

(2019) 02 GUJ CK 0060
In the Gujarat High Court

Case No : R/Criminal Confirmation Case No. 1 Of 2016, R/Criminal Appeal No. 634, 1150 Of 2016

State Of Gujarat		APPELLANT
	Vs	
Patel Akshaykumar S/O Kaushikbhai Ishwarbhai		RESPONDENT

Date of Decision : 18-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 114, 120B, 201, 302, 364A
Code Of Criminal Procedure, 1973 — Section 161, 162, 162(1), 162(2), 209, 311, 313, 342
Indian Evidence Act, 1872 — Section 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27
Constitution Of India, 1950 — Article 14, 19, 20(3), 21, 22

Citation : (2019) 02 GUJ CK 0060

Hon'ble Judges : J.B. Pardiwala, J;A.C. Rao, J

Bench : Division Bench

Advocate : Hk Patel, Aj Yagnik, Pratik B Barot, Kiran Pandey, Hk Patel, Aj Yagnik

Final Decision : Dismissed

Judgement

1 As the captioned criminal confirmation case as well as the two criminal appeals arise from a selfsame judgment and order of conviction and sentence passed by the 2nd Additional Sessions Judge, Mehsana at Visnagar dated 17th March 2016 in the Sessions Case No.33 of 2012, those were heard analogously and are being disposed of by this common judgment and order.

2 The Criminal Appeal No.634 of 2016 is at the instance of a convict accused namely Patel Akshaykumar, son of Kaushikbhai Ishwarbhai (original accused No.1), whereas the Criminal Appeal No.1150 of 2016 is at the instance of a convict accused namely Panchal Kuldeepkumar, son of Karshanbhai Kalabhai (original accused No.2).

3 Both the appeals are directed against the order of conviction and death sentence dated 17th March 2016 passed by the Additional Sessions Judge, Mehsana at Visnagar in the Sessions Case No.33 of 2012, by which the learned

Sessions Judge found the appellants guilty of the offence punishable under Sections 302, 364A and 120B read with 34 and 114 of the Indian Penal Code, and consequently, sentenced them to capital punishment. The Trial Court also convicted the appellants for the offences punishable under Sections 363, 365 and 120B read with 34 and 114 of the I.P.C. and sentenced them to undergo seven years of rigorous imprisonment with fine of Rs.500/- and in default of payment of fine, to undergo further rigorous imprisonment of twelve months. The Trial Court also convicted both the appellants of the offence punishable under Section 201 of the I.P.C. and sentenced them to undergo rigorous imprisonment for a term of seven years with fine of Rs.500/- and in default of payment of fine, to undergo further rigorous imprisonment of twelve months.

- THE CASE OF THE PROSECUTION:

4 The deceased was a five year old boy. While playing with his friends in the common plot of the society on 17th March 2012 in the evening hours, the deceased went missing. In such circumstances, the father of the deceased namely Pratikkumar Ratilal Madhavlal Patel lodged a missing report at the Visnagar Police Station. The father of the deceased namely Pratikkumar Patel is engaged in the business of manufacturing of submersible pumps running in the name of 'ALLWIN Pumps Industries Limited' situated at the GIDC. The deceased was studying in the Sahjanand Primary School. After the registration of the F.I.R., the police as well as the family members started frantically searching for the missing boy. One of the boys also named Bholu, who was playing with the deceased, informed the father of the deceased that while they all were playing, one person came on a motorcycle and made the deceased, sit with him on the motorcycle and left the place. The children were playing in the common plot. The investigation revealed that the appellants herein had hatched a conspiracy to kidnap the deceased and thereafter demand a ransom of Rs.50 Lakh from the father of the deceased. According to the case of the prosecution, the deceased was kidnapped by the original accused No.1 namely Akshaykumar as a part of the conspiracy and thereafter the deceased remained in company of the co-accused namely Kuldeepkumar Panchal (the original accused No.2). While the original accused No.2 - Kuldeepkumar Panchal remained with the deceased, the original accused No.1 namely Akshaykumar Patel persistently kept on calling up the father of the deceased for the purpose of demanding ransom of Rs.50 Lakh. On the next day i.e. on 18th March 2012, both the accused took the deceased to the village Rakhav of the Wagdod Taluka and underneath one bridge killed the deceased by slitting his throat with a blade. Thus, according to the case of the prosecution, the deceased - a five year old boy was kidnapped from his lawful guardianship for the purpose of ransom and thereafter on the next day, the boy came to be killed by the accused persons. It is also the case of the prosecution that after slitting the throat of the child, the body was dumped beneath the heap of earth while there was still some life in the child.

5 On the strength of the F.I.R. lodged by the father of the deceased, the

investigation had commenced. The inquest panchnama Exhibit : 53 of the body of the deceased was drawn in the presence of the panch witnesses. The dead body of the deceased was sent for postmortem examination and the postmortem report Exhibit : 30 revealed that the deceased had suffered multiple injuries on his neck inflicted by a sharp cutting instrument and the cause of death assigned in the postmortem report is the slitting of the throat. The scene of offence panchnama Exhibit : 40 was drawn in presence of the panch witnesses. The clothes of the original accused No.1 namely Akshaykumar Patel were collected by drawing a panchnama Exhibit : 74. Whereas the clothes of the original accused No.2 namely Kuldeepkumar Panchal were collected by drawing a panchnama Exhibit : 81 and were sent to the Forensic Science Laboratory for chemical analysis. Thereafter, both the accused persons were sent for medical examination. The Investigating Officer collected the medical certificate of the original accused No.1 - Akshaykumar Exhibit : 33 and also the medical certificate of the original accused No.1 - Kuldeepkumar Panchal Exhibit : 35. The bloodstained clothes of the deceased were collected by drawing a panchnama Exhibit : 64 and were sent to the Forensic Science Laboratory for chemical analysis. Both the accused were arrested on 19th March 2012 and the arrest panchnama of both the accused Exhibit : 42 was drawn in presence of the panch witnesses. The statements of various witnesses were recorded. Finally, the chargesheet was filed against both the accused appellants in the Court of the Judicial Magistrate First Class, Visnagar.

6 As the case was exclusively sessions triable, the Judicial Magistrate First Class, Visnagar committed the case to the Sessions Court under Section 209 of the Code of Criminal Procedure, 1973. The Sessions Court framed the charge Exhibit : 9 against the accused appellants and the statements of both the accused were recorded. Both the accused did not admit the charge and claimed to be tried.

7 The prosecution adduced the following oral evidence in respect of its case:

Sl.

Description

Exhibit

No.

1

Statement of Dr. Jigneshkumar Rameshchandra Modi

14

2

Statement of Dr. Jayesh Mansukhlal Katkiya

20

3

Statement of Dr. Nitin Rameshbhai Prajapati

29

4

Statement of Dr. Mahendrabhai Amrutlal Limbachiya

32

5

Statement of complainant Pratikkumar Ratilal Patel

37

6

Statement of the panch witness Mukeshkumar

39

Amrutlal Suthar

7

Statement of the panch witness Natvarlal

41

Purshottamdas Patel

8

Statement of the panch witness Krunal Jitendrakumar

46

Patel

9

Statement of the panch witness Hirenkumar Natvarlal

54

Patel

10

Statement of the panch witness Manojkumar

63

Narayanbhai Patel

11

Statement of the panch witness Girishkumar Ambalal

68

Patel

12

Statement of the panch witness Amitkumar Kantilal

70

Patel

13

Statement of the panch witness Dharmendrakumar

73

Prahladbhai Patel

14

Statement of the panch witness Sunilkumar

80

Bhagwanbhai Patel

15

Statement of the panch witness Sandipkumar

86

Bharatbhai Patel

16

Statement of the Mamlatdar - Siddhiben Asheshkumar

88

Patel

17

Statement of the panch witness Hirenkumar

91

Bharatbhai Patel

18

Statement of the Child witness Gaurang Sureshbhai

92

Chaudhary

19

Statement of the witness Lalitkumar Keshavlal

94

Prajapati

20

Statement of the police witness Narendrasingh

95

Samantsingh Rathod

21

Statement of the witness Bhogilal Ambalal Patel

96

22

Statement of the witness Amratlal Shambhubhai Raval

98

23

Statement of the witness Aabidali Ibrahimbhai Muman

99

24

Statement of the witness Ankitkumar Mahendrabhai

100

Patel

25

Statement of the FSL Officer Shri Miraben Kapilbhai

102

26

Statement of the Head Constable Shri Shankarbhai

113

Saburbhai Vankar

27

Statement of the FSL Officer Shri Rameshbhai

119

Ramjibhai Chaudhary

28

Investigating Officer Shri Mahobbatsingh Manubhai

122

Parmar

8 The following pieces of documentary evidence were adduced by the prosecution:

Sl.

Description

Exhibit

No.

1

Injury certificate of the accused Kuldeep Karshanbhai

15

2

Original case of the accused Kuldeep Karshanbhai

16

3

Injury certificate of the accused Akshay Kaushik Patel

17

4

Original case of the accused Akshay Kaushik Patel

18

5

Police Yadi

19

6

Injury certificate of the accused Akshay Kaushik Patel

21

7

Yadi for the treatment of patient and blood collection

22

8

Original Case Paper No.3415

23

9

Form No.2 of the blood sample collected of the

24

accused Akshay Kaushikbhai

10

Injury certificate of the accused Kuldeep Karshanbhai

25

11

Original Case Paper No.3416

26

12

Form No.2 of the blood sample collected of the

27

accused Kuldeep Karshanbhai

13

Postmortem note of the deceased

30

14

Injury certificate of the accused Akshay Kaushik Patel

33

15

Police Yadi

34

16

Injury certificate of the accused Kuldeep Karshanbhai

35

17

Original complaint

38

18

Panchnama of the place of offence

40

19

Panchnama of the state of body of the accused Akshay

42

Kaushibhai Patel and Kuldeep Karshanbhai Panchal

20

Witness slips of the Muddamal Articles Nos.1 to 4

43 to

45

21

Panchnama of the place of offence willingly shown by

47

the accused Kuldeep

22

Witness slip of the Muddamal Article No.6

48

23

Witness slip of the Muddamal Article No.7

49

24

Witness slip of the Muddamal Article No.8

50

25

Witness slip of the Muddamal Article No.9

51

26

Witness slip of the Muddamal Article No.10

52

27

Inquest panchnama

53

28

Panchnama of the Indica car

55

29

Witness slip of the Muddamal Article No.11

56

30

Witness slip of the Muddamal Article No.12

57

31

Witness slip of the Muddamal Article No.13

58

32

Witness slip of the Muddamal Article No.14

59

33

Witness slip of the Muddamal Article No.15

60

34

Witness slip of the Muddamal Article No.16

61

35

Witness slip of the Muddamal Article No.17

62

36

Seizure Panchnama of the clothes of the deceased

64

37

Witness slip of the Muddamal Article No.18

65

38

Witness slip of the Muddamal Article No.19

66

39

Witness slip of the Muddamal Article No.20

67

40

Seizure panchnama of the Bike

69

41

Muddamal panchnama of the mobile phone produced

71

by the complainant

42

Witness slip of the Muddamal Article No.30

72

43

Seizure panchnama of the mobile and clothes worn

74

by the accused Akshaykumar on his willingness at the
time of occurrence of the offence

44

Muddamal panchnama of the Aircell simcard

75

45

Witness slip of the Muddamal Article No.22 to 25

76 to

79

46

Seizure panchnama of the mobile and clothes worn

81

by the accused Kuldeep Karshanbhai on his

willingness at the time of occurrence of the offence

47

Witness slip of the Muddamal Article No.26

82

48

Witness slip of the Muddamal Article No.27 and 28

83, 84

49

Panchnama of the produced mobile by Chiragbhai

87

Panchal

50

Letter written for the Identification Parade

89

51

Panchnama of the Identification Parade

90

52

Zerox copy of the muddamal Bike R.C Book

101

53

Letter of the Visnagar Police Inspector for voice test of

103

the accused

54

Letter of the Visnagar Police Inspector with regard to

104

know the voice of the accused Kuldeep Panchal

55

Original written document as regards voice sample

105

taken of the accused Kuldeep on his consent in

presence of the Investigating Officer

56

Script note in seven pages of the conversation

106

recorded between the complainant and the accused

57

C.D. of the script conversation recorded between the

109

complainant and the accused

58

Graph of the voice frequency

110

59

Forwarding letter sent in the police station as regards

111

submission of report upon the graph and script of

conversation

60

Report upon the graph and script of conversation

112

61

Depute Order

114

62

Written report for registration of the offence

115

63

Original copy of the station diary page No.14

116

64

Special report of the serious offence

117

65

Message of the FSL

120

66

Preliminary report of the FSL

121

67

Report for addition of the Sections 302, 364-A, 384,

123

114, 130B, 34 and 201 of the I.P.C. and Section 135

of the G.P. Act.

