecution branch of the State but also the essential expenses incurred by the complainant or the victim for effecting the prosecution.

458. Such expenses would also necessarily be part of the financial injury and loss which a person (‘victim’ or someone entitled to compensation under Section 357) has been compelled to incur by reason of the crime.

459. There is one other instrumentality which contributes to prosecution, which is the investigating agency. As noted above, the use of the expression '*expenses'* in the legislation instead of reference to mere *'costs'*, would suggest that the legislature has intended to apply the fine in defraying expenses properly incurred of the investigating agency as well.

460. In view of the above discussion, the expression '*prosecution'* cannot be confined to legal proceedings in court or to the expenses incurred by the prosecution agency alone. The expression '*expenses properly incurred in prosecution'* has to encompass the expenses incurred by the complainant, investigating agency as well as the prosecution branch of the state. This view is supported by Section 359 of the CrPC. Thus in the present case, an order under Section 357(1)(a) for defraying expenses properly incurred in prosecution would cover expenses on all actions which were necessitated by the complainant, police and the State from the time the offences were committed till final adjudication.

461. Given the statutory scheme and the mandate on the courts, while performing their duty, it is therefore, essential for the court to

examine the matter and make an appropriate order in respect of clause(a) of Section(1) of Section 357 of the Cr.P.C. at the time of passing the judgment. By virtue of sub-section 4, the appellate court i.e. the high court or the court of session exercising revisional powers is also empowered to make the same order.

462. It is necessary to consider as to what would be the position if a court imposes a sentence of which fine does not form a part. Sub-section 3 of Section 357 enables the court to order the accused person to pay by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act by which the accused person so sentenced. If the person who has suffered loss or injury is compelled to incur expenses in the prosecution, the same would necessarily form part of the financial loss which enures to such person because of the act for which the accused person has been convicted and sentenced. These are the principles on which the present case has to be examined.

XIII. Report of the inquiry pursuant to the order dated 16th May, 2014

463. So far as the inquiry directed by us by our order dated 16th May, 2014 is concerned, the learned inquiry officer conducted a detailed inquiry and handed over the inquiry report in court on the 4th of July 2014.

464. The copies of the inquiry report were served on counsels for all the defendants as well as the standing counsel for the State and

counsel for the complainant. The parties were given an opportunity to examine the same and make submissions/objection in writing thereto, if any.

For the purposes of expediency and clarity, the relevant extract of the report is extracted hereunder:

"**FACTUAL CONCLUSIONS OF THE INQUIRY**

Guided by the various judicial pronouncement, legal principles, research theories and methodologies, a detailed inquiry was undertaken in terms of directions issued by the Hon'ble Division Bench vide its order dated 16.05.2014. The inquiry was initiated on 20.05.2014 and was concluded only on 03.07.2014 (Summer Vacations included) after 20.05.2014, 21.05.2014, 22.05.2014, 23.05.2014, 24.05.2014, 26.05.2014, 27.05.02.14 28.05.2014, 30.05.2014, 31.05.2014, 02.06.2014, 03.06.2014, 05.06.2014, 06.06.2014, 09.06.2014, 27.06.2014, 01.07.2014, 03.07.2014 i.e. **18 dates of hearing**.

During the inquiry, notices were issued to persons/officials out of different departments/categories :

"**LIST OF DEPARTMENTS/CATEGORIES OF PERSONS INTERACTED DURING INQUIRY**

A. Convicts
B. Ld. Defence Lawyers
C. Ld. Special Public Prosecutors
D. Ld. Standing Counsel/Ld. Advocates for complainant
E. Officials of U.P. Police
F. Officials of District Ghaziabad Administration, U.P.
G. Officials of Home Department, Govt. of NCT of Delhi
H. Officials of Delhi Police
I. Officials of Delhi High Court Registry
J. Officials of Delhi District Courts Administration

K. Officials of Jail Administration
L. Officials of Pune Police, Maharashtra
M. Employees of M/s. Reliance General Insurance Co. Ltd., employer of deceased
N. Relatives of deceased
O. Relatives of convicts

Details of individual persons interacted during the inquiry:

A. Convicts:

i. Vikas Yadav
ii. Vishal Yadav
iii. Sukhdev Yadav

B. Ld. Defence Lawyers

i. Mr. Sumeet Verma for convict Vikas Yadav
ii. Mr. Sanjay Jain for convict Vishal Yadav
iii. Mr. Chaman Sharma for convict Sukhdev Yadav
iv. Ms. Ruchika Bhan for convict Vishal Yadav
v. Mr. Amit Kala for convict Vikas Yadav

C. Ld. Special Public Prosecutors

i. Mr. B.S. Joon, (Ex.Director, Prosecution)
ii. Ms. Ritu Gauba, Addl. P.P., DHC
iii. Mr. S.K. Dass, Ld. Chief P.P., New Delhi

D. Ld. Standing Counsel/ Ld. Advocates for complainant

i. Mr. Dayan Krishnan, Sr. Advocate (Ex. Addl. Standing Counsel)
ii. Mr. Pawan Sharma, (Ex.Standing Counsel) - did not respond
iii. Mr. Kaushik Dey, Ld. Counsel for complainant

E. Officials of U.P. Police

i. Ms. Shachi Ghildyal, SSP, Ghaziabad, U.P.
ii. Mr. Dharmender Singh Yadav, SSP, Ghaziabad

iii. S.I. Virender Kumar Pathak
iv. ASI Ravinder Pal Singh

F. Officials of District Ghaziabad Administration, U.P.

i. Mr. S.V.S. Ranga Rao, District Magistrate Ghaziabad, U.P.
ii. Mr. V.K. Yadhuvanshi, CDO, Ghaziabad, U.P.

G. Officials of Home Department, Govt. of NCT of Delhi

i. Mr. G.P. Singh, Addl. Secretary, Home
ii. Mr. B.K. Tiwari, Dy. Secretary, Home
iii. Mr. Victor,
iv. Mr. Subhash

H. Officials of Delhi Police

i. Mr.Alok Kumar, Addl. C.P. Central
ii. Mr. S.K. Tiwari, DCP
iii. Mr. Anand Prakash, ACP, New Delhi
iv. Mr. Ashwani Jaspal, ACP
v. Mr. Bakshi Ram, Inspector
vi. Ms. Meena, S.I.
vii. Mr. Mandal, S.I.
viii. Mr. Jai Bhagwan, S.I.

I. Officials of Delhi High Court Registry

i. Ld. Registrar General
ii. Ld. Registrar Gazzette
iii. Ld. Registrar Accounts
iv. Mr. Rahul, JJA

J. Officials of Delhi District Courts Administration

i. Mr. Sunil Kumar Aggarwal, AD&SJ/DDO, Tis Hazari Courts

ii. Mr. Surinder Arora, Admn. Officer, Tis Hazari Courts

K. Officials of Jail Administration

i. Mr. Sunil Kumar Gupta, Law Officer, Delhi Prisons
ii. Mr. Naveen Kumar Saxena, Superintendent, Jail No.5
iii. Mr. R.N. Meena, Asstt. Superintendent, Jail No.5

L. Officials of Maharashtra Police, Pune

i. Mr. Tushar Dosi, Dy.Commissioner of Police, Hqr.-II, Pune City

M. Employees of M/s. Reliance General Insurance Co. Ltd., employer of deceased

i. Mr. Anil Kumar S. Chief Human Resource Officer
ii. Mr. Mahesh Trilotkar, from Mumbai Office
iii. Ms. Himo Jyoti Sen Gupta, HR Department, Delhi office
iv. Mr. Amit, from Delhi Office

N. Relatives of deceased

i. Ms. Neelam Katara

O. Relatives of convicts

i. Mr. Vivek Raj Yadav, brother of Vishal Yadav

IDENTIFIED POINTS OF INQUIRY

In the course of inquiry, in the first order sheet five factual issues were identified qua which inquiry was undertaken. These issues are as under:

A. ISSUES RELATING TO VICTIM:

- Whether deceased Nitish Katara had left any dependents?

- Loss suffered by family of deceased Nitish Katara because of the actions or omissions of the persons convicted.
- Whether any compensation payable to his family?

B. <u>ISSUE QUA PAYING CAPACITY OF CONVICTS:</u>

- To ascertain the paying capacity of the convicts i.e. Vikas Yadav, Vishal Yadav and Sukhdev Yadav.

C. <u>ISSUE QUA EXPENSES IN PROSECUTION:</u>

- Ascertaining the expenses incurred in the conduct of prosecution of the case.

Now, out of the factual inputs received during the verbal interaction apart from those received in the document form, an endeavour would be made to reach to the just conclusion in the above factual queries/issues.

A. <u>Results of inquiry qua issues relating to victim</u>

<u>Inquiry Issue -</u> Whether deceased Nitish Katara had left any dependents?

<u>Conclusion -</u> Deceased Nitish Katara died at the young age of 23 years. He was son of late Shri Nisheeth M. Katara and Smt. Neelam Katara is also survived by his younger brother Mr. Nitin Katara. Although issue carries the word dependent which tends to convey financial dependency of his surviving family members. However, in terms of definition of word 'Victim' as contained in Section 2(wa) Cr.P.C. "Victim" means a person who has suffered any loss or injury caused by the reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.

<u>Inquiry Issue -</u> Loss suffered by family of deceased Nitish Katara because of the actions or omissions of the persons convicted.

- Whether any compensation payable to his family

<u>Conclusion-</u> The untimely loss of life of a young family member can never be assessed or calculated in money terms. Such

loss of dear one in a family who was not only very well educated but also gainfully employed has many facets. The loss to the family manifests not only into tangible losses such as loss of wages etc. but it also leads to incalculable intangible losses like loss of love and affection, companionship, pain and suffering, reduction in quality of life of surviving family members and likewise.

At the time of his untimely death actuated by the convicts deceased Nitish was at the prime of his youth. He had passed out of a prestigious Management College after doing his MBA in the year 2000 from the Institute of Management and Technology, Ghaziabad. He was serving M/s. Reliance General Insurance Company Limited at Hansalaya Building, Barakhamba Road, New Delhi as Assistant Manager Marketing.

He was getting a **gross monthly salary of Rs.13,543/- as on January, 2002 before he was murdered in February, 2002**.

His father was a Class -I Gazetted Officer serving in Indian Railways and his mother was also a senior Govt. Officer working with Kendriya Vidhyala Sangathan.

Upon conclusion of the inquiry, it is found that the family of deceased Nitish Katara is entitled to exemplary compensation on account of cold blooded murder of their loved one which per se was an act of honour killing. The calculation of the actual loss can be undertaken in terms of guidelines laid by Hon'ble Delhi High Court in Satya Prakash Vs. State.

B. Result of inquiry qua paying capacity of convicts:

Inquiry Issue - To ascertain the paying capacity of the convicts i.e. Vikas Yadav, Vishal Yadav and Sukhdev Yadav.

Conclusion - For the purpose of ascertaining the paying capacity of all the three convicts, directions were issued to them to file their affidavits disclosing all their movable and immovable

assets, self acquired and inherited included. Also additional query sheet was served upon them in terms of case titled, "Puneet Kaur" (supra) asking details of their personal information, income assets apart from liabilities and expenditure.

Detailed affidavits were filed along with list of properties by all the three convicts. However, the query sheets were replied in the course of interaction during the inquiry.

Paying capacity of defendant Vikas Yadav -

In his affidavit convict Vikas Yadav gave a detailed list of 13 immovable properties located in State of U.P. and Uttarakhand. He also included details of immovable assets including equity shares in different companies. Cash and Bank balances, jewellery, investment and other loan advances.

In response to the list of queries served upon the convict, Vikas Yadav disclosed that he is a qualified Engineer i.e. B.E. (Industrial Production) apart from having a MBA Degree. He is unmarried. He has a mother, father, one younger brother, two married sisters and an aged grandfather in family. He stated that he is getting around Rs.2.00 lacs per annum as rent. He has stated that he has incurred expenses of quite a substantial sum of amount and would have to incur further expenditure before Hon'ble Supreme Court for filing an appeal as litigation cost.

The affidavit contained only the purchase value of properties which were acquired mostly in early 90s. As such, as per his own assessment, Vikas Yadav disclosed assets of around Rs.2.59 Crores only. The affidavit was sent for verification to District Magistrate Ghaziabad and SSP, Ghaziabad. The verification report received both from DM and SSP Ghaziabad was not complete owing to paucity of time and some administrative difficulties. Out of the 13 properties, valuation of the 8 properties could be done, which came to Rs.1.56 Crores as against the purchase of eight properties.

Although the enhanced rates after two decades of purchase of the remaining properties could not be ascertained but even if an estimation is done in comparison to the other verified properties, which saw increase in valuation of around 9-10 times. **The total valuation of his immovable assets would roughly come to Rs.3.25 - Rs.3.50 Crores, as per the properties declared purchased value of Rs.33.20 lacs around 18-20 years ago.**

When this approximate value of Rs.3.25 - Rs.3.50 Crores is added to declared movable assets then it comes to Rs.5.50 - Rs.5.75 Crores.

As such the current paying capacity of defendant Vikas Yadav is assessed to Rs.5.50 - Rs.5.75 Crores.

Paying capacity of defendant Vishal Yadav -

In his affidavit convict Vishal Yadav gave a detailed list of 5 immovable properties located in State of U.P. apart from Cash Bank balances and jewellery.

In response to the list of queries served upon the convict, Vishal Yadav through his brother Vivek Raj Yadav disclosed that he is a graduate and has done B.Com (P). He is married, having a 12 year old daughter, wife, mother, younger brother and a married sister. He is assessed with income tax and also filed the Income Tax Return for the year 2012-13 showing gross annual income of Rs.2.15 lacs. He apprised that he has Rs.20 lacs as personal loan and is spending money on his daughter's education. He had spent Rs.25 lacs on his treatment which was raised from his mother and brother. He also has spent handsome amount on litigation till date and would have to incur further expenditure before the Hon'ble Supreme Court in pursuing further litigation in the matter.

The affidavit was sent for verification to the District Magistrate Ghaziabad and SSP, Ghaziabad. The verification report

was received both from the DM and SSP Ghaziabad.

As per the verification report, the value of his immovable properties as on today is **Rs.9.16 Crores.** The movable assets declared by him are **Rs.3.17 lacs** which makes **the total paying capacity of Vishal Yadav as Rs.9.19 Crores.**

Paying capacity of defendant Sukhdev Yadav

In his affidavit convict Sukhdev Yadav states that he does not have any movable or immovable property in India. However, in his interaction, in response to query sheets served upon him, he stated that he studied upto 12th standard and that his family consists of an aged father, wife, four unmarried daughters and one son (all children minors). He stated that his family owned **1.5 bigha of land of which he has 1/5th undivided share**. He has incurred expenses on his trial and would have to incur further expenditure before the Hon'ble Supreme Court in pursing further litigation in the matter which he drew with the financial help of his family. His family is also incurring expenditure on education of his children which are taken care of by them.

As such during the course of inquiry, no substantial fact came to the fore which could show that the convict Sukhdev Yadav has any financial mean to pay any substantial compensation to the family of deceased.

C. Result of inquiry qua expenses in prosecution:

Inquiry Issue - To ascertain the expenses properly incurred in the prosecution.

Here in this inquiry, the phrase "**the expenses properly incurred in the prosecution"** has been given a larger meaning so as to include following heads under the same viz.

HEADS FOR CALCULATING COST OF AN OFFENCE ON

CRIMINAL JUSTICE SYSTEM:

a) All the expenses incurred in the investigation of the offence.

b) All the expenses incurred by the Department of Prosecution i.e. payment made to Ld. Special P.P. in the Trial Court and Addl. Standing Counsel in the High Court and above.

c) All expenses incurred in providing protection to the witnesses.

d) All expenses incurred by the Court administration in Trial Court as well as High Court and above.

e) All expenses incurred by the Jail Administration in providing boarding and lodging of accused/convicts.

f) All expenses incurred in escorted transportation of accused from Jail to Court/Hospitals during the period of their detention.

g) All the expenses incurred in providing medical treatment to the injured/victims.

h) All the expenses incurred in providing compensation to the injured/victims by the State.

i) All the expenses incurred by the Complainant/injured/victim in pursuing the matter on account of offences committed qua them.

INQUIRY SUB-ISSUES

Inquiry Sub-Issue (a)- All the expenses incurred in the investigation of the offence.

Conclusion - As far as financial costs and expenses in the investigation in this case are concerned, repeat notices were issued to SSP, Ghaziabad apart from other interaction. In its report dated 16.06.2014, SSP Ghaziabad stated that it would not be feasible for them to give specific/accurate details of the investigation costs since the matter was not investigated by any Special Cell but was done by the local SHO. Moreover, it was apprised that the further calculation could not be done as the case diary and the charge sheet of this 12 years old matter are not in their custody and are with the Delhi Courts.

However, Sh. B.S. Joon, Ld. Ex.Director (Prosecution) who was appointed Special P.P. in the matter apprised this office that in this matter around 6-7 police officials were involved in the investigation which was covered about 150 case diaries. The investigation team had to make 6-7 outstation visits to Dabra, Gwalior-MP, Alwar-Rajasthan, Kusi Nagar, Badaun -UP and Karnal-Haryana. They examined around 30 witnesses in Delhi and UP and incurred cost of Rs.25,000/- in DNA Report from Calcutta.

In consultation with I.O. Shri Joon apprised that the cost of investigation in the matter was around Rs.2 lacs in the year 2002.

Inquiry Sub-Issue (b) All the expenses incurred by the Department of Prosecution i.e. payment made to Ld. Special P.P. in the Trial Court and Addl. Standing Counsel in the High Court and above.

Conclusion - The murder in question had taken place in District Ghaziabad, U.P. under P.S. Kavi Nagar. The investigation was also carried there. However, on the application of Smt.Neelam Katara, the trial was transferred by Hon'ble Supreme Court to District Courts, Delhi. Shri B.S. Joon was appointed as Special P.P. in this matter. As per his report shared with this office, he was paid professional fee of **Rs.11,40,350/- by U.P. Police.**

Apart from this the appeal in this matter dealt with by Hon'ble Delhi High Court, State of U.P. represented by Shri Dayan Krishnan, Ld. Sr. Advocate (Ex. Addl. Standing Counsel) qua this he has apprised this office that he has raised a bill of **Rs.35.31 lacs.**

Although Ms. Ritu Gauba, Addl. P.P. had also appeared before this office and stated that she was also assisting Sh. Dayan Krishnan but she did not share with this office about any bill raised/payment received by her.

Also several offshoots of this case were filed before Hon'ble High Court of Delhi and Hon'ble Supreme Court apart from Hon'ble High Court of Allahabad and various Standing Counsel and Addl. Standing Counsel representing Govt. of UP but nothing was produced before this office detailing any additional payment, if any made to them.

As such the total approximate cost from the Prosecution Department side comes to Rs.46.71 lacs.

Inquiry Sub-Issue (c)- All expenses incurred in providing protection to the witnesses.

Conclusion - In this case, as per information shared with this office, following persons were provided protection **:**

1. Smt. Neelam Katara, mother of deceased.
2. Sh. Ajay Katara, witness
3. Sh. B.S. Joon, Special P.P.
4. Sh. Nitin Katara, brother of deceased.

As far as expenses incurred by **Delhi Police for providing protection to Smt. Neelam Katara and Sh. Nitin Katara Rs.1,27,66,050/- (Rs.1.27 Crores).** Although Sh. Nitin Katara was provided security by Pune Police but no financial details could be sent by them on the plea that the record were infested by terminus.

As far as protection provided to witness **Sh. Ajay Katara, SSP Ghaziabad informed that the expenses incurred of Rs.62,01,006/- (Rs.62 lacs).**

As regards protection provided to Sh. B.S. Joon, Special P.P., as per report received from DCP (Security) **a total of Rs.2,00,95,290/- (Rs.2 Crores) expenses was incurred in providing three PSOs to him.**

As such **total expenditure in the Witness Protection Head**

comes to Rs.3.89 Crores till date.

It would not be out of place to mention that this is **continuing expenditure on the exchequer as witnesses have continued to be provided security**.

Inquiry sub-Issue (d)- All expenses incurred by the Court administration in Trial Court as well as High Court and above.

Conclusion - Under this head the broad expenses are to be calculated both for District Courts and the High Court during the course of hearing of appeal. The methodology adopted under this head is to ascertain the entire functional cost of the District Courts/High Court for a particular year followed by dividing the same with the number of Judges functioning in the courts. This method was adopted as it had more merits and accuracy as compared to calculated costs of individual Courts only on the basis of number of officials/staff functioning there. other than the Court staff ancillary support wings like Copying Agency, Facilitation, Record Room and Infrastructure are also necessary for running of each Courts.

There is an urgent need to ascertain the monthly, daily and even hourly cost of running of each individual court so as to have an empirical data to study the costing patterns.

General public as well as functionaries of judiciary are supposed to know the each day's cost every court costs on the exchequer. This would go a long way to send a message across the Bar, Bench and the Public that unwarranted adjournments deserve to be curtailed and contained at any cost. There is also urgent need to have a system whereby time spent by each court on a particular case in hour/minute format shall be recorded. This practice would also go a long way to access the costing of each trial individually.

In the absence of such detailed inputs, in this inquiry a rough estimation of expenditure incurred by judiciary in this case is sought to be ascertained. The estimation would only be an indicative figure under the principle of approximation."

465. The learned OSD has noted that detailed inputs were not available and therefore provided a very rough estimation expenditure under this heading. We have noted above the practical difficulties in keeping the above records. In our country, several cases are listed before the trial court as well as the High Court and it is almost impossible to ignore the other work on assigned rosters to give single minded attention to a single case. The report notes that the two trials were listed on 276 and 101 dates while the three appeals were listed on 107 days.

The estimation of the expenditure under this heading is admittedly a rough estimation, which in the noted circumstances, recovery of full estimated amount cannot be based thereon or ordered to be recovered from the defendants. Till details of actual court time spent on the cases is provided, it would be unfair to compute the cost thereof.

466. Let us examine the other expenses examined in the report :

> **"Inquiry sub-Issue (e)- All expenses incurred by the Jail Administration in providing boarding and lodging of accused/convicts.**
>
> **Conclusion -** As data shared by Jail Administration, the expenses incurred in boarding lodging of the three

convicts in Jail during trial and thereafter is **Rs.35,60,169/- (Rs.35.60 lacs)**

<u>Inquiry sub-Issue (f)-</u> All expenses incurred in escorted transportation of accused from Jail to Court/Hospitals during the period of their detention.

<u>Conclusion -</u> As data shared by DCP IIIrd Battalion, the expenses incurred in transportation, security and manpower for the three convicts from Jail to Court/Hospitals during trial and thereafter is **Rs.39,95,180/- (Rs.39.95 lacs)**

CONCLUSION ON COST OF THIS TRIAL ON CRIMINAL JUSTICE SYSTEM TILL DATE

S.NO.	COST HEAD	COST IN RS. (LACS)
1.	Investigation	02.00
2.	Spl. P.P./Standing Counsel	46.71
3.	Police Protection	389.00
4.	Court Administration	73.00
5.	Jail Administration	35.60
6.	Transportation	39.95
Total		**Rs.586.26 Lacs**

<u>FINAL CONCLUSION ON COSTS</u>

The total expenditure incurred on this case by the exchequer is Rs.5.86 Crores (Rupees Five Crores Eighty Six Lacs).

<u>Quantification of compensation in the present case</u>

467. In the present case, we are concerned with the offence of murder, executed with premeditation, planning and full knowledge

of the impact of their acts. The defendants removed all signs of identification, including the clothes of the deceased, jewellery, watch and mobile phone and burnt his body beyond identification. One of the defendants was at that time, facing trial for an offence in another murder case. After a proper enquiry into the means of the defendants, the above circumstances of the crime as well as the non-pecuniary factors noted by us have to be factored into consideration of the compensation by the multiplier method. This is essential so as to ensure a '*just*' and '*adequate compensation*' to the victim/family/dependants.

468. We may note that a categorical submission was made by Mr. Sumeet Verma and Mr. Sanjay Jain, learned counsels for Vikas Yadav and Vishal Yadav that they have no objection to computation and payment of compensation on the multiplier basis.

We may also note the endorsement of the multiplier method for computation of compensation by Mr. Sumeet Verma who in his written submissions has stated that the quantum of compensation has been endorsed.

469. In the present case, after receipt of the inquiry report and during arguments under Section 357 of the CrPC, an affidavit dated 3rd December, 2014 has been filed by the complainant Mrs. Nilam Katara deposing as follows:

"I, Nilam Katara w/o Late Shri N.M. Katara, aged about 62 years, R/o of 7 Chelmsford Road, New Delhi, do hereby solemnly affirm and state as under:

1. That I am the above named deponent and complainant in the above mentioned case, as such conversant with facts of this case and am competent to swear this affidavit.

2. That the deponent, mother of deceased of Nitish Katara with utmost humility states as follows:

I. That deponent is a person of very limited means and now even those means stand further depleted by a long ongoing legal process.

II. That inspite of the above, deponent's conscience does not allow her to let a numerical figure be assigned to the value of life and liberty of her deceased son. That it would be an insult to and desecrate the memory of her deceased son if such an amount was even computed.

III. That any such calculation/computation and payment would cause deponent utmost pain and she trusts it is never the aim of Article 357(A) Cr.P.C. to add to the trauma and misery caused to deponent by losing her young son.

IV. That the deponent beseeches this Honourable Court that in respect of her deceased son no amount may be calculated/computed as 'compensation to the victim's family' and recovered from the convicts for disbursing to deponent or any other person or organization or for any Charitable or other purposes (including legal aid services)."

(Emphasis by us)

470. In deference to the above sentiments of the mother of the deceased victim, we are refraining from embarking on the enquiry into the actual quantification of the amount of fair compensation to his family.

XIV. Expenses incurred in prosecution of FIR No.192/2002

471. We may note that the report submitted by Mr. S.S. Rathi, OSD, DLSA does not take into consideration the several cases which have been filed by the defendants at different stages in the trial in trial courts at Dabra, Ghaziabad, Delhi; the High Courts of Allahabad and Delhi as well as the Supreme Court of India which had to be defended by the State as well as the complainant to ensure the prosecution. It also does not take into consideration the cases which were necessitated and filed by the state or the complainant to ensure due process in the trial and for prosecution of her complaint. We propose to examine the material available in this regard.

472. In our judgment dated 2nd April, 2014, we have adverted to the litigation generated at the instance of the defendants as well as legal actions which were necessary to ensure the effective prosecution of the defendants.

473. In the present consideration, we called upon all parties to disclose litigation in regard to the FIR No.192/2002. The complainant Nilam Katara and the State have filed the list of some cases which we propose to discuss hereafter. None of the defendants have placed any such information before us. In fact, the

status report filed by the State giving the details of the cases and their status sheds valuable light on the issue under consideration. Smt. Nilam Katara has filed a list of some cases as well.

474. Despite our directions, the defence have failed to submit the list of cases before us. On scrutiny of the record of the case, we find that in Crl.A.No.910/2008, Smt. Nilam Katara filed Crl.M.A.No.6376/2010, an application under Section 482 of the Cr.P.C. for permission to assist the court in the criminal appeal. This application was staunchly opposed on behalf of the defendant Vikas Yadav. In support of her application, Mrs. Nilam Katara inter alia urged that she had filed or contested a number of petitions in connection with FIR No.192/2002 from which the cases arose. In this regard, the details of several cases mentioned by Mrs. Nilam Katara have been recorded in the order dated 4th August, 2010 passed by the Division Bench allowing the application. We set down hereunder a compilation revealed from the status report by the State; tabulation submitted by Smt. Nilam Katara; cases noted in the order dated 4th August, 2010 and; those which may have been noted from the available record as well as their status whatsoever disclosed by the parties:

"List of cases, filed by the complainant, before the Supreme Court

S. No	***Petition No.***	***Title***	***Remarks***
1.	*T.P.(Crl.)No.449/2002*	*Nilam Katara v. State*	*Seeking transfer of case from Ghaziabad to Delhi. Supreme Court transferred the case*

	Crl.M.P.No.9441 & 9442/2002 in T.P.(Crl.)No.449/2002		*vide order dated 23rd August, 2002* *Court ordered that all proceeding in relation to the said criminal application could be filed only in Delhi High Court.*
2.	*W.P.(Crl.)No.22/2002*	*Nilam Katara v. UOI*	
3.	*W.P.(Crl.)No.25/2004* *Crl.MP No.6186/2006 in W.P.(Crl.)No.25/2004*	*Nilam Katara v. State of U.P.*	*Challenging order dated 28th January, 2004 of U.P. Govt. vide which appointment of Shri S.K. Saxena as SPP was cancelled. Supreme Court did not set aside the impugned order and disposed the writ petition with the direction to appoint Shri K.K. Singh to conduct the trial vide judgment dated 26th March, 2004.* *Complainant moved application to replace Shri K.K. Singh and appointment of Shri B.S. Joon as SPP.*
4.	*SLP(Crl.)No.12227/2005*	*Nilam Katara v. State of U.P. & Ors.*	*Cancellation of bail of Vishal Yadav*
5.	*SLP(Crl.)No.937/2006*	*Nilam Katara v. State of U.P. & Ors.*	*Particulars not available.*
6.	*SLP(Crl.)No.1716-17/2009*	*Nilam Katara v. State of U.P. & Ors.*	
7.	*SLP(Crl.)No.1511/2010*	*Nilam Katara v. Vishal Yadav*	*Appeal against order dated 25th January, 2010.*
8.	*Crl.M.P.No.2960/2009*	*Nilam Katara v.*	*Appeal against order dated 2nd December, 2008.*

List of cases, filed by the Vikas Yadav, before the Supreme Court

1.	*SLP(Crl.)No.937/2003*	*Vikas Yadav v. State of U.P.*	
2.	*T.P.(Crl.)No.65/2003*	*Vikas Yadav v. State of U.P.*	*Petition by Vikas Yadav that his bail application pending in Allahabad High Court. Supreme Court vide order dated 25th October, 2002 stated that all matters including bail application stand transferred to Delhi.*
3.	*SLP(Crl.)No.5307/2006*	*Vikas Yadav v. State of U.P.*	*Application for interim bail.*
4.	*SLP(Crl.)No.2956/2006*	*Vikas Yadav v. State of U.P.*	*Appeal against order dated 11th August, 2006. Dismissed as withdrawn vide order dated 4th July, 2006*
5.	*SLP(Crl.)No.2086/2007*	*Vikas Yadav v. State of U.P.*	*Appeal against order dated 31st January, 2007*
6.	*T.P.(Crl.)No.306/2007*	*Vikas Yadav v. State of U.P. & Ors.*	*Transfer of petition, dismissed on 29th October, 2007*
7.	*SLP(Crl.)No.5368/2008*	*Vikas Yadav v. State of U.P. & Anr.*	*Appeal against order dated 12th July, 2008.*
8.	*SLP(Crl.)No.8592/2009*	*Vikas Yadav v. State of U.P.*	*Appeal against order dated 7th August, 2009.*
9.	*SLP(Crl.)No.9735/2009*	*Vikas Yadav v. State of Delhi*	*Petition against the order dated 7th August, 2009 passed in Crl.A.No.958/2008.*
10.	*T.P.(Crl.)No.612/2002*	*Vikas Yadav v. State*	*To transfer the case to any other court outside the jurisdiction of Delhi.*
11.	*SLP(Crl.)No.21509/2009*	*Vikas Yadav v. State*	*Application seeking for condonation of delay in refiling SLP is allowed.*

List of matters filed by Ms. Nilam Katara in Delhi High Court

1.	*W.P.(Crl.)No.247/2002*	*Nilam Katara v. UOI & Ors.*	*High Court directed for witness protection policy on 14th October, 2003.*
2.	*Crl.Rev.No.315/2005*	*Nilam Katara v. State (NCT) Delhi*	*Challenging the order dated 30th March, 2005 of ASJ vide which name of Ms. Bharti had been dropped from the list of PW.*
3.	*Crl.M.C.No.7756/2006*	*Nilam Katara v. Vikas Yadav & Ors.*	*Complainant moved to the High Court pursuant to a defamation notice by the accused to Mr. B.S. Joon, Spl.P.P. Disposed on 18th December, 2006.*
4.	*Crl.Rev.P.No.369/2008*	*Nilam Katara v. State & Ors.*	*Ehancement of sentence. Pending adjudication.*

List of matters filed by Vikas Yadav in Delhi High Court

1.	*Crl.M.C.No.593/2003*	*Vikas Yadav v. State of U.P.*	
2.	*Crl.M.C.No.3664/2003*	*Vikas Yadav v. State of U.P.*	
3.	*Crl.M.C.No.2931/2003*	*Vikas Yadav v. State of U.P.*	
4.	*Crl.M.C.No.1506/2003*	*Vikas Yadav v. State of U.P.*	*Prayer to enlarge the petitioner on bail. Dismissed vide order dated 14th October, 2003*
5.	*Crl.Rev.P.No.38/2003*	*Vikas Yadav v. State of U.P.*	
6.	*Crl.M.C.No.2159/2004*	*Vikas Yadav v. State of U.P.*	*For recording of evidence of Ms.*

			Bharti through video conferencing or by commission. Dismissed vide order dated 25th Spetember, 2004
7.	*Bail App.No.2978/2005*	*Vikas Yadav v. State of U.P.*	*Criminal revision and bail applications, disposed on 21st August, 2006.*
8.	*Bail App.No.2726/2005*	*Vikas Yadav v. State of U.P.*	
9.	*Bail App.No.2318/2005*	*Vikas Yadav v. State of U.P.*	
10.	*Bail App.No.4397/2006*	*Vikas Yadav v. State of U.P.*	*Bail application dismissed.*
11.	*Crl.M.C.No.2992/2007*	*Vikas Yadav v. State of U.P.*	
12.	*Crl.M.C.No.2213/2007*	*Vikas Yadav v. State of U.P.*	
13.	*Crl.M.C.No.2150/2007*	*Vikas Yadav v. State of U.P.*	
14.	*Crl.M.C.No.1885/2008*	*Vikas Yadav v. State of U.P.*	
15.	*Crl.A.No.4254/2008*	*Vikas Yadav v. State*	
16.	*Crl.A.No. 910/2008*	*Vikas Yadav v. State*	*Assailing judgment imposing life sentence.*
17.	*Bail App.No.4397/2006*	*Vikas Yadav v. State*	*Bail application dismissed.*

Cases filed by accused/Vikas Yadav in High Court of Allahabad

1.	*W.P.(Crl.)No. 249/2003*	*Vikas Yadav v. State*	*For quashing the appointment of SPP Mr. S.K. Saxena to conduct the trial before Addl. Session Judge, Patiala House Courts, which was dismissed vide order dated 25th July, 2003.*

List of cases, filed by the State, before the Supreme Court

1.	*SLP(Crl.)No.23/2003*	*State of U.P. v. Vishal Yadav*	*Appeal against case no.HC 302/2002 passed by Allahabad High Court. Petition disposed of on 13th August, 2004*
2.	*SLP(Crl.)No.697/2006*	*Govt. NCT Delhi v. Vishal Yadav*	*Application for special leave arising out of order dated 6th October, 2005 in BA no.1142/2005 of the High Court of Delhi, dismissed as it became infructuous.*

List of cases, filed by the State, in High Court

1.	*Crl.M.C.No.447/2007*	*State v. Vikas Yadav*	
2.	*Crl.A.No.958/2008*	*State v. Vikas Yadav & Ors.*	*Seeking enhancement of sentence. Pending hearing.*
3.	*Crl.A.No.1322/2011*	*State v. Sukhdev Yadav & Ors.*	*Seeking enhancement of sentence. Pending hearing*

List of matters filed by the Vishal Yadav, before the Supreme Court

1.	*SLP(Crl.)No.938/2003*	*Vishal Yadav v. State of U.P.*	
2.	*SLP(Crl.)No.2498/2005*	*Vishal Yadav v. State of U.P.*	
3.	*SLP(Crl.)No.7581/2005*	*Vishal Yadav v. State of U.P.*	
4.	*T.P.(Crl.)No.54/2003*	*Vishal Yadav v. State*	*Petition that bail application pending in Allahabad High Court. Supreme Court vide order dated 25th October, 2002 stated that all matters including bail*

			application stand transfer to Delhi.

List of matters filed by Vishal Yadav in Delhi High Court

1.	*HCWP No.303/2003*	*Vishal Yadav v. State of U.P.*	
2.	*Crl.M.C.No.592/2003*	*Vishal Yadav v. State of U.P.*	
3.	*Crl.M.(M) No.1503/2003*	*Vishal Yadav v. State of U.P.*	*Prayer to enlarge the petitioner on bail. Dismissed vide order dated 14th October, 2003.*
4.	*Crl.M.C.No.3666/2003*	*Vishal Yadav v. State of U.P.*	
5.	*Crl.M.C.No.2930/2003*	*Vishal Yadav v. State of U.P.*	
6.	*Crl.Rev.No.39/2003*	*Vishal Yadav v. State of U.P.*	
7.	*Bail App.No.2070/2004*	*Vishal Yadav v. State of U.P.*	*Dismissed vide order dated 4th January, 2005*
8.	*Bail App.No.1215/2004*	*Vishal Yadav v. State of U.P.*	*Dismissed vide order dated 23rd August, 2004.*
9.	*Bail App.No.1142/2005*	*Vishal Yadav v. State of U.P.*	*Bail application dismissed.*
10.	*Crl.Rev.No.94/2005*	*Vishal Yadav v. State of U.P.*	*Against the impugned order dated 25th October, 2004 passed by ASJ New Delhi. Dismissed as withdrawn vide order dated 18th March, 2005.*
11.	*W.P.(Crl.)No.535/2005*	*Vishal Yadav v. Lt. Governor*	*For removal of Ms. Mukta Gupta, the then Standing Counsel (Crl.) to conduct all cases in Delhi High Court emanating from FIR No.192/2002.*

12.	*Crl.A.No.741/2008*	*Vishal Yadav v. State of U.P.*	

List of matters filed by Bharti Yadav (sister of Vikas Yadav who appeared as PW-38 in Delhi High Court

1.	*Crl.Rev.No.43/2004*	*Bharti Yadav v. State*	*Challenged the order of ASJ vide which her request for deposition through video conferencing had not been accepted. Dismissed as withdrawn.*
2.	*Crl.M.C.No.2158/2004*	*Bharti Yadav v. State*	
3.	*Crl.M.C.No.6230/2006*	*Bharti Yadav v. State*	
4.	*Crl.M.C.No.7690/2006*	*Bharti Yadav v. State*	

Other cases filed in the High Court of Delhi

1.	*Crl.A.No.145/2012*	*Sukhdev Yadav v. State*	*Assailing judgment of conviction and imposing life sentence.*

475. Extensive interventions were thus necessary by or at the instance of the complainant Nilam Katara to secure the ends of justice including the transfer of proceedings from the Ghaziabad District Courts to District Courts at Delhi; orders for examination of a prime prosecution witness; in ensuring independence and continuity of prosecutors in the case in securing police protection amongst several other steps.

A perusal of the status report dated 3rd April, 2002 filed by the investigating officer in W.P.(Crl.)No.247/2002 shows that a

writ petition was filed by the accused persons at Allahabad High Court, though details thereof are not available.

476. In a case like the present one, this litigation was essential to ensure the effective proceedings in the trial against the convicts i.e. prosecution. We have noted certain legal steps taken by the Ghaziabad police at High Court of Allahabad, Dabra, M.P.; Ghaziabad, U.P.

477. At the same time, the defendants filed several cases which had to be defended by the State as well as the complainant in order to prevent orders which may have interdicted effective proceedings against these persons. To the extent that against their convictions and sentencing by the trial court at Delhi, appeals were first filed by the defendants in the High Court of Allahabad! These were dismissed by the High Court of Allahabad, which dismissals were assailed by the defendants in the Supreme Court of India.

478. The expenditure which had to be incurred by the complainant as well as the State in pursuing/defending these cases has to form part of the "*expenses properly incurred in prosecution*" as referred to in Section 357(1)(a). We are of the view that consciously of this, the three defendants have deliberately withheld all details thereof.

479. It was orally submitted by Nilam Katara that she has incurred expenditure of over Rs.70,00,000/- in the cases. The mother of the deceased had to engage counsels and vigorously pursue the cases at every stage after the lodging of the FIR.

480. The criminal trials, as in the present cases, reflect the impunity with which defendants hold the criminal justice system at ransom.

481. Article 20(3) of the Constitution of India protects a person accused of any offence from being compelled to be a witness against himself. Article 21, which protects the life and personal liberty of all persons, states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law.

482. This constitutional protection, a fundamental right, stands statutorily recognized inter alia in Section 161 of the Cr.P.C. which enables examination of such persons who are supposed to be acquainted with the facts and circumstances of the case by the police. Sub-section (2) of Section 161 binds such person to truthfully answer all questions relating to the case "*other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or a forfeiture*". Section 162 prohibits signature of the statement by the person making it and also bars the use of the statement or any part thereof for any purpose at any inquiry or trial in respect of the offence under investigation at the time when the statement was made other than such statement being used by the accused and, with the permission of the court, by the prosecution, to contradict such witness in accordance with Section 145 of the Evidence Act. These are the protections made available during investigation.

483. During the course of trial, under Section 313 of the Cr.P.C. in every inquiry or trial, the court is required to give an opportunity to the accused to personally explain any circumstances appearing in the evidence against him. Sub-section 3 of Section 313 grants the right of silence to the accused when it mandates that the accused shall not render himself liable to punishment by refusing to answer the questions by the court or by giving false answers to them.

484. So far as an accused appearing as a witness is concerned, Section 315(1) of the CrPC gives protection to the accused to the effect that he shall not be called as a witness except on his own request in writing and that his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against him or any person charged with him in the same trial.

485. So far as the Indian Evidence Act is concerned, protections qua statements made during investigation are given to the accused person in Sections 24 to 27 of the Indian Evidence Act.

486. Unfortunately, experience has shown that the unduly exaggerated concerns with the rights of the defendants as well as aggressive posturing by or on their behalf have discouraged courts from proactively engaging with the acts and omissions by or on behalf of the defendant which are way beyond the constitutional and statutory protections. As a result of these, defendants in criminal trials get away with misleading investigation, threatening prosecutors, witnesses, the police and misbehaviour in courts.

Trials are protracted because witnesses are pressurised, if not prevented from coming to court.

487. Our judgment dated 2nd of April, 2014 upholding the convictions of these defendants has noted in detail several such actions by Vikas and Vishal Yadav two of the defendants before us. The right to silence only enables the accused person to remain silent - it does permit the accused to, for instance, lead the police on a wild goose chase, to say Alwar, Rajasthan as in the present case to recover a vehicle which they know is not there but located at another location in another State wherefrom it was actually recovered.

488. In this regard, para 2000 of our judgment dated 2nd of April, 2014 is pertinent and we extract it hereunder:

> "2000. One aspect of this conduct of accused persons seldom talked about is the huge demand it makes on the investigation agency and the criminal justice system both in terms of manpower but also from the point of view of public funds which are compelled to be expended. Just to visualize the expenditure incurred on the 28th February, 10th/11th March is mind boggling. The public exchequer has had to provide for the Ghaziabad police personnel required to escort two accused persons – first to go to Dabra to secure custody; proceed with them to Alwar and then again to Panipat – both places where nothing was to be recovered – and then to Karnal. Not to say the incidental costs of transportation boarding, etc. The already stretched police force can ill afford such fruit less exercises. No provision of our Constitution of India or the law entitles accused persons to abuse the protections afforded to them in this

> manner and to deliberately misguide investigations and the courts."

489. The third defendant Sukhdev Yadav compelled a second trial by absconding from justice for a period of over three years- obviously intending to exhaust the witnesses, prosecutors and the complainant. The rights available to the accused do not extend to abscondance. On the contrary, law postulates such persons to make themselves available to the police which is searching for them.

490. In para 1603 of our judgment dated 2nd of April, 2014, we have noted the impact of such abscondance in the following terms:

> "1603. We also find that this abscondance is part of a design. Having compelled the court to proceed with the trial of Vikas and Vishal Yadav in the absence of their accomplice, by the 23rd of February 2005 when Sukhdev Yadav was arrested, evidence of thirty seven prosecution witnesses (out of a total of forty three) stood completed in that trial. Many of the witnesses who had been already examined, had to be recalled in Sukhdev's trial. It appears that the calculated attempt was to pressurise and exhaust witnesses; take advantage of memory fading by passage of time and resultant omissions and contradictions; orchestrated deviations; loss of evidence by non-availability of witnesses at the second trial. By his conduct, the appellant has not only violated statutory provisions but has obstructed the due course of justice and expedition in the trial."

491. One glaring instance of the manner in which both investigation and trials were delayed is the manner in which Bharti

Yadav was first shifted from one State to another i.e. from Ghaziabad (U.P.) to Faridabad (Haryana) immediately after the crime on 16/17.2.2002 to prevent access to her of the U.P. Police. As a result, her statement under Section 161 Cr.P.C. could be recorded only on 2nd March, 2002 by the investigating officer. During the trial, Bharti Yadav was removed from the boundaries of India and sent to U.K. as noted in the judgment dated 2nd April, 2014. Even her address was not furnished to enable the prosecution to summon her. In court, she was represented by father and an uncle of Vikas Yadav (who were also uncles of Vishal Yadav). Bharti Yadav played hide and seek with the court for over three years holding up the trial. This was obviously at the instance of these defendants.

492. What makes a really pathetic story is the manner in which the inability of the prosecution to examine this witness was utilised by the defendant Vikas Yadav in making multiple applications for bail on the ground that in view of the delay in the trial, his incarceration was unwarranted. The complainant had to move heaven and earth to ensure that Bharti Yadav was examined as a witness, in as much as the prosecutor at the trial court frustrated by the efforts to secure her appearance and the extreme pressure put by the defendants on the ground of the resultant delay in trial, gave her up as a prosecution witness. All this generated extensive litigation including several petitions and applications as noted above.

The defendants have to compensate the complainant and the State for the expenses incurred on all this litigation by their act of keeping Bharti Yadav out of court in as much as her examination was an essential part in their prosecution for the crime.

493. There is yet another distressing facet of the proceedings in the present case, right from the trial to the appellate court. On the remote chance that the other sides would either not point out or it would escape notice, protracted arguments on principles which have been settled by judicial pronouncements are made, compelling wastage of judicial time.

494. We also find that advantage is taken of the fact that prosecutors are either changed or compelled to be changed. Certainly, there is no continuity of prosecutors from the trial court to the appellate court. As a result, important proceedings in the higher courts are not placed before the trial courts.

495. On 25th February, 2002, Nilam Katara filed a habeas corpus writ in the Supreme Court, then filed W.P.(Crl.)No.247/2002 on 27th February, 2002 in this court inter alia seeking the following:

> *"(viii) Issue a writ of Habeas Corpus or an order or direction in the nature thereof directing the respondents to produce Nitish Ktara son of the petitioner, forthwith;*
>
> *(ix) Issue a writ of mandamus directing the respondents 1 to 5 to establish with certainly and expeditious the identity of the charred human body recovered by the respondent no.4*
>
> *(x) Issue a writ of mandamus or an order or direction in the nature thereof, in the alternative, in the event the*

police are able to establish that Nitish Katara son of the petitioner has died, directing the respondent no.1 to 5 to investigate into the matter of the unnatural death of Nitish Katara son of the petitioner with expedition, exactitude, efficiently and meticulously.

(xi) Issue a writ of mandamus or an order or direction in the nature thereof, directing the respondent no. 5 to grant adequate protection to the immediate family of the petitioner.

(xii) Issue any other writ, order or direction in favour of the petitioner to which the petitioner may in law be found entitled to in the facts and circumstances of the case and which this Hon'ble Court may deem fit and proper.

(xiii) Issue ad-interim and ex-parte orders in terms of prayers (i) to (iii) above and confirm the same after notice to the respondents."

496. In the writ petition, Vikas Yadav and Vishal Yadav were impleaded as respondent nos. 7 and 8. The father of Vikas Yadav was impleaded as respondent no.6. The record of this writ petition discloses that the Ghaziabad police filed three status reports dated 14th March, 2002, 3rd April, 2002 and 28th April, 2002 in this writ petition. In each of these reports filed by Shri Prashant Kumar, Sr. Superintendent of Police, all steps taken in the investigation up to the date of the status report were set out in detail. So much so that the status report dated 14th March, 2002 clearly sets out the disclosures made on 25th February, 2002 by Vikas Yadav and Vishal Yadav as well as the recoveries of the hammer and wrist

watch made pursuant thereto on 28th February, 2002. All details of the recovery of the Tata Safari car on 11th March, 2002 from their factory in Karnal have also been set out. These status reports detail the statements made by the persons examined under Section 161 of the CrPC. The police also set out the several steps taken to trace and arrest the accused persons.

497. It is noteworthy that Vikas Yadav and Vishal Yadav as respondent nos.7 and 8 have filed a joint counter affidavit dated 13th March, 2002 wherein they make a reference to the remand which was sought by the Ghaziabad police from the CJM, Ghaziabad which was initially declined; the order of the CJM upheld by the District Judge, Ghaziabad and the subsequent orders of the CJM. Vikas Yadav as respondent no.7 filed Crl.Misc.No.862/2002 on 5th October, 2002 under Section 340 of the Cr.P.C.contending that the petitioner Nilam Katara had made wild allegations regarding his conduct in the Jessica Lal's case as well as the writ petition while seeking initiation of criminal proceedings against Nilam Katara. It is noteworthy that neither Vikas Yadav nor Vishal Yadav make any dispute at any time that they had not made the disclosure statements or that the articles were recovered at their instance. In the writ petitions, these defendants were represented by the common counsels who represented them before the trial court as well. Despite this position in the writ proceedings which were contemporaneous with the investigation, protracted submissions were made before the trial court challenging the disclosures as well as the recoveries. Before

us, separate counsels for each of the defendants pressed similar challenges. In fact, the three status reports manifest that investigations in the present case stood really monitored by the court in W.P.(Crl.)No.247/2002 and several of the objections pressed before the trial court as well as us were completely unwarranted, given the conduct of the defendants in not challenging the status reports filed by the police.

498. The constitutional or statutory protections do not permit any defendant to mislead or misdirect the police or the courts. The protections also do not extend to such conduct of the defendants. They also do not tolerate the deliberate actions in misdirecting the police and investigators. For this reason as well, costs incurred by the prosecution in the litigation so generated have to be defrayed out of fine which may be imposed upon them.

499. It can very well be argued that law provides for penal actions for misleading the police, it provides for action under the Contempt of Courts Act if any action impedes course of proceedings in the court. However, these statutory provisions do not take into consideration the financial burden which results to the public exchequer or the complainant as a result. We have no manner of doubt that the defendants in the present case have to defray the expenditure incurred by the State as well as the complainant for the expenses incurred in the investigation, trials and all the litigation generated because of the deliberate acts and omissions of the defendants for their effective prosecution in FIR no.192/2002. This court has the jurisdiction by virtue of Section 357(1)(a) of the

CrPC that such fine as may be imposed, is defrayed towards these expenses.

500. The inquiry report has computed total expenditure under the witness protection head at Rs.3.89 crores. In addition, the expenses incurred on the Special Public Prosecutor, who conducted the trials, and the Additional Standing Counsel in the appeal, cost of Rs.46.71 lakhs has enured. So far as the investigating agency is concerned, the expenses have been notionally quantified at Rs.2 lakhs Mrs. Nilam Katara has claimed that she had incurred expenditure of over Rs.70 lakhs on pursuing the matters relating to the murder of her son besides the expenditure in the present hearings. We have not been provided any details of the expenditure which has enured to the complainant or the State in the present cases.

501. Pursuant to receipt of the inquiry report under Section 357 Cr.P.C. and the opportunity given by us, brief submissions dated 17th July, 2014 on behalf of defendant no.2 Vishal Yadav were filed through his learned counsel Mr. Sanjay Jain, Advocate stating therein that the respondent has 1/4th share as against 1/3rd share in the property as mentioned in the inquiry report. He has further stated that the judgments only talk about compensating the victim and not the cost of the prosecution. It is further stated that as per the inquiry report, the cost of prosecution is really only the amount spent on the protection of witnesses which cannot be fastened on his client since there was no threat to witnesses either from him or his family; that Vishal Yadav has been released on bail/parole

thrice and there is no allegation against him that he threatened the witnesses during this period.

Inasmuch as we do not propose to direct defraying full costs of the investigation, litigation or the expenses incurred on providing protection to witnesses, nothing would turn on this aspect of the matter.

XV. Sentencing Principles

502. We have so far considered the several aspects relating to procedure to be followed and the orders which a sentencing court may pass as well as the considerations for the same. Before proceeding to the examination of the sentence which befits the crimes and the defendants in the present case, we need to advert to the jurisprudence on the principles on which sentencing must be effected.

503. Light on the question as to how a sentence is to be imposed has to be gathered from the pronouncements of the Supreme Court inasmuch as the legislation gives no indication. In the judgment reported at ***(1974) 3 SCC 85, B.G. Goswami v. Delhi Admn.,*** the Supreme Court observed that the "*question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations appropriate quantum in a given case*". It was further observed as follows:

> "10. ... The main purpose of the sentence broadly stated is that the ***accused must realise that he has committed an act which is not only harmful to the society of which he forms*** an integral part ***but is also harmful to his own***

> ***future***, both as an individual and as a member of the society. ***Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole.*** Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. ***Too lenient as well as too harsh sentence both lose their efficaciousness***. One does not deter and the other may frustrate, thereby making the offender a hardened criminal. …"
>
> (Emphasis by us)

504. We may usefully refer to the pronouncement of the Punjab High Court reported at ***AIR 1960 Pun 482, Lekhraj v. State.*** This judgment authored by Justice Dua (as his Lordship then was), sets out the relevance of the offender's circumstances and social milieu, apart from the daring and reprehensible nature of the offence for sentencing puposes.

505. In its ***47th Report*** dated ***28th February, 1972,*** the ***Law Commission of India*** stated that guidelines cannot direct sentencing with mathematical precision, that sentencing discretion to the judge must be maintained; and had summed up the components of the proper sentence. We set down hereunder the relevant recommendations in the 47th Report in paras 7.44, 7.45 and 7.47:

> "7.44 A proper sentence is a composite of many factors, including the nature of the offence, the circumstances —

extenuating or aggravating — of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved.

7.45. The variables in each case, including the accused's prior criminal record, his background and the condition of his health, the prospect of rehabilitation and many other factors are unpredictable, and it is for this reason that a discretion should preferably vest with the judicial officer.

xxx xxx xxx

7.47. For these reasons, we do not think that the discretion of the court to award a sentence below the minimum should be totally abolished. In fact, even some of the officers concerned with enforcement of the Acts agreed that it was impossible to conceive of every possible situation which might operate in mitigation."

506. In ***(1976) 1 SCC 281, Ramashraya Chakravarti v. State of M.P.,*** the Supreme Court held thus:

"Sentencing undoubtedly involves an element of guessing but it is always a matter of judicial discretion subject to any mandatory minimum prescribed by law. In judging the ***adequacy*** of a sentence, ***the nature of the offence***, the ***circumstances of its commission***, the ***age***

and character of the offender, injury to the individuals or to society, effect of the punishment on the offender, eye to correlation and reformation of the offender, are some among many other factors which should be ordinarily taken into consideration by Court."

(Emphasis supplied)

507. Recommending flexibility in choice of punishments, noting judgments of the Punjab and Kerala High Courts as well as the 47th Report of Law Commission of India, in the pronouncement reported at ***(1977) 3 SCC 287, Mohd. Giasuddin v. State of A.P.,*** V. Krishna Iyer, J. had stated thus:

"14. … The Kerala High Court, in *Shiva Prasad* [1969 Ker LT 862] had also something useful to say in this regard:

'***Criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the Court to help it for a correct judgment in the proper personalised, punitive treatment suited to the offender and the crime....***"

xxx xxx xxx

17. It will thus be seen that there is a great discretion vested in the Judge, especially when pluralistic factors enter his calculations. Even so, the ***Judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime-doer and been swept away by the features of the crime***. What is dated has to be

discarded. What is current has to be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion.

18. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.

(Emphasis supplied)

Thus as back as in the year 1977, the Supreme Court had emphasized that the sentence proceedings should be personalized from a reformative angle as well as the appropriateness of conditional sentence as part of sentencing prescriptions.

508. Twenty five years later, in the judgment reported at ***(2012) 8 SCC 537, State of U.P. v. Sanjay Kumar***, the Supreme Court has reiterated the need for discretion in sentencing, stating thus:

"21. xxx 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 judgments 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 emphasis on ***individualised 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.

22. Ultimately, it becomes the ***duty of the courts*** to ***award proper sentence***, having regard to the ***nature of the offence*** and the ***manner*** in which it was ***executed*** or ***committed***, etc. ***The courts should impose a punishment befitting the crime so that the courts are able to accurately reflect public abhorrence of the crime.*** It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. ***Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise.***"

(Emphasis by us)

509. On the measure of punishment, in ***(1991) 3 SCC 471, Sevaka Perumal & Anr. v. State of Tamil Nadu,*** the Supreme Court status thus:

"10. Therefore, ***undue sympathy*** to impose ***inadequate sentence*** would do ***more harm to the justice system*** to undermine the public confidence in the efficacy of law

and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

(Emphasis supplied)

510. On this issue in ***(1994) 2 SCC 220, Dhananjoy Chatterjee v. State of West Bengal,*** the Supreme Court held thus:

> "15. In our opinion, the ***measure of punishment*** in a given case must depend upon the ***atrocity of the crime***; ***the conduct of the criminal*** and the ***defenceless and unprotected state of the victim***. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose ***punishment befitting the crime*** so that the ***courts reflect public abhorrence of the crime***. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the ***society at large*** while considering imposition of appropriate punishment."
>
> (Emphasis supplied)

511. Again, emphasising the factors which must weigh with the court while assessing the adequacy of the sentence, in ***(2005) 8 SCC 11, State v. Rajesh,*** the Supreme Court held thus:

> "Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time or considerations personal to the accused only in respect of such offences will be resultwise counter productive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence inbuilt in the sentencing

system. It is the ***nature and gravity of the crime but not the criminal***, which are ***germane*** for consideration of appropriate sentence in a criminal trial."

(Emphasis supplied)

512. In ***(2009) 11 SCC 737, R. Venkatakrishnan v. Central Bureau of Investigation,*** the Supreme Court held thus:

> "**168.** A sentence of punishment in our opinion poses a complex problem which requires a balancing act between the competing views based on the reformative, the deterrent as well as the retributive theories of punishment. Accordingly, a ***just and proper sentence should neither be too harsh nor too lenient***. In judging the ***adequacy*** of a sentence, the ***nature of the offence, the circumstances of its commission***, the ***age and character of the offender, injury to individual or the society, effect of punishment on offender***, are some amongst many other factors which should be ordinarily taken into consideration by the courts."
>
> (Emphasis supplied)

513. Despite the anguish repeatedly expressed by the Supreme Court over decades, in the judgment reported at ***(2013) 11 SCC 382, Soman v. State of Kerala,*** the Supreme Court has noted that not much has changed so far as the principles and guidelines for determination of sentences are concerned. In para 15 of the judgment, the court noted thus:

> "15. Giving ***punishment to the wrongdoer*** is at the heart of the criminal justice delivery, but in our country, it is the ***weakest part of the administration of criminal justice.*** There are ***no legislative or judicially laid down guidelines to assist the trial court*** in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In *State of Punjab* v. *Prem*

Sagar, (2008) 7 SCC 550, this Court acknowledged as much and observed as under -

> "2. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines."
>
> (Emphasis supplied)

514. Our attention is drawn to the judgment reported at ***(2013) 9 SCC 516, Hazara Singh v. Raj Kumar & Ors., (para 27),*** the very principles stated as back as in 1977 were reiterated by the Supreme Court in the following terms:

> "17. We reiterate that in operating the ***sentencing*** system, law should adopt the corrective machinery or deterrence based on factual matrix. The ***facts and given circumstances*** in each case, the ***nature of the crime***, the ***manner*** in which it was ***planned and committed***, the ***motive*** for commission of the crime, the ***conduct of the accused***, the ***nature of weapons*** used and all other attending circumstances are ***relevant facts*** which would enter into the area of consideration. We also reiterate that ***undue sympathy to impose inadequate sentence*** would do ***more harm to the justice system*** to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the ***rights of the victim*** of the crime but also the

society at large while considering the imposition of appropriate punishment."

(Emphasis by us)

515. So far as the various factors which ought to go into sentencing discretion are concerned, in ***Soman,*** the court placed reliance on writings of *Professor Andrew Ashworth* in *Sentencing and Criminal Justice*, 5th Edition, Cambridge University Press, 2010 holding as follows:

> "16. Nonetheless, if one goes through the decisions of this Court carefully, it would appear that this Court takes into account a ***combination of different factors*** while exercising discretion in sentencing, that is ***proportionality***, ***deterrence***, ***rehabilitation*** etc. (See: *Ramashraya Chakravarti* v. *State of Madhya Pradesh*, (1976) 1 SCC 281, *Dhananjoy Chatterjee alias Dhana* v. *State of W.B.*, (1994) 2 SCC 220, *State of Madhya Pradesh* v. *Ghanshyam Singh*, (2003) 8 SCC 13, *State of Karnataka* v. *Puttaraja*, (2004) 1 SCC 475, *Union of India* v. *Kuldeep Singh*, (2004) 2 SCC 590, *Shailesh Jasvantbhai* v. *State of Gujarat*, (2006) 2 SCC 359, *Siddarama* v. *State of Karnataka*, (2006) 10 SCC 673, *State of Madhya Pradesh* v. *Babulal*, (2008) 1 SCC 234, *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498)
>
> 17. In a ***proportionality analysis***, it is necessary **to *assess the seriousness of an offence in order to determine the commensurate punishment for the offender***. The seriousness of an offence depends, apart from other things, also upon its harmfulness. ***The question is whether the consequences of the offence can be taken as the measure for determining its harmfulness?*** In addition, quite apart from the seriousness of the offence, ***can the consequences of an offence be a legitimate***

> ***aggravating (as opposed to mitigating) factor while awarding a sentence.*** Thus, to understand the ***relevance of consequences*** of criminal conduct from a Sentencing standpoint, one must examine: (1) ***whether such consequences enhanced the harmfulness of the offence***; and (2) ***whether they are an aggravating factor that need to be taken into account by the courts while deciding on the sentence***.
>
> 18. In ***Sentencing and Criminal Justice***, 5th Edition, Cambridge University Press, 2010, ***Andrew Ashworth*** cites the four main stages in the process of assessing the seriousness of an offence, as identified in a previous work by Andrew Von Hirsch and Nils Jareborg. (See Pages 108 - 112)
>
> 1. Determining the interest that is violated (i.e. physical integrity, material support, freedom from humiliation or privacy/autonomy)
> 2. Quantification of the effect on the victim's living standard.
> 3. Culpability of the offender.
> 4. Remoteness of the actual harm."
>
> (Emphasis by us)

516. The current position of sentencing policy is best summed up in the observations of the Constitution Bench of the Supreme Court in the judgment dated 2nd September, 2014 in ***W.P.(Crl.)No.77/2014, Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Ors.:***

> 30. xxx xxx xxx Crime and punishment are two sides of the same coin. Punishment must fit the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when

> crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing. In many countries, there are laws prescribing sentencing guidelines, but there is no statutory sentencing policy in India. The IPC, prescribes only the maximum punishments for offences and in some cases minimum punishment is also prescribed. The Judges exercise wide discretion within the statutory limits and the scope for deciding the amount of punishment is left to the judiciary to reach decision after hearing the parties. However, what factors which should be considered while sentencing is not specified under law in any great detail. xxx xxx xxx"

517. In ***Bachan Singh,*** the Constitution Bench noted that over standardization of the sentencing policy tends to defeat its very purpose and may actually produce opposite results and that it was neither practicable nor desirable to imprison the sentencing discretion of a judge in the strait-jacket of exhaustive and rigid standards. Nevertheless, the precedents on the issue show that it was not impossible to lay down broad guide-lines as distinguished from iron cased standards, which will minimise the risk of arbitrary imposition of death penalty for murder and some other offences under the Penal Code.

518. The sentence is an amalgam of several factors including those relating to the crime as well as the criminal, circumstances mitigating aggravating or extenuating the offence. Deep concerns have been expressed on the lack of uniformity and equality in sentencing with regard to equally placed convicts because of there

being no sentencing guidelines in place. The above narration would show that considerations of proportionality of punishment relating the sentence to the gravity of the crime, circumstances of the criminal, needs of the victim and the community emphasise the imperative requirement of individualized justice and sentencing discretion for the courts. That while broad guidelines could be laid down, it would not be proper (even if possible) to lay down rigid standards. Therefore, the aptness of a sentence must necessarily rest on a consideration of all relevant facts and circumstances of the individual cases.

XVI. Unwarranted hospital visits and admissions of defendants – effect of

The discussion on this subject is being considered under the following sub-headings:

(i) Hospital visits and admissions of Vikas Yadav.

- *(a) Admission in AIIMS of Vikas Yadav.*
- *(b) Change of room category.*
- *(c) Absence of Vikas Yadav from hospital room on 23rd October, 2011, night of 26th/27th October, 2011 and 1st November, 2011.*
- *(d) Special facilities during AIIMS admission and charges.*

(ii) Hospital visits and admissions of Vishal Yadav.

- *(a) Admissions of Vishal Yadav in Batra Hospital.*

(iii) Analysis of hospital visit/admission discussion.

(iv) Cost of hospital visit/admission.

(a) *Cost incurred on escort/security deployment during outside hospital vists.*
(b) *The cost incurred on taxi fare during the outside hospital referrals in respect of Vikas Yadav.*
(c) *Amount incurred on treatment in respect of Vikas Yadav.*
(d) *The cost incurred on taxi fare during the outside hospital referrals in respect of Vishal Yadav.*
(e) *Expenditure on the diet of the two defendants and their escort in the outside visits.*
(f) *Impact of such unwarranted hospital visits and admissions.*

519. While Crl. Appeal Nos.910/2008 and 741/2008 and Crl. Rev.P.No.396/2008 were pending, on 24th January, 2012, **Crl.M.A.No.1168/2012** came to be filed in **Crl.Rev.No.369/2008** by Nilam Katara praying for a direction to the jail authorities as well as the All India Institute of Medical Sciences ('AIIMS' for brevity) to produce all records relating to the treatment of Vikas Yadav including that to any other referral hospital for the entire period while he remained an under trial as well as upon conviction. In this application, it was pointed out that post conviction, Vikas Yadav complained of illness whereupon he was taken to the Deen Dayal Upadhyay Hospital ('DDU Hospital' for brevity) and was diagnosed to be suffering from Tuberculosis. On the recommendation of Tihar Central Jail Hospital, he was referred to AIIMS on 6th August, 2004, ostensibly for a second opinion. After his conviction, Vikas Yadav was alleged to have made 87 visits to hospitals, out of which 81 visits were to AIIMS alone. The

complainant pointed out that the Jail Visiting Judge had passed an order dated 11th November, 2008 permitting Vikas Yadav only to visit Tibia College and Hospital and the Maulana Azad Medical College. Despite this order, the jail authorities were taking Vikas Yadav to AIIMS on their own accord. It was also submitted that there was no material that Vikas Yadav was suffering from any serious ailment for which the treatment required by Vikas Yadav was not available in the jail hospital, the DDU Hospital or other government hospitals. There was no material that it was only available in AIIMS.

520. In addition, on 30th January, 2012, the complainant filed **Crl.M.A.No.1313/2012** in **Crl.Rev.P.No.369/2012** complaining that information received under the Right to Information Act regarding medical treatment of Vishal Yadav has revealed that since his conviction and sentence, he has made 70 visits to the Batra Hospital and Medical Research Centre ('Batra Hospital' for brevity), out of which 40 were merely for '*review'* while two were for the purpose '*for needful*'. The applicant complained with regard to collusion between jail authorities, authorities at the Batra Hospital and Vishal Yadav to keep him out of Tihar jail in the luxurious rooms of the special/private wards of the Batra Hospital. The applicant pointed out that while admitted in Batra Hospital, by way of Crl.M.(Bail)No.157/2009 dated 15th December, 2009 Vishal Yadav applied for interim bail from 14th January, 2010 to 31st January, 2010 for his sister's marriage concealing the fact that he was not in hospital. In this background, the applicant sought a

direction to the authorities of the Tihar jail and the Batra Hospital to furnish the treatment papers of the convict including referral papers for the period of his entire incarceration at the Tihar jail including the period of 2½ years when he was on bail as an under trial.

521. Notice of Crl.M.A.No.1313/2012 was issued on 1st February, 2012 when the parties were required to produce the medical reports relating to the hospital visits of Vikas and Vishal Yadav in court. An officer from the jail conversant with the facts of the case was also required to appear before this court. The jail superintendent was also called upon to submit a list of other accused persons who had repeatedly visited hospitals other than DDU Hospital and LNJP Hospital, the jail referral hospitals, as well as the nature of their ailments.

522. On the 2nd of February 2012, notice was also issued of Crl.M.A.No.1168/2012 which was accepted by learned counsel for Vikas Yadav. In the order recorded on 2nd February, 2012, we had noted that after 3rd June, 2008, Vikas Yadav visited AIIMS 83 times as per record which included visits for confirmation of tuberculosis. Notice was also taken of the expenses involved in taking the convicts to the hospitals. By the order of 2nd February, 2012 the jail authorities as well as AIIMS were directed to produce details of the expenditure incurred on their security, stay, treatment etc. The jail was also called upon to file on affidavit details of the consideration of the request for visiting AIIMS from the convict prior to the visits.

523. Keeping in view the stand of the convicts that they required continuous medical treatment, by the order dated 2nd February, 2012, we had also directed medical examinations of Vikas Yadav (on 9th February, 2012) and Vishal Yadav (on 7th February, 2012) at AIIMS to be conducted by a Board of experts (other than the doctors who had been associated in their examination/treatment of the convicts at any time earlier), to ascertain their medical status.

524. Some records were produced by the AIIMS as well as Batra Hospital which, after getting certified copies prepared and issued, under our order dated 2nd March, 2012 have been kept in sealed cover in the safe custody of the Registrar (Appellate) of this court.

525. The anguish expressed by the complainant of the manipulations and connivance of the convicts with the jail authorities to secure the several outside hospitals visits was noted by us. It was essential to give opportunity to the defendants to place before us the medical records in their possession to support the treatment, hospital visits and admissions. Accordingly, by our order dated 16th March, 2012, we had directed the State as well as the defendants to place on record the following:

> "(i) The rules/guidelines/policy(ies) which were in vogue with regard to manner in which permission was granted to prisoners in the Tihar Jail for outside visits for medical purposes;
> (ii) Record of all referrals made by the DDU hospital or the medical authorities of the jail permitting in outside visits of Shri Vikas Yadav and Shri Vishal Yadav;
> (iii) Records of any reviews undertaken by the Deen Dayal Upadhyay Hospital or the medical authorities in

the jail prior to permission being granted for the outside visits/hospital visits of Shri Vikas Yadav and Shri Vishal Yadav;

(iv) Records of requests (if any) made to the jail authorities for the visits;

(v) ***We grant liberty to the respondents to place any material that they may with to place on record with regard to the medical treatment and expenses, if any, incurred by the respondents towards the treatment while in custody as well as medical treatment prior to arrests. Copies thereof shall be furnished to the petitioner as well as the State.*****"**

(Emphasis furnished)

526. A reply dated 22nd March, 2012 and brief submissions dated 11th March, 2013 in Crl.M.A.No.1313/2012 were filed by defendant Vishal Yadav.

527. The brief submissions dated 11th March, 2013 in Crl.M.A.No.1168/2012 has been filed on behalf of Vikas Yadav wherein, while relying on the report of Army Hospital, it has been submitted by Mr. Sumeet Verma, learned counsel for Vikas Yadav with regard to the admission in AIIMS in October, 2011 that the admission was justified and that Vikas Yadav had been diagnosed with Scheurman's disease D_{11}-D_{12} Vertebrae with Minimal Anterior Wedging. He has further relied on the report of AIIMS dated 20th February, 2012 of AIIMS contending that it did not rule out the requirement of hospitalization in October, 2011. As regards 80 visits outside hospitals including AIIMS, he has submitted that the convict was in the custody of the State and was treated at par with other convicts. As regards stay in the private

ward, it has been submitted that the convict was in the custody of the State and he had no choice but to go wherever he was sent for treatment and that he was shifted to the bigger room due to the security personnel.

528. Thus full opportunity was given to the respondents/convicts to place documents/material as well as their explanation with regard to the medical treatment undertaken in outside hospitals and justification for these visits. The convicts were given opportunity also to disclose their medical condition and treatment prior to their arrests. A direction was also issued to AIIMS to explain the circumstances in which the ward of the convict – Vikas Yadav was shifted from 'B' Class private room to 'A' Class private room.

529. On the 23rd March 2012, we were informed by the State that prior to 10th February, 2011, no guidelines had been formulated by the authorities with regard to referrals of Tihar jail inmates to outside hospitals. Learned counsel for the parties were also heard on the issue of costs involved during such visits. The importance of the issue was noted by us in paras 4 and 5 of the order which reads as follows:

> ***"4. The instant matter raises serious controversies with regard to the outside hospital visits of the respondent nos.2 & 3. The very need for the referrals; the visits; their periodicity; and their duration has been strongly disputed before us.***
>
> ***5. We are aware that medical science is not a definite science but it would be a travesty of justice if outside referrals of prisoners are made unwarrantedly and such visits facilitated at public expense. It is also grossly unfair if such outside***

referrals are sought/obtained utilizing the shield of non-existent medical condition(s). It also requires examination as to whether valuable medical facilities which are deficient have been misused and that too at public expense. Indulgence granted by the court or facilities provided by the jail authorities are not to be abused. Whenever jail and medical facilities have been misused by prisoners, be it as undertrials or as convicts, the matter is of serious concern. It is, therefore, necessary also to ascertain the culpability in this matter and fix the responsibility and initiate appropriate action against all including those remiss in the discharge of their duties."

(Emphasis supplied)

530. We had also noted in the order dated 23rd March, 2012 that the court may not be competent to make an assessment of the gravity of the medical condition of any person or to assess the records received from the Batra Hospital and AIIMS. It was consequently deemed appropriate to appoint a committee of medical experts to facilitate the consideration and adjudication by us. Consequently, we had caused an independent assessment and evaluation of the medical condition of the two convicts based on the records produced by the hospitals, the material produced by the convicts and their examination, if deemed necessary, to be conducted by a Committee of relevant experts constituted by the Medical Superintendent, Army Research and Referral Hospital, Delhi Cantt. ('Army Hospital' hereafter) certified copies of the record was sent to the Army Hospital. The Committee was given opportunity to examine the records filed by the two hospitals in the court; and to seek production of the original record from this court.

The Committee was empowered to call any other records, seek appearance and make enquiries of the doctors or any of the personnel from AIIMS, Batra Hospital, DDU Hospital and Tihar jail for the purposes of making an objective evaluation. The committee of the Army Hospital was given liberty to permit the parties and/or counsels to assist in the scrutiny of the record and to assist it in the evaluation thereof. By our order dated 23rd March, 2012, the committee was required to submit a report within six weeks on the following aspects :

> "(a) the medical condition of Vikas Yadav and Vishal Yadav for the period prior to January, 2012;
> (b) the requirement of their outside referrals;
> (c) the necessity of the hospital visit;
> (d) the Committee shall give an opinion as to which of the hospital admissions was needed, as well as whether the durations thereof was justified under the circumstances or not;
> (e) the Committee may report any period during the hospital visit/admission which was not spent in the hospital/hospital room."

531. In order to enable this court to issue directions so that no under trial or convict is able to exercise undue influence or to persuade the jail authorities to take them on unnecessary outside hospital visits, by the order dated 17th August, 2012, the Medical Superintendent, DDU Hospital and Director General, Tihar Jail was required to examine the availability of facilities at the jail hospitals and to submit a report to us.

532. Pursuant to our directions dated 23rd March, 2012, the Medical Superintendent, Army Hospital appointed the following

Board of medical officers which conducted the proceedings with regard to Vikas Yadav as well as Vishal Yadav on the 14th June, 2012:

"(a)	Brigadier UK Sharma HOD Medical Division	-	Presiding Officer
(b)	Brigadier DV Singh HOD Surgical Division	-	Member No.1
(c)	Col AK Sahni HOD Pathology"	-	Member No.2

533. For the purposes of clarity, we propose to look at the hospital visits and admissions of the two convicts separately.

(i) <u>Hospital visits and admissions of Vikas Yadav</u>

534. So far as Vikas Yadav is concerned, we are informed that he was brought to Tihar Jail on 9th July, 1999 and remained there till 27th September, 1999 as an under trial in FIR No.287/1999 (known as the Jessica Lal murder case). He was thereafter brought on 16th September, 2002 to the Central Jail, Tihar as an under trial in the case arising out of FIR No.192/2002, P.S. Kavi Nagar, Ghaziabad (present case) and has remained in jail ever since. He was convicted and sentenced on 30th May, 2008.

535. The Superintendent, Central Jail No.4, Tihar has filed a status report dated 2nd February, 2012 stating that Vikas Yadav's reference to AIIMS started in the year 2008 on account of an opinion dated 3rd June, 2008 given by Medical Superintendent, DDU Hospital requiring him to be sent to AIIMS for further treatment of tuberculosis. Thereafter, the convict was being sent to

AIIMS on the advice of the "*treating doctor*". Further treatment in respect of an orthopaedic problem is also stated to have been suggested by the treating doctor at AIIMS. As per this status report dated 2nd February, 2012, Vikas Yadav has visited AIIMS 83 times.