68

Report for addition of the Section 212 of the I.P.C.

124

69

Certificate for cause of death issued by the Civil
125
Hospital, Patan
70
Report of the P.S.O. for noteworthy entry as regards
126
further course of action
71
Report sent to the P.S.O. for lodgment of the N.C.
127
Offence
72
Postmortem report
128
73
Letter written to the RTO Mehsana seeking
129
information for the vehicle No.GJ2 AC 7255
74
RC Book of the vehicle No.GJ2 AC 7255
130
75
Entry regarding forwarding of the muddamal in the
131,
FSL
132
76
Receipt of the muddamal in the FSL
133,
134

77

Letter written to the FSL Gandhinagar for receiving

135

back of muddamal

78

Receipt of the muddamal received back from the FSL

136

79

Letter, Analysis Report and Forwarding Report of the

137

FSL Gandhinagar

79(

Letter to the FSL Gandhinagar for re-sending of

138

1)

Muddamal Article 15

79(

Report (DNA Report) sent by the FSL Gandhinagar

139

2)

80

Copy of the F.I.R. bearing C.R. No.I-13 of 12

140

Visnagar

81

Call Form Report of the FSL Van

141

82

Copy of the declaration as regards weapon

142

prohibition

83

Bill of the Samsung phone purchased from the Balaji

143

Mobile Shop

84

Copy obtained from the Net regarding application

144

form for getting simcard

85

Letter regarding grant of permission to file chargesheet

145

by the Deputy Superintendent of Police

86

Letter written by the Superintendent of Police,

146

Mehsana regarding different call numbers

TO

148

87

Calls details of the simcard used by the accused

149

Akshay

88

Form of the simcard used by the accused Akshay and

150

at that time given identification card and report

showing the simcard location

89

Report showing the location of the number

151

9619649943 of the accused Panchal Kuldeep

90

Letter received from the Computer Section of the

152,

Police Department and call details

153

9 After completion of the oral as well as the documentary evidence of the prosecution, the statements of the accused persons under Section 311 of the Cr.P.C. was recorded, in which both the accused stated that the complaint was a false one and they were innocent.

10 At the conclusion of the trial, the Trial Judge convicted both the accused appellants for the offences enumerated above and sentenced them to death.

11 As the Trial Court thought fit to impose death penalty, the matter came to be referred to this Court for confirmation of the death penalty, which has been registered as the Criminal Confirmation Case No.1 of 2016.

12 Being dissatisfied, the accused appellants have come up with their respective appeal.

- ORAL EVIDENCE ON RECORD:

13 The PW 1 - Dr. Jigneshkumar Rameshchandra Modi Exhibit : 14 came to be examined by the prosecution to prove and bring on record the medical certificate of the medical examination of the accused appellants. The PW 1 - Dr. Modi has deposed that both the accused appellants were brought at the General Hospital, Vadnagar with a police Yadi by Shri Kalubhai, ASI, Buckle No.2227 of the Visnagar Police Station. Upon examination of accused Akshaykumar Kaushikbhai Patel, the following injuries were noticed on his body:

"Injury on right thumb dorsally and back injury

(1) Right hand thumb -dorsally 2nd phalanx, oblique abrasion. 1* =0.25 cm.

(2) Back. Irregular bruise mark and Transverse - dark red in colour. All most all over back."

14 According to the PW 1, the accused namely Akshaykumar Kaushikbhai, while narrating the history, stated that "yesterday at around 9 hours, beneath the bridge at Patan Shihori, I sustained injuries on my right hand thumb as I tried to press the mouth of Bholu for the purpose of inflicting injury on Bholu with a blade". The accused also stated in the history that "they were assaulted by people with fisty-cuffs". The PW 1, thereafter, deposed as regards the injuries

suffered by the accused No.2 namely Kuldeepkumar Panchal. According to the PW 1, the very same history, as narrated by the co-accused referred to above, came to be narrated by Kuldeepkumar Panchal. On the body of the accused Kuldeepkumar Panchal, the following injuries were noticed:

"Injuries : Right hand index finger palmer aspect

(1) Abrasion : 0.5 cm * <=1.5mm* =1mm

(2) Abrasion : 0.25cm * <1.5 mm* =1 mm

(3) Abrasion : 0.75cm * <1.5mm* =1mm

(4) Abrasion : 0.25cm * <1.5mm =1mm

Back

(1) Multiple bruise mark (5) in no's. Irregular shape and width about 8-9 cm/ 5-6 cm all red colour."

15 The PW 1 produced the two medical certificates, which were exhibited as Exhibits : 15 and 16 respectively. In the cross-examination of the PW 1, few suggestions were put by the defence, more particularly, with regard to the history noted in the medical certificates. The PW 1 has denied the suggestions put by the defence that the accused persons had not narrated any such history. Except putting few suggestions, nothing substantial could be elicited through the cross-examination of the PW 1.

16 The prosecution examined PW 2 - Dr. Jayesh Mansukhlal Katkiya Exhibit : 20. It appears that both the accused were medically examined by the PW 2 at the Visnagar Hospital at 10:45 hours on 21st February 2012. Before the PW 2 also, the very same history was narrated by both the accused as regards the injuries which were noticed on their body. The PW 2 produced the injury certificates of the accused No.1- Akshaykumar Kaushikbhai Exhibit : 23 as well as the accused No.2 - Kuldeepkumar Karshanbhai Exhibit : 26.

17 The PW 3 - Dr. Nitin Rameshbhai Prajapati Exhibit : 29 came to be examined by the prosecution to bring on record and prove the postmortem report of the deceased. The PW 3, in his deposition, has deposed as regards the nature of the injuries suffered by the deceased. He has deposed that he noticed the following injuries on the body of the deceased:

"(1) Incised wound about 8 cm * 3 cm. Sharp cutting the skin, subcutaneous tissues, carotid artery, sterno-cleido mastoid muscle, Jugular vein on the left side of neck, starting from 1.5 cm lateral to midline at the anterior aspect of neck running slightly oblique and extended upto 2.5 cm below the angle of left mandible and about 4.5 cm below the lobule of left ear, edge and margin, clean cut well defined and Beveling.

(2) Incised wound about 3cm * 0.5 cm x muscle deep at Rt. side of neck on anterior aspect just 3cm below the arch Rt. mandible.

(3) Linear abrasion 3 in number each one size about 2.5 cm just below the arch of mandible on left side.

(4) Incised wound about 5 cm * 0.5 * skin deep just 1 cm below the injury of (1).

(5) Abrasion 1.5 cm * 1 cm on dorasal aspect of left foot."

18 The PW 3 has deposed that the cause of death was shock on account of the throat injuries. In his evidence, he has deposed that the injuries sustained by the deceased were on the vital part of the body and could be caused by a blade. He has also deposed that after slitting the throat, if some life is still left in the person and if that person is buried, then it is possible that earth would get deposited inside the nostrils. He has further deposed that the injuries were sufficient in the ordinary course of nature to cause death. Nothing substantial could be elicited by the defence through the cross-examination of the PW 3.

19 The PW 4 - Dr. Mahendrabhai Amrutlal Limbachiya Exhibit : 32 came to be examined by the prosecution to bring on record the medical certificates of the examination of both the accused persons. The PW 4 - Dr. Mahendrabhai has deposed as regards the injuries, which were noticed on the hands of both the accused persons. The PW 4 had noted the history of both the accused persons wherein both the accused had stated before the PW 4 that they suffered the injuries on their hands on account of assault and blade.

20 The PW 5 - Pratikkumar Ratilal Patel Exhibit : 37 is the father of the deceased. He has deposed that his five year old son named 'Maharsh' alias Bholu went missing all of a sudden on 17th March 2012 while he was playing with his friends. While trying to search his son, he learnt through one of the boys who was playing with the deceased that one person came on a motorcycle and picked up Bholu along with him. This witness lodged the F.I.R. at the police station. He has deposed that thereafter he received a phone call from the mobile number 9619649943 on his mobile number 9825067979. The person, who called him up, started talking to him and the PW 5 was informed by the person who had called up that Bholu was with them and they would kill Bholu if the amount of Rs.50 Lakh was not paid by way of ransom. This witness has deposed that he pleaded before the person who had called him upto accept Rs.10 to 12 Lakh and release Bholu as such amount was available with the PW 5. The PW 5 proved the contents of the FIR which was admitted at Exhibit : 38.

21 The PW 6 - Mukeshkumar Amrutlal Suthar Exhibit : 39 came to be examined by the prosecution as one of the panch witnesses. This witness has proved the scene of offence panchnama at Exhibit : 40.

22 The PW 7 - Natvarlal Purshottamdas Patel Exhibit : 41 came to be examined by the prosecution as one of the panch witnesses of the panchnama of the person of both the accused, the recovery of mobile phone and two simcards from the accused No.2 and also the recovery of the Indica car. This panch witness has proved the panchnama Exhibit : 42.

23 The PW 8 - Krunal Jitendrakumar Patel Exhibit : 46 has been examined as a panch witness of the discovery panchnama of the place where the dead body was buried by the accused persons. The said discovery panchnama Exhibit : 47 is with regard to the place where the boy was buried, recovery of blades, pair of chappals, one whistle and five packets of chocolates has been proved at Exhibit : 47.

24 The PW 9 - Hitenkumar Natvarlal Patel at Exhibit : 54 has been examined by the prosecution as one of the panch witnesses of the panchnama of the blood marks found beneath the steering of the Indica car and the other articles lying inside the car comprising of an iron rod, one wooden log, one water bottle, steel Jar and three steel dishes. This witness proved the panchnama Exhibit : 55.

25 The PW 10 - Manojkumar Narayanbhai Patel Exhibit : 63 has been examined by the prosecution as one of the panch witnesses to prove the panchnama of the clothes of the deceased at Exhibit : 64.