536. The complainant Nilam Katara has placed before us information received by her in response to her query under Right to Information Act that no supporting documentation is available of hospital visits of the convict Vikas Yadav. Ninety eight hospital visits between January, 2008 and 14th December, 2011 have been tabulated therein which include visits to the DDU Hospital; AIIMS and the LNJP Hospital. In order to get a full picture, it is essential to set out the details thereof which read as follows :

S.No.	Date	OPD/Hospital	Remarks
1	6-Jan-08	Microbiology OPD/AIIMS	For Sputum Examination
2	7-Jan-08	Microbiology OPD/AIIMS	For Sputum Examination
3	30-May-08	Medicine OPD/DDU	Date for CECT Chest
4	31-May-08	Medicine OPD/DDU	For Cough for two weeks
5	1-Jun-08	ART Centre/DDU Hospital	For Needful
6	4-Jun-08	Radiology OPD/ DDU Hospital	For USG Abdomen
7	7-Jun-08	Radiology OPD/ DDU	For CECT Chest
8	9-Jun-08	ART Centre/DDU Hospital	For Needful
9	10-Jun-08	Medicine OPD/AIIMS	For Fever & Cough
10	13-Jun-08	Medicine OPD/AIIMS	For Review
11	24-Jun-08	Radiology OPD/AIIMS	For Reporting of CECT-chest done at DDU Hospital
12	1-Jul-08	Medicine OPD/AIIMS	For Review
13	2-Jul-08	Radiology OPD/AIIMS	For USG Abdomen
14	7-Jul-08	Radiology OPD/AIIMS	For Report collection USG
15	11-Jul-08	Ortho OPD/AIIMS	For Pain in Multiple joints
16	25-Jul-08	Ortho OPD/AIIMS	For Needful
17	1-Aug-08	Ortho OPD/AIIMS	For Needful
18	5-Aug-08	Medicine OPD/AIIMS	For Review
19	7-Aug-08	Radiology OPD/AIIMS	For Review
20	8-Aug-08	Medicine OPD/AIIMS	For Review
21	13-Aug-08	Medicine OPD/AIIMS	For Review
22	20-Aug-08	Medicine OPD/AIIMS	For Review
23	22-Aug-08	Chest clinic/AIIMS	For Fever & Cough. On

			ATT since 06.06.2008
24	25-Aug-08	Radiology OPD & Hematology/AIIMS	Date for CECT Chest & Investigation
25	27-Aug-08	Radiology OPD/AIIMS	Date for CECT Chest
26	3-Sep-08	Radiology OPD/AIIMS	For CECT-chest
27	12-Sep-08	Chest clinic/AIIMS	For Review
28	10-Oct-08	Chest clinic/AIIMS	For Review
29	17-Oct-08	Chest clinic/AIIMS	For Review
30	31-Oct-08	Chest clinic/AIIMS	For Review
31	7-Nov-08	Chest clinic/AIIMS	For Review
32	8-Nov-08	Chest clinic & Microbiology Deptt./AIIMS	For Sputum Examination and Review
33	14-Nov-08	Chest clinic/AIIMS	For Review. The Concerned Doctor is not in town
34	21-Nov-08	Tibitya college and Hospital	For needful
35	31-Nov-08	Tibitya College and Hosspital Karol Bagh	For needful
36	6-Dec-08	Dental OPD/MAIDS	For needful
37	01-Jan-09	Chest clinic/AIIMS	For Review
38	09-Jan-09	Chest clinic/AIIMS	For Review
39	16-Jan-09	Chest clinic/AIIMS	For Review. Advised to come on Friday.
40	23-Jan-09	Chest & Dental OPD/AIIMS	For Needful
41	05-Feb-09	RP Eye Centre/AIIMS	For PMT
42	06-Feb-09	Chest clinic/AIIMS	For Review
43	11-Feb-09	Chest clinic/AIIMS	For Review
44	13-Feb-09	Chest clinic/AIIMS	For Review
45	14-Feb-09	Chest clinic/AIIMS	For Review
46	20-Feb-09	Chest clinic/AIIMS	For Review. ATT stopped in Nov/Dec-2008
47	23-Feb-09	Dental Deptt/AIIMS	For Needful
48	24-Feb-09	Pathology Deptt/AIIMS	For Investigation
49	25-Feb-09	RP Eye Centre/AIIMS	For poor distant vision
50	3-Mar-09	Microbiology/AIIMS	For Sputum for AFB Test
51	12-Mar-09	Microbiology/AIIMS	For Sputum for AFB Test
52	13-Mar-09	Microbiology/AIIMS	For Sputum for AFB Test
53	16-Mar-09	Microbiology/AIIMS	For Sputum for AFB Test
54	19-Mar-09	Radiology Deptt/AIIMS	For X-rays
55	23-Mar-09	Radiology Deptt/AIIMS	For MRI Lt. Knee
56	25-Mar-09	Microbiology Deptt/AIIMS	For Sputum for AFB Report Collection
57	27-Mar-09	Ortho OPD/AIIMS	For Follow-up
58	28-Mar-09	Radiology OPD/AIIMS	Date for MRI Lt. Knee
59	8-Apr-09	Ortho OPD/AIIMS	For Review
60	17-Apr-09	Chest clinic/AIIMS	For Follow up
61	21-Apr-09	Radiology Deptt/AIIMS	For MRI Knee
62	3-May-09	Ortho Deptt/AIIMS	For Needful
63	4-May-09	Ortho OPD/AIIMS	For Needful
64	13-May-09	Ortho OPD/AIIMS	For Follow up
65	16-May-09	Physiotherapy/AIIMS	For SWD
66	23-Jun-09	Dental OPD/AIIMS	For Needful

67	3-Jul-09	Chest Clinic/AIIMS	For Needful. As per medical file the concerned Doctor was on leave and advised to revisit.
68	8-Jul-09	Ortho Deptt/AIIMS	For Review
69	5-Aug-09	Ortho Deptt/AIIMS	For Review
70	20-Aug-09	Ortho Deptt/AIIMS	For Review
71	26-Aug-09	Chest Clinic/AIIMS	For complaint of Hemoptysis
72	7-Nov-09	Dental OPD/AIIMS	For Needful
73	15-Jun-10	Radiology & Surgery Deptt/DDU Hospital	For X-Ray KUB & Needful
74	8-Feb-10	Dental Deptt/AIIMS Hospital	For Needful
75	28-Oct-10	Ortho OPD/AIIMS Hospital	For Needful. Advised follow up on Wed/Friday for Continuity of Treatment.
76	18-Aug-11	Ortho OPD/DDU Hospital	For Needful
77	20-Aug-11	Radiology Deptt/LNJP Hospital	For MRI Lt. Knee and X-Ray.
78	23-Aug-11	Ortho OPD/DDU Hospital	To Fill MRI Form.
79	25-Aug-11	Radiology Deptt/LNJP Hospital	For MRI Lt. Knee and X-Ray.
80	26-Aug-11	Radiology Deptt/LNJP Hospital	For MRI Lt. Knee
81	29-Aug-11	Radiology Deptt/LNJP Hospital	For Collection of MRI report.
82	30-Aug-11	Ortho OPD/DDU Hospital	For Review with MRI and X-Rays. The ortho deptt. DDU Hospital Referred the patient to AIIMS Deptt. of Ortho for further evaluation.
83	02-Sep-11	Ortho OPD/AIIMS Hospital	For Needful. Advised MRI DL Spine And Lt. Thigh. Advised to come on 03.09.2011 for X-rays.
84	03-Sep-11	Radiology Deptt/AIIMS	For X-Rays.
85	09-Sep-11	Ortho Deptt./AIIMS Hospital	For Review.
86	15-Sep-11	Radiology Deptt/AIIMS Hospital	For MRI LS-Spine & MRI of Lt. Thigh.
87	21-Sep-11	Ortho Deptt./AIIMS Hospital	For Review. Advised to take opinion from Dr. Shah Alam.
88	23-Sep-11	Ortho Deptt./AIIMS Hospital	For pain in Lt. Thigh. Advised CT-Scan Lt. Thigh.
89	27-Sep-11	Pathology Deptt./AIIMS Hospital	For Blood test.
90	30-Sep-11	Department of N.M.R./AIIMS Hospital	For Review/MRI DL Spine. Advised to visit on Monday.
91	01-Oct-11	Radiology Deptt/AIIMS	For CT Scan Lt. Thigh.
92	03-Oct-11	Ortho Deptt./AIIMS Hospital	For Review. Advised to Visit on Friday for Dr.

			Shah Alam opinion.
93	07-Oct-11	Ortho Deptt./AIIMS Hospital	For Pain Lt. Thigh. Advised to be admitted in AIIMS for evaluation.
94	10-Oct-11	Radiology Deptt/AIIMS Hospital	For MRI Lt. Thigh. Admitted In AIIMS From 10.10.2011 To 04.11.2011 In The Deptt. Of Orthopedics. On Discharge advised PET-CT scan Report
95	29-Oct-11	Radiology OPD/AIIMS	For CECT Chest
96	28-Nov-11	Nuclear Medicine/AIIMS	For PET Scan. But the Doctor from Deptt. of Nuclear Medicine Reported that the Machine is not working and rescheduled for 05.12.2011
97	07-Dec-11	Deptt. of Nuclear Medicine/AIIMS Hospital	For PET Scan
98	14-Dec-11	Nuclear Medicine Deptt. & Orthopaedic Deptt.	For PET Scan report Collection & Review

537. The above tabulation would show that Vikas Yadav has gone to the Department of Microbiology, AIIMS for sputum examination/for sputum examination and review/for sputum for AFB test/for sputum for AFB report collection on the 6th and 7th January, 2008; 8th November, 2008. Then in the month of March, 2009, he paid visits to this department on 3rd; 12th, 13th, 16th and 25th March, 2009! It is inexplicable as to how so many visits to the Department of Microbiology at such short periods were necessary. He has visited the Medicine OPD at AIIMS at intervals of two weeks/for '***fever***' and '***cough***'. Vikas Yadav visited the Medicine OPD/DDU Hospital on 31st May, 2008 then on 10th June, 2008 and then the Chest Clinic/AIIMS on 22nd August, 2008. Thirty two visits are recorded between 1st June, 2008 to 2nd September, 2011 to Ortho, Dental and Chest departments of AIIMS; DDU hospital;

Tibya College and Hospital; MAIDS for '*needful*'. Similarly for the purposes of '*for review*', Vikas Yadav has gone 31 times to AIIMS. After visiting the Medicine OPD at AIIMS on 5th August, 2008, he visits the same department on 8th, 13th, and 20th August, 2008. In between, on the 7th August, 2008, he visited Radiology OPD at AIIMS. Similarly Vikas Yadav has visited the Chest Clinic at AIIMS on 12th September, 2008. In October and November, 2008, he visited the Chest Clinic at AIIMS on 10th, 17th, 31st October, 2008 as well as 7th and 14th November, 2008. In January, 2009, he visited Chest Clinic on 9th and 16th January, 2009. Again in February, 2009, he visited the Chest Clinic on 6th, 11th, 13th, 14th and 20th February, 2009.

538. If an ultrasound of the appellant had been done on 4th June, 2008, why was it repeated on 2nd July, 2008? Three visits to the Orthopaedics OPD to AIIMS in less than a month from between 11th July, 2008 to 1st August, 2008. In August, 2008, Vikas Yadav has visited one or the other department of AIIMS on the 1st, 5th, 7th, 8th, 13, 20th, 22nd, 25th and 27th August, 2008.

539. In almost every month, the convict has had repeated outings out of jail. If the convict was being treated in the medicine, chest and orthopaedics of AIIMS, where was the need for him to go to Tibitia hospital as well. For dental treatment, the convict was visiting MAIDS as well as AIIMS. He visited the orthopaedic department of AIIMS three times within 10 days (3rd, 4th and 13th May, 2009). He goes for physiotherapy to AIIMS on 16th May, 2009. He has got MRI of the left knee and X-rays done in the

radiology department of LNJP Department on 20th, 25th and 26th August, 2011. He is taken to the LNJP Hospital for collection of the MRI report on 29th August, 2011. Is it possible to have three MRIs of the left knee undertaken in six days? And even if he had to visit AIIMS, could not the visits to the various departments be combined in a single visit to AIIMS?

540. No details of the treatment in these OPD visits of Vikas Yadav have been provided either by Vikas Yadav, the jail authorities or hospital authorities including AIIMS**.**

541. The above tabulation would amply establish the fact that he was being taken outside the Tihar jail for minor complaints – '*fever, cough*' at short intervals without any justification. There is not an iota of supporting material to suggest that Vikas Yadav was suffering from such sickness or at least a major illness which could not be treated at the jail hospital or DDU, LNJP. There would certainly be no occasion for visiting a super speciality referral hospital as AIIMS at such short intervals. The information shows that he has been taken out of jail for the "*needful*". What was the needful and what was done? Where was the need for the convict to visit the hospital to get a date for CECT or to collect a MRI report or any other report?

542. A discharge summary dated 4th November, 2011 recorded by AIIMS for Vikas Yadav's admission from 10th October, 2011 to 4th November, 2011 also discloses another interesting fact. Vikas Yadav was diagnosed with Pulmonary TB in 2008 for which "*he took ATT for 4.5 months (stopped by self with symptomatic*

improvement)". The above noting in the discharge summary manifests that either Vikas Yadav did not contract tuberculosis at all (there being no record of medication) or that he was *"cured"* within 4½ months of the commencement of anti T.B. treatment, if at all he took any!

The discharge summary also establishes that between 2008 till middle of 2011, Vikas Yadav was a healthy person without tuberculosis and there was no real need for the hospital visits to AIIMS of Vikas Yadav pursuant to the recommendation dated 3rd June, 2008 of Medical Superintendent, DDU Hospital for this disease.

We may also note that there is no record at all with regard to the infection and treatment for tuberculosis, if Vikas Yadav actually had the disease or underwent treatment for it or was it really an enabling excuse used as a shield to get out of the prison?

543. In the communication dated 15th February, 2012, of the Senior Medical Officer, as per medical records the following details of medication which was advised to Vikas Yadav during his different hospital visits:

"(i) Tab. Shelcal - CT
(ii) Volitra Gel - Locally
(iii) Tab. Nimulid
(iv) Tab. Nervemax
(v) Tab. Ultra Cet
(vi) Tab. Altraday
(vii) Tab. Zinase - D
(viii) Cap. Becousule"

While 'Shelcal' is a calcium supplement, 'Nervemax' is a nerve vitamin; 'Nimulid', ' Ultracet', 'Altraday', 'Zinase-D' are pain killers; 'Becousule' a vitamin supplement, while 'Volitra gel' is an ointment for pain relief.

The above medication also does not point towards any disease requiring visits to a super speciality referral hospital as AIIMS.

544. Pursuant to our order dated 2nd February, 2012, Vikas Yadav and Vishal Yadav were medically examined by a Board of the following five specialists and super specialists of AIIMS in the relevant medical disciplines:

(i) Dr. S. Wadhwa, Professor, Deptt. of P.M.R.
(ii) Dr. A. Jayaswal, Professor, Deptt. of Orthopaedics.
(iii) Dr. S. Chumber, Professor, Deptt. of Surgery.
(iv) Dr. Navneet Vig, Addl. Professor, Deptt. of Medicine.
(v) Dr. I.B. Singh, Addl. Professor, Hosp. Admn.

545. The Board examined Vikas Yadav on 9th 10th and 13th February, 2012; scrutinized the entire medical record relating to Vikas Yadav; took a detailed clinical history as well as physical examination of Vikas Yadav and opined as follows:

> "**Final conclusion and Recommendations of the Medical Board:**
>
> Based on the information obtained by review of medical reports shown by the jail authorities, detailed history and findings of the clinical examination plus relevant investigations, it is reported that Sh. Vikas Yadav is able to perform all the activities of daily living without assistance and is currently not suffering from any acute or severe medical condition which requires

hospitalization or active intervention – medical surgical or investigational. His current condition can be managed by taking appropriate care and medications."

(Emphasis supplied)

546. The Board of experts at AIIMS has reported that Vikas Yadav was not suffering from any acute medical condition. Vikas Yadav was procuring his own medication and would be possessed of the records in this regard. Nothing has been produced to support that he actually took any medication. The medication prescribed would also establish that Vikas Yadav was not suffering from any major sickness necessitating visits to a super speciality hospital. For all these reasons, we have no hesitation in holding that the hospital visits and admission were not necessary.

547. As per the status report dated 2nd February, 2012 of the Superintendent, Central Jail No.4, Tihar, between 5th July, 2010 to 2nd February, 2012, apart from hospital visits, Vikas Yadav had additionally left the jail for court appearances on 15 occasions (5th July, 2010, 1st September, 2010, 1st October, 2010, 9th November, 2010, 4th January, 2011, 7th February, 2011, 3rd March, 2011, 2nd May, 2011, 13th May, 2011, 1st June, 2011, 14th June, 2011, 8th July, 2011, 1st August, 2011, 12th August, 2011, 5th September, 2011). The report states that for this purpose, the convict was handed over to the DAP authorities a day prior to the court date and was admitted back after attending the date. The convict was sent for custody parole on 14th April, 2011 and 29th/30th April, 2011.

548. It is manifest from the above discussion that visits to the hospital have been utilised by the prisoner to procure outings from the jail. These visits were unnecessary and not for any medical reason, in any case not for any serious ailment which could not be treated at an ordinary facility.

(a) Admission in AIIMS of Vikas Yadav

549. Amongst the several visits to AIIMS, on 1st October, 2011, Vikas Yadav visited the Department of Radiology, AIIMS for a CAT scan of the left thigh. On 3rd October, 2011, he visited the Orthopaedic department of AIIMS for review and again visited AIIMS on 7th October, 2011 when he was advised admission in AIIMS (private ward) for evaluation of MRI of left thigh, bone scan and possible PET-CT scan. We are appalled to note the advice of admission for "evaluation" of an MRI and a bone scan. Let us examine the events which transpired as a result of this advice.

550. On 10th October, 2011, Vikas Yadav was admitted to AIIMS for undergoing a PET-CT scan. Initially he was placed in a 'B' Class room in the private ward but immediately thereafter, was shifted to an 'A' Class luxury room. He was discharged on the 4th of November, 2011 without any PET Scan having been conducted or any diagnosis being made. During this period, neither any test was done nor any treatment was provided to him.

551. The office of the Superintendent, Central Jail No.3 under covering letter No.F.3/SCJ-3/ASW/2014/2473 dated 8th December, 2014 has placed the medical report submitted by the Medical

Officer Incharge, Central Jail No.3 Dispensary in respect of Vikas Yadav before us. The photocopy of outdoor patient tickets of the Central Jail Hospital which have been placed shows that Vikas Yadav attended the Radiology Department of the LNJP Hospital on 26th August, 2011 when he had got an MRI as well as X-rays done which was received by him on 30th August, 2011. The referral of the orthopaedic department of AIIMS on 1st September, 2011 gives no reason or aggravation in any medical condition. After the MRI in LNJP, Vikas Yadav visited the AIIMS on 16th September, 2011 to get his MRI undertaken. Why was this necessary?

552. Interestingly, the record of the Central Jail No.4 also shows that Vikas Yadav was being taken to the Radiology Department of the LNJP Hospital earlier. No reason as to why the SCAN could not be performed in any other Governments Hospital which he was visiting is forthcoming. There is no recommendation, referral, evaluation, approval or authorization by the jail medical experts or the DDU Hospital for this reference or admission.

553. The discharge summary dated 4th November, 2011 records the diagnosis as "*suspected Sheurman's disease*". The medical record shows that the treatment which was prescribed for Vikas Yadav by AIIMS on 4th November, 2011 was as follows:

> "(i) Physiotherapy & mobilization
> (ii) T-Nervemax 75 mg BD
> (iii) T-Utracet 1TDS x 5 days
> (iv) T-Pan – 40 1BD
> (v) Incentive spirometry 2 hrsly, steam inhalation 6 hrsly."

Vikas Yadav was thus prescribed a nerve vitamin (T-Nervemax); a pain killer (Ultra-cet) and an anti-acid (TPan) during and after his hospitalisation. It is evident from the above that there was no such medical condition requiring treatment by a super-speciality hospital as AIIMS, let alone admission for twenty six days.

554. In its report of proceedings dated 14th June, 2012, on this admission to AIIMS from 10th October to 4th November, 2011, the Army Hospital Committee has noted the following:

> "3. The Board, having perused all the medical records produced before it has come to the following conclusions:-
> (a) Mr. Vikas Yadav was diagnosed to have ***Pulmonary Tuberculosis in 2008***. He received ***anti-Tubercular treatment*** for a period of 04 to 05 months and ***stopped it on his own***. ***Details of the basis of diagnosis and drugs administered*** are not available in the documents provided.
> (b) He was admitted at AIIMS with effect from 10 Oct 2011 to 04 Nov 2011 for ***low backache and pain left knee joint.*** His final diagnosis and detailed observations of the Board are recorded as per Appendix 'A' to this report.
> (c) The PET-CT Scan of the spine was carried out at a later date i.e. FDG/18725/11 dated 07/12/11, and this ***did not reveal any abnormality***.
> (d) The available records offer ***no information about OPD visits of Mr. Vikas Yadav***."
>
> (Emphasis supplied)

555. As per Appendix 'A' (to the above report of proceedings dated 14th June, 2012) which gave details of hospitalization of

Vikas Yadav at AIIMS from 10th October, 2011 (for 26 days), his discharge diagnosis was Scheurman's disease D_{11}-D_{12} Vertebrae with Minimal Anterior Wedging**.** The Board additionally made the following remarks:

> "(a) Admitted for complaints of Low Backache and pain (Lt) Knee joint. MRI done. ***Revealed only degenerative changes in dorsal vertebrae***.
> (b) Made good clinical recovery on conservative treatment and physiotherapy. Admission was justified for evaluation, observation and treatment.
> (c) A PET-CT Scan was advised and jail authorities were asked to provide money for the same. ***Inordinate delay*** was experienced in obtaining the money. Hence, ***hospital stay got prolonged***. Ultimately, ***patient was discharged without carrying out the scan.*** The ***scan*** was ***done on 07 Dec 2011*** on ***outpatient basis***, and reported ***normal***.
> (d) As per hospital records, Mr. Vikas Yadav was reported to be ***absent from his hospital bed on two separate occasions*** on the night of 26/27 Oct 2011. The ***first absence*** was from 08.30 PM to 12.00 AM and the second from 00.45 AM to 06.00 AM. The matter was reported by the ward sister to the resident doctor on duty, who further informed the Ward in-charge of Ortho ward and the Nursing supervisor, and endorsed the same in the case notes maintained in the ward."
>
> (Emphasis by us)

556. We are pained to note that the Army Hospital (R&R) Committee has merely extracted the expressions (*"justified", "advised"*) used in the other hospital from the records placed before it without recording its independent opinion. "*Degenerative changes*" would be a result of passage of time and aging which

every person undergoes. No hospitalisation was recommended for this condition. It is left to this court to draw its conclusions from the noted facts and circumstances.

557. From the above disclosures, it also appears that Vikas Yadav was either not afflicted with tuberculosis or the infection was so minimal that it could be cured without the standard medication regime for the disease.

558. As per the department of Orthopaedics of AIIMS, Vikas Yadav was "*complaining of pain in the left upper thigh and had acute back pain which had worsened over the last few weeks*". The discharge summary issued by the AIIMS to Vikas Yadav on the 4th of November, 2011 records that the patient was complaining of low backache and pain in left thigh for ***four months*****!** It would appear that this back pain got cured without any medical intervention. The record of AIIMS thus establishes that there was no emergency and no acute condition critically requiring the PET scan or requiring his hospitalization for the purposes of taking the SCAN.

559. After our order dated 4th February, 2012, a communication No.SMO/CJ-4/2012/2350 dated 15th February, 2012 has been sent by the Medical Officer Incharge, Central Jail No.4, Tihar to the Superintendent, Central Jail No.4, Tihar which has been placed on record to explain this admission. So far as the reference of Vikas Yadav to the AIIMS is concerned, the manner and reasons therefor, stated in this communication dated 15th February, 2012 read thus:

> "As per medical record the patient was referred to DDU hospital in Aug-2011 for evaluation and Management of

pain in Lt. Knee. The Doctors of DDU hospital referred the patient to AIIMS Deptt. of Orthopedics on 30.08.2011 for opinion regarding his knee pain/need for arthroscopy (Annexure 1). There after the inmate was referred to AIIMS Deptt. of orthopaedics for further evaluation/Management/follow up as per the advice of treating Doctor. ***The inmate refused to take any medicines from CJ-4 Dispensary*** *as* ***he is taking the medicines on his own as stated by the inmate.*** The details of visits to outside hospitals as per medical record is enclosed (page No. 1 to 6). As per Medical Record he was treated for tubercular Lymphadenopathy in 2008 (ATT started on 06.06.2008 and stopped in November/December, 2008).
His PET – CT Scan conducted at AIIMS on dated 07.12.2011 reveals – No definite evidence of any active disease."

(Emphasis by us)

560. As per an affidavit dated 22nd February, 2012 filed by Medical Superintendent, AIIMS, "*the issue of non-receipt of payment of charges of PET-CT from the jail authorities became the reason of continuing his admission in AIIMS*". What was the emergency for admission (if required) without even receipt of charges for the scan, if it was not a mere shield for facilitating him in staying outside prison. And if funds were the sole reason for keeping Vikas Yadav in hospital, we fail to understand as to why he was discharged at all without undertaking such PET?

(b) Change of room category

561. The payment record submitted by AIIMS shows that Vikas Yadav was put in a 'B' Class private room on 10th October, 2011.

He was shifted to 'A' Class (Deluxe) room on 11th October, 2011. What is the difference between 'A' Class deluxe room and the 'B' Class private rooms? This is disclosed in para 4 of the affidavit of the Medical Superintendent, AIIMS dated 21st March, 2012 which reads as follows:

> "4. That the ***difference*** between ***A type & B type rooms is primarily of the size since both type of rooms are single seater rooms with attached toilet***. The size of ***B class room in old private ward*** is approx. 26 sq. mtr. and size of ***A class room in new pvt. ward*** is approx. 32 sq. mtr. Therefore there is only marginal difference of size in these two types of rooms."

Thus the 'B' class rooms are the 'old', while 'A' class rooms are in the 'new' private ward of AIIMS. The difference between the two is in the size and charges for the room.

562. The affidavit makes a further very interesting disclosure. In para 5 of this affidavit, the Medical Superintendent has disclosed the following information as the reason for keeping a patient in the 'A' Type or 'B' type private room:

> "5. That since the old private ward is located within the main hospital building, and as a matter of precaution from the patient care point of view relatively serious patients (who are more sick) are preferably kept/ admitted in the old pvt. ward, since it is easier for the doctor to reach on being called as & when required and likelihood of doctor being called SOS is more in case(s) of relatively seriously ill patients than stable patients. The ICU's (Intensive Care Unit) & HDU's (High Dependency Units) and other centralized facilities like

> radio-diagnosis & operation threatres are also located in the Main Hospital Building, which is attached with the Old Pvt. Ward. The relatively sick patient as and when required can be very easily shifted to the ICU/HDU/OT if required, whereas it is not only time taking but at time difficult as well for the relatively sick patient to be shifted to ICU/HDU/OT, without loss of time, as it take some time for the shifting of the patient from the New Pvt. Ward. The relatively less serious or stable patients are preferably kept admitted in new private ward since likelihood of urgently calling doctor on duty are less in such patients."
>
> (Underlining by us)

563. In para 5, the Medical Superintendent has admitted that Vikas Yadav was shifted to the 'A' Class room for the reason that he was a stable patient whose possibility of urgently requiring a doctor on duty was much less. It is also stated that the transfer/shifting of Vikas Yadav was done in "*routine manne*r" as per above practice without any consideration of his being a prisoner and without reference to the jail authorities. It clearly establishes that Vikas Yadav was a stable patient for whom the likelihood of requiring urgent medical care was less, so he could be kept away from the centralized facilities at AIIMS. The Medical Superintendent, AIIMS has also explained that 'B' Type rooms are more in demand. Judicial notice requires to be taken of the long line of critically ill patients waiting to be admitted to the AIIMS for treatment in any ward. And yet a healthy prisoner has been permitted to occupy and room for twenty six days thereby enabling him to avoid the prison.

564. This court had directed information with regard to private ward hospitalization of other prisoners in AIIMS. In this regard, in para 8 of the affidavit dated 21st March, 2012 of the Medical Superintendent, it is disclosed thus:

> "8. As regards ***pvt. ward hospitalization of other prisoner patients***, it is informed that several jail patients have been given the facility of private ward hospitalization on the advice of the treating/consulting doctors only in the past as well including Sh. Pappu Yadav, Dr. Ketan Desai and Sh. Amar Singh.
> 9. The jail inmate patient Sh. Amar singh was initially admitted in new private ward in Room No.2018, A type room on 12.9.2011 and was later shifted to Old Private Ward 14.09.2011 in Room No.301 A type room on account of need of regular monitoring required in view of his illness."

565. Since a question has been raised as to the authority with which the hospital shifted the convict to 'A' class room, in para 10 of the affidavit, AIIMS has sought to take the shield that the admission was effected only after the payment was received from the jail and because the jail made such payment, it was with their approval. Given this statement that room change was effected only after receipt of payment from the jail, AIIMS explanation that Vikas Yadav was kept admitted as payment for the PET was awaited is unbelievable, to say the least. This conduct on the part of the jail authorities (if they paid for the 'A' class deluxe room and not for the SCAN) and AIIMS reeks of the collusion with the prisoner to enable his stay in comfort outside of jail.

566. PET-CT scans ordinarily do not require admission into hospital, unless there is a medical condition of the patent requiring his admission. The most telling circumstance which establishes beyond doubt that the hospitalization from 10th October, 2011 to 4th November, 2011 for undergoing the PET scan was completely unwarranted is the fact that the PET-CT scan of Vikas Yadav was not done even in his AIIMS visit on 28th November, 2011 for the same purpose. It was done only on 7th December, 2011 as an out patient i.e. almost two months after his admission on 10th October, 2011 which did not reveal any abnormality. This establishes beyond doubt the fact that there was no urgency in getting the scan and certainly no requirement Vikas Yadav's for hospital admission, let alone for a hospital stay of twenty six days.

(c) Absence of Vikas Yadav from hospital room on 23rd October, 2011, night of 26th/27th October, 2011 and 1st November, 2011.

567. Apart from the sheer number of the hospital visits (more than 100) out of which 83 visits were to AIIMS, an extremely serious and important aspect of the matter is the fact that Vikas Yadav was found missing from his hospital room on three occasions while admitted in 'A' class room of the private ward in AIIMS between 10th October, 2011 to 4th November, 2011.

568. No dispute has been raised by or on behalf of the convict to the record produced by AIIMS. From the original record produced by AIIMS, Mr. P.K. Dey, learned counsel for the complainant has

extracted the course of events during Vikas Yadav's admission in AIIMS between 10th October, 2011 to 4th November, 2011 from his case sheets, which for the purposes of expediency is reproduced hereunder :

"Remained admitted in AIIMS from 10.10.2011 to 04.11.2011

10.10.11 :	Admitted in room no.109 which is a single occupancy.
11.10.11 :	Shifted to room no.3008 (New Block, A Class i.e. luxury room) PET scan to be done, date taken for PET
12.10.11 :	PET Scan on call.
14.10.11 :	As per Patient, he is awaiting release of money for scan from Jail.
15.10.11 :	Pt. on call for PET Scan, money for PET Scan not received.
17.10.11 :	Patient tell that jail authority have been informed regarding money for PET scan. Doctor advice review post PET Scan.
18.10.11 :	Money for PET scan not yet issued.
19.10.11 :	Room locked (evening round), constables told he is meditating.
23.10.11 :	**Round by Doctors, Patient not in the room as told by the attendant; he has gone to meet one of his relative who is admitted in CN Centre along with police constable, hence the issue of charges PET – CT could not be enquired.**
24.10.11 :	On enquiry money for PET Scan yet to come.
26.10.11 :	**"8.30 PM, Call attended for non-availability of the patient in the room. As per the sister on duty the patient went out of the room along with the**

	police constables. There was not any information to the sisters, neither any written permission, the case was informed to the ward incharge Ortho-II" **Patient came back at 12 midnight and wrote in sister's chart that he went out at 10.30 to some doctor's hostel and came back at 12 midnight, but as per <u>one of his attendants</u> he had gone to meet one of his known to who is admitted in CN Centre.**
27.10.11 : (Diwali festival)	**At 12:45 a.m. the patient again went out of the room without any information. On asking the patient as well as the police constable they refused to tell any rather the constable on duty told the sister on duty that the "Patient is under our custody, it is our responsibility regarding the patient not yours"** **Informed to supervisor and ward incharge Ortho-II as well.** **On inspection the room was locked from outside the patient did not report till morning he was first seen on the morning only at 6 am when the police constable came for the keys.** **<u>Morning Round:</u>** **As per the police constable outside, the patient was sleeping inside the room hence was not disturbed.** **Night incidents were explained to Professor S. Rastogi and Dr. S.A. Khan**
28.10.11 :	On inquiry about PET Ct Scan the money is yet to come (<u>none of the attendants</u> neither the police constables were clearly talking about the matter)

31.10.11 :	**10 PM, No entry in Nurses daily record.**
01.11.11	**At 6 AM not found on bed. Informed to Ortho-II, Patient came back at 7.15 AM. (as per daily Nurses daily record)**
02.11.11:	On enquiry about charge for PET CT money is still to be issued from the jail as told by the patient himself. Such answers were given previously also on several occasions. Today he told that the money will be sanctioned by tomorrow.

569. It is pointed out to us that the 27th of October, 2011 was Diwali.

570. Mr. Sumeet Verma, learned counsel for Vikas Yadav has orally submitted that Vikas Yadav had gone to visit some doctor friend in the AIIMS hostel. No details of such friend are disclosed. No information was given to the doctor or nurse on duty. The information given is to the contrary.

571. Another absence is explained by Mr. Verma as a prescription walk as part of Vikas Yadav's physiotherapy regime. We find this explanation completely unacceptable. It is not supported by any hospital record. Furthermore, no person would undertake a walk as part of physiotherapy in the middle of the night. Also why was such walk taken on the night of Diwali alone and on no other night? Again no intimation thereof was given to any authority.

572. It cannot be disputed that if the hospital stay was warranted, the convict was required to restrict his movement to the hospital room. Instead, he has been found missing on the several occasions

as noted in the original record of case sheets by the medical authorities on duty.

573. It would appear that after the hospital visits were highlighted, the Delhi Police has taken the matter seriously. Head Constable Ishwar Singh and Constable Ramesh Kumar had been detailed to ensure the proper care and custody of the convict in the AIIMS on the dates in question. In view of these absences of the convict from the hospital room, the police treated the same as misconduct on the part of these two police officials who were placed under suspension vide an office order dated 27th March, 2012 and subjected to a disciplinary inquiry. The inquiry officer, Inspector Rajeshwar Aggarwal conducted the inquiry in which six witnesses which included the doctors and nursing sisters at the AIIMS were examined. Based on the evidence recorded during the inquiry, the inquiry officer recorded his findings that the charges against the Head Constable Ishwar Singh and Constable Ramesh Kumar were fully substantiated beyond any shadow or doubt. The disciplinary authority caused a copy of the report of the inquiry officer to be served upon the police officials on 24th July, 2012. After considering their joint reply and hearing the defaulters on 3rd August, 2012, the disciplinary authority *inter alia* held as follows :

> "I have carefully gone through the depositions made by the PWs as well as relied upon documentary evidence. The pleas taken by the defaulters are devoid of substance. The contentions raised by the defaulters in their defense statement have been discussed by the Enquiry Officer at length in his finding.

XXX The plea of the defaulters that they were present when checked by Inspr. Vimal Kishor at 11.50 PM is devoid of merit as the main charge against them was that they were not found present in the ward between 12.45 AM to 6.00 AM on the night between 26/27.10.2011.

XXX The claim of the defaulters that they did not remain in collusion and facilitate the convict has no legs to stand as from the overall evidence and relied upon documents it is clearly proved that convict Vikas Yadav and both the defaulters were not present in the ward room from 12.45 AM to 6.00 AM on the intervening night of 26/27.10.2011.

XXX It has been proved in the departmental enquiry that both the defaulters had taken out the convict Vikas Yadav from the ward room of A.I.I.M.S. to an unknown place and were not found present alongwith the convict from 12.45 AM to 6.00 AM of the intervening night of 26/27.10.2011 as is evident from the stamen of PW-3 as well as other corroborating statements of other PWs.

XXX The defaulters, being police officers were expected to perform their duty strictly as per rules which required of them to ensure proper care and custody of convict Vikas Yadav. Instead of doing, so, they remained in collusion with the convict and provided him undue and illegal favours which could have caused serious breach of custody of the convict. The omission & commission of both the defaulters is totally intolerable being members of disciplined police force.

XXX Therefore, keeping in view the overall facts and circumstances of the case as well as above discussion, both the defaulters deserve exemplary punishment. Hence, I, Shibesh Singh, Deputy Commissioner of Police, 3rd Bn. DAP, Delhi, hereby order to remove HC

> Ishwar Singh, No.2578/DAP and Constable Ramesh Kumar, No.7730/DAP from the force with immediate effect. Their suspension period from 27.03.2012 to 22.04.2012 is also decided as period not spent on duty."

574. Mr. P.K. Dey, learned counsel has submitted that as per the call details of the two aforesaid police officials, they were in the area of Vasant Kunj during the relevant time. Mr. De, learned counsel would suggest that the father of Vikas Yadav has a farmhouse in this area and from these call details, the location of the defendant on the night of the Diwali festival is established. In support of this submission, reliance is placed on the pronouncement of Supreme Court reported at ***1992 4 SCC 172 Satpal v. State of Haryana.***

575. Mr. P.K. Dey, learned counsel for the complainant has contended that absences of the convict from the hospital room have, in any case, to be treated as an escape from custody and that even temporary escape is an offence and punishable under Section 224 of the IPC. The further submission is that life imprisonment means rigorous imprisonment and even if a convict was sentenced to simple imprisonment, such absence tantamounts to escape from custody.

(d) <u>Special facilities during AIIMS admission and charges</u>

576. AIIMS has attempted to justify the admission of Vikas Yadav from the 10th of October 2011 to 4th November, 2011 on the ground that payment from the Tihar jail for the scan was awaited.

The bill record with regard to the admission of Vikas Yadav shows that for the 'B' Class private room on the 10th of October 2011, AIIMS charged the jail authorities Rs.1,100/- per day. On the 11th of October 2011, he was shifted to 'A' Class (Deluxe) room for which the room rent was Rs.1,700/- per day. He enjoyed a private diet @ Rs.100/- per day for seven days. The Tihar jail was billed a total of Rs.13,700/- which expense has been incurred out of public funds.

577. We extract hereunder the bills raised by AIIMS from *10th October, 2011 to 17th October, 2011*, when the following charges were raised:

Admission Charges		
1.	**"A" Class (Deluxe)**	
	Room Rent @ **Rs.1700 per day** for 7 days from **11/10/11 to 17/10/11**	Rs.11,900/-
2.	**"B" Class**	
	Room Rent @ **Rs.1100 per day** for 1 day from **10/10/11 to 11/10/11** F.N.	Rs.1,100
3.	Private diet @ Rs.100 per day for 7 days from 11/10/11 to 17/10/11	Rs.700
4.	Extra diet @ Rs.....per day for.....days from.....to.....	
	Total	Rs.13,700/-

578. The following charges were raised from 18th October, 2011 to 24th October, 2011:

Admission Charges		
1.	**"A" Class (Deluxe)**	
	Room Rent @ **Rs.1700** per day for 7 days from 18/10/11 to 24/10/11	Rs.11,900/-

2.	"B" Class	
	Room Rent @ Rs..... per day for ..... day from ..... to	
3.	Private diet @ Rs.100 per day for 1 days from 18/10/11 to 18/10/11	Rs.100
4.	Extra diet @ Rs.....per day for.....days from.....to.....	
	Total	Rs.12,000/-

579. The following charges were raised from 25th October, 2011 to 31st October, 2011:

Admission Charges		
1.	**"A" Class (Deluxe)**	
	Room Rent @ **Rs.1700** per day for 7 days from **25/10/11 to 31/10/11**	Rs.11,900/-
2.	"B" Class	
	Room Rent @ Rs..... per day for ..... day from ..... to	
3.	Private diet @ Rs..... per day for ..... days from ..... to	**Own diet**
4.	Extra diet @ Rs.....per day for.....days from.....to.....	
Other Charges for:		
(a)	CT	Rs.1000/-
(b)	Laboratory Tests	Rs.250/-
	Total	Rs.13,150/-

580. The following charges were raised from 1st November, 2011 to 4th November, 2011:

Admission Charges		
1.	**"A" Class (Deluxe)**	Rs.200
	Room Rent @ **Rs.1700 per day** for 4 days from **1/11/11 to 4/11/11** A.N.	Rs.11,900/-
2.	"B" Class	

	Room Rent @ Rs..... per day for ..... day from ..... to	
3.	Private diet @ Rs..... per day for ..... days from ..... to	**Own diet**
4.	Extra diet @ Rs.....per day for.....days from.....to.....	
	Total	**Rs.7,000/-**
(Less) Advance : R.No.0108 dated 18.10.11 : Rs.12,000 0134 dated 11.10.11 : Rs.6,000		Rs.18,000/-
	Net Amount	**Rs.11,000/-**

Therefore, for the hospital admission in AIIMS in respect of Vikas Yadav from 10th October, 2011 to 4th November, 2011, the State has spent Rs.50750/- on room rent and diet.

581. As per the hospital record placed before us shows that Vikas Yadav was also enjoying "own diet" during his AIIMS admission. The Tihar jail would not have permitted him the luxury of enjoying home cooking or "outings" from the prison on festivals or other occasions while undergoing rigorous imprisonment.

582. It is clearly stated in the affidavit from the jail that there are no policy guidelines by the jail authorities regarding private ward room to be allotted to a jail inmate patient or its class. Such being the position, it was incumbent upon the authorities of the AIIMS to have informed the jail authorities about the substantial difference of about Rs.600/- per day in the cost of the rooms and obtaining specific approval from the competent jail authority, before changing the room.

583. So far as the excuse for admission to a larger room that such patients have larger security personnel or secretarial staff

accompanying is concerned, we find that it is no ground at all for admitting jail inmates in 'A' type room. A prisoner can have no access at all to any "*secretarial staff*". If the reason that security personnel accompany jail inmates was a reason for allotting 'A' Type private rooms, then the hundreds of jail inmates who require visits to hospitals or admissions therein would all be entitled to identical facilities. It is obvious that completely specious and untenable grounds have been set out in the affidavit in order to create the semblance of an explanation for the completely unwarranted hospitalization of Vikas Yadav in the private ward, be it Type 'B' or Type 'A' rooms of the private ward in AIIMS.

584. The Medical Superintendent cites instances of only three prisoners as having been kept in Type 'A' private rooms in the affidavit which shows that such facilities are not available to all jail inmates but a chosen few. Is it possible that no other prisoner has ever been admitted in AIIMS for treatment? If yes, then they have obviously been kept in the general wards – with their security.

585. It is common sense that private hospitalization is for treatment of a serious sickness or if quarantization is required. Whether the patient was kept in the general ward or a private ward, makes no difference at all to the treatment of a disease. The difference only is of the facilities enjoyed by the prisoner in the private ward. And, of course, to the expenses incurred by the public exchequer which would grossly increase if the prisoner was kept in a private ward.