26 The prosecution examined the PW 11 - Girishkumar Ambalal Patel at Exhibit : 68 as one of the panch witnesses to the production / recovery of the motor bike through one Ankitkumar Mahendrabhai Patel at Exhibit : 69. This witness has deposed that he was called on 20th March 2012 at the police station where he was introduced to one Ankitkumar Mahendrabhai Patel. He has deposed that the police on inquiring with Ankitkumar Patel stated that Akshay - accused No.1 had taken his bike in the evening on 17th March 2012. This bike is of the Hero Honda company bearing registration No.GJ2AR6291. According to the case of the prosecution, this is the very same bike on which the deceased was picked up by the accused No.1. There is practically no cross-examination of this witness by the defence counsel.

27 The prosecution examined the PW 12 Amitkumar Kantilal Patel at Exhibit : 70 as one of the panch witnesses for collecting the mobile phone of the first informant bearing mobile No.9825067979. This witness has proved the panchnama Exhibit : 71. This is the very same mobile owned by the father of the deceased on which the accused persons had called up for the purpose of demanding ransom. Nothing substantial could be elicited by the defence in the cross-examination of the PW 12.

28 The prosecution examined the PW 13 - Dharmendrakumar Prahladbhai Patel at Exhibit : 73 as one of the panch witnesses to a discovery panchnama of a simcard at the instance of the accused No.1 concealed beneath a stone lying near an electric pole including the mobile phone as well as the clothes of the deceased discovered from the house of the uncle of the accused No.1. The name of the uncle of the accused No.1 is Girishkumar Ishwarbhai Patel. The PW 13 has proved the panchnama Exhibit : 74. The evidence of the PW 13 assumes importance. The PW 13, in his evidence, has deposed that on 20th March 2012, at around 12:00 o'clock, in the afternoon, he was called at the police station to act as a panch witness. According to the PW 13, one another person by name

Jigneshkumar Gandabhai Patel was also present and he was also requested by the police to act as a panch witness. He has deposed that the Investigating Officer inquired with Akshaykumar Kaushikkumar, the accused No.1 as to what he wanted to disclose. According to the PW 13, the accused No.1 stated before the police that he would like to show the place where he had concealed a simcard of the Aircel company, one Nokia mobile and the clothes worn by the deceased at the time of the incident. He has deposed that the accused No.1 - Akshaykumar was made to sit on the front seat of the Police Jeep. Thereafter, as guided by the accused No.1, the police reached near the Neelkanth Mahadev Temple. Akshay i.e. the accused No.1 led the police party and the panch witnesses near an electric pole and beneath a stone lying near the electric pole the simcard was concealed. The accused No.1 took out the simcard and handed over the same to the police in the presence of the panch witnesses. Thereafter, the accused No.1 led the police party along with the panch witnesses to the house of his uncle namely Girishkumar Ishwarbhai Patel. From the house of Girishkumar Patel, the accused No.1 took out one shirt and a pant and one Nokia phone from a black coloured suitcase. The same was collected by the police by drawing an appropriate panchnama. Nothing substantial could be elicited in the cross-examination of the PW 13 by the defence. The PW 13 has proved the panchnama Exhibit : 74.

29 The prosecution examined the PW 14 - Sunilkumar Bhagwanbhai Patel at Exhibit : 80 for the purpose of proving the contents of the panchnama at Exhibit : 81. The PW 14 came to be examined by the prosecution as one of the panch witnesses of a discovery panchnama. The accused No.2 led the police party along with the panch witnesses with the PW 14 and showed the place where a broken simcard was concealed in a dust-bin placed near an electric pole. The PW 14 also deposed as regards the discovery at the instance of the accused No.2 of his clothes worn by him on the date of the commission of the offence. The PW 14 has proved the contents of the panchnama Exhibit : 81. Nothing substantial could be elicited from the cross-examination of this witness by the defence.

30 The prosecution examined the PW 15 - Sandipkumar Bharatbhai Patel at Exhibit : 86 as one of the panch witnesses to the production / recovery of a mobile phone through one Chiragbhai Panchal allegedly used by the original accused No.2 in the commission of the offence. The PW 15 has proved the contents of the panchnama Exhibit : 87.

31 The prosecution examined the PW 16 - Siddhiben Ashishkumar Patel at Exhibit : 88. The PW 16 came to be examined by the prosecution to prove the identification parade at Exhibit : 90. The PW 16 is a Executive Magistrate, who had conducted the identification parade. The PW 16 has proved the contents of the proceedings of the identification parade at Exhibit : 90. This witness has deposed that, as requested by the Police Inspector, Visnagar, the identification parade was conducted on 22nd March 2012. The accused No.1 - Akshaykumar

Kaushibhai was identified by a seven year old friend of the deceased. The friend of the deceased could identify the accused as he had seen the accused No.1 picking up the deceased on his motorcycle on the day the deceased was kidnapped. The accused No.2 Kuldeep Panchal was identified by the person i.e. PW 19 Exhibit 94 working at the Theatre. Nothing substantial could be elicited in the cross-examination by the PW 16 to discredit the evidence with regard to the identification parade.

32 The prosecution examined the PW 17 - Hirenkumar Bharatbhai Patel at Exhibit : 90 as one of the panch witnesses to the identification parade. He has proved the contents of the proceedings of the identification parade Exhibit : 90.

33 The prosecution examined the PW 18 - Gaurang Sureshbhai Chaudhary at Exhibit : 92. The evidence of this child witness assumes importance. The PW 18, in his evidence, has deposed that his family members addressed him as Bholu. He has deposed that his friends are Parth, Vidhi, Jimi, Bholu, Raj and Priyank. Incidentally, the deceased was also called and known as Bholu. He has deposed that it was Saturday and in the evening hours, they all were playing together. At that time, one person came on a motorcycle and called Bholu (deceased). That person asked Bholu to sit on his motorcycle and thereafter took away Bholu on his motorcycle. This witness has thereafter given description of that person who had taken away Bholu on his motorcycle. He has deposed that thereafter the mother of Bholu came over there inquiring about him and at that time he disclosed before the mother of Bholu that one person came on a motorcycle and took away Bholu. The PW 18 is the very same witness who has identified the accused No.1 Akshay in the identification parade. Nothing substantial could be elicited by the defence counsel in the cross-examination of this witness.

34 The prosecution examined PW 19 - Lalitkumar Keshavlal Prajapati at Exhibit : 94. The evidence of this witness also assumes importance because the PW 19, at the relevant point of time, was serving at the City Point cinema, Patan. He was serving in his capacity as a Ticket / Window Operator. The PW 19, in his evidence, has deposed that on 17th March 2012, his duty was from three o'clock in the evening upto twelve o'clock in the night. He has deposed that one person along with a small child came and purchased two tickets for the Night show i.e. 9 to 12 show. He has further deposed that after the ticket counter was closed, he thereafter went to the cinema canteen. At that time, the very same person came over there with a small child and purchased Popcorn and Pepsi Cola. Thereafter, the very same person with a small child came and made a request to him for a mobile charger, but as the PW 19 had no charger with him, he was not able to accede to the request of that person. The PW 19 is the very same witness who has identified the accused No.2 in the identification parade. He has further deposed that the police came at the cinema hall for the purpose of investigation and showed one photograph of a boy. He has deposed that he could immediately recognize the boy in the photograph. The PW 19 identified the accused No.2 in the Court room as the very same person who had come with the deceased to

watch the movie on 17th March 2012. In his cross-examination also, the defence could not discredit his evidence.

35 The prosecution examined the PW 21 - Bhogibhai Ambalal Patel at Exhibit : 96. The PW 21, in his evidence, has deposed that he is a resident of village : Kansa. He has deposed that as he is running a Pan Parlour in one shop situated at the Laxminarayan Shopping Centre. He has deposed that he would keep his shop open upto ten o'clock in the late evening. According to him, on 17th March 2012, at around eight o'clock, while he was at his shop, the accused No.1 - Akshay came at his shop to purchase Gems chocolate. At that time, he was all alone. The PW 21 identified the accused No.1 in the Court room as the very same person, who had visited his shop for the purchase of chocolates. However, this witness came to be declared as hostile. However, in the cross-examination of this witness by the Public Prosecutor, the PW 21 has admitted that the person sitting in the Court room is the very same person who had been identified by him in the identification parade as the person who had come to his shop with 'Maharsh' i.e. the deceased.

36 The prosecution examined PW 22 - Amratbhai Shambhubhai Raval at Exhibit : 98. The evidence of this witness assumes importance. The PW 22, in his evidence, has deposed that he is a resident of Khokharvada situated at Patan. He has deposed that he sells 'Bidi' and few other miscellaneous articles in a lorry. He has deposed that on 18th March 2012, while he was standing with his lorry, at that point of time, two persons with a small child came over there and purchased three packets of blades. This witness identified both the accused persons in the Court room as the very same two persons who had purchased blades from him. This witness has also identified the blades collected by the police as muddamal, as the very same blades he had sold to the two accused persons. The defence did try to discredit this evidence in his cross-examination, but nothing substantial could be elicited through the cross-examination of the PW 22 so as to render his evidence doubtful.

37 The prosecution examined PW 23 - Abedali Ibrahimbhai Muman at Exhibit : 99. This witness, in his evidence, has deposed that he is running a Pan Parlour near the Navjivan Hotel situated at Patan, Siddhpur Road. In his Parlour, he sells whistles, rubber wrist bands and plastic toys meant for small children. The evidence of this witness assumes also importance. He has deposed that on 18th March 2012, while he was at his shop, at that time, one man came along with a small child and purchased one whistle and a rubber wrist band. He sold the whistle for Rs.25/- and the rubber wrist band for Rs.10/-. He has deposed that thereafter that person along with the small child sat on the bench adjacent to the shop of this witness. He asked for Tea. The PW 23 offered Tea to that person. The PW 23 identified the muddamal articles i.e. the whistle and the rubber wrist band as the very same articles purchased from his Parlour. This witness identified the accused No.2 - Kuldeep as the very same person who had come to his shop along with the small child. Nothing substantial could be elicited by the defence

through his cross-examination so as to discredit this evidence.

38 The prosecution examined PW 24 - Ankitkumar Mahendrabhai Patel at Exhibit : 100. This witness has been examined, as the Hero Honda motorcycle seized by the police in connection with the crime is of the ownership of the PW 24. He has deposed that on 17th March 2012, at about 6:30 p.m., his friend namely Akshay (accused No.1) came to him requesting to part with his bike. The PW 24, upon request made by the accused No.1, parted with his bike and later, at eight o'clock, came and returned the bike to this witness.

39 The prosecution examined the PW 25 - Meeraben Kapilbhai Patel at Exhibit : 102. The PW 25 came to be examined by the prosecution in her capacity as a Scientific Officer. The PW 25 has deposed as regards the Voice Spectrography Test. She has proved the Voice Spectrography Test report Exhibit : 112 through her evidence. The prosecution has been able to prove through the evidence of the PW 25 that the person who used to call up the father of the deceased on his mobile was the accused No.2 Kuldeep. Nothing substantial could be elicited through the cross-examination of the PW 25 so as to render the evidence of the Voice Spectrography Test doubtful in any manner.

40 The prosecution examined PW 26 - Shankarbhai Shaburbhai Vankar at Exhibit : 113. He came to be examined, in his capacity, as the Head Constable posted at the Kadi Police Station. The PW 26 had taken down the F.I.R. lodged by the father of the deceased.

41 The prosecution examined the PW 27 - Rameshbhai Ramjibhai Chaudhary in his capacity as the Scientific Officer. The articles lying near the place of the occurrence were collected by the Investigating Officer in presence of the PW 27.

42 The prosecution examined PW 28 - Mohabbatsinh Manubhai Parmar at Exhibit : 122. The PW 28 is the Investigating Officer. The Investigating Officer, in his evidence, has given a detailed description of all the relevant aspects of the investigation. Nothing substantial could be elicited by the defence through the cross-examination of the Investigating Officer so as to render the case of the prosecution doubtful in any manner.

43 Having regard to the evidence on record, oral as well as documentary led by the prosecution in the course of the trial, the Trial Court took into consideration the following incriminating circumstances pointing towards the guilt of the accused persons:

? INCRIMINATING CIRCUMSTANCES AGAINST THE ACCUSED NO.1- AKSHAYKUMAR KAUSHIKBHAI PATEL:

[1] Incriminating admission in the form of history given before the three medical officers.

[2] The recovery of a mobile phone as also the recovery of Indica car used in the commission of the offence.

[3] The recovery of Hero Honda motorcycle allegedly used in the commission of the offence by the accused No.1 at the time of kidnapping of the deceased.

[4] The discovery of a simcard, mobile phone and clothes of the deceased worn by him at the time of commission of the offence at the instance of the accused.

[5] The identification of the accused in the Test Identification Parade.

[6] The evidence of the child witness PW 18 (Exhibit : 92) as regards the deceased last seen in the company of the accused No.1.

[7] The deposition of the PW 21 (Exhibit : 96) as regards the purchase of Gems chocolate by the accused No.1.

[8] The deposition of the PW 22 (Exhibit : 98) as regards the purchase of the blades by both the accused persons and the very same set of blades used in the commission of the crime.

[9] The discovery of clothes of the accused No.1 with bloodstains matching with the blood group of the deceased, as certified by the F.S.L. Report at Exhibits : 131 and 139 respectively.

? INCRIMINATING CIRCUMSTANCES AGAINST THE ACCUSED NO.2 - KULDEEPKUMAR KARSHANBHAI PANCHAL:

[1] Incriminating admission in the form of history given before the three medical officers.

[2] The discovery of a mobile phone and two simcards at the instance of the accused No.2.

[3] discovery of the spot i.e. the place at which the pant and shirt of the deceased was buried at the instance of the accused No.2.

[4] The discovery of a broken simcard and clothes worn by the accused No.2 at the time of commission of the offence.

[5] The recovery of Nokia mobile used by the accused No.2 for the purpose of calling up the father of the deceased for ransom. However, the mobile phone was purchased through one Chirag Panchal.

[6] The identification of the accused No.2 in the Test Identification Parade.

[7] The purchase of blades by the accused No.2 and the co- accused on 18th March 2012.

[8] The evidence of the PW 19 at Exhibit : 94 as regards the deceased last seen in the company of the accused No.2 on 17th March 2012.

[9] The purchase of a whistle and rubber wrist band by the accused No.2 from the PW 23 (Exhibit : 99).

[10] Evidence of the Voice Spectrography Test.

[11] The bloodstains of the blood group of the deceased found on the clothes of the accused No.2, as certified by the F.S.L. at Exhibits : 131 and 139 respectively.

- SUBMISSIONS ON BEHALF OF THE ACCUSED NO.1 - AKSHAYKUMAR PATEL:

44 Mr. Anand Yagnik, the learned counsel appearing for the accused No.1 very fairly submitted that the prosecution has been able to lead cogent and convincing evidence to prove the guilt of the accused. Mr. Yagnik fairly submitted that the Trial Court has exhaustively discussed all the incriminating circumstances pointing towards the guilt of the accused. In such circumstances, Mr. Yagnik did not deem fit to seriously assail the legality and validity of the judgment and order of conviction. Mr. Yagnik concentrated only on the quantum of punishment. According to Mr. Yagnik, the Trial Court ought not to have imposed the sentence of death penalty. According to Mr. Yagnik, even if the crime could be termed as very heinous and gruesome, the same by itself is not sufficient to bring the case within the category of the "rarest of the rare case". According to Mr. Yagnik, his client, at the time when the offence came to be committed, was 21 years of age. It is submitted that there is nothing on record to indicate that the accused cannot be reformed and the death penalty was the only option which was available to the Trial Court.

45 In such circumstances referred to above, Mr. Yagnik submitted that the death penalty does not deserve to be confirmed. According to Mr. Yagnik, this Court may sentence the accused to undergo life imprisonment with a clarification that the imprisonment for life means sentence for the entire life i.e. till the accused breathes his last. Mr. Yagnik fervently appealed to this Court that the life of his client may not be taken away.

- SUBMISSIONS ON BEHALF OF THE ACCUSED NO.2 - KULDEEPKUMAR PANCHAL:

46 Mr. Pratik Barot, the learned counsel appearing for the accused No.2 submitted that some of the circumstances taken into consideration by the Trial Court as incriminating and pointing towards the guilt of the accused No.2 are not admissible in evidence. Mr. Barot submitted that the contents of the extra-judicial confession of the accused persons alleged to have been made before the Doctors is not admissible in evidence. Mr. Barot would submit that while the history was being narrated and recorded, the accused was in the police custody and any type of confession before any third person including the Doctor would be hit by Sections 25 and 26 of the Evidence Act. In such circumstances, according to Mr. Barot, the history narrated before the Doctors could not have been made admissible in evidence. Mr. Barot, in support of his submissions, placed strong reliance on two decisions of the Supreme Court : (1) Indra Dalal vs. State of Haryana reported in 2015(7) Scale 17 and (2) State of Andra Pradesh vs. Gangula Satyam Murthy reported in 1997(1) SCC 272.

47 We are not impressed by the aforesaid submission of Mr. Barot. The history given to the Doctors by both the accused at the time of treatment would not be strictly called an extra-judicial confession, but, would be a relevant piece of

evidence, as this document had been prepared by the Doctors in the normal course of their business. What was stated by the accused before the Doctors in the form of history could be termed as an incriminating admission of a relevant fact admissible under Section 21 of the Evidence Act.

48 Admission is defined by Section 17 of the Evidence Act as a statement, oral or documentary, or contained in electronic form, which suggests an inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances as specified in Sections 18, 19, 20 and 21.

49 A close reading of the Sections 18, 19 and 20 of the Evidence Act clearly shows that the admissions made in various circumstances, as envisaged by Sections 18, 19 and 20, are admissible in suits or proceedings of civil or quasi-civil nature. Sections 22, 23 and 24 stipulates the circumstances where admission may not be allowed to be brought into evidence. That leaves us with Section 21, which reads as under :

"Section 21. Proof of admissions against persons making them, and by or on their behalf.-

Admissions are relevant and may be proved as against the person who makes them, or his representative in interest, but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases :-

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission."

50 A close reading of the provisions, contained in Section 21, clearly shows that though an admission cannot be proved by or on behalf of the person, who makes the admission, except in the cases as specified in Section 21, yet an admission is relevant and may be proved against a person, who makes it. There is nothing, in Section 21, indicating that Section 21 applies to civil proceedings only. Far from this, the illustrations, given in Section 21, make it more than abundantly clear that these illustrations are in the realm of criminal law and not necessarily confined to civil law. The illustrations read as under :

"(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a

statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, or can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course.

A produce a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under Section 32 clause (2).

(c) A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under Section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory or conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it is counterfeit or not, and that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration."

51 A close examination of the illustrations, as given in Section 21, makes it more than abundantly clear that an admission of a fact can be used against the maker even in criminal law.

52 Let us, now, turn to the question as to what is 'confession' and how does 'admission' differ from 'confession'?

53 The Evidence Act does not define confession. Stephen, in his Digest on the Law of Evidence, defines confession as an admission made, at any time, by a person charged with crime or suggesting the inference that he committed the crime. Straight, J. in *R. v. Jagrup*, reported in (1885) ILR 7 All 646, and Chandawarkar, J. in *R. V. Santya Bandhu*, reported in (1902) 4 Bom LR 633, did not, however, accept such a wide definition and gave a restricted meaning to the expression 'confession' by holding that only a statement, which was a direct acknowledgment of guilt, would amount to 'confession' and that a 'confession' would not include merely inculpatory admissions, which fall short of being

admission of guilt. The controversy, as to what 'confession' means, came to be, eventually, resolved and settled, way back in 1939, by the Privy Council, in *Pakala Narayana Swami v. The King Emperor* (AIR 1939 PC 47). The Privy Council, in *Pakala Narayana Swami* (supra), explained as to what 'confession' means but, did not, strictly speaking, follow the Stephen's definition of confession that 'admission' of facts, made by an accused, suggesting an inference that he had committed the crime, is confession. The Privy Council, in *Pakala Narayana Swami* (supra), laid down that no statement, containing self-exculpatory matter, would amount to confession if the exculpatory statement was of some facts, which, if true, would negative the offence alleged to have been confessed. It was further pointed out, in *Pakala Narayana Swami* (supra), that the word 'confession' as used in Evidence Act cannot be construed as meaning "a statement by an accused 'suggesting the inference that he committed' the crime."

54 In its often quoted passage, defining confession, in *Pakala Narayana Swami* (supra), Lord Atkin stated thus :

"Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles : confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872 : and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime."

55 From what has been defined as confession by the Privy Council, in *Pakala Narayana Swami* (supra), it becomes clear that a statement cannot be confession unless it either admits, in terms, the offence or, at any rate, substantially all the facts, which constitute the offence. The definition, so given, in *Pakala Narayana Swami* (supra), also makes it clear that the admission of certain facts which suggests an inference that the maker of the admission has committed the crime charged with, will not be treated as confession. The Apex Court has consistently followed this definition of confession in its subsequent decisions in *Palvinder Kaur v. The State of Punjab* (AIR 1952 SC 354), *Om Prakash v. State of U. P.* (AIR 1960 SC 409), *A Nagesia v. Bihar State* (AIR 1966 SC 119), and *Faddi v. State of*

Madhya Pradesh (AIR 1964 SC 1850).

56 In *Palvinder Kaur* (supra), the statement, made by the accused, was that she had placed her husband's dead body in a trunk and had carried it in a jeep and thrown it into a well. But with regard to the cause of her husband's death, her statement was that her husband had accidentally taken a poisonous substance erroneously thinking that to be a medicine. The Supreme Court referring to *Pakala Narayana Swami's* case (supra), and the dictum of Lord Atkin, held that a statement, which contained self-exculpatory matter would not amount to a 'confession' if the exculpatory matter is of some fact, which, if true, would negative the offence alleged to be confessed. The Court also added that a statement, to be a 'confession' must either admit, in terms, the offence or, at any rate, substantially, all the facts, which constitute the offence and that an admission of a gravely incriminating fact, even a conclusively incriminating fact, is not, of itself, a confession.

57 From the definition of confession, as given in *Pakala Narayana Swami* (supra), it becomes clear, as already indicated above, that unless an accused admits, in terms, the offence or, substantially, all the facts, which constitute the offence, such a statement will not amount to confession. In other words, if an accused does not own up his guilt or does not admit, substantially, all the facts, which constitute the offence, then the admission of such facts, which may give rise to an inference that he has committed the crime, will not be treated as confession.