586. It needs no special information regarding the practice in private hospitals that the cost of investigations, treatment and case fees for doctor visits etc. increases in direct proportion to the class of room/facility to which the person is admitted. Therefore, treatment in an 'A' class facility/ward in a private hospital may cost two or three times than that for same investigation/treatment etc. in a 'B' class facility/ward, and up to six times what it would cost in the general ward. The difference of Rs.600/- per day maintained in the room charges in AIIMS between 'A' and 'B' type room manifests this position in AIIMS as well. We ask a question, why should this be permitted at the cost of the public exchequer? Especially, if treatment or medicare of the person does not require so? And if the same is warranted, why should not such facility be made available to every prisoner, irrespective of his/her economic/social/political standing or position as the right to life guaranteed under Article 21 of our Constitution guarantees equal protection of our right to life without any such distinction and it is the State's responsibility to protect the same, especially of prisoners?

587. Despite our specific order dated 16th March, 2012, the jail authorities offer no explanation as to why one prisoner will go to the private ward of AIIMS while another goes to general ward. Neither AIIMS nor the jail authorities disclose why and on what basis such privileges are extended. Certainly it is not the stand of these authorities that there is necessarily a correlation between the seriousness of the medical condition of the prisoner and the

room/bed to which he is admitted in AIIMS. Or that only certain class of prisoners suffer ailments requiring admissions in exclusive hospital wards which the jail authorities (i.e. the public exchequer) must fund.

588. Hospitals need to take special care in this regard where treatment of prisoners is concerned inasmuch as the expenses are borne by the public exchequer. Furthermore unless, the concerned and competent security agency or the prison authority has verified and recommended special facilities because of the nature of disease or some special security concerns of a prisoner, all prisoners would be entitled to the same treatment.

(ii) Hospital visits and admissions of Vishal Yadav

589. Nilam Katara also filed **Crl.M.A.No.1313/2012** dated 2nd January, 2012 complaining that misusing financial and political position with impunity, Vishal Yadav, also a life convict is also being unnecessarily and repeatedly taken to visit the Batra Hospital and Medical Research Centre for treatment of tuberculosis. The applicant pointed out that Vishal Yadav was initially taken to the DDU Hospital which referred him to AIIMS where he was diagnosed as suffering from tuberculosis. Pursuant to an order dated 24th March, 2004, he was permitted to visit Batra Hospital when he was an under trial person. Without any court orders or any reference by the DDU Hospital, after the conviction, Vishal Yadav has been taken to Batra Hospital almost 70 times for minor

complaints. As per the complainant, out of 70 visits, 40 were for mere review, two were mysteriously recorded as "the needful".

590. As per the status report dated 2nd February, 2012, Vishal Yadav was admitted on 16th September, 2002 in the Central Jail, Tihar and remained in custody till 10th October, 2005 as an under trial. He was re-admitted to jail on 28th May, 2008 upon his conviction and sentenced to life imprisonment on 30th May, 2008. Since 28th January, 2009, Vishal Yadav was lodged in Central Jail No.4, Tihar.

591. So far as visits to hospitals are concerned, we are informed of the following hospital visits by Vishal Yadav:

S.No.	Date	OPD/Hospital	Remarks
1	4-Dec-2003	Medicine OPD / GBPH	For Review
2	6-Dec-2003	Gastro OPD /.GBPH	For Review
3	12-Dec-2003	Gastro OPD /.GBPH	For Review
4	18-Dec-2003	Gastro OPD /.GBPH	For Review
5	1-Jan-2004	Gastro OPD /.GBPH	For Review
6	8-Jan-2004	Gastro OPD /.GBPH	For Review
7	12-Jan-2004	Gastro OPD /.GBPH	For Review
8	14-Jan-2004	Gastro OPD /.GBPH	For Endoscopy
9	10-Feb-2004	Gastro OPD /.GBPH	For Review
10	10-Apr-2004	Gastro OPD /.GBPH	For Follow up
11	25-Apr-2004	Gastro OPD /.GBPH	For Follow up
12	16-Apr-2004	Radiology OPD/GBPH	For CET Abdomen
13	13-May-2004	Gastro OPD /GBPH	For Review
14	3-Jun-2004	Medicine OPD/DDU Hospital	For Review
15	4-Jun-	Medicine OPD/DDU	For Review

	2004	Hospital	
16	5-Jun-2004	Cardiology OPD/DDU Hospital	For Echo
17	11-Jun-2004	Cardiology OPD/GMBH	For Review
18	28-Jun-2004	Medicine OPD/AIIMS	For Review. Admitted in AIIMS from 29-06-2004 to 7-07-2004
19	6-Aug-2004	Medicine OPD/AIIMS	For Review. As per court order.
20	24-Aug-2004	Cardiology OPD/AIIMS	For Echo
21	31-Aug-2004	Medicine OPD/**Batra Hospital**	For Review
22	03-Sept-2004	Medicine OPD/**Batra Hospital**	For Review. Admitted in **Batra Hospital** from 03-09-2004 to 15-09-2004
23	22-Sept-2004	Medicine OPD/**Batra Hospital**	For Review
24	30-Sept-2004	Medicine OPD/**Batra Hospital**	For Review
25	6-Dec-2004	Medicine OPD/**Batra Hospital**	For Review
26	20-Dec-2004	Medicine OPD/**Batra Hospital**	For Review
27	27-Dec-2004	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani**)
28	5-Jan-2005	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani**)
29	17-Jan-2005	Medicine OPD/**Batra Hospital**	For Review
30	7-Mar-2005	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani**)
31	6-Apr-2005	Medicine OPD/**Batra Hospital**	For Review
32	11-Apr-2005	Medicine OPD/**Batra Hospital**	For **Dermatitis** (seen by **Dr. Manohar Lal Sindhwani**) advised next visit after 15 days
33	25-Apr-2005	Medicine OPD/**Batra Hospital**	For Review
34	18-May-2005	Medicine OPD/**Batra Hospital**	For pain abdomen (seen by **Dr. Manohar Lal Sindhwani**)
35	26-Sept-2005	Medicine OPD/**Batra Hospital**	For Review (seen by Dr. Manohar Lal Sindhwani) advised next visit on 03.10.2005
36	5-Oct-2005	Medicine OPD/**Batra Hospital**	For Review (seen by Dr. Manohar Lal Sindhwani) advised next visit after 7 days
37	5-Jul-2005	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani) and advised admission on Monday**
38	7-Jul-2008	Medicine OPD/**Batra Hospital**	For admission as advised by **Batra Hospital**
39	14-Aug-2008	Medicine OPD/**Batra Hospital**	For follow up of Disseminated Koch's. **Admitted** in **Batra Hospital** from 14.08.2008 to 6.09.2008

40	22-Sept-2008	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani**) advised next visit after 2 weeks
41	6-Oct-2008	Medicine OPD/**Batra Hospital**	For Review
42	21-Oct-2008	Medicine OPD/**Batra Hospital**	For **excision biopsy** and review (seen by **Dr. Manohar Lal Sindhwani**)
43	24-Oct-2008	Medicine OPD/**Batra Hospital**	For Review. **Admitted** in **Batra Hospital** from **24.10.2008 to 15.12.2008 under Dr. Manohar Lal Sindhwani**
44	11-Feb-2009	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani) advised next visit on 25.02.2009**
45	25-Feb-2009	Medicine OPD/**Batra Hospital**	**For Review**. **Admitted** in **Batra Hospital** from **25.02.2009 to 04.06.2009** under **Dr. Manohar Lal Sindhwani**
46	8-Jul-2009	Medicine OPD/**Batra Hospital**	For pain abdomen (seen by **Dr. Manohar Lal Sindhwani**) **advised next visit after 2 weeks**
47	31-Jul-2009	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani**) advised next visit after 15 days
48	19-Aug-2009	Medicine OPD/**Batra Hospital**	For **Rash** (seen by **Dr. Manohar Lal Sindhwani) advised next visit after 10 days**
49	26-Aug-2009	Medicine OPD/**Batra Hospital**	For Review
50	16-Sept-2009	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani) advised next visit after 14 days**
51	07-Oct-2009	Medicine OPD/**Batra Hospital**	For chest discomfort and Giddiness (seen by **Dr. Manohar Lal Sindhwani**) advised admission. **Admitted** in **Batra Hospital** from **07.10.2009 to 16.12.2009** on discharge **advised to be reviewed after 2 weeks.**
52	08-Mar-10	Path Lab/DDU Hospital	For FNAC
53	13-Apr-10	MOPD/**Batra Hospital**	For Follow up
54	19-Apr-10	Medicine OPD/**Batra Hospital**	For Follow up
55	24-May-10	Medicine & Ortho OPD/**Batra Hospital**	For Needful & Possible Admission
56	16-Jun-10	Medicine OPD/**Batra Hospital**	For **Backache** (seen by **Dr. Manohar Lal Sindhwani)**
57	14-Jul-10	Medicine OPD/**Batra OPD**	For **Backache** (seen by **Dr. Manohar Lal Sindhwani) advised next visit after 2 weeks**
58	24-Jul-10	Ortho Deptt/**Batra Hospital**	For **backache**. Advised to be reviewed on Tuesday
59	27-Jul-10	Ortho OPD/**Batra Hospital**	For Review

60	30-Jul-2010	Ortho OPD/**Batra Hospital**	For Review (seen by **Dr. Manohar Lal Sindhwani) advised next visit 2 weeks**.
61	16-Aug-10	Ortho & MOPD/**Batra Hospital**	For **Review with MRI** (seen by **Dr. Manohar Lal Sindhwani**) advised next visit on 19.08.2010
62	19-Aug-10	Neuro surgery/**Batra Hospital**	For Review with MRI Report (seen by **Dr. Manohar Lal Sindhwani) advised next visit** on 23.08.2010
63	23-Aug-10	Neurology/**Batra Hospital**	For Review with MRI Report
64	30-Aug-10	Skin OPD/Majedia Hospital	For review
65	15-Sept-10	Neuro surgery OPD/**Batra Hospital**	For **Backache** (seen by **Dr. Manohar Lal Sindhwani) advised next visit after 2 weeks**
66	29-Sept-10	Neuro surgery OPD/**Batra Hospital**	For Review. **Admitted in Batra Hospital from 29.09.2010 to 03.11.2010** as per discharge summary follow up case of disseminated koch's with PIVD on discharge advised to be reviewed after 1 week.
67	10-Nov-10	Medicine OPD/**Batra Hospital**	For **pain abdomen** (seen by **Dr Manohar Lal Sindhwani) advised next visit 7 days.**
68	24-Nov-10	Neurosurgery & Medicine OPD/**Batra Hospital**	For pain abdomen (seen by **Dr Manohar Lal Sindhwani) advised next visit 15 days.**
69	08-Dec-10	Neurosurgery & Medicine OPD/**Batra Hospital**	For **pain left iliac region** (seen by **Dr Manohar Lal Sindhwani**) **advised next visit on 15.12.2010**
70	15-Dec-10	MOPD/**Batra Hospital**	For Review (seen by **Dr Manohar Lal Sindhwani) advised next visit after 2 weeks**
71	06-Jan-11	Radiology Deptt./**Batra Hospital**	For CECT Abdomen (CECT Abdomen not done as report of blood urea, Serum Creatinine awaited)
72	17- Jan-11	Ortho OPD DDU Hospital	**For Opinion**
73	19-Jan-11	Pathology & Radiology Deptt.//**Batra Hospital**	**For Report Collection**
74	02-Feb-11	Radiology & MOPD/**Batra Hospital**	For USG Abdomen and Review
75	09-Feb-11	Radiology Deptt./**Batra Hospital**	For CECT Abdomen (seen by **Dr Manohar Lal Sindhwani) advised next visit after 2 weeks**
76	23-Feb-11	Radiology Deptt./**Batra Hospital**	For **MRI** (seen by **Dr Manohar Lal Sindhwani**) advised next visit on 09.03.2011
77	09-Mar-11	Radiology Deptt./**Batra Hospital**	For MRI + review for chest discomfort (seen by **Dr Manohar Lal Sindhwani**) advised next visit after 7 days.
78	16-Mar-11	Radiology Deptt./**Batra Hospital**	For CECT Abdomen + Review (seen by **Dr Manohar Lal Sindhwani) advised**

			next visit on 23.03.2011
79	23-Mar-11	Medicine OPD/**Batra Hospital**	For IBS (seen by **Dr Manohar Lal Sindhwani) advised next** visit after 7 days.
80	30-Mar-11	Medicine OPD/**Batra Hospital**	For Review (seen by **Dr Manohar Lal Sindhwani**) **advised next visit after 7 days.**
81	20-Apr-11	Medicine OPD/**Batra Hospital**	For Backache (seen by **Dr Manohar Lal Sindhwani) advised next visit after 07 days.**
82	27-Apr-11	Medicine Deptt./**Batra Hospital**	For nasal blockage (seen by **Dr Manohar Lal Sindhwani) advised next visit after 1 week.**
83	04-May-11	Medicine Deptt./**Batra Hospital**	For **headache and sinusitis** (seen by **Dr Manohar Lal Sindhwani) advised next visit after 7 days.**
84	11-May-11	Medicine Deptt./**Batra Hospital**	For **Chest discomfort with headache** (seen by **Dr Manohar Lal Sindhwani) advised next visit on 18.05.2011**
85	18-May-11	Medicine Deptt./**Batra Hospital**	For Chest discomfort with headache (seen by **Dr Manohar Lal Sindhwani**) **advised next visit on 26.05.2011**
86	26-May-11	Medicine OPD./**Batra Hospital**	For Chest discomfort with headache (seen by **Dr Manohar Lal Sindhwani) advised next visit after 15 days.**
87	08-Jun-11	Medicine OPD./**Batra Hospital**	For Follow up for low backache with pain abdomen with disseminated Koch's (seen by **Dr Manohar Lal Sindhwani) advised next visit after 15 days**
88	22-Jun-11	Medicine Deptt./**Batra Hospital**	For Follow up for low backache (seen by **Dr Manohar Lal Sindhwani**) advised next visit after 2 weeks
89	27-Jun-11	Medicine Deptt./**Batra Hospital**	For Follow up for low backache (seen by **Dr Manohar Lal Sindhwani) advised next visit after 2 weeks**
90	13-Jul-11	Medicine Deptt./**Batra Hospital**	For Follow up for low backache (seen by **Dr Manohar Lal Sindhwani) advised next visit on 27.07.2011.**
91	27-Jul-11	Medicine Deptt./**Batra Hospital**	For Review for Low backache (seen by **Dr Manohar Lal Sindhwani) advised revisit after 15 days**
92	10-Aug-11	Medicine Deptt./**Batra Hospital**	For Follow up LBA (seen by **Dr Manohar Lal Sindhwani**) Referred to Neuro Surgery Deptt./Ortho Deptt. advised next visit on 17.08.2011.
93	17-Aug-11	**Neusology Hospital** Deptt./**Batra**	For Review (seen by **Dr Manohar Lal Sindhwani**) as per medical file Dr Dua is busy in OT advised next visit on 24.08.2011
94	24-Aug-11	**Neurology Hospital** Deptt./**Batra**	For Review with MRI (seen by **Dr Manohar Lal Sindhwani) as per medical file Surgeon not available**, busy in OT. per medical file Dr Dua is busy in

			OT advised next visit on 24.08.2011
94	24-Aug-11	**Neurology** Deptt./**Batra Hospital**	For Review with MRI (seen by **Dr Manohar Lal Sindhwani)** as per medical file Surgeon not available, busy in OT.
95	07-Sept-11	**Neuro** Surgery Deptt./**Batra**	For Review (seen by **Dr Manohar Lal Sindhwani) advised to consult Neuro** surgeon and Next visit after 2 weeks as per Medical file, Neuro Surgeon is presently busy in OT **advised revisit after 01 week.**
96	14-Sept-11	**Neuro** Surgery/**Batra Hospital**	For Follow up of PIVD (seen by **Dr Manohar Lal Sindhwani**) **advised next visit** on 05.10.2011
97	08-Oct-11	**Neuro Surgery**/**Batra Hospital**	For Low backache (seen by **Dr Manohar Lal Sindhwani**) **advised next visit after 15 days.**
98	14-Oct-11	**Neuro Surgery** Deptt./**Batra**	For **headache and nasal blockage** (seen by **Dr Manohar Lal Sindhwani** and Dr S Kaduria ENT Sp.) **admitted in Batra Hospital from 14/10/2011 to 17.10.2011**. a diagnosis of DNS Left was made as per Discharge summary.
99	02-Nov-11	Medicine OPD/**Batra Hospital**	For pain abdomen (seen by **Dr Manohar Lal Sindhwani**) **advised next visit after 7 days.**
100	19-Nov-11	**Neuro Surgery**/**Batra Hospital**	For Follow up
101	25-Nov-11	**Neuro Surgery**/**Batra Hospital**	Follow up for tuberculosis (seen by **Dr Manohar Lal Sindhwani**) advised next visit after 2 weeks.
102	10-Dec-11	Medicine Deptt. & **Neurosurgery Deptt**./**Batra Hospital**	For pain abdomen (seen by **Dr Manohar Lal Sindhwani) advised next visit** after 2 weeks.
103	24-Dec-11	Medicine + **Neurosurgery**/**Batra Hospital**	For R/V & Needful (seen by **Dr Manohar Lal Sindhwani) advised next visit** on 31.12.2011
104	31-Dec-11	Med & NS OPD & **Dental OPD**/**Batra Hospital**	Follow up for Low backache (seen by **Dr Manohar Lal Sindhwani) advised next visit** after 2 weeks.
105	14-Jan-12	Medicine Deptt./**Batra Hospital**	For **Needful** (seen by **Dr Manohar Lal Sindhwani**)

592. The above tabulation lists 105 hospital visits between 4th December, 2003 to 14th January, 2012. That most of them were unnecessary is writ large even on the scanty information placed before us. This defendant made six hospital visits in 40 days between 6th December, 2003 to 12th January, 2004 (on 6th, 12th, 18th

December, 2003; 1st, 8th and 12th January, 2004) for gastro review in the G.B. Pant Hospital (GBPH). He again goes for a gastro review and follow-up on 10th February, 2004; 10th and 25th April, 2004. He goes to the medicine OPD in the Deen Dayal Upadhyay Hospital (DDU Hospital) on 3rd and 4th June, 2004 consecutively. Thereafter on short intervals (31st August; 3rd, 22nd and 30th September, 2004), he visits the medicine OPD in the Batra Hospital for medicine reviews. For the same purpose, he visits the medicine OPD of Batra Hospital five times (6th, 20th and 27th December, 2004; 5th, 17th January, 2005). He thereafter undertakes three medicine reviews within 21 days (6th, 11th and 25th April, 2005); three orthopaedic reviews in six days (24th, 27th and 30th July, 2010); 15 medicine visits in 87 days to the Batra Hospital. Vishal Yadav then made 14 visits to the medicine Department, Batra Hospital (23rd, 30th March, 2011, 20th, 27th April, 2011, 4th, 11th, 18th, 26th May, 2011, 8th, 22, 27th June, 2011, 13th, 27th July, 2011 and 10th August, 2011).

593. From 27th December, 2004, Dr. Manohar Lal Sindhwani from the Department of Internal Medicine was the doctor who was attending to Vishal Yadav's every complaint.

594. A question arose in our mind as to how did this cycle of visits and admissions of Vishal Yadav to the Batra Hospital commence? In this regard, the Jail Superintendent has also placed before us the following order dated 23rd August, 2004 passed by the learned Single Judge in Bail App.No.1215/2004, which was filed by Vishal Yadav:

"The petitioner seeks interim bail being diagnosed as suffering from ***disseminated tuberculosis*** with pleuropericardial effusion with pulmonary and mediastinal lymphoadenopathy. He has been ***undergoing treatment for the said ailments as advised by AIIMS***. Lastly, his case was reviewed at AIIMS on 6th August, 2004 and he was advised to continue anti-tubercular treatment besides review in cardiology department. Plea for release on interim bail is being opposed on behalf of the respondent State on the ground that one of the material witnesses Ms. Bharti Yadav remains yet to be examined. He refers to an order dated 14th October, 2003 of this Court whereby request for release on interim bail was declined earlier and the petitioner could renew the plea in that regard only after the statement of Ms. Bharti Yadav is recorded by the Trial Court. Confronted with the aforesaid order, the ***petitioner seeks a direction to Jail Superintendent concerned to take him to Batra Hospital instead of AIIMS for further investigation and treatment of the ailments*** he is suffering from. ***Learned counsel for the State of U.P.*** has no objection to such a request being granted. Accordingly while declining the release of the petitioner on interim bail on medical ground a ***direction is issued to the Jail Superintendent concerned to arrange for or taking the petitioner in custody to Batra Hospital*** as and when so required for his **further** ***treatment*** at his ***own cost*** of the ailment he ***is suffering*** from. In case of any difficulty being experienced, the petitioner would be at liberty to approach this Court from time to time. Petition is disposed of.
Dasti."

(Emphasis by us)

This order was passed when Vishal Yadav was an under trial.

595. Our attention is drawn to a communication dated 12th December, 2011 from the office of the Director General (Prisons) addressed to the Registrar General of this court mentioning that "*under the shield of this order, the prisoner had visited the Batra Hospital"* for more than 80 occasions during the past years after the order and *"he is not regular in taking the prescribed medicines as per the observations of the treating doctor".* A clarification was sought based on the change of the status of the prisoner from under trial to convict as well as the policy formulated by the prison department.

596. The Registrar General placed this communication before the learned Single Judge on 18th January, 2012, when it was clarified that the relief granted in the order dated 23rd August, 2004 could not be extended to Vishal Yadav after his conviction and that in case Vishal Yadav would require any medical treatment, he would be at liberty "*to make such request before the concerned court*".

597. It is important to note that the order dated 23rd August, 2008 refers to Vishal Yadav suffering from disseminated tuberculosis with pleuropericardial effusion with pulmonary and mediastinal lymphoadenopathy. It was clearly directed that as and when he was required to be taken to Batra Hospital for "***further*** *treatment*", it was to be "*at his* ***own cost*** *of the* ***ailment he is suffering*** *from*". The directions of the court were explicit that he could be taken for treatment of this disease alone and none other. The cost, which was required to be paid by the prisoner, would be all costs involved for taking treatment from Batra Hospital.

598. As per the record, interestingly, in his visits and admissions to the Batra Hospital, Vishal Yadav was under the treatment of one, Dr. Manohar Lal Sindhwani. This doctor had recorded that so far as the Tuberculosis was concerned, "*Tuberculosis was completed/cured*". On the 15th of September, 2009, the jail authorities had requested the Batra Hospital to "*kindly advice is it necessary to send the patient to very hospital for review, as we are having medicine and chest specialist in jail hospital*". Dr. Sindhwani gave no response to this query and continued to call Vishal Yadav to Batra Hospital for review on flimsy and non-specific grounds, which cannot be verified.

599. It is well nigh impossible to deal with each every hospital visit of the convict or his hospital admission in this judgment. The tabulation of the hospital visits of Vishal Yadav would show that visits to the same departments of the hospital were separated by gaps of were 2, 3, 4 days. All visits, be it for an Orthopaedic, neurology, neurosurgery, radiology or any other problem, have been advised by Dr. Manohar Lal Sindhwani. Interestingly, almost on every visit to Batra Hospital, Dr. Sindhwani has planned ("*advised*") the next visit, on most occasions after a gap of barely one week only!

600. In four visits to the Neurology Department of the Batra Hospital between 17th August, 2011 and 14th September, 2011, Vishal Yadav is seen by Dr. M.L. Sindhwani as "*one Dr. Dua was busy in the O.T.*". Vishal Yadav appears to have complaining about a lower backache, which ought to have been seen by an

orthopaedician or neurologist whereas Dr. Sindhwani, a specialist of internal medicine, examined the convict.

601. We also questioned as to how, after his conviction, Vishal Yadav came to be repeatedly referred and sent by the jail authorities to the Batra Hospital and required the State to disclose the same. The State has placed a copy of the memorandum dated 18th February, 2012 addressed by the Medical Officer Incharge of the Central Jail No.4 to Superintendent, Central Jail No.4, Tihar Jail, New Delhi informing that Vishal Yadav "*was initially referred to Batra Hospital as per the court order. Subsequently he was referred as per the* ***advice of treating doctors of Batra Hospital***". Therefore, without any intervention or recommendation of the concerned medical experts in the jail or at the jail referral hospitals i.e. DDU Hospital and LNJP Hospital, Vishal Yadav was permitted to be taken out of the jail repeatedly to visit Batra Hospital merely on the 'advice' of Dr. M.L. Sindhwani. No effort was made by the jail authorities even to ascertain whether such visit was warranted or not.

602. In his reply dated 22nd March, 2012 filed before us, Vishal Yadav admits that he was required to be produced for the purpose of treatment "*whenever necessary as per the opinion of the jail doctor*". There is no such record of opinion of the relevant medical experts of the jail. It is evident that Vishal Yadav has taken such a plea to disown the responsibility for his actions.

603. Let us also examine some more information which points towards the health of the convict. Vide his letter dated 15th

February, 2012, the Medical Officer Incharge of Central Jail No.4, Tihar Jail has provided the following information with respect to the medication of Vishal Yadav while in jail to the Superintendent, Central Jail No.4 :

"1. Tab. Pantocid – D - acidity
2. Tab. Dolonex – DT - pain killer
3. Cap. Gaba pentin – SR - nerve pain killer
4. Inj. TRI – Redosal – IM - nerve vitamin
5. Inj. Neurobion – IM - nerve vitamin
6. Tab. Polybion - nerve vitamin
7. Tab. Aristozyme - digestive enzyme
8. Tab. Spasril - pain killer stomach
9. Flomist – Nasal Spray
10. Tab. Lyrica - nerve pain killer
11. Cap. Vibraniya- nerve vitamin
12. Tab. A to Z - multi vitamin
13. Myolaxin – D. Spray Locally - muscle pain killer
14. Inj. Methycobal - nerve vitamin
15. Tab. Etosine - pain killer
16. Tab. Hatrik – 3 - cough/cold/fever
17. Tab. Becousule – Z - multi vitamin
18. Tab. Rablet – D - acidity
19. Inj. Arachitol - vitamin D
20. Syrup Viva Bloom - digestive
21. Montair Plus - asthma
22. Tab. Flexon - pain killer
23. Tab. Myoril Plus - pain killer - muscle relaxant
24. Tab. Forcox - antibiotic
25. Cap. Megancuron Plus - nerve vitamin"

Thus, Vishal Yadav stands prescribed anti-acids ('Pantocid', 'Rablet'); painkillers ('Dolonex', 'Gaba Pentin', 'Spasril', 'Lyrica', 'Myolaxin-D', 'Etosine', 'Flexon', 'Myoril Plus'); nerve vitamin ('Inj. TRI-Redosal-IM', 'Inj. Neurobion-IM', 'polybion', 'Vibraniya', 'Inj.

Methycobal', 'Megancuron Plus'); digestive enzyme ('Aristozyme', 'syrup Viva Blook'); multi vitamin ('A to Z', 'Becousule-Z'); vitamin D ('Inj. Arachitol'); asthma ('Montair Plus'); antibiotic ('Tab. Forcox'); nasal spray ('Flomist'); cough/cold/fever ('Hatrik-3'). Is there any ailment covered by these medicines, which could not be treated in the jail hospital or even the DDU Hospital? The answer is a clear negative.

604. So far as treatment and medication for tuberculosis as well as reference to his investigations are concerned, the Medical Officer Incharge, has informed thus:

> "As per the medical record the patient was treated for Disseminated Tuberculosis (pleuropericardial effusion with pulmonary and Mediastinal Lymphnode) in 2004. ***The inmate refused to take any medicines from CJ-4 Dispensary as he is taking the medicines on his own as stated by the inmate. He was initially referred to Batra Hospital as per court order and on subsequent visits he was referred as per the advice of treating Doctor.*** The details of visits to outside hospitals as per medical record is enclosed (page No. 1 to7).
>
> CECT Abdomen and pelvis (Dated 16.03.2011) at Batra Hospital reveals no significant abnormality in abdomen pelvis.
>
> MRI of Lumbo – Sacral spine (Dated 05.10.2010) at Batra Hospital reveals difuse Disc bulge at L5-S1.
>
> As per medical record on most of the visits to batra hospital he was being reviewed/follow up for low backache and pain abdomen."
>
> (Emphasis supplied)

605. It is noteworthy that the convict Vishal Yadav has produced no documentary proof at all that he procured or took any

medication for tuberculosis. Thus with regard to Vishal Yadav as well there is also no material with regard to treatment of tuberculosis at all placed on record by either the jail authorities, any hospital or the prisoner himself. No investigation reports which would support the diagnosis exist. It is unbelievable that such an educated person would not preserve his own medical record, if it actually existed.

606. Shri Vijender Singh, Superintendent (Jails), Tihar Jail has sworn and filed an affidavit on the 4th of October, 2012 before us stating that amongst the facilities available at the 150 bedded Central Jail Hospital, there is a tuberculosis ward. The affidavit discloses that "*patients who do not get cured on O.P.D. basis are referred by the doctors of the respective jails to Central Jail Hospital for investigations and treatment Central Jail Hospital provides round the clock emergency services and in patient treatment facilities. Junior residents, Senior Residents, Medical Officer and Consultants are working under Senior Medical Officer Hospital along with other medical and Paramedical staff*".

It is further stated that in the Central Jail Hospital, specialists in medicine ophthalmology, orthopaedics, chest and tuberculosis, skin, psychiatry, pathology are available.

607. The Central Jail hospital thus has consultants who are specialists in medicine ophthalmology, orthopaedics, chest and tuberculosis, skin, psychiatry and pathology. The hospital has an entire ward for patients of tuberculosis. Apart from the facilities available within the jail itself, the referral DDU Hospital located

close by is also able to provide treatment for tuberculosis. This apart, in Delhi there are specialised departments, clinics as well as hospitals devoted to the treatment of tuberculosis and chest disease, including the National Institute of Tuberculosis and Respiratory Diseases, Sri Aurobindo Marg, Near Qutab Minar, New Delhi-110030; Babu Jagjiwan Ram Chest Clinic, Jehangir Puri, Delhi-110033; Baba Saheb Ambedkar Hospital and T.B. Chest Clinic, Sector-6, Rohini, Delhi-110085; DDU Hospital Chest Clinic, Hari Nagar, Delhi-110014; Kingsway Camp Chest Clinic, GTB Nagar Kingsway Camp, Delhi-110009; Lok Nayak Hospital, J.N. Marg, Delhi-110002 and Vallabhai Patel Chest Institute, North Campus, Vijay Nagar Marg, Delhi University, Delhi-110007.

608. For radiological investigations as well as orthopaedic complaints, Vikas Yadav was visiting the DDU Hospital as well as LNJP Hospital. The Safdarjung Hospital has an elaborate and renowned orthopaedic department. In the jail itself as well as, in close proximity, all facilities are available. There would be no question of referring any person to a tertiary care referral hospital, especially for primary investigations or treatment of routine ailments as abdomen pain, backache, nasal blockage, etc. which are required to be addressed by primary facilities. It is only after a detailed clinical examination by a medical expert, investigations, if any, that a reference could be made to a tertiary care referral hospital of the nature of AIIMS or the Batra Hospital. This has been avoided in the present case.

609. The aforesaid status report also informs that between 5th July, 2010 till 2nd February, 2012, Vishal Yadav had 15 court appearances outside jail. On each occasion, he was handed over to DAP escort a day prior to the court date and was admitted back after attending the date.

610. Our observations on the frequent hospital visits of Vikas Yadav squarely apply to these visits of Vishal Yadav as well, only difference being of the dates and hospital. There is no material at all to justify these visits of the convict to the outside hospitals.

(a) Admissions of Vishal Yadav in Batra Hospital

611. The details of hospital/admissions of Vishal Yadav from 3rd June, 2004 (Annexure 'B') have also been placed by the State before us. While the first admission was to the DDU Hospital on 3rd June, 2004 for 2 days 6 hours 50 minutes; the second admission of Vishal Yadav was to the AIIMS hospital on the 28th June, 2004 to 7th July, 2004 (8 days). He was thereafter admitted in the Batra Hospital from 3rd September, 2004 to 15th September, 2004(12 days).

612. So far as admissions of Vishal Yadav in the Batra Hospital are concerned, till his conviction on 28th May, 2008, Vishal Yadav was admitted in the Batra Hospital only once from 31st August, 2004 to 15th September, 2004 (15 days, 13 hours and 30 minutes).

613. Apart from the OPD visits to Batra Hospital regarding the admissions of Vishal Yadav, some shocking facts are revealed. We propose to briefly advert to these admissions to illustrate the

conduct of the prisoner despite conviction for such major offences. After his conviction, Vishal Yadav was inter alia admitted in the Batra Hospital on the following occasions as well :

S.No.	Duration
(i)	Admitted in Batra Hospital from 07.07.2008 to 07.08.2008 (**32 days**)
(ii)	---do--- from 14.08.2008 to 06.09.2008 (**24 days**)
(iii)	---do--- from 24.10.2008 to 15.12.2008 (**53 days**)
(iv)	---do--- from 25.02.2009 to 04.06.2009 **(100 days)**
(v)	---do--- from 07.10.2009 to 16.12.2009 **(71 days)**
(vi)	---do--- from 29.09.2010 to 03.11.2010 (**36 days**)
(vii)	---do--- from 14.10.2011 to 17.10.2011 (**4 days**)

614. The close proximity of the above Batra Hospital admissions (separated by few weeks to a couple of months only) and the life of a person in luxurious private ward facilities in the Batra Hospital points to the design of the prisoner to keep himself out of jail.

Vishal Yadav was admitted thrice – from 7th July, 2008 to 7th August, 2008 (for 32 days); from 14th August, 2008 to 6th September, 2008 (for 24 days) and 24th October, 2008 to 15th December, 2008 (for 53 days) as a case of the old tuberculosis. The re-admission on 14th August, 2008 was within seven days of discharge from the Batra Hospital on 7th August, 2008, after a stay of 32 days.

615. During his admission of about 3½ months from 25th February, 2009 to 4th June, 2009, as per the discharge summary produced by the Batra Hospital, Vishal Yadav was administered innocuous medications of the nature of Metrogyl, Spasmindon,

Aristogyme for infections, cramps (spasms), enzyme respectively, which are given for minor ailments. All these medicines clearly suggest that the convict was not suffering from any major ailment.

616. In the prolonged admission from 7th December, 2009 to 16th December, 2009 (of 2 months and 10 days), the said Dr. Manohar Lal Sindhwani, Consultant in Internal Medicine Department had advised admission for surgery. After Vishal Yadav's prolonged stay of 2 months and 10 days, the convict was discharged without any surgery. Dr. Sindhwani certainly was not competent to either make a surgical diagnosis nor had the expertise to treat a patient who needed surgery. A shocking state of affairs is revealed from the above details of Vishal Yadav's hospital visits to the Batra Hospital that a specialist in internal medicine was providing orthopaedic, neurology, cardiology as well as surgical opinions.

617. So far as the last admission is concerned, Vishal Yadav had been referred to Batra Hospital for a review only. Where was the occasion for his admission?

618. So far as the medical opinion on the records of the treatment and hospitalization of Vishal Yadav is concerned, the medical board of officers at the Army Hospital (R&R), Delhi Cantt. has submitted a report under the cover of the letter dated 19th June, 2012 giving the following conclusions :

> "3. The Board, having perused all the medical records produced before it, has come to the following conclusions:-
> (a) Mr. Vishal Yadav was diagnosed to have Tubercular pleuropericarditis with ***Cervical***

Lymphadenopathy prior to 31 Aug 2004 and started on anti tubercular treatment with effect from Jun 2004. The ***details of the basis of diagnosis and exact treatment prescribed are not available in the documents provided***.

(b) He was admitted on multiple occasions to Batra Hospital with complaints of ***chest pain and breathlessness*** from 31 Aug 2004 to 17 Oct 2011, for variable periods ranging from ***04 days to 109*** days at a stretch. Dates of all recorded hospitalizations are mentioned as per Appendix 'A' to this report. The remarks column mentions the specific conclusions of this board with respect to each visit.

(c) It is pertinent to mention that ***Tubercular Lymphadenopathy is generally treated the world over on OPD basis and does not warrant prolonged hospitalizations except for specific complications***.

(d) On many occasions, ***discharge*** from hospital was ***planned but cancelled without there being any change in his clinical condition***.

(e) Admission in Sep 2010 records the diagnosis of ***PIVD WITH RADICULOPATHY*** which is an ***unconnected disease condition***."

619. The details of the above admissions and the remarks set out in Appendix 'A' to the above report, from the Army Hospital Committee Report read thus :

S. No.	**Date of Admission**	**Date of Discharge**	**Duration of Stay**	**Discharge Diagnosis**	**Remarks**
1.	31 Aug 2004	03 Sep 2004	04 days	Follow up case of Pleuropericarditis with (L) Pleural Effusion (Encysted) healed Upper Lobe	Afebrile over three days in hospital. No evidence of pericardial effusion on ECHO. FNAC of

				Lesions Paratracheal Lymphadenopathy	supraclavicular LN revealed granulomatous inflammation. No AFB detected. Visit as well as hospitalization for investigations justified.
2.	03 Sep 2004	15 Sep 2004	13 days	Tubercular Peuropericarditis Grade I Hemorrhoids with Acid Peptic disease	**Readmitted within 4 hours of discharge for** a chest pain. Nonspecific changes on ECG. Detailed investigations negative for Coronary Artery Disease. Readmission and length of stay **not justified** as per available records.
3.	30 Sep 2004	15 Nov 2004	47 days	Pulmonary Koch's/Tubercular Peural Effusion Pericardial Effusion	**Readmitted within 15 days of last discharge**. All investigations repeated. LN biopsy **done 18 days after it was advised**. Reason for **inordinate delay** in carrying out the **biopsy not explained in the documents. The biopsy could have been carried out as an outpatient procedure.** Lengthy stay in hospital **not justified**.
4.	17 Jan 2005	14 Feb 2005	29 days	Pulmonary Koch's with secondary complications	Complained of nausea/vomiting and yellow urine. No objective findings on examination or lab abnormalities. The visit is justified but the **length of stay not justified.**
5.	18 May 2005	03 Sept 2005	109 days	Disseminated Koch's	Fresh enlargement of supraciavicular LN. No fever or wt loss. Discharge planned on several occasions but not done. Prolonged stay **not justified**.

6.	07 Jul 2008	07 Aug 2008	32 days	Koch's adenitis sequelae of old koch's with fresh lesion	Fresh evaluation for enlarged cervical LN. Aspirate found positive for AFB. Ant-tubercular treatment restarted. Visit to hospital justified but prolonged hospital stay **not justified**.
7.	14 Aug 2008	06 Sept 2008	24 days	Disseminated Tuberculosis	**Admission within seven days** of previous discharge. Clinical notes **do not justify** the **admission or length of stay**.
8.	24 Oct 2008	15 Dec 2008	53 days	Disseminated Koch's	**Readmitted for same complaints within 45 days of last discharge**. Planned for LN excision surgery on 25 Oct 2008. Excision actually carried out on 18 Nov 2008. The reason for delay in surgery not clear from the case notes. Prolonged stay following surgery **not justified** by case notes.
9.	25 Feb 2009	07 Jun 2009	103 days	Koch's Chest and Lymphadenitis and UTI	Admission for nonspecific pain abdomen, nausea and vomiting, CECT Chest and CECT Neck did not reveal any significant abnormality. No evidence of UTI in case records. Prolonged stay **not justified**.
10.	07 Oct 2009	15 Dec 2009	70 days	Disseminated Koch's with PIVD LS-S1	Admitted for non specific symptoms of chest pain and breathlessness. Case notes **do not justify** an inordinately long stay in hospital.
11.	29 Sep 2010	03 Nov 2010	36 days	Follow up case of disseminated Koch's with PIVD	Admitted for low backache. MRI revealed PIVD.

				and radiculopathy	**Discharge** planned on 25 Oct. **Delayed by 9 days.**
12.	14 Oct 2011	17 Oct 2011	04 days	DNS left	**Unconnected illness**. Short stay in hospital.

620. The report of the experts from the Army R&R Hospital clearly establishes that tubercular lymphadenopathy is treated world over on OPD basis. It does not warrant hospitalization except in specific complications. The investigations and treatment suggest that Vishal Yadav was actually suffering from no complications at all.