58 However, the admission, made in such a statement which does not amount to confession, may, nevertheless, be admissible, under Section 21 of the Evidence Act, against an accused depending, of course, on the facts of given case, for, Section 21 permits such admission to be proved and the embargo, placed by Section 26, which prohibits confession, made by a person, "whilst he is in custody of a police officer" from being admitted into evidence, will not be attracted. The contours of Section 21 are not bounded by the limitations of the person being in the custody of the police officer. If an admission, made by an accused, while in the custody of police, to a person, other than police officer, amounts to confession, such admission would transgress into forbidden area of confession and would not be admissible under Section 26; but if such admissions are short of confession, such admissions would be admissible against the maker. One may, in this regard, refer to the case of *Faddi v. Madhya Pradesh*, (AIR 1964 SC 1850). *Faddi*, the appellant lodged a first information report and, based on this information, the dead body of his step son was recovered and three persons were arrested. As a result of the investigation, however, the appellant was arrested, was sent up for trial, which resulted in his conviction and a sentence of death. In his appeal to the Supreme Court, it was contended that the first information report ought not to have been admitted, because of Section 25 of the Evidence Act and Section 162 of the Criminal Procedure Code. This contention was turned down on the ground that neither of the two provisions barred the admissibility of the first information report as that report was only an

admission by the appellant of certain facts, which had a bearing on the question as to how and by whom the murder was committed and whether the statement of the appellant, in the Court, denying the evidence of certain prosecution witnesses was correct or not. Such admissions, held the Supreme Court, in Faddi (supra), were admissible under Section 21 of the Evidence Act and, as such, could be proved against the accused.

59 From the decision, in Faddi (supra), what becomes transparent, as already indicated above, is that when a statement, made by an accused, not being a direct acknowledgment of guilt, or not being admission of the facts, which constitute the offence charged with, can, nevertheless, be admissible in evidence, as admission, by virtue of Section 21 of the Evidence Act and can be proved against the accused.

60 Clarifying the position of law with regard to the question as to whether a confession, which falls short of an actual admission of guilt, may be used as evidence against the maker, under Section 21, the Supreme Court, in Central Bureau of Investigation v. V. C. Shukla (AIR 1998 SC 1406) : (1998 Cri LJ 1905), observed and held as under :

"45. It is thus seen that only voluntary and direct acknowledgment of guilt is a confession but when a confession falls short of actual admission of guilt it may nevertheless be used as evidence against the person who made it or his authorised agent as an 'admission' under Section 21. The law in this regard has been clearly and - in our considered view - correctly explained in Monir's Law of Evidence (New Edition at pages 205 and 206), on which Mr. Jethmalani relied to bring home his contention that even if the entries are treated as 'admission' of Jains still they cannot be used against Shri Advani. The relevant passage reads as under :- "the distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an accused person, if it is an admission, is admissible in evidence under Section 21 of the Evidence Act, unless the statement amounts to a confession and was made to a person in authority in consequence of some improper inducement, threat or promise, or was made to Police Officer, or was made at a time when the accused was in the custody of Police Officer. If a statement was made by the accused in the circumstances just mentioned, its admissibility will depend upon the determination of the question whether it does not amount to a confession. If it amounts to a confession, it will be inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggest an inference as to a fact which is in issue in, or relevant to, the case and was not made to a Police Officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure. Secondly, a statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him.

Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between an admission and a confession is of fundamental importance."

61 In *Kanda Padayachi v. State of Tamil Nadu* (AIR 1972 SC 66), the question was admissibility of a statement, which had been made by the accused, while he was in the police custody, to a doctor regarding some minor injuries found on his person. The accused had stated to the doctor, while in the police custody, that it was the deceased, who, at about midnight, on July, 10, 1969, had caused injury by biting him. The Supreme Court, referring to the case of *Pakala Narayana Swami* (supra), held, in *Kanda Padayachi* (supra), that the said statement amounted to only an admission of fact, however, incriminating, but since the said statement did not, by itself, establish the guilt of the maker of such admission, the statement would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act. The Supreme Court makes it clear, in *Kanda Padayachi* (supra), that the admissibility of an admission, which does not amount to confession, is not barred and cannot be questioned under Section 26 and that such admission is admissible in evidence and can be relied upon as an admission under Section 21.

62 We may pause here to point out that Section 161 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') makes the provisions for the examination of the witnesses by the police during investigation. There is no specific provision in the Code providing for examination of an accused person. Should it, therefore, mean that an accused cannot be examined by a police officer? While answering the question, so posed, it needs to be borne in mind that though the heading of Section 161 reads, "Examination of witnesses by police", the provisions, contained in sub-section (1) of Section 161, clearly state that 'a police officer may, during investigation, examine, orally, any person supposed to be acquainted with the facts and circumstances of the case'. The language, used in sub-section (1) of Section 161, thus, refers to "any person" and does not use the expression "any witness". It, therefore, logically, follows that the expression "any person" occurring in Section 161, would include not only witnesses but also an accused, for, an accused would also be a person, who is 'supposed to be acquainted with the facts and circumstances of the case'.

63 What is, now, necessary to be seen is that Section 162 of the Code provides that a statement, made to a police officer, and recorded by him, under Section 161, is inadmissible in evidence except for the purpose of contradicting the maker of the statement, when he appears, as a witness, at the trial. What is of utmost importance to note, in this regard, is that when the maker of a such statement, as described in sub-section (1) of Section 162, dies, or when such a statement relates to the cause of death or to any of the circumstances of the transaction, which resulted in his death, in the cases in which the cause of that person's death comes into question, or, when such a statement leads to the discovery of a fact, as provided in Section 27 of the Evidence Act, such statements, according to sub-section (2) of Section 162, should not be treated as

a statement, which sub-section (1) of Section 162 make inadmissible in evidence.

Thus, a statement of an accused, recorded under Section 161, shall, according to Section 162(2), be admissible in evidence if the statement leads to discovery of a fact. The provisions, so made in Section 162(2), fortify the conclusion that sub-section (1) of Section 161 covers examination of an accused.

64 What is, now imperative to note is that since a statement of an accused, recorded by a police officer, during investigation, under Section 161, is, in the light of the provisions of Section 162, not admissible unless the statement, in terms of Section 27 of the Evidence Act, leads to discovery of a fact, the question is whether an admission made, by an accused, of an incriminating fact, to a police officer, when such statement is not covered by Section 161, (i.e. when the statement containing 'admission' has not been made during investigation) be not barred under the law? While considering this aspect of the case, it needs to be noted that while Section 25 makes a 'confession' made to a police officer, under any situation, completely barred from being admitted into evidence, no such bar is imposed on statement(s) of an accused, which may amount to 'admission' of some incriminating fact, which does not amount to 'confession'. Necessarily, therefore, when a statement is made by an accused to a police officer and when such a statement, though amounts to admission, is not covered by Section 161, such a statement, of even an incriminating fact, would be admissible in evidence provided that the statement does not, if we may reiterate, fall within the meaning of Section 161(1) read with Section 162(1).

65 Thus, when a statement falls short of a plenary acknowledgment of guilt, it would not be a confession, even though the statement is in respect of some incriminating facts, which taken, along with other evidence, tends to prove the guilt of the accused. However, such a statement would, indeed, be admission.

66 The statement made by an accused to the doctor as to how he had sustained injuries or as regards the cause of injury was nothing, but certain admissions made by the accused. Such admissions were held to be admissions under Section 21. Thus, when a statement amounts to confession, such admissions will not be admissible in evidence if at the time when such admissions were made, the accused was in police custody; but if such admissions do not amount to confession, the admissions would be admissible in evidence, under Section 21, against the accused even if he, at the relevant point of time, was in the custody of police (See *Kanda Padayachi v. State of Tamil Nadu*, reported in AIR 1972 SC 66). The relevant observations made, in *Kanda Padayachi* (supra), read as under :

"14..... it is clear that the statement in question did not amount to a confession. It was an admission of a fact, no doubt, of an incriminating fact and which established the presence of the appellant in the deceased's room but which clearly was not barred under Section 26. The Sessions Judge and the High Court were, therefore, right in holding it to be admissible and in relying upon it. In this

view, counsel's second contention also fails and has to be rejected."

67 What crystallises from the above discussion is that a statement cannot be a 'confession' and cannot be treated to be a 'confession' unless the accused confesses to have committed the crime, which he is alleged to have committed, or unless he admits all such facts, which constitute the offence. While confession made by an accused, who is in police custody, to a police officer or while 'confession' made by an accused to any person is inadmissible in evidence if, at the time of making 'confession', the accused was in the custody of a police officer unless the 'confession' is made in the immediate presence of a Magistrate, such 'confession' is not admissible, the 'admission' made by such an accused, who is in police custody, to a person, other than a police officer, would nevertheless be admissible, if voluntarily made, however incriminating the 'admission' of the accused may be. When a statement, treated as a confessional statement, contains both exculpatory as well as inculpatory statements, it is possible for the Court to reject exculpatory parts of such a confessional statement, which stands belied by the other evidence on record, and rely upon that inculpatory part of the confessional statement, which is proved to be true by the evidence on record.

68 A confession has to be a direct acknowledgment of the guilt of the offence in question and such a would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgment of guilt, it would not be a confession even though the statement is of some incriminating fact which taken along with the other evidence tends to prove his guilt. Such a statement is admission, but not confession. An admission of fact, however, incriminating, but not by itself establishing the guilt of a maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act. It is clear that the statement made by both the accused in the form of history before the Doctors did not amount to a confession. It was an admission of a fact, no doubt, of an incriminating fact, and which established that the deceased was in company of the accused persons and which was clearly not barred under Section 26 of the Evidence Act. [See : Deepak Panyang vs. State of Arunachal Pradesh, 2010 Cr.L.J. 2567].

69 The second submission of Mr. Barot is with regard to the admissibility of the report of the Voice Spectrography Test . According to Mr. Barot, the Voice Spectrography Test conducted could be said to be in violation of Article 20(3) of the Constitution. In such circumstances, Mr. Barot would submit that the Trial Court committed a serious error in placing reliance on the evidence of the Voice Spectrography Test. We are not impressed even by this submission of Mr. Barot. It is not the case of the accused persons that they were forced or coerced into furnishing such a sample. The accused on their free will and volition gave their voice samples for the purpose of the Voice Spectrography Test. We are convinced with the evidence of the Voice Spectrography Test which has come on record and it establishes the complicity of accused No.2 in the crime.

70 In the aforesaid context, we may quote the observations of the Supreme

Court in the case of Sudhir Chaudhary and others vs. State (NCT of Delhi) reported in (2016) 8 SCC 307:

"7 The order of the ACMM was questioned before the Delhi High Court. By a judgment and order dated 11 February 2015, a learned Single Judge held that the purpose of a voice sample is to facilitate the process of comparing it with a recorded conversation. The voice sample is not a testimony in itself since it only constitutes what was described as 'identification data'. A voice sample, in the view of the High Court is not a substantive piece of evidence. The High Court rejected the submission that the direction to furnish a voice sample was in violation of the fundamental right under Article 20(3) of the Constitution since firstly, the Appellants had not been forced or coerced into furnishing such a sample since it was they who had furnished their consent; secondly, a voice sample is not evidence since its purpose is only to compare it with the questioned text. In the view of the High Court, once the Appellants had furnished their consent to furnishing their voice samples, it was not open to them to dictate the course of investigation. This order is called into question.

8 Learned senior counsel appearing on behalf of the Appellants submitted that while it is true that the Appellants have consented to the drawing of their voice samples (a concession which was reiterated before this Court in the course of the submissions) yet the process of drawing the samples must be fair, so as to be consistent with the right of the Appellants under Article 21 of the Constitution. The requirement of a fair investigation, it was urged, is implicit in Article 21 and the procedure which is adopted for drawing a voice sample must be fair and reasonable.