621. The complainant has placed a summation from the medical record of Vishal Yadav as submitted by the Batra Hospital with reference to the volume number and pagination of the original records. The same makes interesting revelations. We, therefore, extract the same qua the post-conviction admissions hereunder :

> "**Sixth admission - 07.07.2008 to 07.08.08 (1 month 2 days)**
>
> After conviction on 28.05.08 he was admitted in Batra Hospital. At the time of admission, the patient history, no mention of any ailment or treatment at Batra or any other hospital during 2 1/2 years period (vol.2-pg.837)
>
> 07.07.08: admitted for weight loss, loss of appetite and generalized weakness (vol.2 pg.837)
>
> ***18.07.08: for discharge on Monday (vol.2, pg 857)***
>
> 19.07.08: for discharge on Monday (vol.2, pg. 859)
>
> 28.07.08: advised today (vol.2, pg. 867)
>
> 31.07.08: may be discharged today (vol.2, pg. 871)
>
> 03.08.08: advised discharge. (vol.2, pg.873)
>
> 04.08.08: advised discharge (vol.2, pg.873/b)

05.08.08: to be discharged after patient clears bill (vol.2, pg.875)

07.08.08: discharged today (vol.2, pg. 877)

Seventh admission - 14.08.08 to 06.09.08 (23 days)

Patient admitted as M.M. Order.
Condition on discharge:- stable
Review with Dr. Sindwani (Vol.2, pg.653)

Eighth admission - 24.10.08 to 15.12.2008 (1 month 22 days)

Admitted disseminated Koch's
Follow up : with Dr. Sindwani on Monday (Vol.3, pg. 645)

Ninth admission - 25.02.09 to 04.06.09 (3 month 10 days)

Admitted for Abdominal pain and nausea vomiting (vol.3, pg.9)

09.04.09 : discharge today (vol.3, pg.73)

12.04.09 : requested discharge (vol.3, pg.75)
13.04.09 : discharge after clearing bills. (vol.3, pg.77)
14.04.09 : patient requested for deposit money (vol.3, pg.77/b)
16.04.09 : to check payment
24.04.09 : patient requested to clear bills (vol.3, pg.85)
29.04.09 : for discharge if patient balance amount (vol.3, pg.89)
19.05.09 : requested to deposit balance (vol.3, pg.109)

04.06.09 : finally discharged (vol.3, pg.123)

Note : He was advised for discharge on 09.04.2009 but he remained hospitalised till 04.06.2009 on one pretext and other and specially for non-payment of the bill.

Tenth admission - 07.10.09 to 16.12.09 (2 months 10 days)

Admitted on 07.10.2009 for ***complaint of giddiness, pain Lt. chest and breathlessness on walking***, but in Jail referral slip received through RTI, ***Dr. M.L. Sindhwani***, (Sr. consultant Internal medicine) ***has written "Advised admission for surgery"***. (P: 95-RTI)

09.10.09: consulted for cosmetic surgery (vol.4, pg.503)

13.10.09: can be discharged (vol.4, pg.507/b)

25.10.09: for discharge on Monday (vol.4, pg.525/b)

06.11.09: can be discharged (vol.4, pg.537)

12.11.09 : Orthopedics Doctor advised, if no response to treatment then surgery (vol.4, pg 547/b)

14.11.09: discharge planning (vol.4, pg.551/b)

17.11.09: Patient wants to avoid surgery (vol.4, pg.557)

27.11.09: for discharge (vol.4, pg.573/b)

05.12.09: requested to deposit money (vol.4, pg.581/b)

10.12.09: for discharge (vol.4, pg.587)

11.12.09: Doctor to decide for surgery (vol.4, pg.589)

15.12.09: for discharge today (vol.4, pg.591/b)

16.12.09: discharged.

Note : He was advised for discharge on 13.10.09 and remained hospitalised till 16.12.09 on one pretext and other including surgery which patient avoided and specially for non-payment of the bill.

Eleventh Admission - Period 29.09.10 to 03.11.10 (1 months 4 days) (vol.4, pg.231)

Admitted with complaint of ***low backache pain*** in the thigh radiating downwards and common cold. Improved with symptomatic and supportive care and physiotherapy.

25.10.10: may be discharged (vol.4, pg.259/b)

29.10.10: for discharge (vol.4, pg.261)

31.10.10: may discharged (vol.4, pg.261/b)
2.11.10: for discharge will discuss (vol.4, pg.263)

<u>Twelfth admission - period 14.10.11 to 17.10.11</u>
(vol.4, pg.11)
Complaint of ***nasal blockage since 1 year and headache***."

622. In the reply dated 22nd March, 2012 filed on behalf of Vishal Yadav supported by an affidavit of his brother, Shri Vivek Yadav, it is submitted on behalf of Vishal Yadav that his Tuberculosis appears to be a direct result of the ills affecting the prison system. It has been orally suggested that tuberculosis is widely rampant in the jail. If the treatment given to Vishal Yadav was the correct treatment, then the several prisoners suffering from tuberculosis should all have been visiting or admitted in private rooms Batra Hospital to ensure parity of treatment to prisoners.

623. We have noted the negative medical opinion with regard to requirement of hospitalisation for Kochs disease (tuberculosis) while considering the case of Vikas Yadav above. The medical record of Vishal Yadav also does not support any need for hospital admission on these occasions. There is neither clinical evidence nor investigation results which support any requirement for hospitalisations. On the contrary, despite being advised discharge, Vishal Yadav continued his hospital stay for weeks at an end without any reason.

624. We are of the view that Vishal Yadav has also acted in violation of the order dated 23rd August, 2004 which did not permit

any visits to the Batra Hospital for the minor ailments as nausea, vomiting, stomach disorder, nasal blockage and the like. Vishal Yadav was not only taken to the Batra Hospital as an outpatient for trivial complaints but was also repeatedly hospitalized for the same.

625. Pursuant to our order dated 2nd February, 2012, Vishal Yadav was also medically examined by the aforesaid Board at AIIMS in February, 2012 when the following report was given :

> "**Final conclusion and Recommendations of the Medical Board:**
> Based on the information obtained by review of medical reports shown by the jail authorities, detailed history and findings of the clinical examination plus relevant investigations, it is reported that ***Sh. Vishal Yadav is able to perform all the activities of daily living without assistance and is currently not suffering from any acute or severe medical condition which requires hospitalization or active intervention – medical surgical or investigational. He is stable and actively mobile. The complaints mentioned by him are mild and of chronic nature and can be managed by taking appropriate care and medications.***"
>
> (Emphasis by us)

626. It is further pointed out that Vishal Yadav was admitted in the Batra Hospital w.e.f. 7th October, 2009 to 15th December, 2009 i.e. for a period of 70 days and wanted out of prison for which one excuse after another was being created. Vishal Yadav had got filed Crl.M.(Bail)No.157/2009 dated 15th December, 2009 seeking interim bail on the ground of his sister's marriage from 14th

January, 2010 to 31st January, 2010. He deliberately concealed the fact that he was not in jail when he filed this application.

627. We find that the hospital visits and admissions of Vishal Yadav post conviction were also without permission from the concerned court or from any authority. No referral from any jail doctor for the visits or admissions is also forthcoming. Specialists to look after the complaints of the prisoner were available in the jail hospital. There is therefore, substance in the submission that Vishal Yadav has actively manipulated authority, connived with jail authorities and the doctors at the Batra Hospital to keep himself out of jail and away from undergoing the sentence of life imprisonment imposed on him on false pretexts of medical treatment.

(iii) Analysis of hospital visit/admission discussion

628. It is noteworthy that we had given opportunity to the convicts to place all records of their medical condition and treatment before the Board of Officers constituted by the Army Hospital (R&R), Delhi Cantt. as well as before us.

No record at all has been produced of prescriptions, medical investigation, treatment, bills, payment records, etc. by either of the defendants with regard to the visits to any hospital as an out or as in patient, before or after their convictions.

629. Vikas Yadav has also not required any outside hospital visits after 23rd January, 2012 when Crl.M.A.No.1168/2012 was filed. There is no averment or evidence of any sickness before his arrest.

No record of treatment in any hospital is forthcoming. On the contrary, as per available record, Vikas Yadav stopped T.B. treatment without any medical advice. The jail has no record of his having taken ever taken medication for the same. After the initial mention that Vikas Yadav suffering from T.B., there is no mention of any such disease.

630. If Vishal Yadav was so sick that he required such extensive hospitalization after his conviction, it can be reasonably expected that there would have been some kind of sickness in the prior period of 2½ years when he was on bail during trial. There is no assertion even of illness, let alone any evidence to support the same. Vishal Yadav has also not made any outside hospital visits after 27th January, 2012 when Crl.M.A.No.1313/2012 was filed.

631. The above factors also lend support to the objection that the complaints of sickness, visits to and hospitalizations were contrived, manipulated and were not for any genuine medical problem.

632. We have set out above the extensive number of visits of the two convicts in the present case to the hospitals as well as the details of their hospitalization. We have noted that from the record, the convicts have been enjoying their own diet.

633. It is complained by Mr. P.K. Dey, learned counsel for the complainant that while the convict Vishal Yadav was luxuriating in the Batra Hospital, he also ran up a total bill of Rs.55,000/- for making telephonic calls alone. Mr. Sanjay Jain, learned counsel for Vishal Yadav has submitted that these calls were not only by

Vishal Yadav but by his wife and mother as well who were with Vishal Yadav as his attendants during his admission in the Batra Hospital.

634. We may point out that neither Vishal Yadav nor Vikas Yadav, was so ill as to need an attendant with them during his hospital stay. There is no record of any treatment being administered which had to be monitored at these times. Clearly, the admissions were to keep the convicts out of jail in the company of wife/relatives, with access to visitors, telephone facilities, home cooking with facilities as in the nature of private room, private bathroom, air conditioning, etc. similar to those they would have enjoyed at home. It was certainly not the regimented lifestyle which the jail stay entails.

635. In a reply which is dated 1st October, 2012, it has been stated by Vishal Yadav that "*each and every expense of the treatment and the calls has been borne by the answering respondent and the answering respondent has in fact spent about Rs.25 lakhs apart from certain medicines in the treatment, which in fact lessen the cost on the government exchequer*". The defendant is unable to support these submissions with any record of treatment for a serious disease which required his hospitalizations. In Crl.M.A.No.4073/2012, Vishal Yadav claims to have spent Rs.23,60,000/- on treatment. This figure, coupled with the amount of Rs.55,000/- spent on phones reeks of the luxury which the defendant enjoyed. That he could procure it while undergoing a life

sentence indubitably points to an inability to conform to legal systems.

636. It needs no elaboration that merely because you can afford it, would justify hospital admission, especially when as a life convict, prisoners are required to undergo the sentence of rigorous imprisonment for life.

637. The facilities enjoyed in the private rooms in AIIMS or in Batra Hospital have not the remotest of the semblance or comparison to the discipline during jail incarceration. The facilities enjoyed in private rooms are certainly way beyond those available even in the general wards of the Batra Hospital or AIIMS. The facilities which were made available to these two defendants in these hospitals can bear no comparison to those which are provided in the general ward in government hospitals which other prisoners would have got.

638. In the jail, the prisoners do not have access to telephone facilities or the benefit of air conditioning or personalized bathroom and private toilet facilities. Both these convicts have had prolonged stays outside the regimentation and discipline of the jail. Such stays were as per their whim and desire.

639. The defendants need to be reminded that while it is the duty and responsibility of the State to ensure the health and well being of the convicts but it is no part of State's responsibility to facilitate or incur expenditure of even a single paisa for enabling prisoners to make unwarranted visits outside the jail or to facilitate a convict’s unwarranted visits to or stays in hospital.

640. It is therefore, obvious that Vikas Yadav and Vishal Yadav have utilized the shield of the hospital visits and stays in connivance with jail authorities as well as doctors at the hospital which they visited or were admitted to. They manipulated the systems deliberately and knowingly with impunity without any respect for law or authority, sure and confident that their unholy and illegal acts would go undetected and they could avoid undergoing the imprisonment awarded to them, in any sense.

641. For the period between 30th of May, 2008 till 17th October, 2011 of 36 months and 140 days, Vishal Yadav has spent 32 days (from 7th July, 2008 to 7th August, 2008); 24 days (from 14th August, 2008 to 6th September, 2008), 53 days (24th October, 2008 to 15th December, 2008); 100 days (from 25th February, 2009 to 6th June, 2009); 71 days (from 7th October, 2009 to 16th December, 2009); 36 days (from 29th September, 2010 to 3rd November, 2010); 4 days (from 14th October, 2011 to 17th October, 2011) (totalling 320 days, equivalent to over 10 months) in private rooms in the Batra Hospital in the company of his family with wife and/or mother staying with him without any medical justification for the same. The defendant has also partaken home or outside cooking during this period. With such relatives, friends and acquaintances who were not in hospital, he has freely engaged on the telephone access.

This period certainly cannot be treated as part of imprisonment already undergone by the defendant.

642. Similarly, the comfortable stay of Vikas Yadav from the 10th of October, 2011 to 4th November, 2011 (23 days) in the private ward ['B' category room (for one day) and then the 'A' category room] in AIIMS in the company of "attendants" (noted in his case sheets) with full freedom in terms of diet, access to friends and family; freedom to take outings, cannot be treated as period during which the convict was undergoing even simple imprisonment.

(iv) *Cost of hospital visit/admission*

643. We now come to a critical question which arises in the present case. Given the above discussion, is it fair to burden the public exchequer with the costs of such *'outings'* for prisoners? Before we answer, let us examine the stand of the two convicts.

644. So far as Vikas Yadav is concerned, despite opportunity, no medical record produced. Only a brief synopsis dated 11th March, 2013 has been filed. Mr. Verma has vehemently contended that T.B. is widely rampant in the jail and the convict contracted the infection from jail. It is also submitted that he has been rightly taken to the hospitals for the several visits. Learned counsel would justify Vikas Yadav's admission in AIIMS and his absences from the hospital room as well. It is submitted that the medical treatment of Vikas Yadav while in custody was the absolute responsibility of the State and he cannot be called upon to bear costs thereof. Mr. Verma would deny liability for the cost thereof contending that the practice of taking prisoners on outside hospital

visits is common and that there is nothing unique about either the defendant's visits or his client's hospital admission.

645. Vishal Yadav has opposed the consideration of the aspect of liability for the costs on the hospital visits and admissions from the perspective that it is the bounden duty of the State/its agencies to bear the costs for the security of the convicts and that Vishal Yadav was never a free man; as his visits were controlled by the prison authorities. It is submitted that in the order dated 23rd August, 2004, Vishal Yadav had undertaken to bear only the cost of treatment which would be incurred at the Batra Hospital and not the cost incurred on the security arrangements to take him to and fro from the jail premises.

646. The order dated 23rd August, 2004 nowhere restricts '*cost*' to only treatment cost. The use of the expression '*cost*' would show that the court intended Vishal Yadav to bear all costs which would be incurred on his visits to Batra Hospital for undergoing treatment for tuberculosis. Vishal Yadav, a literate and well placed individual, was fully conscious that he was in custody and the '*costs*' entailed in being treated in the Batra Hospital would include not only the cost of treatment but also expenditure transportation as well as providing the security and other ancillary costs. In fact expenditure on all counts for the purpose of taking him to Batra Hospital was inherent in the direction that the prisoner would bear the costs of the treatment at Batra Hospital.

647. It is also pertinent that the order nowhere directed the State to incur costs for visits to the hospital which were not warranted,

especially costs of prolonged hospital stays for months together without any reason or justification.

(a) *Cost incurred on escort/security deployment during outside hospital visits*

648. Every expense incurred on a prisoner, whether under trial or a convict is additional burden on the public exchequer. Examining the hospital visits of the convict from the perspective of the unwarranted expense and drain of public resources, we had called upon the State to inform us as to the costs which were entailed in providing escort and guard duties to the two prisoners as well as other expenses incurred thereon. The State has been able to provide some details of expenses incurred on providing escorts to the prisoners and taxi fare on some occasions. We consider the few details provided hereafter.

649. The State has filed an affidavit of Shri Shamsher Singh posted as Superintendent, Central Jail No.4, Tihar with regard to the costs incurred for provision of security arrangements in respect of Vikas Yadav for his referral visits to AIIMS and the DDU Hospital and the costs incurred by the 3rd Battalion for making security arrangements when he was admitted to the hospital.

650. As per the memo dated 22nd February, 2012 from the office of the Deputy Commissioner of Police, 3rd Battalion, DAP, Delhi**,** no money is charged from prisoners for escort and guard duties of under trial prisoners. In custody parole cases, payment is charged when specific orders are given by the court and guard charges are

calculated on the basis of the Government of Delhi notifications dated 5th August, 1999 and 16th July, 2007.

651. Implicit in the above directions is the fact that security/escort has to be deployed only for such hospital visits as have been authorised in accordance with law. Certainly for such authorised hospital visits, it would be the duty of the State to ensure escort and guard duties. Can the same be said of such visits and admissions as are not required for medical reasons?

652. The office of the Deputy Commissioner of Police, 3rd Battalion DAP, Delhi has placed a copy of Standing Order No.52/2008 in this regard. It is been pointed out that as per this Standing Order, it was the duty of the 3rd Battalion DAP to escort under trial witnesses during their court production as well as to hospitals for treatment and to guard them during such visits.

653. Additionally, a copy of the Notification No.6/71/98/HP-Estt. dated July, 2007 issued in exercise of powers conferred under Section 40(2) of the Delhi Police Act, 1978 by the Lieutenant Governor of the NCT of Delhi prescribing the scale of charges in respect of deployment of additional police on payment to private persons, commercial establishment and for other duties of the nature as provided in Sections 39 and 40 of the said Act, has been placed before us. As per this notification, the following are the rates of charges for the above duties:

1.	Assistant Commissioner of Police	Rs.831	Per day of five hours of per night of

			four hours
2.	Inspector of Police	Rs.903	--do--
3.	Sub-Inspector of Police	Rs.773	--do--
4.	Assistant Sub-Inspector of Police	Rs.548	--do--
5.	Head Constable	Rs.451	--do--
6.	Constable	Rs.425	--do--

654. Distressed by the impunity and complete lack of respect for systems, law, human resources and scarce medical facilities displayed by these two defendants despite their conviction, that too, while undergoing the sentences of life imprisonment, we had passed an order dated 2nd February, 2012 calling upon the State to furnish the following details:

(i) the expenses which had been incurred with regard to the deployment of vehicles and guards;

(ii) defrayment of the expenditure incurred on the provision of the transportation as well as security;

(iii) the provisions which had to be made with regard to the diet of both the convicts as well as attending security personnel on each of these visits;

(iv) payment, if any, made to the hospitals;

(v) authorization for all of the above.

655. It is unfortunate that the State has been able to provide only scanty information limited to expenditure incurred on providing escort during some hospital visits and taxi fare, again not for all visits.

656. The State has also placed some calculation of costs based on these notifications including the number of guards deployed and the time for which the convicts were admitted in the hospital. The first hospital visit of ***Vikas Yadav*** in the year 2008 was on 31st May, 2008 for which the police has notified expenses incurred as Rs.1,845/-. ***One Assistant Sub-Inspector, one Head Constable and two Constables*** had been deployed in providing security for the convict. ***For 74 hospital visits of Vikas Yadav up to 13th January, 2012*** detailed in the annexure, the police has notified that an amount of ***Rs.1,13,702/- was incurred in providing security***.

657. So far as Vishal Yadav is concerned, for 93 visits starting from 4th December, 2003 till 7th February, 2012, an amount of Rs.1,65,963/- has been spent on providing security. 63 visits have been made after his conviction, the first being on 5th July, 2008.

658. We extract hereunder the report from the Central Jail of the guard deployments for the two convicts during their hospital admissions hereafter :

(i) ***Guard deployment cost during post conviction hospital admission of Vikas Yadav***

S. No.	Name of the inmate	Hospital	No. Of Guards deployed	**Cost incurred on the provision of security arrangements**	Provision of diet of escort party	Time & Date of Admission	Time & Date of discharge
	Vikas Yadav S/o D.P. Yadav	AIIMS Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**120012/-**		09.50 ...../ **10/2011**	06.35 PM **04/11/2011**

We are informed that for this admission alone, expenditure of **Rs.1,20,012/-** was incurred in the guard deployment.

(ii) ***Guard deployment cost during hospital admissions of Vishal Yadav***

S. No.	Name of the inmate	Hospital	No. Of Guards deployed	**Cost incurred on the provision of security arrangements**	Provision of diet of escort party	Time & Date of Admission	Time & Date of discharge	Timing and duration of the stay at hospital
1.	Vishal Yadav S/o Kamal Raj	DDU Hospital	Shift SI-1, HC-1, Ct-2 **(Round the clock)**	**17940/-**		08.55 AM 03.06.04	03.45 PM 05.06.04	2 days 6 Hrs 50 Min
2.	Vishal Yadav S/o Kamal Raj	AIIMS Hospital	Shift SI-1, HC-1, Ct-2 **(Round the clock)**	**69000/-**		08.55 AM 28.06.04	02.30 PM 07.07.04	9 days 5 Hrs. 25 Min
3.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift SI-1, HC-1, Ct-2 **(Round the clock)**	**115920/-**		09.30 AM 31.08.04	11.00 PM 15.09.04	15 days 13 Hrs. 30 Min
4.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift SI-1, HC-1, Ct-2 **(Round the clock)**	**Amount cannot be calculated in absence of arrival time & for duration of Guard deployed.**		09.34 AM 30.09.04	Arrival not traceable	
5.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift SI-1, HC-1, Ct-2 **(Round the clock)**	**-do-**		09.22 AM 17.01.05	Arrival not traceable	
6.	Vishal Yadav S/o Kamal	Batra Hospital	Shift HC-1, Ct-1 **(Roun**	**148044/-**		10.10 AM **07/07/08**	07.35 PM **07/08/08**	31 days 09 Hrs 25

	Raj		**d the clock)**					Min
7.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**110376/-**		11.00 AM **14/08/08**	08.55 PM **06/09/08**	23 days 09 Hrs 55 Min
8.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**247908/-**		11.46 AM **24/10/08**	06.30 PM **15/12/08**	52 days 06 Hrs 44 Min
9.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**469536/-**		12.36 PM **25/02/09**	05.05 PM **04/06/09**	99 days 4 Hrs 29 Min
10.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**327624/-**		11.30 AM **07/10/09**	06.10 PM **16/12/09**	69 days 6 Hrs 40 Min
11.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**155928/-**		9.30 AM **25/09/10**	03.35 PM **03/11/10**	33 days 6 Hrs 5 Min
12.	Vishal Yadav S/o Kamal Raj	Batra Hospital	Shift HC-1, Ct-1 **(Round the clock)**	**15768/-**		10.35 AM **14/10/12**	03.30 PM **17/10/12**	3 days 4 Hrs 55 Min
			Gross Total	**1678044/-**				

659. So far as the amount spent on providing security of Vishal Yadav in his hospital admissions post conviction is concerned, as noted above he has been admitted on the seven occasions commencing from 7th July, 2008. The ***total*** of ***the expenditure*** incurred in these ***seven hospitalisations on the security*** which was assigned to Vishal Yadav comes to a total of ***Rs.14,75,184/-***.

660. We are informed by the State that as per the guidelines in the *Notification* dated *16th July, 2007, the 'total amount of guard*

charges in respect of both *Vikas Yadav and Vishal Yadav* for the *period 1st January, 2009 to 7th February, 2012* as per the available record of their *outside visits, OPDs and hospitalization* in various hospitals comes approximately to **Rs.20,77,721/-**, a burden borne by the tax payer.

661. These monetary figures are no measure of the colossal waste of valuable manpower and scarce human resources as the police personnel are constantly required for discharging critical policing duties. That the defendants could manipulate and influence authority to permit this kind of wastage of services of police personnel to guard these two defendants for unwarranted hospital visits and admissions is completely impermissible and cannot be countenanced under any circumstance.

(b) The cost incurred on taxi fare during the outside hospital referrals in respect of Vikas Yadav

662. In Annexure 'C' to his affidavit dated 23rd February, 2012, Shri Shamsher Singh, Superintendent, Central Jail No.4, Tihar Jail has provided the details of the amounts incurred on taxi fare in some of the hospital visits of Vikas Yadav. As per these details, for 11 visits between 11th July, 2008 to 1st January, 2009, a sum of Rs.3,850/- was incurred on taxi fare. In respect of 35 visits between 11th February, 2009 to 13th January, 2012 to AIIMS and the LNJP hospital, the State has paid taxi fare to the tune of Rs.14,650/-. The actual outside hospital visits of Vikas Yadav far outnumber these 46 visits for which information has been provided. Despite court directions, the State is unable to retrieve

the complete information and place it before us. For the above 46 visits, the State has spent a total of Rs.18,500/- on taxi fare.

(c) Amount incurred on treatment in respect of Vikas Yadav

663. So far as the expenditure incurred on the treatment of Vikas Yadav from outside hospitals is concerned, the following incomplete details have been furnished :

Date	Amount (in Rs.)
30.09.2011	3000.00
30.09.2011	500.00
10.10.2011	12200.00
04.11.2011	7500.00
Total	**Rs.23,200.00**

(d) The cost incurred on taxi fare during the outside hospital referrals in respect of Vishal Yadav

664. Again so far as hospital visits of Vishal Yadav are concerned, Shri Shamsher Singh, Superintendent, Central Jail No.4, Tihar Jail in Annexure 'C' of the affidavit dated 23rd February, 2012 has provided the details of the amounts incurred on taxi fare. As per these details, for 9 visits between 3rd September, 2005 to 1st January, 2009, a sum of Rs.3,950/- was spent on taxi fare. In respect of 19 visits between 25th February, 2009 to 31th December, 2011 to Batra Hospital, the State has paid taxi fare to the tune of Rs.10,750/-. Again, the information furnished is hopelessly incomplete and deficient.

(e) Expenditure on the diet of the two defendants and their escort in the outside visits

665. The State has informed us that so far as convicts are concerned, diet for them is supplied on OPD/outside hospital visits by the jail administration through the Central Jail No.6 in packets at the time of boarding the ambulance/taxi from the DAP Command Room located at Central Jail No.2, Tihar, New Delhi. It is further informed that in case any inmate/convict is admitted in outside hospital, the jail administration does not provide any diet to the inmate/convict and the diet is provided by the concerned hospital as per the norms of the hospital.

666. As per the affidavit, no diet or payment at all is provided to the security personnel on escort duty by the jail authorities to the guards and the security personnel providing security to the jail inmate during such visits or admissions.

667. It is important to note that there is no reference to any statutory provisions, rule, regulation or guideline to which the above practice is relatable. There cannot be an instance of bigger subversion and compromise of discipline which personnel in the uniformed services must maintain. The commitment of the assigned police personnel to their duty would have been compromised given their exposure to the luxury of being in the private wards, even though in hospitals. The non provision of diet or payment in lieu thereof to security personnel for the duties with prisoners during their outside visits would have rendered the security personnel dependant on the convict and his family/attendants for provision of their dietary needs as well. The

bonding which would have been created thereby between the prisoner and his guards has to have resulted in a consequential relaxation of the control which is required to be maintained over prisoners. This is amply illustrated in the present case. The guard's presence, thus reduced to mere token, is certainly of no significance and would not have interdicted the freedoms enjoyed by the defendants in any manner during the visits or the admission(s).

668. We do not know, but the bonhomie generated by the liberties shared with the guards during the protracted hospital admission may have led to them permitting the aforenoted freedom to Vikas Yadav during his AIIMS admission between 10th October, 2011 and 4th November, 2011. Even the guards on escort duties have a duty to inform the jail authorities about the unnecessary visits or stays in the hospitals.

(f) *Impact of such unwarranted hospital visits and admissions*

669. Mr. Sumeet Verma submits that there was nothing unusual in the hospital visits of the two convicts inasmuch as thousands of outside hospital visits are undertaken by jail inmates. Even if this figure were correct, it can have no impact at all so far as consideration of the justification for the visits by the prisoners in hand is concerned. It is well settled that a plea based on equality of treatment rests only in legality, it cannot rest on or be claimed qua acts which are contrary to law or steeped in violations of rules. We are of the firm view that even if such practice is being universally

adopted in the jails as claimed, it is completely illegal and impermissible.

670. We are greatly saddened by the situation manifested from the fact that persons convicted for heinous offences, undergoing life imprisonments are able to manipulate not only jail authorities but medical professionals in the most premier institutions enabling utilisation of a shield of non-existent medical ailments for "outings" out of jail. Thereby convicts in a heinous murder offence have been permitted creation of a facade of sickness to enjoy the luxury of visiting and staying in private wards in private hospitals in the company of relative and friends ('attendants'). That jail authorities could permit these visits and stays without once bringing it to knowledge of the concerned medical experts in the jail hospital or the jail referral hospitals and taking their opinion on the justification for the hospital visit or the hospitalisation lends support to the complainant's suggestion of involvement. We do not know whether these acts and omissions had any element of any quid pro quo, but they are completely impermissible even if emanating out of a misplaced sense of sympathy towards life convicts or out of regard for the status or position of the convict or his family. Those placed in positions of authority, be it jail administration or be it medical experts, must realise that no one is above the law, that each person must be treated equally. That imprisonment, especially after conviction, brooks no such liberties.

671. Be it by actually making or facilitating referrals, or permitting visits and admissions, authorising and making payments

for such visits admissions; or lending tacit support to the same by not pointing out/objecting or standing by the same, the liability for involvement in misuse of the process of law remains the same.

672. Merely because other prisoners have indulged in similar practices and that the official machinery in jails and hospitals is susceptible to such manipulation/influence, with or without quid pro quos, would not in any manner mitigate the culpability of the prisoner. We may point out that such practice is prevalent because prisoners who entertain such intents and expectations exist, who actively engage and utilise influence of every kind, (be it position/ political/monetary/association/relationship) so that official jail machinery is subverted/lured/intimidated/persuaded into bending rules and regulations, in facilitating unwarranted benefits to prisoners. If Vikas Yadav and Vishal Yadav had not aspired to avoid prison stay while undergoing their life sentence, no official or doctor in the jail or hospitals would have facilitated their outside visits and stays. Why would any jail official or doctors in the hospital be interested in keeping the convicts out of jail? They obviously reacted to such request by the prisoners and succumbed to some kind of influence.

673. The above is illustrated by the fact that there is no allegation or material with regard to outside visits of the third defendant Sukhdev Yadav who is not financially or politically as empowered as Vikas Yadav and Vishal Yadav.

674. So far as Vishal Yadav is concerned, the order of the learned Single Judge dated 23rd August, 2004 specifically directed that the

visit to the Batra Hospital for treatment was to be at the cost of the prisoner. The fact that the Tihar jail has not claimed the cost of transport and security arrangements for the hospital visits and during the hospital admissions from the prisoner, which they were bound to do so in terms of order by itself speaks volumes about the connivance of prison authorities with the convict.

675. We therefore, have no hesitation in holding that Vikas Yadav and Vishal Yadav are liable to bear the costs incurred on any count in every unnecessary visit outside and hospital admission(s). Inasmuch as incomplete information is available with regard to the OPD hospital visits of Vikas Yadav and Vishal Yadav, we therefore, propose to pass directions for notional payments for these visits.

676. The State has also for the allegedly incurred expenditure of Rs.23,200/- on treatment of Vikas Yadav. As no details are available, we shall give him the benefit of doubt on this figure for want of record.

677. In view of the above, it is held that Vikas Yadav is liable to pay to the State the following amounts :

(i)	Towards amounts paid to AIIMS for admission [from 10th October to 4th November, 2011 (total of the bills for Rs.13,700/-; Rs.12,000/-, Rs.13150/-, Rs.11900/-)]	:	Rs.50,750/-
(ii)	Towards cost incurred on security deployment during admission in AIIMS w.e.f. 10th October, 2011 to 4th November, 2011	:	Rs.1,20,012/-

(iii) Notional payment out of the total notified amount of Rs.1,13,702/- for provision of security during OPD hospital visits of Vikas Yadav. : Rs.50,000/-

(iv) In respect of Vikas Yadav on taxi fare for post conviction hospital visit:

(a) Between 11th July, 2008 to 1st January, 2009 : *Rs.3,850/-*

(b) Between 11th February, 2009 to 13th January, 2012 to AIIMS and the LNJP hospital for 35 hospital visits : *Rs.14,650/-*

Total amount of taxi fare : Rs.18,500/-

678. Amount spent on Vishal Yadav in his seven hospital admissions post conviction from 7th July, 2008 to 17th October, 2012, the State is entitled to the following :

(a) Provision of security during the seven admissions : Rs.14,75,184/-

(b) Notional payment out of the total amount of Rs.1,65,963/- provision of security to Vishal Yadav during his OPD hospital visits. : Rs.50,000/-

(c) Taxi fare for 9 post conviction visits to Batra Hospital between 3rd September, 2005 to 1st January, 2009. : *Rs.3,950/-*

For 19 visits, between 25th February, 2009 to 31th *Rs.10,750/-*

December, 2011

Total amount of taxi fare : Rs.14,700/-

The two prisoners are liable to pay these amounts to the state

XVII. Power of this court to pass orders with regard to unwarranted hospital visits

679. Having concluded that hospital visits and admissions were unwarranted; that such outings cannot be treated as sentence undergone and that public money has knowingly been caused to be squandered by these two convicts, what can this court do? Is there any way of ensuring that the order of life imprisonment imposed by the court is complied with in its real spirit? Or will the court helplessly watch the brazen manoeuvrings of these two convicts? Can these convicts be permitted to claim the period(s) that they spent outside the jail as period of sentence undergone while computing the period of imprisonment undergone?

680. The complainant has prayed for drastic orders based on inter alia such conduct of the defendants. Before proceeding to pass any orders, it is essential to consider the competence of the court to proceed in the matter.

681. By the order dated 30th of May, 2002, Vikas Yadav and Vishal Yadav were sentenced to undergo life imprisonment upon conviction for the offence of murder which necessarily means rigorous imprisonment. The sentence was passed in exercise of the powers of the trial court under Code of Criminal Procedure. The

manipulations and the conniving by the convicts have enabled them to avoid the rigours of the imprisonment in the circumstances detailed above. Certainly, this conduct of the prisoners tantamounts to violation of the orders of life imprisonment.

682. Section 482 of the Cr.P.C. recognises the inherent jurisdiction of the High Court for the following purposes:

(i) to give effect to an order under the Cr.P.C.;

(ii) to prevent an abuse of the process of court; and

(iii) to otherwise secure the ends of justice.

[***Ref.: (2011 8 S.C.R., Sushil Suri v. C.B.I. & Anr.***]

683. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice for which alone the court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the court.

Reference has been made in ***Sushil Suri*** to the pronouncement reported at ***(2009) 6 SCC 351, Central Bureau of Investigation v. A. Ravishankar Prasad*** in this regard**.**

684. We find that the scope of the powers of the High Court under Section 482 of the Cr.P.C. stands elaborated in the three Judge Bench pronouncement of the Supreme Court reported at ***(2012) 10 SCC 303, Gian Singh v. State of Punjab & Anr.*** in the following terms:

"53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, "nothing in this Code" which means that the provision is an overriding provision. These words ***leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e. to prevent abuse of the process of any court or otherwise to secure the ends of justice.*** As has been repeatedly stated that Section 482 confers no new powers on the High Court; it merely safeguards existing inherent powers possessed by the High Court ***necessary to prevent abuse of the process of any court or to secure the ends of justice.*** It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. ***It should be exercised very sparingly and it should not be exercised*** as against the express bar of law engrafted in any other provision of the Code.

54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. ***Formation of opinion by the High Court before it exercises inherent power*** under Section 482 on either of the twin objectives, (*i*) ***to prevent abuse of the process of any court***, or (*ii*) ***to secure the ends of justice, is a sine qua non.***

55. In the very nature of its constitution, it is the ***judicial obligation of the High Court to undo a wrong in course of administration of justice*** or to prevent continuation of unnecessary judicial process**.** This is founded on the legal maxim*quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest*. The full import of which is whenever ***anything is authorised***, and especially ***if, as a matter of duty,***

> ***required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae*** is inbuilt in such exercise; the whole idea is to ***do real, complete and substantial justice for which it exists.*** The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.
>
> **56.** It needs no emphasis that ***exercise of inherent power*** by the High Court would entirely ***depend on the facts and circumstances of each case***. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided."
>
> (Emphasis supplied)

685. In the pronouncement reported at ***(2002) 4 SCC 388, Rupa Ashok Hurra v. Ashok Hurra & Anr.,*** the Supreme Court had observed that public confidence in the judiciary is said to be the basic criterion of judging the justice delivery system. If any act or action, even if it is a passive one, erodes or is even likely to erode the ethics of the judiciary, the matter needs a further look. In the event, if there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, technicality ought not to outweigh the course of

justice—the same being the true effect of the doctrine of ex debito justitiae. It is enough if there is a ground of an appearance of bias.

686. The limits of the inherent power of the High Court under Section 482 were amply elaborated by the Supreme Court in the judgment reported at ***(2011) 14 SCC 770, State of Punjab v. Davinder Pal Singh Bhullar & Ors.*** in the following terms:

> **"52.** The power under Section 482 CrPC cannot be resorted to if there is a specific provision in CrPC for the redressal of the grievance of the aggrieved party or where alternative remedy is available. Such powers cannot be exercised as against the express bar of the law and engrafted in any other provision of CrPC. ***Such powers can be exercised to secure the ends of justice and to prevent the abuse of the process of court.*** However, such expressions do not confer unlimited/unfettered jurisdiction on the High Court as the "ends of justice" and "abuse of the process of the court" have to be dealt with in accordance with law including the procedural law and not otherwise. Such powers can be exercised ex debito justitiae to do real and substantial justice as the courts have been conferred such inherent jurisdiction, in absence of any express provision, as inherent in their constitution, or such powers as are necessary to do the right and to undo a wrong in the course of administration of justice as provided in the legal maxim *quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest*. However, the High Court has not been given nor does it possess any inherent power to make *any order*, which in the opinion of the court, could be in the interest of justice as the statutory provision is not intended to by-pass the procedure prescribed."
>
> (Emphasis supplied)

687. In order to ensure compliance with the orders on sentence and to secure the ends of justice, it is therefore the judicial obligation of this court to pass appropriate orders with regard to the unwarranted outside visits and hospitalization of the two defendants as well as the expenditure incurred thereon. So far as the unwarranted hospitalizations i.e. hospital admission(s) are concerned, information on the hospital costs, guards and taxi fare for the purposes have been provided and there is no difficulty in passing orders. Inasmuch as we have not been provided complete documentation with regard to the numerous OPD hospital visits and as such, it may not be appropriate to rule on the propriety of such visits, and so we are refraining from burdening the prisoners with regard to the full costs with regard thereto. We however, propose to direct the convicts to make a token payment towards the cost of security on which expense has been entailed to the State for the security provided during such hospital visits. Other details have been noted above.

688. In addition thereto, appropriate orders are necessary so far as the manner in which the period of unauthorized hospitalizations, in conditions most unlike the discipline in the jail, is to be treated for the purposes of computation of the period of sentence undergone in jail.

XVIII. Jurisdiction of the appellate court while considering a prayer for enhancement of the sentence.

689. An objection is pressed before us that while considering an appeal against conviction or acquittal, the High Court has vide powers but it does not have any such power while considering an appeal for enhancement of sentence. It has been contended by Mr. Sumeet Verma before us that so far as interference with the order of sentence of the trial court is concerned, the same can be enhanced only if in case it is held that the order is perverse. In this regard, reliance is placed on the pronouncements of the Supreme Court reported at ***(1994) 4 SCC 353, Jashubha Bharatsingh Gohil v. State of Gujarat.*** In this case, 12 persons were found by the sessions court to be the members of an unlawful assembly. Different members were guilty for murder of 10 people. The trial court imposed a sentenced of life imprisonment for the offence under Sections 302 and 302/149. No separate sentence was imposed under Section 120B of the IPC. Some of the accused were also sentenced to rigorous imprisonment for three years and fine for commission of the offence under Section 25A of the Indian Arms Act. The defendants filed an appeal in the High Court while the State filed an appeal seeking enhancement of the sentence of life imprisonment to death sentence. The High Court partly accepted the State appeal and awarded the sentence of death only to Jashubha Bharatsingh Gohil, the appellant before the Supreme Court. Aggrieved thereby, the appeal was filed before the Supreme Court. The observations of the Supreme Court in para 12 on the

legislative intent and principles which must weigh with court while sentencing deserve to be considered in extenso and read thus:

> "12. It is needless for us to go into the principles laid down by this Court regarding the enhancement of sentence as also about the award of sentence of death, as the law on both these subjects is now well settled. There is undoubtedly power of enhancement available with the High Court which, however, has to be sparingly exercised. ***No hard and fast rule can be laid down as to in which case the High Court may enhance the sentence from life imprisonment to death***. xxx xxx xxx xxx Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so ***operate the sentencing system as to impose such sentence which reflects the social conscience of the society.*** The sentencing process has to be stern where it should be."
>
> (Emphasis supplied)

690. Thereafter the Supreme Court noted the incorporation of Section 354(3) of the Cr.P.C. into the statute which makes it obligatory in cases of conviction for offences punishable with death or with imprisonment for life to assign reasons in support of the sentence awarded and, in case death penalty is awarded, "*special reasons*" for such sentence. The Supreme Court in para 14 noted that the judge was under a legal obligation to explain his choice of sentence and that the sentencing court was therefore, required to approach the question seriously and to make an

endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. It is only after giving due weight to the mitigating as well as aggravating circumstances that it must proceed to impose an appropriate sentence.