9 The Appellants expressly consented to a voice sample being drawn, in their response to the application that was filed by the Investigating officer before the Court of Metropolitan Magistrate. This was reiterated before the High Court. In the submissions which have been urged in these proceedings, learned counsel has specifically stated that the Appellants would abide by the consent which they had furnished to their voice samples being drawn. That being the position, the only surviving issue for this Court is to ensure that the underlying process for drawing the voice samples is fair and reasonable, having due regard to the mandate of Article 21. On the one hand, it is not open to the accused to dictate the course of investigation. Hence, we do not find substance in the submission that the text which is to be read by the Appellants in the course of drawing their voice samples should contain no part of the inculpatory words which are a part of the disputed conversation. A commonality of words is necessary to facilitate a spectrographic examination."

71 Mr. Barot next submitted as regards the evidentiary value of the discovery panchnama and the other panchnamas relied upon by the Trial Court. According to Mr. Barot, the panch witnesses are expected to specifically depose in their evidence as regards the exact statement made by the accused before them, which, ultimately, leads to the discovery of an incriminating fact. The submission

of Mr. Barot is that the omission on the part of the panch witnesses in not specifically deposing as regards the exact statement made by the accused would render the discovery of the incriminating articles inadmissible in evidence. We are not impressed by such submission of Mr. Barot. It is true that the panch witnesses must depose before the Court the exact statement made by the accused while in police custody and heard by them so far as the discovery of an incriminating fact is concerned. It is equally true that if the panch witnesses have failed to depose as regards the exact statement made by the accused persons and heard by them, then it is the duty of the Investigating Officer to lead cogent evidence in that regard. We have gone through the oral evidence of the panch witnesses as well as the Investigating Officer and are convinced with regard to the reliability of the various panchnamas drawn by the Investigating Officer in the course of the investigation. The contents of all the panchnamas could be said to have been proved in accordance with law through the oral evidence of the panch witnesses and the Investigating Officer before the Court.

72 In *Mohmed Inayatullah v. State of Moharashtra* [(1976) 1 SCC 828 : 1976 SCC (Cri) 199], while dealing with the ambit and scope of Section 27 of the Evidence Act, the Supreme Court held that:

"11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:

27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that

part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which' may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see *Sukhan v. Emperor*, *Ganu Chandra Kashid v. Empror*). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya v. King Emperor*, 1946 SCC Online PC 47 : AIR 1947 PC 67 and *Udai Bhan v. Stae of U.P.* AIR 1962 SC 1116 (emphasis in original)

73 In *Aftab Ahmad Anasari v. State of Uttaranchal* (2010) 2 SCC 583 after referring to the decision in *Palukuri Kotayya*, the Court adverted to the seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that: (*Aftab Ahmad Anasari Case*, SCC p. 596, para 40)

"40. ...the part of the disclosure statement, namely, that the Appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible Under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the Appellant pursuant to the voluntary disclosure statement made by the Appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits."

74 In *State of Maharashtra v. Damu* (2000) 6 SCC 269, it has been held as follows:

"35. ...It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the Privy Council in *Pulukuri Kotayya v. King Emperor* 1946 SCC Online PC 47 : AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

The similar principle has been laid down in *State of Maharashtra v. Suresh* (2000) 1 SCC 471, *State of Punjab vs. Gurnam Kaur* (2009) 11 SCC 225, *Aftab Ahmad Anasari v. state of Uttaranchal* (2010) 2 SCC 583, *Bhagwan Dass v. State*

(NCT of Delhi) (2011) 6 SCC 396, Manu Sharma vs. State (NCT of Delhi) (2010) 6 SCC 1 and Rumi Bora Dutta vs. State of Assam (2013) 7 SCC 417.

75 In the case at hand, as is perceptible, the discovery of all the incriminating facts had taken place when the appellants were accused of an offence, they were in custody of a police officer, the discovery had taken place in consequence of the information furnished by them and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimony.

76 Additionally, another aspect can also be taken note of. The fact that the appellants had led the police officer to find out the spot where the crime was committed, the place where the dead body was buried, the place where the simcards were concealed, the bloodstained clothes were concealed and the discovery of other incriminating articles eloquently speak of their conduct as the same is admissible in evidence under Section 8 of the Evidence Act. In this context we may refer with profit to the authority in *Prakash Chand v. State (Delhi Admn.)* (1979) 3 SCC 90, wherein the Supreme Court after referring to the decision in *H.P. Admn. v. Om Prakash* (1972) 1 SCC 249 held thus:

"8. ...There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible Under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 of the Code of Criminal Procedure. What is excluded by Section 162, Code of Criminal Procedure is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, Under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act."

77 In *A.N. Venkatesh v. State of Karnataka* [(2005) 7 SCC 714], it has been ruled that:

"9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct Under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand v. State (Delhi Admn.)* (1979) 3 SCC 90. Even if we hold that the

disclosure statement made by the accused-Appellants (Exts. P- 15 and P-16) is not admissible Under Section 27 of the Evidence Act, still it is relevant Under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence Under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible Under Section 8 of the Evidence Act."

78 It is not necessary to multiply the authorities on this aspect. In our opinion, the Trial Court rightly placed reliance on the facts discovered by the Investigating Officer on the basis of the various disclosure made by the accused appellants herein after their arrest. All the panchnamas have been proved by the panch witnesses.

79 The Supreme Court in the case of Sanatan Naskar and Anr. v. State of West Bengal [(2010) 8 SCC 249 : (AIR 2010 SC 3570 : 2010 AIR SCW 4445)], where the Court held as follows (paras 13 and 14 of AIR, AIR SCW) :

"27. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye-witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye-witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard.

28. A three-Judge Bench of this Court in Sharad Birdhichand Sarda v. State of Maharashtra (AIR 1984 SC 1622) held as under (SCC pp. 184-85, paras 152-54) : (Para 151 of AIR) :

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant Govind Nargundkar v. State of M.P. (AIR 1952 SC 343). This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of U.P. and Ram Gopal v. State of Maharashtra (AIR 1972 SC 656). It may be useful to extract what Mahajan, J. has laid down in Hanumant case (AIR pp. 345-46, para 10):

'10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so

established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* (AIR 1973 SC 2622) where the observations were made: [SCC p. 807, para 19 : SCC (Cri) p. 1047] : (Para 19 of AIR) :

'19. ... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.' (Emphasis in original)

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

80 In an Essay on the Principles of Circumstantial Evidence by William Wills by T. and J.W. Johnson and Co. 1872, it has been explained as under:

"In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial

evidence, the judgment in respect of which is essentially inferential. There is no apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions. ?

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy, The word "presumption," ex vi termini, imports an inference from facts; and the adjunct "presumptive," as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the *reductio ad absurdum*."

81 Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

82 All the circumstances referred to above and relied upon by the prosecution have been conclusively established by the prosecution. They are specific and of a clinching nature and all of them irresistibly lead to the conclusion that the appellants alone were guilty of committing the murder of the deceased. All the circumstances which have been conclusively established are consistent only with the hypothesis of the guilt of the appellant and are totally inconsistent with their innocence. Not only in the cross-examination of the various prosecution witnesses, but even during the arguments, nothing has been pointed out as to why any of the witness for the prosecution should have falsely implicated the appellants in such a heinous crime. None of the witnesses had any motive to falsely implicate them. None had any enmity with them. The witnesses produced by the prosecution have withstood the test of cross- examination well and their creditworthiness and reliability has not been demolished in any manner. All the circumstances established by the prosecution, as discussed above, are conclusive in nature and specific in details. They are consistent only with the hypothesis of

the guilt of the appellants and totally inconsistent with their innocence. We, are therefore in complete agreement with the Trial Court that the prosecution has established, the guilt of the appellants beyond a reasonable doubt and we therefore, uphold their conviction for the offences under Sections 302, 363, 364A, 201 and 120B read with 34 and 114 of the Indian Penal Code. As held by the Supreme Court in *Dharm Das Wadhvani vs. the State of U.P.* reported in AIR 1975 SC 241, if crime is to be punished gossamer web niceties must yield to the realistic appraisals. The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of the legitimate inferences flowing from the evidence, circumstantial or direct.

83 In the aforesaid context, we may state that none of the appellants offered any explanation as regards the incriminating circumstances put before them during the recording of their statements under Section 313 of the Cr.P.C. Except for a vague denial, they have stated nothing more. In fact, even in response to a question relating to the injuries that they had suffered, they opted to make a denial, which fact had duly been established by the oral evidence of the Investigating Officer and Doctors. It is a settled law that the statement of Section 313 of the Cr.P.C is to serve a dual purpose, first, to afford to the accused an opportunity to explain their conduct and secondly to use denials of the established facts as incriminating evidence against them. In this regard, we may refer to some judgments of the Supreme Court.

84 The Supreme Court in the case of *Asraf Ali v. State of Assam* [(2008) 16 SCC 328 : (AIR 2009 SC (Supp) 654 : 2008 AIR SCW 5608)] has observed as follows (Para 13 of AIR, AIR SCW):

"21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh v. State (Delhi Admn.)* (AIR 1976 SC 2140) while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the

trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

Again, in its judgment in *Manu Sao v. State of Bihar* [(2010) 12 SCC 310 : (2012 AIR SCW 6138) (Para 8 of AIR SCW)], a Bench of the Supreme Court has reiterated the abovestated view as under :

"12. Let us examine the essential features of this Section 313 CrPC and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.

13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the

prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

85 In view of the above principles, it was expected of the appellants to render proper explanation for their injuries and their conduct. However, they opted to deny the same and in fact even gave false replies to the questions posed to them.

86 If the accused gave incorrect or false answers during the course of his statement under Section 313 of the CrPC, the Court can draw an adverse inference against him.

87 In the present case, we are of the considered opinion that the accused have not only failed to explain their conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the accused would also tilt the case in favour of the prosecution.

88 A number of witnesses have deposed of seeing the deceased in the company of the appellants before the incident. In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred.

(Vide: Nika Ram v. State of Himachal Pradesh, AIR 1972 SC 2077; and Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 : (1992 AIR SCW 1175)).

- CONFIRMATION CASE:

89 The Trial Court, for the reasons assigned in the judgment, has thought fit to impose death penalty on both the accused. According to the Trial Court, the case falls within the category of "the Rarest of rare case".

90 'Sentenced to death' - these few words would have a chilling effect on anyone, including a hardened criminal. Our society demands such a sentence on grounds of its deterrent effect, although there is no conclusive study on its deterrent impact. Our society also demands death sentence as retribution for a ghastly crime having been committed, although again there is no conclusive study whether retribution by itself satisfies society. On the other hand, there are views that suggest that punishment for a crime Signature Not Verified must be looked at with a more humanitarian lens and the causes for driving a person to commit a heinous crime must be explored. There is also a view that it must be determined whether it is possible to reform, rehabilitate and socially reintegrate into society even a hardened criminal along with those representing the victims of the crime [see : Rajendra Pralhadrao Wasnik vs. State of Maharashtra (SC)].

91 It is settled proposition of law that imposing sentence of death penalty is an exception and it should be awarded only in the rarest of the rare cases. Under

the old Criminal Procedure Code, ample discretion was given to the Courts to pass death sentence as a general rule and the alternative sentence of life could be awarded only in exceptional circumstances and that too after recording special reasons for making the departure from the general rule. The Code of Criminal Procedure, 1973 has reversed the said rule. Sentence of imprisonment for life is now the rule and capital sentence is an exception. It has also made obligatory on the Courts to record special reasons, if ultimately, death sentence is to be awarded.