691. In para 15, the court had observed thus :

> **"15.** xxx xxx xxx Therefore, the trial court did not merely, by a cursory order, impose the sentence of life imprisonment and used its discretion not to award the capital sentence of death for detailed reasons recorded by it. The reasons given by the trial court cannot be said to be wholly unsatisfactory or irrelevant much less perverse. The High Court differed with the reasoning of the trial court and almost 5 years after the judgment had been pronounced by the trial court proceeded to enhance the sentence of A-11 from life imprisonment to that of death sentence. The High Court also gave its own reasons in support of its view on the question of sentence. The ***High Court, however, did not opine that the reasons given by the Sessions Judge were perverse or so unreasonable as no court could have advanced the same. It took a different view of the legislative policy as also of the law laid down by this Court and referred to some other judgments of this Court*** also in support of its "reasons" to impose the sentence of death. The view taken by the High Court, it can legitimately be said is also a possible view."
>
> (Emphasis by us)

692. We may also refer to para 17 of the pronouncement wherein reliance was placed by the court on a prior judgment reported at

AIR 1953 SC 364, Dalip Singh v. State of Punjab. It was held as follows:

> "**17.** Prior to the incorporation of Section 354(3) CrPC in 1973 when the imposition of death sentence was almost the rule and imposition of life imprisonment required the trying judge to give reasons, this Court was faced with almost a similar situation as in the present case. In *Dalip Singh* v. *State of Punjab* [1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465] , this Court dealt with the subject, thus: (AIR pp. 367-68, para 39)
>
> > "On the question of sentence, it would have been necessary for us to interfere in any event because a question of principle is involved. In a case of murder the death sentence should ordinarily be imposed unless the trying judge for reasons which should normally be recorded considers it proper to award the lesser penalty. *But the discretion is his and if he gives reasons on which a judicial mind could properly found an appellate court should not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial Judge and the only ground on which an appellate court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.*"
>
> (Underlining supplied)

693. After so observing, in para 18, the Supreme Court held thus:

> **"18.** xxx xxx xxx ***in the peculiar facts and circumstances of this case***, when the occurrence took place almost 10 years ago and for the last more than 6 years the spectre of death has been hanging over the head of A-11, Jashubha, the High Court should not have enhanced the sentence from life imprisonment to death because for exercising its discretion in choosing the sentence the trial court had given elaborate reasons which it cannot be said no judicial mind could advance. Only because the High Court looked at those reasons differently, in our opinion, it did not justify the enhancement of sentence to death sentence. xxx xxx xxx"
>
> (Emphasis by us)

694. The court has thus examined the order of the trial court on sentence noting that the reasons for not imposing the death sentence as well as statutory provisions had been elaborately considered and the trial judge had thereafter concluded that the sentence of imprisonment for life would meet the ends of justice. Coupled with the factual matrix of the case, it was held that in the enhancement of the sentence to award the death penalty to the appellant by the High Court was not justified.

There can be no dispute at all with these well settled principles. It is therefore, well settled that the appellate court has the jurisdiction to examine reasons recorded by the trial court to ascertain whether they were perverse or such as no court would have propounded. The court would have no power to substitute the sentence merely on another possible view. The jurisdiction to

correct an error in law would certainly be available to the High Court examining the order on sentence of the trial court as well as failure to exercise jurisdiction by it.

XIX. Factual consideration in present case

The discussion on this subject is being considered under the following sub-headings:

(i) Single blow by hammer.

(ii) Crime a result of emotional disturbance.

(iii) Impact of post offence events.

(iv) Motive for crime and public abhorrence.

(v) Absence of eye-witness - case of circumstantial evidence.

(vi) Life imprisonment harsher than death sentence.

(vii) Post murder conduct - burning of the body.

(viii) Whether the passage of time since the date of commission of the offence is per se material for sentencing purposes.

(ix) Possibility of reform and rehabilitation.

(x) Family has not abandoned Vikas Yadav.

(xi) Age and antecedents.

(xii) Finding that death penalty is not deterrent.

(xiii) Murder - not an honour killng.

(xiv) Possibility of reform and rehabilitation and its impact on imposition of death penalty.

(xv) Probationary Officer's report.

(xvi) Conduct since July, 2013.

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

695. Before embarking on an inquiry into the facts in the present case, it is necessary to notice a recent judgment reported at ***2014 SCC OnLine SC 844, Mofil Khan & Anr. v. State of Jharkhand,*** wherein the Supreme Court has elaborately detailed the manner in which the courts will consider the relevant circumstances. In this case, the appellants had some property disputes with their own brother, murdered eight persons including their brother, his wife, four minor children one of whom was a physically disabled child. Their mother was the sole eye-witness who supported the prosecution case and testified against them. The court summed up the principles laid down by successive judgments of the Supreme Court which we propose to reproduce, highlighting those which apply to the factual matrix of the present case:

> **"18.** This Court in the aforesaid decisions has evolved the doctrine of "rarest of the rare" case and put it to test via the medium of charting out the aggravating and mitigating circumstances in a case and then balancing the two in the facts and circumstances of the case. As a norm, the ***most significant aspect of sentencing policy is independent consideration of each case by the Court and extricating a sentence which is the most appropriate and proportional to the culpability of the accused. It may not be apposite for the Court to decide the quantum of sentence with reference to one of the classes under any one of the head while completely ignoring classes under other head.*** That is to say, ***what is required is not just the balancing of these circumstances by placing them in separate compartments, but their cumulative effect which the Court is required to keep in its mind so as to better administer the criminal justice system*** and provide an effective and meaningful reasoning by the Court as

> contemplated under Section 354(3) Code while sentencing. xxx xxx xxx"
>
> (Emphasis by us)

Thus the relevant circumstances, say age and antecedents; weapon used; nature of injury - whether single or multiple; brutality of crime, etc., cannot be construed individually in water tight compartments, to individually rule on whether they are to be treated as mitigating or aggravating but have to be cumulatively examined and a view taken of the impact of the circumstance accordingly.

696. The Supreme Court, in ***Mofil Khan*** further enumerated factors from precedents which have been treated as aggravating or mitigating circumstances. In para 18, it was further stated thus:

> "18. xxx xxx xxx The following broad heads have been culled out by the successive judgments of this Court:
>
> "***Aggravating Circumstances:***
>
> 1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
> 2. The offence was committed while the offender was engaged in the commission of another serious offence.
> 3. The offence was committed with the intention to create a fear psychosis in the public at large and

was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

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

5. Hired killings.

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

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

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.

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

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

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

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial

conscience but even the conscience of the society.

Mitigating Circumstances:

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

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

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

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

5. The ***circumstances*** which, in ***normal course*** of life, would ***render such a behavior 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 behavior 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 relateable 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. xxx xxx xxx"

(Emphasis supplied)

697. After so enumerating the circumstances, in ***Mofil Khan*** (para 18)**,** the court stated the principles on which they must be evaluated in the following terms:

"18. xxx xxx xxx

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."***

19. We remind ourselves that the doctrine of "***rarest of rare***" ***does not classify murders into categories of heinous or less heinous***. The ***difference between two*** is not in the identity of the principles, but ***lies in the realm of application thereof to individual fact situations.*** Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose-punitive, deterrent and protective.

xxx xxx xxx

45. The crime test, criminal test and the "rarest of the rare" test are certain tests evolved by this Court. ***The tests basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. The cases exhibiting pre-meditation and meticulous execution of the plan to murder by leveling a calculated attack on the victim to annihilate him, have been held to be fit cases for imposing death penalty.*** Where innocent minor children, unarmed persons, helpless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and ***where after ghastly murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed***. Where it is established that the accused is a hardened criminal and has committed murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder,

> exhibiting depravity and callousness, this Court has acknowledged the need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal murders, society's cry for justice has been taken note of by this Court, amongst other relevant factors. ***While deciding whether death penalty should be awarded or not, this Court has in each case realizing the irreversible nature of the sentence, pondered over the issue many times over.*** This Court has always kept in mind the caution sounded by the Constitution Bench in *Bachan Singh* case (supra) that judges should never be blood thirsty but wherever necessary in the interest of society identify the rarest of rare case and exercise the tougher option of death penalty."
>
> (Emphasis by us)

698. The question which this court has to consider is whether the trial court orders dated 30th May, 2008 against Vikas Yadav and Vishal Yadav and 12th July, 2011 against Sukhdev Yadav on the sentences are premised on a consideration of the relevant circumstances as per law, are well reasoned and therefore, cannot be interfered with? We shall examine this question on these well settled principles.

699. The learned trial judge in the order dated 30th May, 2008 has held that the present case did not fall within the ambit of any of the principles laid down in ***Machhi Singh*** to award the extreme penalty of death to the convicts.

700. Mr. P.K. Dey points out that the learned trial judge has erred in holding that the case was not covered by ***Machhi Singh*** inasmuch as the case is covered under categories I, II and III.

701. The above conclusion was based on the finding that as per the post mortem report there was only a single injury on the skull of the deceased caused by a hammer which, the learned trial judge has held that could not be termed as "*murder in a brutal or diabolical manner*". In so concluding, the learned trial judge has held that there were three accused but only one injury was found which, is a great mitigating circumstance in favour of the convicts. After so holding, the learned trial judge has further held that the destruction of evidence was a separate offence under Section 201 which did not invite the extreme penalty of death. Lastly, the learned trial judge has held that it is not the death penalty which is deterrent in which a person is hanged to death in a few seconds; that to the contrary, it is life imprisonment which is deterrent wherein a convict dies every moment in the jail. These three reasons have persuaded the learned trial judge to impose the sentences which we have set out above.

702. So far as the order of sentence dated 12th July, 2011, on the third defendant Sukhdev Yadav @ Pehalwan is concerned, the learned trial judge has held that the murder in the instant case could not be described as an "*honour killing*"; that the offence could not be described as extremely brutal, grotesque, diabolical or revolting. The submissions of the defendant that a single blow by a hard object given at the vital body part resulted in the death of the victim and that putting the body on the fire was for the intention of abolishing incriminating evidence for which act the accused were convicted under Section 201 of the IPC. The learned trial judge

held that the case could not be taken as falling in the category where murder was committed with the motive which evinced total depravity and meanness and that this defendant was merely in the employment of the liquor shop business of the family of the other two defendants. It was therefore, held that the case did not fall in the category of rarest of rare cases.

Inasmuch as in both the orders dated 30th May, 2008 and 12th July, 2011, the learned trial judges have arrived at similar conclusions persuaded by the same factors, we propose to discuss the findings arrived at by them together.

(i) Single blow by hammer

703. It has been extensively argued by Mr. Sumeet Verma, learned counsel supported by the submissions of Mr. Sanjay Jain, learned counsel and Mr. Chaman Sharma, learned counsel that it was a case of a single blow by a mere hammer which is not a dangerous weapon and that this factor by itself leads to the conclusion that there was no brutality in the commission of the offence. It is submitted that this must be treated as a mitigating circumstance.

704. The learned trial judges have been persuaded to hold that the death resulting by the single injury had to be treated as a mitigating circumstance. The learned trial judges have also observed that the case rested on the circumstantial evidence alone.

705. We find that the learned trial judges have considered each of the circumstances pointed out by the defence singularly and not

examined these circumstances cumulatively to impose an appropriate sentence. This is contrary to law. As discussed in some detail above, each of these factors by itself is also certainly not determinative of whether the death penalty ought to be imposed or not.

706. A hammer is not a tool that is usually found in a tool box in a car. There is little possibility of finding a hammer in car. The defendants therefore, consciously chose to use the hammer as a weapon of offence and carried it with them. In our view, it is not the instrument used but the use to which the article is put, which would render it dangerous or not so. A hammer used for murder is certainly a dangerous article in the hands of the murderers. The use of this instrument, in fact, points towards the meticulous planning of the defendants.

707. Let us also examine the victim profile. Nitish Katara was born on 20th April, 1978 and was a young well educated man of 23 years (para 1836 of our judgment) who had just embarked on his professional career on the fateful night.

708. It has been urged by Mr. Dey, learned counsel for the complainant that as per the post-mortem report, Nitish Katara was a healthy able-bodied young person who would not have easily permitted infliction of the blow and that it would have required force to control him even to inflict the single assault. For this reason, three persons were involved. It is urged that two of the defendants would have been actively involved in immobilizing him so as to inflict the hammer injury. There is certainly strength in

this submission. It is contended that the post-mortem finding that his tongue was out of his mouth would show that the deceased was throttled as well.

709. There were no clothes on the body which would suggest that the deceased had obviously been overpowered, throttled and a blow of such force inflicted with a hammer, brought for this purpose, on his skull, a vital part of the body.

710. The force of the single blow is apparent from the fact that it resulted in a fracture of the frontal bone, lacerations and congestion of the brain which lacerations corresponded with the fracture of the skull bone and resulted in haemotoma of half litre in the left skull cavity. As per the post mortem report, there was only one litre blood out of the total blood in the body.

711. The consideration by the Supreme Court of Appeal of South Africa in ***S Nyathi and The State, (2005) ZASCA 134*** (23 May 2005) of the argument of "*inadvertence*", a "*conscious decision*", "*degree of* culpability", "blameworthiness" though in the context of a road accident resulting in death, sheds valuable light on the issue and reads as follows:

> "14. In *S* v. *Nxumalo* 1982 (3) SA 856 (SCA) the court approved a passage from *R* v. *Barnardo* 1960 (3) SA 552 (A) (at 557D-E) where the court held that although ***no greater moral blameworthiness arises from the fact that a negligent act caused death, the punishment should acknowledge the sanctity of human life***. It affirmed the dicta of Miller J who twenty years earlier in *S* v. *Ngcobo* 1962 (2) SA 333 (N) at 336H-337B had set out the approach to road death cases. At 861H Corbett JA said:

> "It seems to me that in ***determining an appropriate sentence*** in such cases the basic criterion to which the Court must have regard is the ***degree of culpability or blameworthiness exhibited by the accused in committing the negligent act.*** Relevant to such culpability or blameworthiness would be ***the extent of the accused's deviation from the norm of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence.*** At the same time the ***actual consequences of the accused's negligence cannot*** be disregarded. ***If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor,*** warranting a more severe sentence than might otherwise have been imposed.'"
>
> (Emphasis by us)

712. The principles laid down in these pronouncements from South Africa were cited with approval in ***(2013) 11 SCC 382 : (2012) 12 SCALE 719, Soman v. State of Kerala*** and the court reiterated the well settled principles that punishment should acknowledge the sanctity of human life, concluding as follows:

> **"27.1.** Courts ought to base sentencing decisions on various different rationales — most prominent amongst which would be proportionality and deterrence.
>
> **27.2.** The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint.
>
> **27.3.** Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

> **27.4.** One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.
>
> **27.5.** Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable. xxx"

713. The blow may have been single, however, it was not a mistake or a result of inadvertence. The blow was a conscious decision to eliminate the deceased in this brutal manner. The death was the consequence of an intentional and calculated hammer injury on the head.

714. The single blow, that too on the vital part of the body, with the intent to kill, was so precise and lethal, that it became the cause of death of Nitish Katara. The force of the injury was such that it was sufficient to cause death also manifests the ferocity of the attack on the deceased.

We find force in the submissions of counsel that the brutality of this crime lay not only in the manner of its execution but also in its conceptualization.

715. A single injury is not the sole criteria to judge the brutality of the offence (**Ref. :** ***AIR 1931 Lahore 749, Sultan v. Emperor***)

716. The incidence of brutality in the commission of the crime and manner of its execution is certainly an aggravating factor. The number of injuries by itself is not the sole criteria to assess such brutality. Even a single injury being inflicted pursuant to a pre-plan and deliberation certainly has to be considered as an aggravating circumstance, through brutality by itself may not be

the sole criteria for judging whether the case is of the rarest of rare category. (**Ref. : *(1998) 7 SCC 177, Panchhi v. State of U.P.***) In this regard, reference may also be made to the pronouncement in ***Jagmohan*** wherein the court refers to the murder which was diabolical in its inception.

717. Mr. Mahajan would rely on the pronouncement of the Supreme Court reported at ***(1970) 2 SCC 113, Tapinder Singh v. State of Punjab*** wherein the brutal manner in which the offence was committed reflected deliberation and pre-planning and had led to the confirmation of the capital punishment imposed on the appellant by the trial court.

718. We have noted the several precedents where betrayal, when in a position of trust, has been held to be an aggravating circumstance (**Ref. : *Ramnaresh*)**

719. Therefore, the submission on behalf of the appellants that the medical evidence disclosed that only a single injury resulted in the death and that this fact has to be taken as a mitigating circumstance by the learned trial judges is, in the facts and circumstances of the present case, completely unacceptable. The fact that the three defendants were able to achieve what they wanted with the single injury cannot be considered a mitigating circumstance by any measure but must count as an aggravating circumstance. The learned trial judges have completely ignored the relevant and material fact that the blow was deliberate and premeditated and carefully inflicted on the vital part of the body. The surrounding facts and circumstances of this case have also not been considered.

The single blow has been dealt with in isolation and treated as a mitigating circumstance which is contrary to law and erroneous in the facts and circumstances of this case. The finding to this effect is unsustainable even on the principles laid down in ***(1994) 4 SCC 353, Jashubha Bharatsingh Gohil v. State of Gujarat.***

(ii) *Crime a result of emotional disturbance*

720. The submission that the crime resulted on account of an emotional disturbance is also not supported by the evidence on the record of the case.

721. The plan which was executed by the defendants was well thought out and meticulously executed. The date (night of 17th February, 2002 - Shivani Gaur's wedding) and time was carefully chosen. The precision of its execution establishes the clarity of the three defendants.

722. The manner in which the defendants came to Shivani Gaur's wedding clearly shows that they were under no kind of emotional disturbance. We have discussed in the judgment dated 2nd of April 2014 that as per the evidence, Vishal Yadav and Sukhdev Yadav were not invited to the wedding of Shivani Gaur (a friend of Bharti Yadav only). Vikas Yadav was invited to this wedding. Yet Vishal Yadav had the arrogance and confidence to not only go with Vikas Yadav to the wedding venue, but to accompany him to the stage and get himself photographed with the bridal couple! We have noted the casual attire of these defendants in our judgment which also points to the real purpose of their going to the wedding.

723. The evidence on record establishes that they had deliberated on their actions to conclude that the only way of ending the alliance between the deceased Nitish Katara and sister of Vikas Yadav was by eliminating Nitish Katara. The deceased was eating his dinner in the company of old friends when accosted at the party and had accompanied the defendants trustingly from the wedding of Shivani Gaur, completely unaware of the fate which was going to befall him. Nitish Katara was alone, unarmed, innocent and completely defenceless when he was brutally murdered. The destruction of the body of the deceased, concealment of all sources of identification and abscondance establish the fact that there was no emotional disturbance, that the defendants went about their criminal acts with complete clarity.

724. The murder was not an ordinary murder. It was an honour killing which was executed with extreme vengeance. The crime was certainly not a result of emotional disturbance. The learned trial judge in fact, has gravely erred in holding that the defendants were emotionally disturbed also for the reason as it was a defence of the defendants that they had no knowledge of the relationship between the deceased and Bharti Yadav.

725. Again the learned trial judges have arrived at such conclusion because they failed to consider all the material circumstances noted above but only examined the motive for the offence as a stand alone circumstance in so concluding.

(iii) Impact of post offence events

726. Let us also examine the post offence events and impact of the offence on the family of the deceased. On the 17th February, 2002, a dead body was found in a badly burnt position on Shikarpur Road (P.S. Kotwali) by one Shri Virender Singh (PW-23). On his information, Inspector K.P. Singh reached the spot; took photographs; prepared a panchnama and; a site plan. Only the left hand fingers and palm were not burnt. Post-mortem was done on the 18th of February 2002 on this dead body of an unknown person by Dr. Anil Singhal at the District Hospital, Bulandshehar, U.P. whereafter the body was kept in the mortuary. On 19th February, 2002, S.I. Anil Somania from P.S. Kavi Nagar reached Bulandshehar.

727. On receipt of information from the P.S. Kavi Nagar about the recovery of the dead body, on 21st February 2002 the complainant Nilam Katara and her son Nitin Katara and other family members reached the mortuary. The deceased was burnt to such a point, that his own mother could only suggest the identification from the small size of one unburnt palm with fingers of the hand that the body appeared to be that of Nitish Katara. The identification had to be confirmed by DNA testing. For this purpose, on 21st February, 2002, S.I. Anil Somania made an application before the CJM, Bulandshehar seeking possession of the body and its transfer to the All India Institute of Medical

Sciences (AIIMS) for DNA and finger print examination. This application was allowed and the body was removed to AIIMS.

728. The finger print samples were taken on 22nd February, 2002. On the same day, blood samples of the mother Nilam Katara and father Nishit M. Katara were taken for the DNA test as well as from dead body which were sent to the Central Forensic Laboratory at Kolkata. The finger print expert gave his report on 25th February, 2002 to the effect that the finger prints of the dead body matched the finger prints of Nitish Katara which had been obtained from the Regional Transport Office, Sarai Kale Khan, New Delhi. This report stands rejected by the trial court.

729. The DNA report however, was received only on the 6th of March, 2002 which established the body as belonging to a biological son of Nilam Katara and Shri Nishit M. Katara. It was only thereafter that the body was handed over to the family of Nitish Katara so that they could proceed for the cremation which took place on the 12th of March, 2002.

730. We have noted the above dates just to bring to the fore the magnitude of the vengeance of the defendants and the extent to which they went to destroy the body of Nitish Katara after his murder so much so that a confirmed identification even by his mother and immediate relatives was also not possible. The family of the deceased must have died a million deaths as they would have nursed such hopes of his being alive from the night of 16th/17th February, 2002 till his death was confirmed by the report of the DNA matching on 6th March, 2002. How his family would have

agonised about his safety and well being during this period. And all this merely because Nitish befriended the sister of one of them!

731. The hope of the family is manifested from the prayers in the habeas corpus petition filed by them in W.P.(Crl.)No.247/2002 wherein directions were sought for his production by the present defendants who were impleaded as respondent nos.7 and 8.

732. We were informed by Mr. P.K. Dey, learned counsel for the complainant that Mr. Nishit M. Katara was so traumatised by the loss of his son that he also expired on 3rd August, 2003. It was submitted that there is grave threat and danger to Nitish Katara's mother and brother even on date. Mr. Dey points out that Nilam Katara is under police protection even on date while his brother lives in constant fear from the reach of the defendants in distant places. Such has been the impact of the crime on the family of the deceased.

733. Before us, while arguing the appeal, Mr. Ravinder Kapoor, learned counsel for Sukhdev Yadav had challenged identity of the body.

(iv) *Motive for crime and public abhorrence*

734. We have held that the offence was carefully planned and premeditated and the murder was committed in cold blood without any provocation. It was committed because the defendants did not approve the romantic relationship between Nitish and Bharti Yadav – sister of Vikas Yadav, for the reason that the deceased did not belong to their caste and because that he belonged to a family of

government servants, therefore, not as affluent as Vikas Yadav's family. The unity of their thought, aim and purpose is apparent from the fact that the three defendants are of the same caste, two closely related, the third an employee at a family concern.

735. Both Mr. P.K. Dey and Mr. Rajesh Mahajan, learned Additional Standing Counsels for the State have vehemently urged that the crime invited public abhorrence, shook the collective conscience of the society to the core as well as the judicial conscience.

736. The motive which incited the despicable crime certainly evidences exceptional depravity and meanness. Caste divisions are a menace which the society is struggling to eradicate. The motive evinces exceptional depravity, meanness; the crime was socially abhorrent and certainly an aggravating circumstance. **[Ref. *: Machhi Singh* (para 34)]**

(v) *Absence of eye-witness - case of circumstantial evidence*

737. We now turn to the finding that the case rested on circumstantial evidence and there was no eye-witness, therefore, it was not possible to say who inflicted the injury-therefore a mitigating factor. The learned trial judge had concluded that the defendants shared a common intention to commit the offences. We have agreed with the findings of the learned trial judge. Therefore, the absence of any eye-witness or evidence as to which accused in particular caused the fatal injury is irrelevant for sentencing purposes inasmuch as the three shared the common intention to

commit the offence of murder and each would be liable for the actions of the others.

738. In this regard, we may refer to the following observations in para 30 of ***(2009) 5 SCC 740, Rameshbhai Chandubhai Rathod (1) v. State of Gujarat:***

> **"30.** The ***plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused***, that forms the foundation for conviction. ***That has nothing to do with the question of sentence*** as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentence is awarded for rape and murder and the like, there is practically no scope for having an eyewitness. They are not committed in the public view. By the very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of learned counsel for the appellant that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable."
>
> (Emphasis by us)

739. This was reiterated in ***(2008) 15 SCC 269, Shivaji v. State of Maharashtra*** wherein in para 27, it was held that in a case of

circumstantial evidence, death should not be granted cannot be an absolute rule. In the balance sheet of aggravating and mitigating circumstances that the fact that the case rests on circumstantial evidence has no rule to play. To hold the fact that the case rested on circumstantial evidence as ipso facto a mitigating factor would amount to consideration of an irrelevant aspect. It was so declared in para 49 of ***Swamy Shraddananda (2).*** Merely because the conviction rested on circumstantrial evidence is not sufficient ground for not imposing the death sentence. The learned trial Judges in the instant case have therefore misdirected themselves.

(vi) *Life imprisonment harsher than death sentence*

740. In observing that life imprisonment is harsher than the death penalty, the learned trial judge failed to consider power under Section 432 of the Cr.P.C. to apply for and secure remission of the life sentence. The learned trial judges have also not considered the aspect of remorse and repentance which was completely lacking on the part of the defendants in the present case. Both the learned trial judges have overlooked these well settled principles and erred in law.

(vii) *Post murder conduct - burning of the body*

741. It is contended by learned counsel for the State as well as the complainant that the actions of the defendants after the murder to disfigure the dead body beyond recognition and to destroy the evidence of the crime display the attitude of the defendants and

points towards their being accustomed to criminal activity, a strong aggravating factor.

742. The post offence conduct of the accused specially in causing mutilation or disappearance of the dead body is treated as an aggravating factor. Expressing strong disapproval of such conduct, in para 11 of ***(1996) 4 SCC 148, Ravindra Trimbak Chouthmal* v. *State of Maharashtra***, the court observed thus:

> "**11.** But then, it is a fit case, according to us, where, for the offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder — the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body. To these sentences, we do not, however, desire to add those awarded for offences under Sections 316 and 498-A/34, as killing of the child in the womb was not separately intended, and Section 498-A offence ceases to be of significance and importance in view of the murder of Vijaya."

For this reason, it was ordered that the sentence of seven years rigorous imprisonment for offence under Section 201/34 IPC would start running after the life imprisonment had run its course.

743. In ***(2012) 4 SCC 37, Rajendra Prahladrao Wasnik v. State of Maharashtra***, the accused left the deceased in a badly injured

condition in the open fields without even clothes. The court noted that "*this reflects the most unfortunate and abusing facet of human conduct, for which the accused has to blame no one else than his own self".* The death sentence was upheld in this case. In ***(1999) 9 SCC 581, Molai & Anr. v. State of M.P.,*** similar conduct was held to be displaying no respect for the human body.

744. Therefore, the finding of the learned trial judge that the act of burning the dead body was a separate offence and could not be treated as an aggravating circumstance to invite extreme penalty of death is erroneous and contrary to the well settled principles which would guide consideration of the facts and circumstances on record. In fact, in so concluding, the learned trial judge has gravely erred in ignoring the fact that the removal of all sources of identification and burning of the body beyond identification was part of single premeditated plan executed by the defendants.

745. The actions of the defendants manifest disrespect of human body, brutalization and its burning display depraved state of mind and lack of remorse, all of which are aggravating factors. Just as in ***Ravindra Trimbak Chouthmal,*** for commission of the offence under Section 201/34 IPC, the defendants are liable for a sentence of imprisonment which must necessarily run consecutively to the imprisonment imposed for the other offences. Therefore, the imprisonment to be undergone for this offence would commence after completion of the imprisonment for the other offences.

(viii) *Whether the passage of time since the date of commission of the offence is per se material for sentencing purposes*

746. As at present it is argued by the defence that much time has passed since the offence was committed and that this factor must be treated as a mitigating factor for sentencing. This submission completely fails to note an important aspect in many trials. More often than not, as in the present case the accused persons protracted trials. We have dealt at length on this aspect in paras 1918 to 1924 of our judgment dated 2nd April, 2014.

747. It has been held in several judgments that delay per se would not impact sentencing. In ***(2013) 9 SCC 516, Hazara Singh v. Raj Kumar & Ors.,*** it was held as under:

> **"26.** It is unfortunate that the High Court failed to appreciate that the ***reduction of sentence*** merely on the ***ground of long pending trial is not justifiable***. In *Sadha Singh* v. *State of Punjab* [*Sadha Singh* v. *State of Punjab*, (1985) 3 SCC 225 : 1985 SCC (Cri) 359] , a three-Judge Bench of this Court, while considering the identical issue which also arose for an offence under Section 307 and reduction of substantive sentence by the High Court, held as under: (SCC p. 228, paras 5-6)
>
> > "*5.* … We must confess that what ought to be the proper sentence in a given case is left to the discretion of the trial court, which discretion has to be exercised on sound judicial principles. Various relevant circumstances which have a bearing on the question of sentence have to be kept in view. Before deciding the quantum of sentence the learned Sessions Judge has to hear both the sides as required by the relevant provision of the Code of Criminal Procedure.
> >
> > *6.* In an appeal against the conviction, it is open to the High Court to alter or modify or reduce the

sentence after confirming conviction. If the High Court is of the opinion that the sentence is heavy or unduly harsh or requires to be modified, the same must be done on well-recognised judicial dicta. Therefore, we may first notice the reasons which appealed to the learned Judge to reduce the substantive sentence awarded to the appellants to sentences undergone."

27. While rejecting the similar reasons as stated by the High Court in the present case, the following conclusion arrived at by this Court is relevant: (*Sadha Singh case* [*Sadha Singh* v. *State of Punjab*, (1985) 3 SCC 225 : 1985 SCC (Cri) 359] , SCC pp. 228-29, paras 7-8)

"*7.* … The learned Judge then took notice of the fact that three co-accused of the appellants were given benefit of doubt by the trial court and acquitted them although they were also attributed causing of some injuries. If acquittal of some co-accused casts a cloud of doubt over the entire prosecution case, the whole case may be rejected. But we fail to understand how acquittal of some of the accused can have any relevance to the question of sentence awarded to those who are convicted. xxx xxx xxx.

28. Applying the same principles in *State of U.P.* v. *Nankau Prasad Misra*[(2005) 10 SCC 503 : 2005 SCC (Cri) 1615] , this Court set aside the judgment of the High Court reducing the sentence without adequate reasons."

(Emphasis supplied)

748. In the case reported at ***(2014) 4 SCC 317, Sushil Sharma v. State (NCT of Delhi),*** the offence was committed on 2nd July, 1995, the trial court convicted and sentenced the appellant to death on 3rd November, 2003. The High Court confirmed the death

sentence on 19th February, 2007. The appeal had remained pending in the Supreme Court for six years. In this background, it was submitted on behalf of the appellant that there had been a long lapse of time since imposition of a capital sentence and its consideration by the court which provided a valid ground for commuting death sentence to life imprisonment. The court noted in para 72 the submission of counsel for the appellant as well as various judicial pronouncements which were relied upon in support of this submission. The submission was countered by the State inter alia on the following submission:

> **"76.** On the aspect of delay, relying on the judgment of this Court in *Triveniben* v. *State of Gujarat* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , the counsel submitted that in this case the Constitution Bench has held that while considering whether the death sentence should be awarded or not, the time utilised in judicial proceedings up to final verdict cannot be taken into account. This is not a case of delay in disposing of mercy petition. The counsel submitted that while awarding death sentence, perception of the society is one of the considerations. The counsel submitted that this case is one of the most widely published and infamous murder case. It is a case where this Court must, by confirming the death sentence, send a strong signal to the society which will operate as an effective deterrent in future."

749. After examining the several judicial pronouncements on award of death sentence, so far as time taken in judicial proceedings is concerned, the court pointed out as follows:

> **"104.** We must also bear in mind that though, the judicial proceedings do take a long time in attaining finality, that

would not be a ground for commuting the death sentence to life imprisonment. Law in this behalf has been well settled in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] . The time taken by the courts till the final verdict is pronounced cannot come to the aid of the accused in canvassing commutation of death sentence to life imprisonment. In*Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , the Constitution Bench made it clear that though ordinarily, it is expected that even in this Court, the matters where the capital punishment is involved, will be given top priority and shall be heard and disposed of as expeditiously as possible but it could not be doubted that so long as the matter is pending in any court, before final adjudication, even the person who has been condemned or who has been sentenced to death has a ray of hope. It, therefore, could not be contended that he suffers that mental torture which a person suffers when he knows that he is to be hanged but waits for the doomsday. Therefore, the appellant cannot draw any support from the fact that from the day of the crime till the final verdict, a long time has elapsed. It must be remembered that fair trial is the right of an accused. Fair trial involves following the correct procedure and giving opportunity to the accused to probabilise his defence. In a matter such as this, hurried decision may not be in the interest of the appellant."

750. In ***W.P.(Crl.)No.77/2014, Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Ors.,*** the Constitution Bench of Supreme Court has observed thus:

"Also, time taken in court proceedings cannot be taken into account to say that there is a delay which would convert a death sentence into one for life. [See: Triveniben v. State of Gujarat, (1989) 1 SCC 678, at paras 16, 23, 72]. Equally, spending 13½ years in jail

does not mean that the petitioner has undergone a sentence for life."

751. It has been held in paras 16, 23 and 72 of the judgment reported at ***(1989) 1 SCC 678, Triveniben v. State of Gujarat*** that the time taken in court proceedings cannot be taken into account to say that if there is a delay, the death sentence should be converted into a life sentence.

752. On this issue, the Constitution Bench in ***Triveniben*** stated thus:

> **"71.** xxx xxx xxx The time taken in the judicial proceedings by way of trial and appeal was for the benefit of the accused. It was intended to ensure a fair trial to the accused and to avoid hurry-up justice. The time is spent in the public interest for proper administration of justice. If there is inordinate delay in disposal of the case, the trial court while sentencing or the appellate court while disposing of the appeal may consider the delay and the cause thereof along with other circumstances. The court before sentencing is bound to hear the parties and take into account every circumstance for and against the accused. If the court awards death sentence, notwithstanding the delay in disposal of the case, there cannot be a second look at the sentence save by way of review. There cannot be a second trial on the validity of sentence based on Article 21. The execution which is impugned is execution of a judgment and not apart from judgment. If the judgment with the sentence awarded is valid and binding, it falls to be executed in accordance with law since it is a part of the procedure established by law. Therefore, if the delay in disposal of case is not a mitigating circumstance for lesser sentence, it would be, in my opinion, wholly inappropriate to fall back upon the same delay to impeach the execution."

Reduction of sentence because of delay in trial or acquittal because a co-accused was acquitted are not relevant circumstances which would ipso facto effect sentencing.

(ix) *Possibility of reform and rehabilitation*

753. It is urged by Mr. Rajesh Mahajan, learned Standing Counsel for the State that material for this court to conclude as to whether the defendants would not commit criminal act or acts of violence in the future and whether there was any possibility of their reform and rehabilitation is amply available from the record of the trial court in respect of investigation and trial in the present case.

754. So far as the post crime, pre-trial conduct of the defendants is concerned, our attention is drawn to the material available on record and our observations thereon in our judgment dated 2nd April, 2014. After burning the body more than 50 kms from the wedding, the three defendants set about creating false alibis and absconded from justice. Two of the defendants Vikas Yadav and Vishal Yadav stage managed their arrest at Dabra in the State of M.P. and despite every effort by the Ghaziabad police which was investigating the crime, they could not be traced out. The efforts to track them included visits to home and the other places which they visited. Close relatives of the defendants would not disclose their whereabouts. Searches had to be effected in different States as well. So far as the third defendant Sukhdev Yadav is concerned, he could be arrested only on 23rd February, 2005 whence also he opened fire on the police party.

755. Ample material regarding the conduct of the defendants during the trial is available on the trial court records.

756. So far as the post conviction conduct i.e. conduct in jail is concerned, the nominal rolls have been placed on record as also the material which has been produced before this court pursuant to the orders passed by us. It is therefore, submitted that there is adequate material relating to both, offence as well as the offenders on record, which is relevant for arriving at a conclusion on this aspect of the matter and that in view thereof, there is no further necessity of inducing further evidence or placing more material on record.

757. Let us examine the post crime conduct which can be divided into three parts: (i) *conduct during investigation*; (ii) *conduct during trial and*; (iii) *conduct in jail*. These three aspects have been dealt with elaborately in the judgment dated 2nd April, 2014. Mr. Rajesh Mahajan, learned Standing Counsel for the State has tabulated these circumstances as considered in depth in the judgment which for convenience, we extract hereunder:

"*CONDUCT POST CRIME DURING INVESTIGATION*

a) In Para 72 of the judgment of conviction dated 2.4.2014, discussed the arrest of two of the accused being stage managed with definite purpose followed by dramatic entry of third accused who was arrested after firing at a police patrol party.

b) In Para 782 of the judgment, this Court has observed as to how the appellants delayed and hampered investigation by misleading the police tream at the time of the recovery of the Tata Safari vehicle.

c) In Para 792 and 793 of the judgment, this Court has laid down the manner in which the accused Vikas and Vishal obstructed the police team in obtaining their custody and remand from PS Dabra by first raising objections to the order allowing the police remand and then delaying the handing over by stating that a writ petition has been filed in the High Court of Allahabad which eventually delayed the remand till the next day.

d) In para 801, how the accused misled the police to an inter-state trip to Alwar, Rajasthan for recovery of Tata Safari. Thereafter they disclosed that vehicle could be in UP or Punjab. On 9.3.02, they led police team to Panipat, from where the vehicle was finally recovered from burnt factory premises of Vikas Yadav's father in Karnal.

e) In Para 1421 and 1422 of the judgment, this Court has observed the manner in which, after their arrest, the accused persons avoided their custody being handed over to the Ghaziabad police by filing frivolous applications and objections before the court.

f) In para 1581, finding has been returned that accused persons were absconding. Further, they stage managed their arrest from outside maalgodown at Dabra as they wielded influence in Dabra. Consequently, they delayed their custody being handed over to Ghaziabad Police. This is followed by discussion on absondance of Sukhdev Yadav.

g) In Para 1603 of the judgment, this Court has stated as to how the accused persons have violated statutory provisions and obstructed justice with respect to the abscondance of Sukhdev Yadav which is stated to be a part of a design in order to pressurize and exhaust the witnesses and take advantage of fading memories of the witnesses due to passage of time and thus resulting in contradictions and omissions.

h) In para 1611, the conduct of the accused in making no voluntary efforts to join investigation is discussed.