92 The question as to whether death sentence should be imposed or not has been a vexed question engaging the attention of the Courts considerably and consistently since a long time. No fixed yardstick or formula has been evolved for the same and its imposition is dependant upon the facts and circumstances of each case, vision and understanding of the Judge, has been found to be inseparable. The phrase "rarest of the rare cases" still remains to be defined while the concern for human life, the norms of a civilized society and the need to reform the criminal has engaged the attention of the Courts. It has equally been the view that sentence of death has to be based on the action of the criminal rather than the crime committed. The doctrine of proportionality of sentence vis-a-vis the crime, the victims and the offender has been the greatest concern of the Courts.

93 The Supreme Court in *Harish Mohandas Rajput vs. State of Maharashtra*, 2011 (12) SCC 56, held that 'the rarest of the rare case' comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of 'the rarest of the rare case'. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue indulging in criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society.

94 In *Santosh Kumar Singh vs. State* (2010) 9 SCC 747 : (AIR 2011 SC (Cri) 1505), it was observed by the Supreme Court that undoubtedly, the sentencing part is a difficult one and often exercises the mind of the Court but where the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the Court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind "the rarest of the rare" principle.

95 The learned counsel appearing for the convicts vehemently submitted, relying upon number of pronouncements of the Supreme Court, that though the murder is most foul and gruesome, still it does not fall within the category of "the Rarest of rare cases", and even otherwise, as the guidelines laid down by the Supreme Court in the various pronouncements, life imprisonment is the rule and capital

punishment is the exception and a such, it is submitted that the convict be sentenced to imprisonment for life without remission. Whereas, on behalf of the State, it is vehemently contended that, as the accused - convicts committed a heinous crime for the lust and greed of money, they are liable to be awarded with death punishment.

96 In order to appreciate the contentions of both the sides, it is necessary for this Court to once again consider the philosophy behind the principles of awarding capital punishment and the well settled principles, as laid down, by the Apex Court in this regard.

97 It may be pertinent to mention here that, the Indian Criminal Jurisprudence is based on a combination of deterrent and reformatory theories of punishment.

98 The provision of death sentence for convicts of murder and similar heinous crimes is on the statute book, since the enactment of the Indian Penal Code in 1860. But the circumstances and considerations for awarding it, have changed by the amendments of procedural law. Initially, death punishment was the rule and life imprisonment was an exception, but the position has reversed now.

99 The constitutional validity of the death punishment was considered by the Supreme Court in the case of Jagmohan Singh v. State of U.P. reported in AIR 1973 SC 947. Apart from the constitutional validity, the Apex Court also considered and discussed position in other countries, the structure of Indian Criminal Law, various policies and bills proposed in the Parliament, the extent of judicial discretion, etc. In this regard, the main issues discussed were :

- a) Whether death sentence serves any penological purpose?
- b) Views of famous jurists and sociologists from all over the world, various foreign cases and position in other countries;
- c) Circumstances which can aggravate or mitigate death punishment;
- d) Cases in which the death sentence should be inflicted; and
- e) The extent of judicial discretion and need of guidelines.

100 Thus, though the Apex Court settled this controversy long back in 1973, even thereafter this question came up again and again before the Apex Court

101 After the amendment of Criminal Procedure Code in 1973 under Section 354(3) it was specifically mandated that special reasons are to be recorded by the Court for imposing death punishment in capital offences.

102 The next important case and which can be termed as a milestone in the Indian Criminal Jurisprudence is the case of Bachan Singh vs. State of Punjab reported in AIR 1980 SC 898. So strong were the principles laid down by the Apex Court in that case that the principles are being followed even now.

103 On the question of reasonableness of death punishment, the Apex Court

observed "If notwithstanding the view of the abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislature, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of the society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973, it took up revision of the Code of 1898 and replaced by it by the Code of Criminal Procedure, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. Therefore, it could be concluded that the impugned provision in Section 302, violates neither the letter or the ethos of Articles 19 and 21."

104 While considering as to laying down the standards or norms restricting the area of imposition of death penalty to a narrow category of murders, the Apex Court in Bachan Singh's case, following the observations from a American decision in the case of *Mc Gautha v. California* (1971) 402 US 183 observed that "the infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no jury/judge would need." The Apex Court observed that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Standardisation of the sentence process tends to sacrifice justice at the altar of blind uniformity.

105 In the end, the Court following the decision in Jagmohan's case (supra) held that the sentencing process exactly as it came from the legislative, flexible and responsive to its case on its merits, subject to the discretion of the court and in case of any error in exercise of discretion subject further to correction by the Superior Court. The Apex Court observed that "in Jagmohan's case, this Court had held that the sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all aggravating and mitigating circumstances of the crime."

106 In conclusion, the Constitution Bench in Bachan Singh's case observed that

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

107 At this stage, it is also relevant to note the observations of the Law Commission in its 35th report "Experience of other countries could not be conclusive for India. Need for a deterrent control provided by capital punishment is greater in various classes of society. There is a greater danger in India of increase in violent crimes if capital punishment is abandoned, particularly in respect of professional criminals."

108 In November 2013, the Centre appointed the former Chief Justice of the Delhi High Court Justice Ajit Prakash Shah as the new Chairman of the 20th Law Commission of India. The 20th Law Commission of India submitted its 262nd report on the issue of "Death Penalty" in India. The Commission, in its report, discussed issues ranging from death penalty being a deterrent, to changing International and National scenario to arbitrariness in the decision making and existence of bias as some of the reasons for recommending the abolition of death penalty except in cases of terrorism related offences. The commission recommended that the death penalty be abolished for all crimes except for terrorism related offences and waging war. The commission came to this conclusion based on the following reasons:

Changing International / National Situation towards abolition of death penalty
Death Penalty as a Deterrent is a Myth Complete Arbitrariness in sentencing in Capital Offences leading to a high number of rejections (more than 95%) of trial court decisions in higher courts Geographical Variations in imposition of death penalty Structural Issues & existence of a bias Evolving Jurisprudence.

The Law Commission mentioned the following six factors that necessitated a fresh look at this issue since the 35th report of the commission already dealt with this issue.

Development in India (Social Economic Conditions are vastly different now)

The new Code of Criminal Procedure in 1973 that requires special reasons to be given when death sentence is imposed

The emergence of constitutional due-process standards Judicial developments on the arbitrary and subjective application of the death penalty

Recent Political Developments like Tripura Assembly's resolution and demand from various political parties for the abolition of Death Penalty

International Developments

The report mentions that the data on death penalty indicates the existence of disparity in the imposition of the death penalty, reflecting systemic and structural disadvantages, particularly of the socially and economically marginalized. The data presented to the commission by the Death Penalty Research Project of National Law University, Delhi indicates that out of 373 prisoners on death row in the country, over 75% belong to backward classes and religious minorities. 93.5% of those sentenced to death for terror offences are religious minorities or Dalits. The data also showed that nearly 74% of convicts were economically vulnerable. The issue of disposal of mercy petitions by the President and the ensuing delay was also discussed in the commission's report. The commission concluded that death penalty does not serve the goal of deterrence any more than life imprisonment. The commission made the following recommendations:

The Commission recommended various provisions for police reforms, witness protection scheme and victim compensation scheme.

The Commission felt that time has come for India to move towards abolition of the death penalty.

The Commission recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.

109 The principle "Rarest of rare case" came up for consideration in the case of *Machhi Singh v. State of Punjab*, reported in 1983 (3) SCC 470 : (AIR 1983 SC 957). The Supreme Court observed that "the reasons why the Community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-nor- case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'kitting' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self- preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from

the platform of the motive for, or the manner of commission of the crime, or the antisocial or abhorrent nature of the crime, such as for instance.

MANNER OF COMMISSION OF MURDER.

110 When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house, (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death, (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

MOTIVE FOR COMMISSION FOR MURDER

111 When the murder is committed for a motive which evinces total depravity and meanness? For instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold-blooded murder is committed with deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

ANTISOCIAL OR SOCIALLY ABHORRENT NATURE OF THE CRIME .

a) When murder of a member of Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance, when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands are benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

MAGNITUDE OF THE CRIME

112 When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a larger number of persons of a particular caste, community or locality are committed.

PERSONALITY OF THE VICTIM OF MURDER

113 When the victim of a murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless women or a person rendered helpless by old age or infirmity, (c) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

114 While referring to Bachan Singh's Case and the guidelines indicated in the said decision, in Machhi Singh's case, the Apex Court observed the guidelines :

(i) The extreme penalty of death need not be inflicted except in gravest case of

extreme culpability;

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

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

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

(v) The Supreme Court further observed that in order to apply these above guidelines, the Court may ask question as to whether there is something uncommon about the crime which renders the sentence of, (a) imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose the sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? It further observed that if overall view of all the circumstances in the light of aforesaid proposition and taking into account the answer to the questions proposed herein- above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

115 In the case of *Lenha vs. State of Haryana*, 2002 SCC (Criminal) 526, a Bench of three Hon'ble Judges again reiterated all these principles and held that "in rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty, that sentence can be awarded. The community may entertain such sentiment in the following circumstances :

1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community;

2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murdered is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland;

3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social

wrath, or in case of bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation;

4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of the family or a large number of persons of a particular caste, community or locality, are committed.

5) When the victim of a murder is an innocent child, or a helpless women or old or infirm person vis-a-vis whom the murderer is in a dominating position on a public figure generally loved and respected by the community. [see: Shivu vs. Registrar General of Karnataka High Court (2007) 4 SCC 713].

116 The Apex Court in the said decision further observed as follows :

"A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civil society and it is no longer the physical opinion of the majority that takes away the liberty of citizens by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at the trial in a system wedded to the rule of law is the outcome of cool deliberation in the courtroom after adequate hearing is afforded to the parties, accusation are brought against the accused, the prosecution is given an opportunity of meeting the accusation by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e., the Judge that leads to determination of the lis."

117 The principle of proportion between the crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

"The Criminal Law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation, and sometimes even the terrific result of his crime. Inevitably, these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are

serious and widespread."

118 In the case of *Dhananjay Chatterjee vs. State of W. B.*, reported in 1994 (2) SCC 220 : (1995 AIR SCW 510), the Apex Court observed thus :

"shockingly large number of criminals even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility.....The 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 act 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 the imposition of appropriate punishment."

119 In *Sevaka Perumal v. State of Tamil Nadu*, 1991 (3) SCC 471 : (AIR 1991 SC 1463), it is observed thus :

"Law as a corner-stone of the edifice of order should meet the challenges confronting the society..... in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation of 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 and all other attending circumstances are relevant facts which would enter into the area of consideration."

120 As against the aforesaid decisions of the Supreme Court, the learned counsel for the defence placing reliance on the pronouncement of the Apex Court in the case of *Swamy Shraddananda alias Murali Manohar Mishra vs. State of Karnataka* (2007) 12 SCC 288, contended that all these decisions referred to above have been once again considered by the Apex Court and has for all practical purposes held that the basic decisions of the Apex Court in *Machhi Singh's* case which in turn is based on the decision in *Bachan Singh's* case is no more a good law. It is submitted that in view of this decision of the Apex Court only life imprisonment can be awarded and not death punishment.

121 In all the decisions referred to above, the basic questions considered by the Courts are :

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

b) Are the circumstances of the crime such that there is no alternative but to impose death penalty even after recording maximum live-in to the mitigating circumstances which speak in favour of the offender?