In para 1612, Sukhdev Yadav opening fire at police party when he was challenged and recovery of arms and ammunition from him and his arrest on 23rd February, 2005 are discussed.

i) In Para 1870 to 1880 of the judgment, this Court records the influence of the defendants resulting in deliberate lapses, gaps and defects left in the investigation. These included avoidance of taking on record by the investigating officer of best evidence of motive in the form of cards, albums etc., as the IO was under the influence of the family of the accused persons; IO not visiting the spot till February 28, 2002 leading to loss of crucial evidence; IO not obtaining report with regard to presence of any inflammable circumstance on the body of the deceased, nor lifting of soil, burnt ash for chemical examination; IO not recording certain facts in statement of Nilam Katara u/s 161 Cr.P.C.; lapse on the part of the IO in not seeking opinion of doctor with regard to recovered hammer and not making sketch of hammer; mistake by prosecution in dropping Bharti Yadav as witness on March 30, 2005; mistake in exhibiting statement of Kamal Kishore u/s 161 Cr.P.C.; failure on the part of IO to analyse the call records and documents, verification of emails; non conduct of TIP.

j) In Para 1881, this court lamented the shocking state of affairs wherein Bharti Yadav, an educated 23 year old young lady, was terrorized and physically confined by her immediate family and brow-beaten into submission.

k) In para 1966, the aspects of Vikas and Vishal misleading the investigations with regard to recovery of Tata Safari are discussed.

CONDUCT DURING TRIAL:

a) In Para 71, it is pointed out how in the first trial, out of 43 witnesses, all except one, including police officials, had to be declared hostile or were won over and influenced.
b) In Para 73 and Para 446 of the judgment, this Court has stated as to how the well-placed accused persons had put pressure on the public witnesses as well as the public prosecutor in the case.

c) In Para 76, obstruction of trial, subverting due process, suborning witnesses and leading false evidence on the part of accused is discussed.

d) Para 78, intimidation of witnesses, suggestion of answers to not only defence but also prosecution witnesses, to compel contradictions and omissions on record, setting up false pleas in applications and leading false evidence are discussed.

e) In para 81 control over appearance of witnesses in court and successful avoidance from testifying of Bharti Yadav for over three and a half years is discussed.

f) In Para 160, Para 163, Para 189-191, Para 996 and Para 2024 of the judgment, this Court has illustrated the pressure which had been put on PW Bharti Singh Yadav, both prior to the incident and subsequent to the incident wherein she was spirited away from her house to Faridabad and out of India subsequently, in order to save her brothers at all costs. This court observed that such facts have been denied by her which stand established by documentary evidence and any testimony to the contrary cannot be relied on.

g) In Para 392 and Para 393, this Court has stated as to how the testimony of PW42, Bhawna Yadav, was tutored to favour the accused persons as she initially denied all questions put to her and on a later date changed her stand to depose that she does not remember the number of times she had spoken on the phone to Nilam Katara, Nitish Katara, Bharat Diwakar and Gaurav Gupta.
h) In Para 602, 603 and Para 1999 of the judgment, this Court has deprecated the arrogance with which the appellants conducted themselves during trial and the impunity with which they had set up a false defence which reeks of the sense that they deem themselves to be above the law.

i) In Para 719 of the judgment, this Court has stated as to how PW 23 who is stated to be a witness to the recovery of the body is influenced by the accused persons in so far as in his testimony in

court he could not give the time and date when he saw the police at the spot where the body was found.

(j) In para 827, a finding was returned with regard to Vikas and Vishal Yadav setting up a false plea that they had gone to wedding of Shivani Gaur on February 16, 2002 not in a Tata Safari but in a Mercedes Car.

(k) In para 837 to 839 the aspect of doctored photograph Ex PW 6/D3 showing deceased wearing a round watch with metallic chain is discussed. This is followed by discussion on PW-6 Archana Sharma acting at the instance of accused persons and production of photographs by her which were not genuine.

(l) In Para 841 of the judgment, this Court while dealing with the deposition of PW-15, Vijay Kumar, has stated the manner in which the accused persons had influenced the said witness in supporting their defence plea by producing morphed photographs.

(m) In Para 1063 of the judgment, this Court while considering the testimony of PW 32, Ct. Satender Pal Singh, has noted the pressure which was upon him as regards his testimony which was evident from the sense of hopelessness expressed by him and that despite best assurances from the trial court, the same failed to instil confidence and as sense of security in him.

(n) In Para 1069 and Para 1930 of the judgment, this Court has expressed its view upon the testimony of PW 32 and PW 28 stating that they reflect the manner in which the police constables had either been won over or sufficiently intimidated to resile from the statement under Section 161 CrPC.

(o) In Para 1431 of the judgment, it has been held that to negate the prosecution allegation of abscondance all accused led defence evidence of plea of alibi, which ultimately was found to be false.

(p) In Para 1613, the conclusion with regard to the plea of alibi being proved to be false is discussed.

(q) In Para 1695, Para 1698, Para 1699 and Para 1940 of the judgment, this Court has reflected upon how Bharat Diwakar (PW

25) and Gaurav Gupta (PW 26) were won over and influenced by the accused persons as during their examination in court they resiled from the statements made to the police in order to dilute the prosecution story.

(r) In Para 1840, Para 1842, Para 1926 and Para 1995 of the judgment, this Court has observed the duress faced by PW 33, Ajay Kumar, who expressed that he had received threats to his and his family's life and to be roped in false cases at the instance of the accused persons in order to make him change his statement and give a favourable statement in favour of the accused persons. He further stated that threats were also received from police officials and that he had apprehension to his life and security.

(s) In Para 1917, this court under eight different heads has elaborately discussed the conduct of the accused persons.

(t) In Para 1918, the setting up of false pleas that Vikas Yadav and Vishal Yadav were at the house of DW-1 at the time when they were spotted by Ajay Katara and subsequently their alibi from February 17 to 23, 2002 and alibi of Sukhdev Yadav that he was in his native village; this is followed by leading false evidence about going to marriage of Shivani Gaur in a Mercedes and not a Tata Safari.

(u) In sub paras (c) to Para 1918 and subsequent paras upto Para 1923 of the judgment, this Court had made categorical observation as regards the delay caused to the trial by the accused persons by deliberately avoiding the appearance of PW 38, Bharti Singh Yadav, before the trial court on one pretext or the other. The court observed that how her movements after the incident were orchestrated by her family members as she was shifted out of Ghaziabad and eventually sent to the UK. The statement under Section 161 CrPC was also recorded in the presence of her father. This Court had also observed that the address provided of the said witness was also incorrect as a Nottingham address was given while she was staying in London. The witness finally appeared only when steps were taken to revoke her passport. The court made strong observations with regard to influence, reach and sheer arrogance of the accused and the impunity with which the court

orders were flouted and undertakings to produce the witness were repeatedly violated, reflecting the mindset of the accused persons in para 1923.

(v) In Paras 1925-1926 intimidation of witness Ajay Kumar/Katara is discussed in detail.

(w) In Para 1927, it is observed that the record reflects that the accused in the present case wielded political influence as well as economic and physical power. As a result thereof various witnesses deposed either out of fear, pressure, threat or because of the influence of their relationship with accused persons. The variations in the evidence of the witnesses between the statements u/s 161 CrPC and court testimonies establish the pressure borne by the witnesses. The witnesses included Shivani Arora nee Gaur, BhawnaYadav, Ct. Inderjeet Singh, Ct. Satender Pal Singh, Rohit Gaur, Bharat Diwakar, Gaurav Gupta and Virender Singh.

(x) In Para 1929 and Para 1959 of the judgment, it has been observed as to how the defence has worked as a part of a design in defeating the prosecution case by manufacturing a false defence so much as the witnesses resile in their testimonies given in the court on the same aspects. This Court had infact considered criminal action against the witnesses deposing falsely bt took a lenient view taking into consideration the lapse of time.

(y) In Paras 1935-1943 of the judgment, it is stated as to how PW 8, Rohit Gaur (in Sukhdev Yadav trial) too had turned hostile to the extent of not remembering who accompanied Vikas Yadav to the wedding and further denying making any statement to the police.

(z) In Para 1942-1943 of the judgment, this Court observed that, during the trial there were instances of shouting in court and blatant tutoring of witnesses inside the court and preventing the testimonies from being recorded, and thereby displaying no respect for process of law are discussed.

aa) In para 1944, the defence counsels tutoring and suggesting answers to the witnesses is discussed. Bharat Diwakar being under the influence of accused persons is discussed in para 1945; defence

counsel suggesting answers to DW-3 Rajender Chaudhary finds mention in para 1946; interference by defence counsel during examination of DW-1 finds mention in para 1948; Vikas Yadav whispering in the ear of PW-15 Vikram Garg and observations with regard to obstruction of trial are discussed in para 1949; the design in improvements, contradictions and facts resiled from by the witnesses finds mention in para 1958.

bb) In Para 71, Para 1953, Para 1955, Para 1957, Para 1994 as well as in Para 2004 of the judgment, this Court has stated as to how police witnesses and other crucial witnesses such as Bharti Yadav, Bhawna Yadav, Shivani Gaur etc. had been either won over or influenced by or on behalf of the accused persons.

cc) In Paras 79, 1972 and 1973 of the judgment, this Court has observed as to how the accused person tried their best to brow-beat and intimidate the prosecutors who were conducting the prosecution of the case, by sending legal notice, filing complaints and civil suits against the prosecutors.

dd) In Paras 1987 and 1988 of the judgment, this Court has noted as to how the accused persons had manipulated the court records to include papers which were seemingly introduced after the passing of the judgment."

758. In para 2004 of our judgment dated 2nd April, 2014, we have been compelled to make the following observations:

> "Inference needs to be drawn against the accused persons who deliberately misled investigators; suborn witnesses; destroy evidence; win over crucial witnesses; protract trial so that crucial evidence is lost or forgotten by witnesses... The education, economic status, position occupied by the witnesses is immaterial when accused persons go about exercising influence – it is only the nature of influence which may vary – so as to succeed in their dishonest designs... This case has distressed judicial conscience not only because of manner of commission of crime, but also because of the staunch

efforts made to obstruct the process of dispensation of justice..."

759. Our attention is drawn to the pronouncement of the Supreme Court reported at ***(2003) 12 SCC 199, Praveen Kumar v. State of Karnataka*** wherein it was held that abscondance for four years indicated that possibility of rehabilitation was nil.

760. The above narration would show that at the same time, every effort was made to weaken the prosecution case.

761. Mr. Rajesh Mahajan, learned additional Standing Counsel for the State has pointed out that in the judgment reported at ***(2013) 13 SCC 1, Yakub Abdul Razak Memon v. State of Maharashtra,*** cooperation with the investigating team has been taken as a mitigating circumstance while non-cooperation, including misleading investigators, would be treated as an aggravating circumstance. The post crime conduct of the defendants noted above must be taken as an aggravating circumstance. In the present cases as well, therefore, the abscondance, failure to co-operate with the investigators, the pressure put on the witnesses and prosecutors and obstructions to fair trials have to be treated as aggravating circumstances. These important circumstances do not find even a mention in the orders of the learned trial judges.

(x) Family has not abandoned Vikas Yadav

762. Mr. Sumeet Verma, learned counsel for Vikas Yadav has urged that the family of the appellant including his mother, father, sister, brother and grandfather have supported him at every stage

and have still not abandoned him. Mr. Verma has referred to the various applications seeking interim bail supported by their affidavit. It is necessary to examine the purpose of these applications.

(i) *Crl.M.B.No.1218/2009* dated 9th October, 2009 was filed by Vikas Yadav seeking interim bail for a period of one month on two grounds, firstly on the ground that his grandfather Sh. Tejpal Yadav was old and unwell and desired to spent time with the appellant and secondly that his sister Bharti Yadav was to get married on 1st November, 2009 which ceremony was proceeded by family functions to be held on 20th October, 2009; 24th October, 2009 and 28th October, 2009. In as much as the application referred to facts relating to her marriage, Vikas Yadav was in jail, the facts in regard thereto were supported by Bharti Yadav's affidavit.

(ii) *Crl.M.B.No.535/2011* dated 23rd March, 2011, under Section 389 read with Section 482 of the CrPC seeking interim bail on the ground of re-establishing ties with society and family including a 91 year old grandfather. Vikas Yadav had complained that his application for his prayer for regular suspension of sentence (Crl.M.B. 1301/2008) was dismissed by the order dated 7th August, 2009. On his application for interim bail (Crl.M.B. 1218/2009) by the order dated 23rd October, 2009, he was permitted only custody parole for a few hours to attend the marriage ceremony. He also pointed out that he had filed SLP (Crl.) 8592/2009 wherein by the order dated 27th November, 2009,

his prayer for regular suspension of sentence was not granted by the Supreme Court but he was given liberty to approach this court. Making grievance that he had undertone nine years incarceration and that his grandfather Sh. Tejpal Yadav was more than 91 years of age suffering from old age diseases osteoarthritis and deep vein thrombosis who earnestly desired that he spends some time with Vikas Yadav. In the application, reference was made to activities in which Sh. Tejpal Yadav was involved. It was also stated that his brother Kunal Yadav was scheduled to get married on 29th April, 2011; and functions in relation thereto i.e. the ring ceremony on 14th November, 2009; lagan ceremony on 25th April, 2009 were to be held followed by two receptions, one on 1st May, 2011 at Chandigarh and the second on 6th May, 2011 in District Badayun, U.P. Vikas Yadav also wished to attend kirtan and mehandi being hosted by the bride side on 23rd and 27th April, 2011. This application was supported by the affidavit of Sh. Tejpal Yadav referring to his sicknesss as well as the marriage of his grandson Kunal and expressing desire to spent time with Vikas Yadav and also for him to make arrangements for the marriage functions and participate therein. On this application, Vikas Yadav was granted custody parole to attend the ring ceremony and wedding of his real brother. Against the order dated 26th April, 2011, also the appellant filed a Special Leave Petition being SLP(Crl.) 8592/2009

(iii) *Crl.M.B.No.1741/2011* - Mr. Sumeet Verma has drawn our attention to Crl.M.B. 1741/2011 dated 29th September, 2011 filed by Vikas Yadav. The appellant prayed for suspension of sentence.

This application was supported by an affidavit of Smt. Umlesh Yadav, mother of Vikas Yadav. The application was dismissed as withdrawn on 21st October, 2011.

(iv) *Crl.M.No.10813/2011* dated 8th November, 2011 was filed on behalf of Vikas Yadav supported by an affidavit of Sh. D.P. Singh Yadav, his father placing the order dated 27th November, 2009 in SLP (CRL.) 8592/2009 disposing of the petition for regular suspension of sentence with liberty to seek expeditious hearing of the appeal or move a fresh bail application.

(v) *Crl.M.B.No.1944/2011* - On 5th November, 2011, Vikas Yadav filed Crl.M.B.1944/2011 seeking suspension of sentence of four days and release on interim bail to execute a registered general power of attorney in favour of his mother Umlesh Yadav to manage and control affairs of the freehold residential house no.R-4/18, Block-4, Raj Nagar, Ghaziabad. This application would obviously be supported by his mother's affidavit.

This application was considered on 22nd November, 2011 when one day custody parole was permitted to the applicant for which purpose his counsel was required to intimate the learned additional standing counsel for the state and the jail superintendent about the date on which he was required to appear before the concerned authorities. On such date, the Jail Superintendent was directed to ensure that the applicant returns to the jail on the same day after the documents are executed.

763. Three persons of a particular community got together to eliminate a young life from another community who dared to

befriend sister of one of them and cousin of another. The offence was committed in the instant case on a misconceived belief that the defendant was upholding the honour of the family, caste and the community.

764. To keep this sister away from deposing in the court, concerted effort was made by the defendants, as well as the father and uncle of the defendant for a period of 3½ years. When Bharti Yadav gave her deposition, Vikas Yadav sought exemption from remaining present in court. During the course of submissions, it has been pointed out that the sister of the defendant has been married in the same community. It certainly cannot be expected that in these circumstances, the family would take a stand against the defendants. The filing of the affidavits by the family members or family support for the defendants is therefore, of no consequence so far as sentencing is concerned.

(xi) Age and antecedents

765. It has been argued by Mr. Sumeet Verma as well as Mr. Sanjay Jain and Chaman Sharma, Advocates that the age and antecedents of the defendants necessarily were such that it stands established that they had no propensity towards crime.

766. It is urged by Mr. Sumeet Verma and Mr. Sanjay Jain that regard must be had to the young age of the accused, their background and socio-economic strata; that Vikas Yadav and Vishal Yadav are highly educated and have roots in the society.

767. Mr. P.K. Dey, learned counsel for the complainant has on the other hand urged at length that Vikas Yadav has a criminal state of mind and that his criminal activity started in the year 1991. In his written submissions, Mr. Dey, learned counsel has pointed out the following:

"Vikas Yadav - (1) He was prosecuted for the murder of Devendra P. Singh. The prosecution was withdrawn when his father D.P. Yadav was a Minister in U.P. government (2) He was also detained under the National Security Act though it was subsequently quashed. (3) He was prosecuted in Jessica Lal murder case and convicted under Section 201 of IPC. While on bail in the Jessica case, he committed the murder of Nitish. The Supreme Court in ***(2010) 6 SCC 1, Manu Sharma v. State*** (paras 117, 125 and 126) referred to his conduct which displayed his scant regard for law. (4) He was prosecuted under Section 25 of Arms Act at Dabra, Gwalior.

Vishal Yadav - He was prosecuted under Section 25 of Arms Act at Dabra, Gwalior and he was also prosecuted in two cases one in under Section 297/337 IPC and under Punjab Excise Act.

Sukhdev Yadav - He was absconding for three years, and when the police tried to apprehend him, he fired on the police party, a case under Section 307 IPC has been registered against him. Led false defence evidence (Head No.XV - Pages 849-857, at paras 1588 and 1600-1603)."

768. It has further been contended that Vikas and Vishal Yadav were arrested in case under the Arms Act on 23rd February, 2002 at

Dabra in M.P. and that they had committed several crimes during trial and during custody including tampering with court records, threatening prosecutors and prosecution witnesses. They have misused their qualifications to subvert the process of law. Mr. P.K. Dey has vehemently urged that the antecedents of the third defendant would also reflect his propensity towards crime.

769. Let us firstly examine the profile of the defendants and the circumstances brought out on record in respect of the offence. It is contended by learned counsels for all the defendants that they were of young ages, a mitigating factor. On the night of 16th/17th February, 2002 when the offence was committed, Vikas Yadav was aged 26 years. We have been informed that Vikas Yadav is a qualified engineer who had also obtained a degree in Masters in Business Administration.

770. Vishal Yadav was aged 24 years at the time of the offence. Vishal Yadav had done his schooling from the Delhi Public School, Ghaziabad followed by the graduation from the Delhi University.

771. Sukhdev Yadav was aged 27 years at the time of the offence and was working in the liquor shop at Buland Shahr, U.P. which belonged to the father of Vikas Yadav.

772. Vikas Yadav has also contended that he was standing for assembly elections which were to be scheduled shortly after the incident. Both Vikas Yadav and Vishal Yadav are managing several properties and as emerges in the inquiry are extremely well placed in life.

773. Vishal Yadav was even in February, 2002 a well educated married man with a child as well.

774. Sukhdev Yadav, a matured man, was an employee of the father of Vikas Yadav and a father of four children at that time. He was also not of such vulnerable age that he did not understand the import of his actions. The three defendants were certainly so stationed that they fully understood the nature and impact of their actions.

775. The age of the defendants has been pressed as a mitigating factor. The defendants at the time of commission of the crime were not so young for their age to come within the ambit of consideration as a mitigating factor. They were not of an age bordering juvenility but were of an age when they possessed the maturity to understand completely the nature of their actions.

776. It is trite that the age of the accused by itself is not a determinative factor against award of the death sentence (**Ref. : *Dhananjoy, Jai Kumar, Shivu, Ramdeo Chauhan, Atbir and Vikram Singh***).

777. Mr. Rajesh Mahajan, leanred Additional Standing Counsel for State has drawn our attention to para 12 of the pronouncement reported at ***(1991) 3 SCC 471, Sevaka Perumal, etc. v. State of Tamil Nadu*** wherein a similar submission was repelled by the Supreme Court observing as follows:

> **"12.** Undoubtedly under Section 235(2) of Code of Criminal Procedure, the accused is entitled to an opportunity to adduce evidence and if need be the case

> is to be adjourned to another date. There is illegality to convict and to impose sentence on the same day. It is true as contended for the State that under Section 309(2) third proviso brought by Amendment Act, 1978 no adjournment should be granted for the purpose only of enabling the accused person to show cause against sentence to be imposed upon him. Under Section 235(2) when the accused has been given right to be heard on the question of sentence it is a valuable right. To make that right meaningful the procedure adopted should be suitably moulded and (*sic*) the accused given an opportunity to adduce evidence on the nature of the sentence. The hearing may be on the same day if the parties are ready or be adjourned to a next date but once the court after giving opportunity proposes to impose appropriate sentence there is no need to adjourn the case any further thereon. No doubt the Sessions Judge needed to adjourn the case under Section 235(2) to next date but in the High Court the counsel was directed to show any additional grounds on the question of sentence. The High Court observed that the counsel was unable to give any additional ground. ***It is further contended that the appellants are young men. They are the breadwinners of their family each consisting of a young wife, minor child and aged parents and that, therefore, the death sentence may be converted into life. We find no force. These compassionate grounds would always be present in most cases and are not relevant for interference.*** Thus we find no infirmity in the sentence awarded by the Sessions Court and confirmed by the High Court warranting interference. The appeals are accordingly dismissed."

778. It is not an inflexible rule that in every case where the accused is a young person, death sentence cannot be granted. The final adjudication rests on a consideration of all relevant facts and circumstances.

779. The discussion by us would show that the defendants in the instant case have no respect at all for the law and the judicial system. While on bail in the *Jessica Lal murder case*, Vikas Yadav has committed the offence in the present case. It has been urged by Mr. Sumeet Verma, learned counsel that Vikas Yadav was found guilty only for commission of offence under Section 201 of the IPC in the *Jessica Lal murder case* and not for any serious offence. Learned counsel would urge that this conviction is irrelevant for consideration of a sentence for commission of the offence of murder.

780. Let us examine the allegations for which Vikas Yadav was tried and found guilty in the *Jessica Lal murder case*. The judgment of the Supreme Court in the case is reported at ***(2010) 6 SCC 1, Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi):*** We may briefly notice the essential facts and the allegations against Vikas Yadav in this case as they point to the mindset of the defendant. On the 29th of April, 1999, Vikas Yadav had accompanied Sidhartha Vashisht @ Manu Sharma, Amandeep Singh Gill and Alok Khanna to the Tamarind Cafe in a black Tata Safari bearing no.CH-01-W-6535 where a Thursday night party was going on. At about 2:00 am, Manu Sharma asked for some drinks of liquor, however, the waiter did not serve the same as the party was already over. On this, Manu Sharma took out a .22" calibre pistol and fired one shot at the roof while another shot was fired at Jessica Lal (working as a waitress) which hit her near the left eye as a result of which she was declared dead in the early

hours of 30th April, 1999 at the Apollo Hospital. Manu Sharma and his associates abandoned the vehicle while making good their hasty escape after the shooting.

781. On receipt of an information about the incident, the police reached the Tamarind Cafe at about 2:30/2:45 am on 30th April, 1999 and directed PW-30 (Shrawan Kumar), a home guard constable to keep a vigil at the parking lot so that nobody is allowed to take the cars parked there. While on duty, this guard saw a while Tata Sierra vehicle, occupied by two persons on the front seats, bringing in their vehicle slowly and stopping the same near the Tata Safari. Vikas Yadav got out and opened the Tata Safari with a key. Despite being told by the guard not to do so, he forcibly entered the Tata Safari, started the vehicle and drove away with it. The guard gave a lathi blow on the last window pane on the driver's side on the Tata Safari, as a result of which, the window pane broke. The witness identified Amardeep Singh Gill who had driven the Tata Sierra and Vikas Yadav who accompanied him and as the person who forcibly took away the Tata Safari. The Tata Safari was subsequently recovered from Noida on the 2nd of May 1999 when a live cartridge of a .22" weapon bearing a Mark 'C' was recovered from the vehicle. Two empty cartridge cases of the .22" with 'C' Mark were recovered from the spot of the murder and the mutilated lead recovered from the skull of the deceased was of .22" which could have been fired from the standard .22" calibre fire arm. Manu Sharma admitted that he possessed a fire

arm licence and that he also owned a .22" bore Beretta pistol made in Italy. The weapon of offence was not recovered.

782. On these facts, while Manu Sharma was charged for commission of an offence under Sections 302, 201 read with 120B IPC as well as the Arms Act, Vikas Yadav and Amardeep Singh Gill was charged with commission of offence under Sections 201 read with 120B IPC.

783. The judgment of acquittal by the trial judge dated 21st February, 2006 was reversed on the State appeal by the Division Bench of this court inter alia holding that Vikas Yadav with the other co-accused had come to the Cafe in the said Tata Safari and was present at the time of the incident. The Tata Safari was abandoned by Manu Sharma at the time of his escape which was subsequently removed from outside the Cafe pursuant to a conspiracy between Vikas Yadav, Amardeep Singh Gill and Manu Sharma. It was consequently held that they were guilty for commission of the offences under Section 201 read with 120B IPC by a separate judgment dated 20th December, 2006. This court had handed sentences of two to four years of rigorous imprisonment each and a fine of Rs.2,000/- each and in default three months of imprisonment under Section 201/120B of the IPC.

784. It appears that Vikas Yadav was on bail in this case when he committed the offence in the present case on the night intervening 16th/17th February, 2002. The judgments in *Jessica Lal* were not placed before us during arguments in the appeals against conviction and examination thereof would show a striking parallels

between the present case and what transpired in *Jessica Lal's murder* trial. The large number of witnesses turning hostile; challenge to identification on identical grounds as in the present case; objection to the make of the vehicle; the dispute with regard to identification; the grounds on which recoveries were assailed and; the nature of the expert witness evidence (ballistic expert in Jessica Lal's case and the medical expert in the present case), are to name a few parities.

785. We find that, just as in the present case, in Jessica Lal's case as well [para 47 at pages 176-177 of] (***2007) 93 DRJ 145, State v. Sidharth Vashisht & Ors.***, the Division Bench has noted that an application dated 16th August, 1999 was "*clearly a plant in judicial record*". It was noted that there was no reference to any such application in any proceedings of Magistrate and that "*even if it was filed, it was only an eye-wash, not to be pursued and, in fact, it was not pursued at all*". In our judgment dated 2nd April, 2014, we have also held so with regard to an application which was sought to be relied upon by Vikas Yadav before us. It is perhaps a sheer coincidence that in both cases, a black Tata Safari was involved and that the city of Karnal has prominently figured.

786. Though Vikas Yadav was not found guilty for commission of the offence under Section 302, but his conduct amply illustrate the mindset and the arrogance of the defendant that he could actually take away the vehicle which was under police guard. It reflects complete lack of respect for authority and the law and

manifests a confidence that he is above law, that even the long arms of law cannot touch him.

787. While on bail in this case, Nitish Katara was murdered on the night of 16th/17th February, 2002.

788. The circumstances in *Jessica Lal* murder, the manner of commission of murder committed in the presence of Vikas Yadav and the manner in which he committed the offence of Section 201 of the IPC in that case are certainly relevant for assessment for his propensity to commit offences in the future.

789. We also note that the conduct of Vikas Yadav clearly displays criminality in attitude as, from being a by-stander in the commission of the offence of murder in *Jessica Lal's* murder, he has been actually involved in the murder in the present case, even while standing trial in the previous case. This is certainly an important circumstance which points towards the propensity towards crime.

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

> ***"Swinging fortunes"***
> **169.** Swinging fortunes of the accused on the issue of determination of guilt and sentence at the hand of criminal justice system is something which is perplexing

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

791. In para 73 of our judgment dated 2nd April, 2014, we have observed as follows:

> "73. Despite the investigation being conducted under judicial scrutiny of not only the Chief Judicial Magistrate, Ghaziabad but also this court in Crl.Writ No.247/2002, before us police action has been subjected to protracted objections. ***The trials bring to fore the manner in which well-placed accused persons are able to put pressure on the public witnesses and public prosecutors in the very capital of India, in a trial court room not even half a kilometer from this court, and barely a kilometer from the Supreme Court,*** as the discussion hereafter will amply demonstrate."
>
> (Emphasis by us)

792. Let us briefly advert to the consideration of the very circumstances pressed before us, by the Supreme Court in ***2014 SCC OnLine SC 844, Mofil Khan & Anr. v. State of Jharkhand*** which reads as follows:

> **"62.** In the ***instant case***, the ***mitigating circumstances under which the appellants seek refuge have failed to convince us.*** The ***age*** of the appellants ***is not a relevant circumstance in the present case***. They were middle

aged at the time of commission of the offence and their ***faculties were ripe*** enough to ***comprehend the implications of their actions*** and therefore, do not warrant pardon of this Court. Secondly, ***the circumstance that the appellants have a family and old aged parents etc. does not convinces us***, especially in light of the fact that the parents themselves have testified against the appellant's act of uprooting their brother's family and their utter disregard for blood relations. Thirdly, the mere fact that ***some of the accused persons of young age have been awarded a lesser sentence*** than death sentence can ***not be made a ground for commuting the sentence of death to imprisonment for life.*** The ***manner in which the crime was committed*** on the helpless members of a family including children of tender age and child with locomotive disability and ***design of the accused-appellants to eliminate the whole family*** justifies the grant of death sentence. Lastly, the ***manner of the commission of crime***, the ***diabolic murder*** of the young and innocent children of deceased-Haneef Khan for property and ***choice of the day of commission*** of crime by the appellants belittles the argument with respect to possibility of reformation of the appellants and their possible rehabilitation.

63. In our considered view, the "***rarest of the rare***" case exists ***when an accused would be a menace, threat and anti-thetical to harmony*** in the society. Especially in cases where an ***accused does not act on provocation***, acting in spur of the moment ***but meticulously executes a deliberately planned crime inspite of understanding the probable consequence of his act***, the death sentence may be the most appropriate punishment. We are mindful that ***criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society.*** Keeping in view the said principle of proportionality of sentence or what it termed as "just-

> desert" for the vile act of slaughtering eight lives including four innocent minors and a physically infirm child whereby an entire family is exterminated, we cannot resist from concluding that the depravity of the appellant's offence would attract no lesser sentence than the death penalty."
>
> (Emphasis by us)

793. It cannot be disputed that the murder in the present case was committed with utmost brutality and shook the collective conscience of the society to the hilt. The conduct of two of the defendants Vikas Yadav and Vishal Yadav after conviction suggests that their education in good institutions and their placement in society, instead of inculcating discipline, has led to creation of an arrogance that their position in society places them above the law and they continue to exhibit lack of respect for the discipline of law. Instead of motivating them to abide by the law, even after commission of the crime, they have acted in the worst possible manner during investigation; before the learned trial court as well as in the jail. In the given circumstances, their age, qualifications and social status certainly do not mitigate their culpability. Despite convictions they show no concern for society and persist in aggressively manipulating the systems.

794. In the present case, it would certainly be a travesty of justice if the age, education and economic status of the defendants was accepted as a mitigating factor so far as sentencing is concerned.

(xii) *Finding that death penalty is not deterrent*

795. The learned trial judge in the order dated 30th May, 2008 was further of the view that it is not the death penalty which was the deterrent inasmuch as the person is hung to death in a few seconds and that it is the life imprisonment which is a deterrent wherein a convict dies every moment in jail. These observations may be correct if life imprisonment meant the remainder of the convict's life. However, in so stating, the learned trial judge has based her conclusions on a personal opinion in ignorance of provisions of Sections 432 and 433 of the Code of Criminal Procedure, a view which has to be treated as unreasonable.

(xiii) *Murder - not an honour killing*

796. So far as the order on sentence dated 12th July, 2011 with regard to Sukhdev Yadav @ Pehalwan is concerned, the learned trial judge has recorded that such a situation may not describe the case as a murder committed as "*honour killing*". This finding is contrary to the record as well as our judgment dated 2nd April, 2014. The circumstances of the criminal have also not been considered by the learned trial judge.

(xiv) *Possibility of reform and rehabilitation and its impact on imposition of death penalty*

797. The consideration of the entirety of the circumstances established by the prosecution which have been detailed in our judgment dated 2nd April, 2014 especially with regard to the

meticulous planning and execution of the crimes; the brutality with which they were executed and our above discussion on the various other factors and circumstances pressed before us certainly brings the present case in the category of *'rarest of rare'* cases. However, so far as imposition of the death sentence is concerned, it is well settled that a case falling in the rarest of rare category would per se not invite imposition of the death penalty but the important factor with regard to the possibility of reform and rehabilitation of the offender has to be examined.

798. It is contended on behalf of the defendants that the State has not led evidence in accordance with ***Bachan Singh*** to show that the accused persons are beyond possibility of reformation and rehabilitation and therefore, death sentence cannot be imposed against the defendants. The Supreme Court has repeatedly held that it is open to the court to examine the material in this regard on the available record.

799. We have discussed heretofore the nature of hearing and the factors which are required to be considered by the court in deciding upon the appropriate sentence (***Santa Singh***). Both the prosecution and the defendant are required to be given an opportunity to bring relevant material on record. We have noted the principle that in case the State fails to produce any material on record, the court could ascertain from the available material on record, if there are any mitigating factors favouring the accused. In case a proper pre-sentence hearing has not been afforded, it is open to the appellate court to do so.

800. It is thus, well settled that material with regard to sentencing can be gathered from the earlier stage of the proceedings. In the present case, we have extensively noted the post-crime conduct of the defendants. The State and the complainant have urged that given the nature of the crimes as well as the conduct of the defendants, they ought not to go unpunished and that enhanced punishment is necessary to ensure the adequacy of the sentence.

801. Mr. P.K. Dey, learned counsel for complainant has submitted that while in custody during trial and post conviction, the aforenoticed conduct of Vikas Yadav and Vishal Yadav in fact tantamounts to commission of several criminal offences. He has enumerated the following:

> "The convicts, especially Vikas and Vishal, have committed several offences while in custody; (a) threatening the prosecution witnesses being an offence under Section 503/504; (b) intimidating the Public Prosecutor being an offence under Section 503/504 and 189; (c) not allowing Bharti to come and depose being an offence under Section 173 and 187; (d) absconding after the commission of the crime being an offence under Section 172; (e) making a false statement being an offence under Section 177; (f) producing false witnesses in defence being an offence under Section 191 read with Section 107; (g) moving false applications in the court being an offence under Section 192; (h) tampering of the court records being an offence under Sections 196, 464 and 466 read with Section 107 and (i) escape from custody being an offence under Section 224."

802. It is urged that the above acts were committed by the defendants after their arrest and continued till 2013; that these acts are not just crimes but more gravely they tantamount to obstruction or interference in the administration of justice and strike a blow to the rule of law. Learned counsel would contend that these acts prove beyond doubt that the defendants have no remorse and are beyond reformation.

803. It is contended by Mr. Sumeet Verma, learned cousnel that the appellant Vikas Yadav has undergone lengthy incarceration of more than 12 years.

804. As per the nominal roll placed before us, Vikas Yadav has been in custody in the present case since 25th February, 2002. He has gone on custody parole by the order dated 23rd October, 2009 on 1st November, 2009 to attend the marriage ceremony of his sister from three hours before the 'barat' and till the 'doli' in the morning. Thereafter by the order dated 7th April, 2011, he was permitted to go in custody firstly on 14th April, 2011 to attend the ring ceremony of brother Kunal at Hyatt Regency Hotel for two hours and secondly on 29th April, 2011 to attend his marriage at Umrao Hotel and Resort, NH-8 from 6:00 pm to early hours of 30th April, 2011. These were two occasions when he was permitted by the court.

805. However, we have discussed hereinabove that Vikas Yadav has repeatedly gone out of jail post conviction on the pretext of hospital visits. In addition, he has had an unwarranted hospital stay w.e.f. 10th October, 2011 to 4th November, 2011 which period we

have held cannot be treated as a period during which he underwent imprisonment.

806. Vishal Yadav was arrested in the present case on 25th February, 2002 and admitted to bail on 11th October, 2005 as an undertrial. He came to be lodged in the prison upon his conviction of 28th May, 2002. It is submitted by Mr. Sanjay Jain that both while on bail or when he was granted suspension of sentence, there has been no complaint against the conduct of Vishal Yadav. It is submitted that he does not belong to the family of Vikas Yadav. He is a married man with a daughter aged 12 years and deserves leniency.

807. With regard to Vishal Yadav's argument with regard to marriage of his sister in a different caste, Mr. P.K. Dey submits that this marriage took place more than 12 years after the murder of Nitish Katara. He further submits that so far as his brother's marriage is concerned, the same did not survive for reasons best known to Vishal Yadav's family.

808. The closeness of Vikas Yadav and Vishal Yadav and their complicity in the crime and the course of events thereafter is evident from the fact that in the record of Batra Hospital, in 2004 Vishal Yadav has given his address as that of Mr. D.P. Yadav (father of Vikas Yadav) at 15, Balwant Rai Mehta's Lane, New Delhi. After the crime, they also absconded and were arrested together.

809. So far as Sukhdev Yadav is concerned, he got together with the other two defendants who are from the same caste and

committed the heinous crimes. He remained absconding for over three years after crime till he was arrested on 23rd February, 2005. All efforts to arrest him including issuance of proclamation and attachment of property were of no avail. Even when the police party went to arrest him, he opened fire pursuant to which a case under Section 307 IPC bearing FIR No.56/05 was registered against him by Police Station Dewaria in District Kushi Nagar. Another FIR No.57/05 was also registered against him under the Arms Act. Sukhdev Yadav's abscondance for over three years appears to be a part of the clear design to pressurize and exhaust witnesses. His culpability for the offence is no less than that of the other two defendants though his incarceration appears to have chastened him over the last two years.

810. So far as Vikas Yadav and Vishal Yadav are concerned, despite their conviction for such heinous offences, we have discussed and concluded above that while in jail, they have ruthlessly misused the process of law and have manipulated hospital visits and admissions. This conduct of Vikas Yadav and Vishal Yadav manifests that there is no remorse or regret. The jail stay has also had no impact so far as reformation and rehabilitation of these two defendants is concerned.

811. We may note that, before us, it has not been argued on behalf of any of the defendants that they have no responsibility for the manipulations which have resulted in the hospital visits or the unwarranted admissions. This is rightly so. The defendants are the ones who have directly benefitted as a result and have been able to

stay out of the Tihar jail for different periods which we have noted above. Why would the jail or medical authorities permit such visits and admissions unless it was persuaded by them, to assist their stays out of the jail?

812. It is necessary to point out an important factor that there is no such allegation of feigning sickness and unnecessary hospital visits and admission against Sukhdev Yadav, a reflection of the reality that he, not as well placed as the other two, does not have the influence, to manipulate authority and systems.

813. So far as the post conviction conduct i.e. the conduct of the defendants in jail is concerned, the following jail punishments are revealed in the nominal rolls:

CONDUCT IN JAIL:

a) As per the nominal roll of Vikas Yadav, he was awarded punishment dated 28.05.2012 when 10 cigarettes were recovered from him. Another punishment dated 10.07.2013 was awarded to him for assaulting a ward sahayak. His jail conduct for the last one year is stated to be satisfactory.

b) As per the nominal roll of Vishal Yadav, he was awarded punishment dated 28.05.2012 when tobacco was recovered from him. Another punishment dated 08.07.2013 was awarded to him for assaulting a ward sahayak. His jail conduct for the last one year is stated to be satisfactory.

c) As per the nominal roll of Sukhdev Yadav, he was awarded punishment dated 10.07.2013 for assaulting a ward sahayak. His jail conduct for the last one year is stated to be satisfactory.

(xv) <u>Probationary Officer's report</u>

814. Vikas Yadav has filed W.P.(Crl.)No.1644/2014 impugning the order of the Lt. Governor rejecting his application for parole. In this case, a report by Mr. Yogesh Chandra Mishra, Probationary Officer, Department of Social Welfare Government of NCT of Delhi dated 26th August, 2014 has been filed by the jail authorities. Mr. Sumeet Verma, learned counsel for the defendant has extensively relied on this report contending that the report establishes that the possibility of the defendant's reform and rehabilitation cannot be ruled out. Reliance is placed on the judgment in ***Birju*** by Mr. Verma in this regard.

815. This report is staunchly challenged by the State as well as the complainant. It is pointed out by the complainant that Mr. Sunil Babu, an officer, Ward no.5 of the jail recorded her statement on the 2nd October, 2014. Mr. Mahajan, learned Additional Standing Counsel has also submitted that no such report had been requisitioned by him and that the probationary officer has not undertaken relevant issues into consideration nor the behaviour pattern of the defendant over the entire period since the crime before returning a finding on the possibility of his reformation. It is submitted that no sociological or psychiatric appraisal by any expert or specialised body was undertaken and that the report is premised completely on the conduct of the defendant for the period immediately preceding the report.

816. The report of the probationary officer encloses statements of what has been termed as "three neighbours". It is pointed out by Mr. P.K. Dey, learned counsel for the complainant (and not

disputed by Vikas Yadav) that out of these three persons, Suraj Singh (shown resident of 4/32, Raj Nagar) is a servant of Mr. D.P. Yadav (father of the defendant) who stays in the same residence while Satendra (residing at 4/17, Raj Nagar) is a son of Shri D.P. Yadav's elder brother Shyam Singh. The third person whose statement was recorded is also a neighbour, obviously under the influence of the family of Vikas Yadav.

817. It is complained by the Mr. P.K. Dey that the last two lines of the probationary officer's report indicate his malafides. The report does not even advert to the pre-conviction and post conviction conduct of the defendant including the manipulated hospital visits and admissions. The report also does not refer to the fact that the c'omplainant as well as a witness in the case are even on date granted police protection. The report makes no reference to the circumstances in which the parole was rejected.

818. It needs no elaboration that it is not the conduct of the defendant when consideration of his appeal is underway which alone is to be considered but his conduct over his entire stay in jail has to be considered.

We have already noted above the report from the Superintendant, Jail about the defendants' conduct since 2013.

819. Something needs to be stated about this report which has been filed directly by the jail authorities without being routed through even learned Additional Standing Counsel for the State who represents the authorities before us. There is certainly weight in the submission of Mr. Dey that this defendant continues to wield

a deep influence. We are refraining from commenting further on this report which we will consider in the writ petition.

(xvi) Conduct since July, 2013

820. Mr. Sumeet Verma, learned counsel appearing for Vikas Yadav has submitted that Vikas Yadav has undergone several Vipasana sessions in the jail. In support of his submission with regard to jail conduct of Vikas Yadav is concerned, Mr. Verma has pointed out that Vikas Yadav's conduct in jail for the last one year has been exemplary. Placing reliance on certificates and rewards by jail authorities including a certificate of recognition dated 16th April, 2014; for good conduct; 31st May, 2014 issued by the Gandhi Smriti Darshan Samiti for participating in the competition and his poetry published in by-monthly jail magazine "*Asha Ki Kiran*".

821. The above activities and courses have been undergone by him after the consideration of the appeal against conviction had commenced. Reform, remorse and repentance for the offence as well as respect for systems has to be manifested from every action of the defendant. Only then will the court conclude that reform and rehabilitation is possible. Lip service to the rehabilitation programmes being conducted in the jail with the object of earning sympathy of the court cannot impact the present consideration. It is while in custody, the defendant has manipulated many outside jail visits.

822. However, the nominal rolls also do not disclose any jail offences by any of the three defendants over the last year. The nominal rolls state that the conduct of the defendants in jail is now satisfactory. There is also no material that after 2012, the defendants are still manipulating the systems to secure '*outings*' from the jail.

823. Let us also examine the material available in the present case on the aspect of possibility of reform and rehabilitation of these defendants. The nominal rolls discussed above would show that for the last one year only, the conduct of these defendants has been satisfactory. No offence is reported from the jail after July, 2013. This fact would suggest that the possibility of reformation and rehabilitation of the defendants is not "unforseeably foreclosed" and therefore, the present case may not invite the imposition of death penalty on the defendants.

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

824. So far as imposition of a death sentence is concerned, it is argued before us that one guard who rapes and murders a young girl residing in the building over which he stands as a guard got a death sentence (***Dhananjoy Chatterjee)*** whereas a similarly aged guard who commits a similar, if not identical crime, gets life imprisonment (***Rameshbhai Chandubhai Rathod***). The submission is that use of a particular weapon for commission of the crime of murder makes it more heinous in one case while the same

may be treated as less heinous in another. It leads to variation in the sentence imposed from the capital punishment in one case to the life imprisonment in another. Learned counsels submit that the education or the economic status of one defendant has been considered a mitigating circumstance while considering imposition of a punishment. It is urged that on the other hand, higher education, better economic status should in fact be an aggravating circumstance as such persons would be expected to know both the correct conduct as well as the consequences of their actions; why should the act of cutting up a dead body after murdering a in one case lead to imposition of a death sentence whereas for a similar offence, in another case, it may not be deemed relevant. It is submitted that this dichotomy ought to weigh in favour of the defendants.

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

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

> "**48.** That is not the end of the matter. ***Coupled with the deficiency of the criminal justice system is the lack of***

consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] laid down the principle of the rarest of rare cases. *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the ***unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the Machhi Singh [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] categories were followed uniformly and consistently.***"

(Emphasis by us)

827. The Supreme Court's discomfort that the working of the balance sheet approach had not worked sufficiently well was reiterated in ***(2009) 6 SCC 498, Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra*** in the following terms:

> **"109.** xxx xxx xxx ***the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system.*** It can be safely said that the *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] ***threshold of "the rarest of rare cases" has been most variedly and inconsistently applied by the various High Courts as also this Court***.
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> **129.** xxx xxx xxx
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> > *49.* In ***Aloke Nath Dutta* v. *State of W.B.*** [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] Sinha, J. gave some very good illustrations from a number of recent decisions in

which on similar facts this Court took contrary views on giving death penalty to the convict (see SCC pp. 279-87, paras 151-78: Scale pp. 504-10, paras 154-82). He finally observed (SCC para 158) that '***courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar***' and further '***it is evident that different Benches had taken different view in the matter***' (SCC para 168). Katju, J. in his order passed in this appeal said that he did not agree with the decision in *Aloke Nath Dutta* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju, J. may be right that there cannot be an absolute rule excluding death sentence in all cases of circumstantial evidence (though in*Aloke Nath Dutta* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] it is said 'normally' and not as an absolute rule). But there is no denying the illustrations cited by Sinha, J. which are a matter of fact.

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

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

on the personal predilection of the Judges constituting the Bench.

52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a ***small band of cases in which the murder convict is sent to the gallows*** on confirmation of his death penalty by this Court and on the other hand there is a ***much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished*** on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied.

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

130. Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage. ***We share the Court's unease and sense of disquiet in Swamy Shraddananda (2) case [(2008) 13 SCC 767 : (2008) 10 Scale 669] and agree that a capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21***. Therefore, an equal protection analysis of this problem is appropriate. In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally

> distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect sentencing system. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary. We have to be, thus, mindful that the true import of *rarest of rare* doctrine speaks of an extraordinary and exceptional case."
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> (Emphasis by us)

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

> **"32.** It does appear that in view of the inherent multitude of possibilities, the ***aggravating and mitigating circumstances approach has not been effectively implemented***.
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> **33.** Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh*[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] . It appears to us that even though*Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in*Swamy Shraddananda* [(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] and *Bariyar*[(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] . This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] seems to have been lost in transition.
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> xxx xxx xxx

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

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

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

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

> ***out***. It is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases."
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> (Emphasis by us)

831. It was noted that the learned judge who had differed and awarded life sentence was persuaded to do so inter alia on account of there being some uncertainty that the nature of circumstantial evidence; mitigating circumstances particularly the young age of the appellant; the possibility that he could be rehabilitated and would not commit any offence later on could not be ruled out and the finding that the statutory obligation cast on the court under Section 235(2) read with 354(3) Cr.P.C. had been violated. Inasmuch as the accused had not been given adequate opportunity to plead on the question of sentence. The larger Bench had agreed with these observations and had consequently commuted the death sentence awarded to the appellant to life but directed that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the government for good and sufficient reasons.

832. While altering the death sentence to imprisonment for life and fixing the term of imprisonment as 20 years without remission over and above the period of sentence already undergone, in the case reported at ***(2014) 4 SCC 747 : 2014 (3) SCALE 344, Ashok Debbarma v. State of Tripura,*** Radha Krishnan, J. had noted the profound right of the accused not to be convicted of an offence which is not established by the evidential standard of proof

"*beyond reasonable doubt*". In para 29, the court discussed '*residual doubt*' as a mitigating circumstance which was sometimes used and urged in the United States of America dealing with the death sentence. Refering to the fact situation of the case, the observations of the court in para 31 deserve to be extracted in extenso and read as thus:

> **"31.** In *Commonwealth* v. *Webster* [(1850) 5 Cush 295 : 52 Am Dec 711 (Mass Sup Ct)] at p. 320, Massachusetts Court, as early as in 1850, has explained the expression "reasonable doubt" as follows:
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> > "Reasonable doubt … is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction."
>
> In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the courts are convinced of the accused persons' guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as firearms, *dao*, *lathi*, etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only eleven persons were charge-sheeted and, out of which, charges were framed only against five accused persons. Even out of those five persons, three were acquitted, leaving the appellant and another, who is

absconding. The court, in such circumstances, could have entertained a "residual doubt" as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of the rare category."

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

> **"36.** Right to get proper and competent assistance is the facet of fair trial. This Court in *M.H. Hoskot* v. *State of Maharashtra* [(1978) 3 SCC 544 : 1978 SCC (Cri) 468], *State of Haryana* v. *Darshana Devi* [(1979) 2 SCC 236], *Hussainara Khatoon (4)* v. *State of Bihar* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] and *Ranjan Dwivedi* v.*Union of India* [(1983) 3 SCC 307 : 1983 SCC (Cri) 581], pointed out that if the accused is unable to engage a counsel, owing to poverty or similar circumstances, trial would be vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose engagement, the accused does not object. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in *Hussainara Khatoon (4) case* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] , this Court has held that: (SCC p. 105, para 7)
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> > "*7.* … This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons

such as poverty, indigence or incommunicado situation…."

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

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

> "**39.** The court, ***in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence***. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is ***whether there is a reasonable probability that, absent the errors, the court independently reweighing the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence***.
>
> (Emphasis supplied)

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

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

837. The Supreme Court was called upon to consider the question as to whether the hearing of review petitions by the Supreme Court in death sentence cases should not be by circulation but should be in open court only. The anxiety of the Constitution Bench of the Supreme Court to ensure that no injustice results, was emphasised in the judgment dated 2nd September, 2014 in ***W.P.(Crl.)No.77/2014, Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Ors.,*** when it was held that "*even a remote chance of deviating from such a decision while exercising the review jurisdiction, would justify oral hearing in a review petition".* The Supreme Court emphasised the fact that "*when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant a death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of "reasonable*

procedure"." It is keeping in view the above two realities which impact the fundamental right to life under Article 21 of the Constitution of India of a person, it has been held in ***Mohd. Arif*** that to be just fair and reasonable, any procedure impacting the right, has to take into account these two factors.

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

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

The Supreme Court shared the concern of the High Court and observed that it would be a mockery of justice to permit the appellants to escape the extreme penalty of law when faced with

such offence and such cruel acts. The death sentence was accordingly confirmed.

840. Another precedent in which the motive of murder was the intercaste marriage of the sister of one of the appellant despite resentment and disapproval by the girl's family, has been brought to our notice. The judgment of the Supreme Court is reported at ***(2010) 1 SCC 775, Dilip Premnarayan Tiwari v. State of Maharashtra*.** The appellant stood convicted of the offence of murder and sentenced to 25 years of imprisonment.

841. This very factor that on the same, that on very similar facts, variable sentences are possible also dissuades us from invoking our jurisdiction in imposing the death sentence in the present case.

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

842. In the present case, the manner in which the offence was committed; the impunity with which effort was made to remove traces of the offence by removing clothes, jewellery, phone, etc. and burning the body; the abscondance after the commission of the offence and the stage managing of the arrest; the conduct of the defendants during investigation and after conviction, especially, misuse and abuse of the facility of outside hospital visits and hospitalisation despite the passage of a decade after the offence, establishes the fact the that the long incarceration has had little impact on the defendants who have neither remorse nor repentance for their actions. With impunity, Vikas Yadav and Vishal Yadav

even in jail believe that they can manipulate all systems. These two defendants have displayed that they have no respect for the criminal dispensation system nor any fear of the law.

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

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

845. The absolute propositions pressed by the defendants, emphasising individual circumstance and as held thereon by the learned trial judges are clearly untenable. This is to be found from

a reading of the principles culled out in ***Mofil Khan*** above. Each circumstance cannot be treated as by itself enabling the court to arrive at a conclusion as to what would be a punishment adequate for and befitting the crime. The reference to the balance sheet by the Supreme Court was never of the nature of *'one plus one would necessarily make two'* but required a consideration of the varied facts and circumstances which lead to and go into a crime cumulatively, especially heinous crimes.

846. In this background, the consideration by the learned trial judges of each of the established circumstances individually without examining the same cumulatively or in totality is clearly contrary to the well settled principles of law on which sentencing is to be effected. The learned trial judges have completely failed to consider material circumstances including the pre-meditation which went into the offence as well as manner of its execution; antecedents of the defendants; the impact of the crime on society; the conduct of the defendants; amongst others, which have been held by the Supreme Court to be an aggravating circumstance and an essential consideration for imposing an appropriate sentence. The assessment of the mitigating and aggravating circumstances by the trial courts was therefore, incomplete and cannot be the basis for evaluation of an adequate sentence on the defendants.

847. Mr. Rajesh Mahajan has pressed that there are several precedents wherein, on a consideration of the relevant factors, the court held that the **possibility** of reformation and rehabilitation is not ruled out and therefore, death penalty was not imposed.

However, instead of awarding life sentences simplicitor, term sentences or consecutive running sentences were imposed upon the convicts. In this regard, reference is made to the pronouncements in ***(2012) 4 SCC 257, Ramnaresh v. State of Chhattisgarh*** (21 years sentence)***; (2002) 2 SCC 35, Prakash Dhawal Khairnar (Patil) v. State of Maharashtra*** (20 years sentence)***; 2014 (8) SCALE 113, Amar Singh Yadav v. State of U.P.*** (30 years sentence) and***; (2013) 2 SCC 479, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra*** (consecutive running of sentences)**.** It is submitted that if this court is not inclined to impose the death penalty, certainly life sentence simplicitor is not an adequate sentence and the court must consider this other option. We shall examine this submission hereafter.

848. The learned trial judges have imposed a sentence of life imprisonment on the three convicts for commission of the offence under Section 302 of the IPC without any more. The defendants could therefore, make an application in accordance with the provisions of Sections 431 to 433A of the Cr.P.C. for remission of the sentence imposed on them upon completion of 14 years of imprisonment.

849. The learned trial judges by the order dated 30th May, 2002 against Vikas Yadav and Vishal Yadav and by the order dated 12th July, 2011 against Sukhdev Yadav, have imposed the following sentences upon them:

For conviction for offence	**Prescribed sentence under**	**Sentence imposed by**	**Sentence imposed by**

under	**IPC**	**order dated 30th May, 2008 to Vikas Yadav & Vishal Yadav**	**order dated 12th July, 2011 to Sukhdev Yadav**
Section 302/34 IPC	Death or imprisonment for life & liable to fine	Life imprisonment and a fine of Rs.1 lakh each	Life imprisonment with fine of Rs.10,000/-
	Default imprisonment for non-payment of fine	1 year SI	2 years RI
Section 364/34 IPC	Imprisonment for life or RI for a term which may extend to 10 years and shall also be liable to fine	RI for 10 years and a fine of Rs.50,000/-	7 years RI with fine of Rs.5,000/-
	Default imprisonment for non-payment of fine	6 months SI	6 months RI
Section 201/34 IPC	In case of capital offence, 7 years and fine. In case of imprisonment for life, 3 years and fine. In case of less than 10 years, 1 month or fine or both.	RI for 5 years and a fine Rs.10,000/-	3 years RI with fine of Rs.5,000/-
	Default imprisonment for non-payment of fine	3 months SI	6 months RI

The three sentences have been directed to run concurrently.

850. A most distressing aspect of the murder of Nitish Katara is the fact that the convicts made a conscious choice to opt as to which one, out of the two partners in the objected relationship, they

would eliminate. They consciously decided to sacrifice Nitish Katara while sparing the life of Bharti Yadav perceived as their own.

851. The crimes were perpetrated in an organized and systematic manner. The amplitude of the gravity of the offence, its nature and its deleterious effect, not only upon the victim or his family but upon the entire civilized society at large, cries for the need that the defendants be adequately punished. It is sentence of life imprisonment simplicitor were to be remitted or commuted on expiry of 14 years in terms of the CrPC provisions, the sentence would really be inconsequential and completely inadequate so far as the crimes in the instant case is concerned.

852. The abduction of the deceased was integral to the offence of murder. The detailed discussion in our judgment dated 2nd April, 2014 would show that the abduction was really an aggravating feature of the murder, firstly because of the level of planning which has gone into it and secondly, its meticulous execution. Thirdly, the degree of arrogance displayed by the defendants who took away the victim from amidst hundreds of guests. As we have considered abduction as integral, to the offence of murder, we are of the view that the sentences of imprisonment on these two offences can run concurrently.

853. The offence involving burning of the body in order to cover the acts of the defendants was also brutal, cruel and heartless. It left an indelible negative impact on the family and horrified the society. This act of burning was committed as part of the same

premeditation but it was committed after the commission of the offence of murder. This therefore, justifies a consecutive sentence.

854. After the brutal crime was committed, the clarity of the defendants is evident in the care that they took in removing all articles of identification from his body; concealing his clothes, mobile, gold chain as well as the hammer which was the weapon of the offence. The defendants thereafter with utmost clarity proceeded to the next stage when they absconded from the scene of the crime and could not be traced by the police. The brutal murder of young Nitish Katara had no impact on the emotions of the three defendants who executed the crimes with precision and clarity. The depravity in the mindset and planning of the crimes, brutality in its execution, post crime conduct during investigation and trial detailed above point to one essential fact that a life sentence which means only 14 years of imprisonment is grossly inadequate in the present cases and that these defendants do not deserve to remission of the life sentence imposed on them by application of Section 433A of the CrPC.

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

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

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

858. A similar contention was argued on behalf of the prosecution witness in the judgment reported at ***(2001) 4 SCC 458, Subhash Chandra v. Krishan Lal.*** The court had taken on record the

statement made by one of the convicts to the effect that imprisonment for life shall be the imprisonment in prison for the rest of life. Keeping in view the circumstances of the case specially the apprehension of the imminent danger expressed by the witness, the court ordered that for this appellant, imprisonment for life shall be the imprisonment in prison for the rest of his life, that he shall not be entitled to any commutation or premature release under the Cr.P.C., Prisoners Act, Jail Manual or any other statute and rules made for the purposes of grant of commutation and remissions.

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

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

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

861. After his arrest, Sukhdev Yadav appears to have been chastened. We may note that there is a jail offence attributed to him on 10th of July, 2013 with regard to assaulting to a ward sahayak for which he was awarded punishment. Interstingly, an identical offence dated 10th July, 2013 is attributed to Vikas Yadav for which he has also been awarded punishment. We do not know whether the two were implicated in the same offence. If the two were implicated for the same crime, it has to be borne in mind that Sukhdev Yadav was an employee of the father of Vikas Yadav which may have been the influence for his involvement in this jail offence. However, there is no allegation with regard to violating any other jail regulation against Sukhdev Yadav. Another important circumstance is the fact that only the State has sought enhancement of the sentence imposed on Sukhdev Yadav whereas the complainant Nilam Katara in Crl.Rev.No.369/2008, has not prayed for enhancement of the sentence against him. In the oral submissions, it has been pleaded on behalf of Sukhdev Yadav that on account of his incarceration, his family is in dire straits. Sukhdev Yadav is a married man with five children. Our inquiry has also established that he is not a person of substantial means. Keeping only these circumstances in mind, so far as Sukhdev Yadav is concerned, we are drawing a distinction between the punishments being imposed on Vikas and Vishal Yadav on the one hand and Sukhdev Yadav on the other.

862. We also find that given his lesser paying capacity, the default imprisonment which the learned trial judge has ordered for

non-payment of fines against Sukhdev Yadav in the judgment dated 12th July, 2011 as unduly harsh. By the present order, we propose to modify and reduce the default imprisonments which have been imposed on Sukhdev Yadav.

XXI. Appropriate government for the purposes of Section 432 of the Cr.P.C. in the present case

863. The instant case arose out of an offence committed in the State of U.P. on a complaint which was lodged with the police station Kavi Nagar and was registered as FIR No.192/02. The chargesheet was originally filed in the district courts at Ghaziabad in the State of U.P. A transfer petition being Transfer Petition No.449/2002 was filed by Smt. Nilam Katara praying for transfer of the case to Delhi. By virtue of orders dated 22nd May, 2002 and 22nd August, 2002 passed by the Supreme Court of India, the trial was transferred to the district courts in Delhi and culminated in the judgment on conviction dated 28th May, 2008 so far as Vikas Yadav and Vishal Yadav are concerned and against Sukhdev Yadav on 6th July, 2011. They were respectively sentenced by the judgment dated 30th May, 2008 and 12th July, 2011 by the Sessions Courts at Delhi.

864. Section 432 of the Cr.P.C. concerned with the power of suspension of the execution of the sentence or remission of the whole or any part of the punishment to which he was sentenced, envisages an application by a person who has been sentenced to punishment for an offence to the "*appropriate government*". The

expression "*appropriate government*" is defined under sub-section 7 of Section 432. For the purposes of the present case, the definition of appropriate government in sub-clause (b) of sub-section 7 of Section 432 is relevant which defines the "*appropriate government*" as the government of the State within which the offender is sentenced.

865. The Code of Criminal Procedure has conferred the power upon the executive to remit the sentence of the defendants in Chapter XXXVII of the CrPC. The present case has thrown up a unique situation where an offence committed in District Ghaziabad in the State of Uttar Pradesh has been tried by the trial court at Delhi. The question arises is as to which would be the appropriate authority for considering a prayer for remittance of sentence if made by the defendants?

866. In the present case, after their conviction and sentence, it appears that Vikas Yadav and Vishal Yadav filed an appeal assailing the same in the High Court of Allahabad which was rejected for want of jurisdiction. Though the orders of the Allahabad High Court have not been placed before us, but during the course of arguments, it was submitted that they assailed the order of the Allahabad High Court before the Supreme Court of India which rejected the challenge.

The appeals were thereafter filed before this court.

867. We find that the statute is clear and suggests no ambiguity. The defendants have been tried, convicted and sentenced by the trial courts at Delhi. The appeals have been heard by the Delhi

High Court and the sentences are being considered as well by the same court. Therefore, so far as the present defendants are concerned, if at any point of time, they were to seek remission of the sentence, the only government which is competent to consider an application by these defendants under Chapter XXXII (E) of the Cr.P.C. would be the government of the National Capital Territory of Delhi.

XXII. <u>What ought to be the fines in the present case</u>

868. Apart from imprisonment, we note that Section 302 of the IPC directs that whoever commits murder shall be punished with death or imprisonment for life and <u>shall</u> also be liable for fine. Under Section 364, punishment of imprisonment for life or rigorous imprisonment for 10 years and fine is prescribed. Under Section 201, imprisonment for seven years and fine is prescribed.

Therefore, while considering an appropriate sentence, apart from imprisonment, we also have to consider and direct payment of adequate fines.

869. What would be an appropriate sentence so far as imposition of the fine is concerned? Valuable light is thrown on the importance of an appropriate sentence befitting the crime in the pronouncement of the Supreme Court reported at ***(2012) 8 SCC 450, State v. Sanjeev Nanda.*** The respondent was involved in a motor accident on the night intervening 9th/10th January, 1999 while driving the BMW Car No.M-312-LYP in which he struck seven persons standing on the road. The respondent ignored the

cries of the injured persons and drove away at a high speed. In this accident six persons were killed while PW-2 was injured. Efforts were thereafter made to destroy material evidence. The respondent was charged under Sections 201, 304 Part I, 308 read with Section 34 of the IPC. The trial court found the respondent guilty of commission of offence under Section 304 Part II IPC and awarded him jail sentence of five years while he was acquitted of the other charges. His co-accused was found guilty for the commission of other offences and also sentenced.

On appeal to the High Court, the learned Single Judge modified the conviction and found the respondent guilty of commission of offence under Section 304A IPC and reduced the imprisonment sentence to two years.

870. The Supreme Court was called upon to consider as to whether the respondent – convict deserves to be held guilty of commission of an offence under Section 304 Part II of the Indian Penal Code, 1860 or whether the conviction and sentence awarded to him by the High Court of Delhi under Section 304A IPC should be held legally tenable. The matter was placed before a two Judge Bench of the Supreme Court. The observations of the Supreme Court in the supplementing reasons by Justice K.S.V. Radhakrishnan on the consideration of the relevant circumstances to arrive at a punishment commensurate with the gravity of the offence are illuminating for the present purposes and read thus:

> **"115.** We may now examine the mitigating and aggravating circumstances and decide as to whether the

punishment awarded by the High Court is commensurate with the gravity of the offence.

116. The ***mitigating circumstances*** suggested by the defence counsel are as follows:

(*i*) The ***accused was only 21 years*** on the date of the accident, ***later married and has a daughter***;

(*ii*) ***Prolonged trial and judicial unfairness caused prejudice***;

(*iii*) The accused ***has undergone sentence*** of two years awarded by the High Court and, during that period, his ***conduct and behaviour in the jail was appreciated***;

(*iv*) ***Accident occurred on a foggy day*** in the early hours of morning with poor visibility;

(*v*) The accused had ***no previous criminal record*** nor has he been involved in any criminal case subsequently;

(*vi*) The accused and the family members contributed and ***paid a compensation of Rs 65 lakhs***, in total, ***in the year 1999 to the families of the victims***;

(*vii*) The accused had ***neither the intention nor knowledge of the ultimate consequences*** of his action and that he was holding a driving licence from the United States.

117. Following are, in our view, the ***aggravating circumstances*** unfolded in this case:

(*i*) ***Six persons*** died due to the rash and negligent driving of the accused and the car was driven with the knowledge that drunken driving without licence is likely to cause death.

(ii) Much of the delay in completing the trial could have been avoided if wisdom had dawned on the accused earlier. Only at the appellate stage the accused had admitted that it was he who was driving the vehicle on the fateful day which resulted in the death of six persons and delay in completion of the trial cannot be attributed to the prosecution as the prosecution was burdened with the task of establishing the offence beyond reasonable doubt by examining sixty-one

witnesses and producing several documents including expert evidence.

(*iii*) The ***accused did not stop the vehicle*** in spite of the fact that the vehicle had hit six persons and one got injured and escaped from the spot without giving any helping hand to the victims who were dying and crying for help. Human lives could have been saved, if the accused had shown some mercy.

(*iv*) The ***accused had the knowledge*** that the car driven by him had hit the human beings and human bodies were scattered around and they might die, but he ***thought of only his safety*** and ***left the place***, leaving their fate to destiny which, in our view, is not a normal human psychology and no court can give a stamp of approval to that conduct.

(*v*) ***Non-reporting the crime to the police*** even after reaching home and ***failure to take any steps to provide medical help*** even after escaping from the site.

118. Payment of compensation to the victims or their relatives is not a mitigating circumstance, on the other hand, it is a statutory obligation. ***Age of 21, as such is also not a mitigating factor, in the facts of this case, since the accused is not an illiterate, poor, rustic villager but an educated urban elite, undergoing studies abroad.*** We have to weigh all these mitigating and aggravating circumstances while awarding the sentence."

(Emphasis by us)

871. So far as considerations which must weigh with the court while passing a sentencing order is concerned, the observations in paras 119 to 122 and the directions in para 123 deserve to be considered in extenso and read thus:

"Sentencing

119. We have to decide, after having found on facts, that this case would fall under Section 304 Part II, what will be the appropriate sentence. Generally, the policy which

the court adopts while awarding sentence is that the punishment must be appropriate and proportional to the gravity of the offence committed. Law demands that the offender should be adequately punished for the crime, so that it can deter the offender and other persons from committing similar offences. Nature and circumstances of the offence; the need for the sentence imposed to reflect the seriousness of the offence; to afford adequate deterrence to the conduct and to protect the public from such crimes are certain factors to be considered while imposing the sentence.

120. The ***imposition of sentence without considering its effect on the social order in many cases is in reality a futile exercise***. In our view, had the accused extended a helping hand to the victims of the accident, caused by him by making arrangements to give immediate medical attention, perhaps lives of some of the victims could have been saved. Even ***after committing the accident***, he only thought of his safety, did not care for the victims and escaped from the site showing least concern to the human beings lying on the road with serious injuries. ***Conduct of the accused is highly reprehensible and cannot be countenanced by any court of law***.

121. The High Court, in our view, has committed an error in converting the conviction to Section 304-A IPC from that of Section 304 Part II IPC and the conviction awarded calls for a relook on the basis of the facts already discussed, otherwise this Court will be setting a bad precedent and sending a wrong message to the public. After having found that the offence would fall under Section 304 Part II IPC, not under Section 304-A, the following ***sentence awarded*** would ***meet the ends of justice, in addition to the sentence already awarded*** by the High Court.

Community service for avoiding jail sentence

122. Convicts in various countries, now, voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime,

greater the sentence. But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community what they owe. Conduct of the convicts will not only be appreciated by the community, it will also give a lot of solace to them, especially in a case where because of one's action and inaction, human lives have been lost.

123. In the facts and circumstances of the case, where six human lives were lost, we feel, to adopt this method would be good for the society rather than incarcerating the convict further in jail. ***Further sentence of fine also would compensate at least some of the victims of such road accidents who have died, especially in hit-and-run cases where the owner or driver cannot be traced***. We, therefore, order as follows:

(*1*) The ***accused has to pay an amount of Rs 50 lakhs*** (Rupees fifty lakhs) to the Union of India ***within six months***, which will be ***utilised for providing compensation to the victims of motor accidents, where the vehicle owner, driver, etc. could not be traced, like victims of hit-and-run cases. On default***, he will have to ***undergo simple imprisonment for one year***. This amount be kept under a different head to be used for the aforesaid purpose only.

(*2*) The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years."

(Emphasis by us)

872. Although, the Supreme Court has not specifically mentioned Section 357(1)(a) of the Cr.P.C. while directing the payment of Rs.50,00,000/- but it appears that the Supreme Court had exercised the jurisdiction under Section 357 while issuing the direction to the convict to pay. The relevant para of the judgment is as follows:

> "**127.** In addition, the accused is put to the following terms:
>
> (*1*) The accused has to pay an amount of Rs 50 lakhs (Rupees fifty lakhs) to the Union of India within six months, which will be utilised for providing compensation to the victims of motor accidents, where the vehicle owner, driver, etc. could not be traced, like victims of hit-and-run cases. On default, he will have to undergo simple imprisonment for one year. This amount be kept under a different head to be used for the aforesaid purpose only.
>
> (*2*) The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years."

873. In ***Sanjeev Nanda,*** the Supreme Court ordered the driver to do community service and imposed the sentence of fine payable to the Union of India to be utilised for providing compensation to victims of motor accidents where vehicle owners, drivers, etc. could not be traced, as for instance in hit and run cases in order to do complete justice in the case. The High Courts may be able to source the power to pass similar order to the inherent powers under Section 482 of the Cr.P.C. We are not undertaking an examination of the issue as to whether the trial courts have the jurisdiction to so mould sentencing orders.

874. It is well settled that a fine should not be excessive. This could obviously relate to the ability to pay the fine by the defendant. A fine which cannot be realised would be unduly

excessive. The quantification has to be effected having regard to all the circumstances of the case which include the means of the offender ***[*Ref. : *AIR 1977 SC 1323, Paliappa Gounder v. State of Tamil Nadu* (paras 11 and 12)*]***

875. So far as the paying capacity of the defendants is concerned, the inquiry has concluded the paying capacity of the defendant Vikas Yadav as between Rs.5.50 crores to Rs.5.75 crores and the paying capacity of Vishal Yadav at Rs.9.19 crores. So far as Sukhdev Yadav is concerned, the inquiry conducted under orders of this court has concluded that he does not have financial means to pay any substantial compensation to the family of the deceased.

876. It appears that Vishal Yadav filed an affidavit dated 26th May, 2014 before the enquiry officer Shri S.S. Rathi, OSD, Delhi Legal Services Authority wherein, so far as immovable properties were concerned, Vishal Yadav has stated that he has shares in ancestral undivided properties and as per oral understanding, his share is 1/3rd of the total value. Based thereon, the learned enquiry officer has given the finding with regard to Vishal Yadav's paying capacity. However, in the written submissions dated 17th July, 2014 filed before us, it is stated on behalf of Vishal Yadav that there is a mistake in mentioning the share and that Vishal Yadav has 1/4th share because his sister also has a share. Be that as it may, even if this statement was accepted, Vishal Yadav's paying capacity would still be over Rs.5 crores.

877. The quantification of the fine must take into consideration the fact that they are being sentenced for conscious acts in

execution of a premeditated plan and brutal commission of grievous offences.

878. So far as Sukhdev Yadav is concerned, it would appear that he does not have the paying capacity to pay an enhanced fine.

879. We may note that so far as unwarranted hospital visits are concerned, the same has been dealt with separately and not as part of the compensation discussion in the present discussion. Based on the discussion and findings reached, we have opted to separately issue directions against the defendants for the same. The directions to the defendants to make payments with regard to the hospital visits and admissions are not in the nature of an order to pay a fine.

880. The inquiry undertaken under our orders discloses that Vikas Yadav and Vishal Yadav have the capacity to pay an appropriate fine.

XXIII. Result

881. In view of the above discussion, we modify and enhance the sentence imposed by the judgments dated 30th May, 2008 upon the defendants Vikas Yadav, Vishal Yadav and 12th July, 2011 upon Sukhdev Yadav and direct that they shall be liable to undergo the following sentences :-

(I)

For commission of offences under	**Sentences awarded to each of Vikas Yadav & Vishal Yadav**	**Sentence awarded to Sukhdev Yadav**
Section 302/34 IPC	Life imprisonment which shall be 25 years of actual imprisonment without consideration of remission, and fine	Life imprisonment which shall be 20 years of actual

	of Rs.50 lakh each	imprisonment without consideration of remission, and fine of Rs.10,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment of 3 years.	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for one month.
Section 364/34 IPC	Rigorous imprisonment for 10 years with a fine of Rs.2 lakh each	10 years rigorous imprisonment with fine of Rs.5,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment for 6 months	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for 15 days
Section 201/34 IPC	Rigorous imprisonment for 5 years and a fine Rs.2 lakh each	5 years rigorous imprisonment with fine of Rs.5,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment for 6 months	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for 15 days

(II) It is directed that the sentences for conviction of the offences under Section 302/34 and Section 364/34 IPC shall run concurrently. The sentence under Section 201/34 IPC shall run consecutively to the other sentences for the discussion and reasons in paras 741 to 745 above.

(III) The amount of the fines shall be deposited with the trial court within a period of six months from today.

(IV) We further direct that the fine amounts of Rs.50,00,000/- of each of Vikas Yadav and Vishal Yadav when deposited with the trial court, are forthwith disbursed in the following manner:

(i)	To the Government of Uttar Pradesh towards investigation, prosecution and defence of the cases with regard to FIR No.192/2002 P.S. Ghaziabad.	:	Rs.5,00,000/- from the deposit of the fine of each of the defendants
(ii)	To the Government of NCT of Delhi towards prosecution, filing and defence of litigation, administration of courts and witness protection with regard to FIR No.192/2002 P.S. Ghaziabad	:	Rs.25,00,000/- from the deposit of the fine of each of the defendants
(iii)	To Nilam Katara towards the costs incurred by her in pursuing the matter, filing petitions and applications as well as defending all cases after 16th/17th February, 2002 with regard to FIR No.192/2002 in all courts.	:	Rs.20,00,000/- from the deposit of the fine of each of the defendants

(V) Amount of fines deposited by Sukhdev Yadav and other fines deposited by Vikas Yadav and Vishal Yadav shall be forwarded to the Delhi Legal Services Authority to be utilised under the Victims Compensation Scheme.

(VI) In case an application for parole or remission is moved by the defendants before the appropriate government, notice thereof shall be given to Nilam Katara as well as Ajay Katara by the appropriate government and they shall also be heard with regard thereto before passing of orders thereon.

(VII) So far as Vikas Yadav is concerned, we also issue the following directions:

(i) The period for the admission in AIIMS from 10th October, 2011 to 4th November, 2011 (both days included) shall not be counted as a period for which he has undergone imprisonment. His records and nominal rolls shall be accordingly corrected by the jail authorities.

(ii) Vikas Yadav shall make payments of the following amounts to the Government of NCT of Delhi:

(i)	Amounts paid to AIIMS	:	Rs.50,750/-
(ii)	Towards security deployment during AIIMS	:	Rs.1,20,012/-
(iii)	OPD visits	:	Rs.50,000/-
(iv)	Taxi fare	:	Rs.18,500/-
	Total	**:**	**Rs.2,39,262/-**

(VIII) So far as Vishal Yadav is concerned, we direct as hereafter :-

(i) The periods of the admissions in the Batra Hospital totalling 320 days [32 days (from 7th July, 2008 to 7th August, 2008); 24 days (from 14th August, 2008 to 6th September, 2008), 53 days (24th October, 2008 to 15th December, 2008); 100 days (from 25th February, 2009 to 6th June, 2009); 71 days (from 7th October, 2009 to 16th December, 2009); 36 days (from 29th September, 2010 to 3rd November, 2010); 4 days (from 14th October, 2011 to 17th October, 2011)] shall not be counted as a period which he has undergone imprisonment. His records and nominal rolls shall be accordingly corrected by the jail authorities.

(ii) Vishal Yadav shall make payments of the following amounts to the Government of NCT of Delhi:

(i)	Provision of security during the above seven hospital admissions post conviction	:	Rs.14,75,184/-
(ii)	During OPD hospital visits	:	Rs.50,000/-
(iii)	Post conviction visits on taxi fare	:	Rs.14,700/-
	Total	**:**	**Rs.15,39,884/-**

(IX) The amounts directed to be paid by Vishal Yadav and Vikas Yadav at Sr. Nos.(VI) and (VII) above shall be deposited within four months of the passing of the present order.

(X) In the event of the failure to deposit the amount as directed at Sr. Nos.(VI), (VII) and (VIII), the defaulting defendant (Vikas Yadav and Vishal Yadav) shall be liable to undergo rigorous imprisonment of one year. It is made clear that these directions are in addition to the substantive sentences imposed upon them.

(XI) We direct that the portion of this judgment at Sr. No.XVI, "*Unwarranted hospital visits and admissions – effect of*" from paras 519 to 688 be sent to the Union of India as well as to the government of NCT of Delhi for conducting an inquiry and taking appropriate action against those culpable.

(XII) It is further directed that the directions in this judgment with regard to the sentencing procedure in paras 290 and 291 (pages 228 to 233) as well as compensation inquiry and evaluation in para 424 (pages 321 to 325) be circulated to all trial judges to ensure compliance.

(XIII) It is further directed that the copy of this judgment shall be sent to the government of NCT of Delhi as well as State of Uttar Pradesh to ensure compliance.

(XIV) The above judgment decides the challenge to the orders dated 30th of May, 2008 in Crl.Appeal Nos. 741/2008, Vishal Yadav v. State; Crl.App. No. 910/2008, Vikas Yadav v. State as well as the challenge to the orders of sentence dated 12th July, 2011 in Crl.App. No. 145/2012, Sukhdev Yadav v. State & Anr.; Crl.App.No.958/2008, State v. Vikas Yadav & Anr.; Crl.App. No.1322/2011, State v. Sukhdev Yadav @ Pehlwan; as well as Crl.Rev.No.369/2008, Nilam Katara v. State Govt. of NCT of Delhi & Ors.; Crl.A.No.1322/2011, State v. Sukhdev Yadav @ Pehlwan; Crl.A.No.145/2012, Sukhdev Yadav v. State & Anr. This judgment also disposes of Crl.M.A. Nos. 12546/2011, 1168/2012, 1313/2012, 4073/2012, 13951/2012 & 13952/2012 in Crl.Rev.P.No.369/2008.

882. Before parting with this case, we must record our appreciation for the assistance which has been rendered by Mr. Rajesh Mahajan, Additional Standing Counsel for the State and Mr. P.K. De, Mr. Sumeet Verma and Mr. Sanjay Jain, Advocates who have appeared in these matters. They have incisively and elaborately placed the entire jurisprudence on the several issues considered by us and also made a sharp analysis of the facts and circumstances which are on record. These issues are extremely relevant for the purposes of sentencing making it necessary for us to deal with the various submissions and contentions, some of

which though routine and well settled, but have been completely lost sight of by courts in the criminal justice dispensation system.

GITA MITTAL, J.

J.R. MIDHA, J.

FEBRUARY 06, 2015
aj/kr/mk/aa/kapil