122 The Supreme Court in the case of *Allauddin Mian and others Sharif Mian and*

another vs. State of Bihar reported in AIR 1989 SC 1456 observed as under:

"9....Section 302, IPC casts a heavy duty on the Court to choose between death and imprisonment for life. When the Court is called upon to choose between the convict's cry 'I want to live' and the prosecutor's demand 'he deserves to die' it goes without saying that the Court must show a high degree of concern and sensitiveness in the choice of sentence. In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of sub-section (3) of S. 354 of the Criminal P.C., 1973 ("the Code") which reads as under:

"When the conviction for an offence is 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."

This provision makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a term of years to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards the death penalty, "special reasons" for such sentence shall be stated in the judgment. When the law casts a duty on the Judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the 'special reasons clause' in the above provision implies that the Court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be. Basing his submission on what is described as the humanitarian ideology or the rehabilitarian philosophy, Mr. Garg submitted that any law which permits the supreme right to life being sacrificed for the failure of the State to establish a social order in which such crimes are not committed must be struck down as offending Articles 14, 19 and 21 of the Constitution. While rejecting the demand of the protagonist of the reformatory theory for the abolition of the death penalty the legislature in its wisdom thought that the 'special reasons clause' should be a sufficient safeguard against arbitrary imposition of the extreme penalty. Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the Judge would not award the death sentence. It may be stated that if a Judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fail on the lower sentence. In all such cases the law casts an obligation on the Judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal

crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the Courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the Judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. In the face of this statutory provision which is consistent with Art. 21 of the Constitution which enjoins that the personal liberty or life of an individual shall not be taken except according to the procedure established by law, we are unable to countenance counsel's extreme submission of death in no case. The submission that the death penalty violates Articles 14, 19 and 21 of the Constitution was negatived by this Court in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684: (AIR 1980 SC 898). Mr. Garg, however, submitted that the said decision needs re-consideration as the learned Judges constituting the majority did not have the benefit of the views of Bhagwati, J. who ruled to the contrary. We are not impressed by this submission for the simple reason that the reasons which prevailed with Bhagwati, J., could not have been unknown to the learned Judges constituting the majority.

10. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under :

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fairplay that the accused who washithertoconcentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section

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

123 The Supreme Court in *Shankar Kisanrao Khade vs. State of Maharashtra* reported in 2013(5) SCC 546 gave few statistics of the number of death

sentences awarded by the Courts across the country. The Supreme Court referred to the annual report published by the National Crime Records Bureau (NCRB) in the judgment which is as under:

DETAILS OF DEATH SENTENCE DURING 2001 TO 2011

STATE / U.T.

CONVICTS SENTENCED TO DEATH

CONVICTS WHOSE SENTENCE COMMUTED TO LIFE IMPRISONMENT

EXECUTED

Andhra Pradesh

8

3

0

Assam

21

97

0

Bihar

132

343

0

Chhatisgarh

18

24

0

Goa

1

0

0

Gujarat

57

3

0

Haryana

31

23

0

Himachal Pradesh

3

2

0

Jharkhand

81

300

0

Jammu & Kashmir

20

18

0

Karnataka

95

23

0

Madhya Pradesh

87

62

0

Maharashtra

125

175

0

Manipur

3

1

0

Meghalaya

0

0

0

Mizoram

0

0

0

Nsagaland

0

15

0

Orissa

33

68

0

Punjab

19

24

0

Rajasthan

38

33

0

Sikkim

0

0
0
Tamil Nadu
95
24
0
Tripura
2
9
0
Uttar Pradesh
370
458
0
Uttarakhand
16
46
0
West Bengal
79
98
1
Total
1374
1853
1
Chandigarh
4
3
0

Dadra & Nagar Haveli

0

0

0

Daman & Diu

4

0

0

Delhi

71

2462

0

Lakshadweep

0

2

0

Pondicherry

2

1

0

Total

81

2468

0

Grand Total

1455

4321

1

The Supreme Court, thereafter, proceeded to explain the significance of the
aforenoted figures by observing in para 70 as under:

"70 The significance of these figures is that even though the Courts have awarded death penalty in appropriate cases applying the rarest of rare principle, the death sentence has been commuted in many of them. The reasons for commuting the death sentence by the Executive are not in the public domain and therefore it is not possible to know what weighed with the Executive in commuting the death sentence of each convict. Was the reason for commutation that the crime and the criminal did not fall in the category of rarest of rare and if so what was the basis for coming to this conclusion when the competent Court has come to a different conclusion?"

The Supreme Court also took notice of the fact that though the Courts have been applying the Rarest of rare principle, still the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. In this regard, the Supreme Court observed in paras 71 and 72 as under:

"71 It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.

72 It does prima facie appear that two important organs of the State that is the Judiciary and the Executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the Judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application) the standard applied by the Executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the Executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India."

124 In *Gurvail Singh alias Gala and another vs. State of Punjab* reported in 2013(2) SCC 713, the Supreme Court observed as under:

"We notice that, so far as this case is concerned, appellants do not deserve death sentence. Some of the mitigating circumstances, as enunciated in *Machhi Singh*

(AIR 1983 SC 957) come to the rescue of the appellants. Age definitely is a factor which cannot be ignored, though not determinative factor in all fact situations. The probability that the accused persons could be reformed and rehabilitated is also a factor to be borne in mind. To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the Court has to finally apply the Rarest of Rare Cases test (R-R Test), which depends on the perception of the society and not "Judge-centric", that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities etc. examples are only illustrative and not exhaustive. Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not Judge centric."

125 In *Mukesh and another vs. State for NCT of Delhi and others* reported in 2017(6) SCC 1, the Supreme Court observed that before the Court proceeds to make a choice whether to award death sentence or life imprisonment, the Court is to draw up a balance-sheet of the aggravating and mitigating circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. The Supreme Court observed as under:

"Two questions are to be asked and answered:-

- (i) Is there something uncommon about the crimes which regard sentence of imprisonment for life inadequate;
- (ii) Whether there is no alternative punishment suitable except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large. "

The Supreme Court in the said case, took notice of the individual affidavits placed on record by the accused persons who were found guilty of the offence of gang rape. In para 514, the Supreme Court took notice of the mitigating circumstances which were highlighted by the convicts:

"As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/appellants namely A-3 Akshay, A-4 Vinay and A-5 Pawan placed on record, through their individual affidavits dated 23.03.2017, following mitigating circumstances:-

- (a) Family circumstances such as poverty and rural background,

- (b) Young age,
- (c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,
- (d) Absence of criminal antecedents,
- (e) Conduct in jail, and
- (f) Likelihood of reformation. "

The Supreme Court proceeded to observe as under:

"515. In *Purushottam Dashrath Borate and another v. State of Maharashtra* (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

516. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in *Om Prakash v. State of Haryana* (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime."

126 We may also profitably refer to a very recent pronouncement of the Supreme Court on the subject of capital punishment rendered in the case of *Chhannu Lal Verma vs. the State of Chhatisgarh* [Criminal Appeal Nos.1482-1483 of 2018 decided on 28th November 2018]. The facts of the said case are that the appellants entered the house of Anandram Sahu, Firanteen Bai (wife of Anandram Sahu) and Smt. Ratna Sahu (daughter-in-law of Anandram) and caused fatal injuries to all the three with a knife. Thereafter, the appellant entered the house of one Durga Banchhor with blood-stained knife and assaulted her by inflicting grievous injuries. The Sessions Court convicted the appellant for murder and sentenced him to death. The High Court confirmed the death sentence. The Trial Court and the High Court, while balancing the aggravating and mitigating circumstances, considered the following aggravating circumstances:

- i. "That the appellant has committed murder of three persons.
- ii. That the appellant knew what he was doing and the consequences thereof and yet he committed the offence.
- iii. That the murder of Ratna Bai was committed as he was previously charged of rape with the deceased Ratna and detained in jail for a year although he was

later acquitted.

iv. Apart from committing murder of three persons, he has also caused grievous injuries to three persons.

v. That two of the deceased and one of the injured persons were women."

The High Court, while confirming the death sentence, held that the aggravating circumstances, outweighed the mitigating circumstances and the case thus fell within the ambit of rarest of the rare case which called for the imposition of death penalty. Justice Kurian, speaking for the Bench, after an exhaustive review of various decisions on the subject of death penalty, held as under:

"8. In Bachan Singh (supra) while upholding the constitutional validity of death penalty in India, it was held that under Section 354(3) of the CrPC, imprisonment for life is the rule and death sentence is the exception. The Court emphasized the need for principled sentencing without completely trammeling the discretionary powers of the judges. It also held that the "special reasons" that are required to be recorded while awarding death sentence means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Some of the aggravating and mitigating circumstances indicated in Bachan Singh (supra) are: -

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

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

(b) if the murder involves exceptional depravity; or

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

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

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

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code." Mitigating circumstances: In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

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

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

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

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above. (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

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

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

9. The Court also clarified that while determining the punishment, due regard must be given to the crime as well as the criminal. The aggravating and mitigating circumstances would have to be viewed from the perspective of both the crime and the criminal. The relevant discussion reads thus:

"201. ...As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist." (Emphasis supplied)

However, the Court has emphasised that the list of aggravating and mitigating circumstances provided above are not exhaustive and the scope of mitigating factors in death penalty must receive a liberal and expansive construction by the courts. Paragraph 209 reads as follows:

"209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in

the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide- lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." (Emphasis supplied)

10. In *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 the Court summarised the findings in *Bachan Singh* (supra) and held as follows:

"38. In this background the guidelines indicated in *Bachan Singh* case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh* case:

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

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

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

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

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

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

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

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

11. It is evident that the Court in Bachan Singh (supra) has set a very high threshold of "rarest of rare cases when the alternative option is unquestionably foreclosed" for the grant of death penalty. The meaning and ambit of this expression has been discussed in Santosh Bariyar (supra). The Court also emphasised the need for a bifurcated hearing for the purpose of conviction and sentencing. The relevant portion reads:

"56. At this stage, Bachan Singh 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 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 mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

58. The rarest of rare dictum breathes life in "special reasons" under Section 354(3). In this context, Bachan Singh laid down a fundamental threshold in the following terms: (SCC p. 751, para 209)

"209. ... A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." (emphasis supplied)

An analytical reading of this formulation would reveal it to be an authoritative negative precept. The "rarest of rare cases" is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in the form of "when the alternative option is unquestionably foreclosed".

59. Thus, in essence, the rarest of rare dictum imposes a wide- ranging embargo on award of death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification enumerated below:

1. that the case belongs to the rarest of rare category,
2. and the alternative option of life imprisonment will just not suffice in the facts of the case.

60. The rarest of rare dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the rarest of rare dictum places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.

61. The background analysis leading to the conclusion that the case belongs to the rarest of rare category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the rarest of rare aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted: (Bachan Singh case, SCC p. 738, para 161)

"161. ... The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal."" (Emphasis supplied)

12. In *Shankar Kisanrao Khade vs. State of Maharashtra* (2013) 5 SCC 546 this Court looked at the manner in which the aggravating and mitigating circumstances are to be weighed and how the rarest of rare test is to be applied while awarding death sentence and held 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)

13. In our opinion, the High Court has erroneously confirmed death penalty without correctly applying the law laid down in *Bachan Singh* (supra), *Machhi Singh* (supra), *Santosh Bariyar* (supra) and *Shankar Kisanrao Khade* (supra). The decision to impose the highest punishment of death sentence in this case does not fulfil the test of "rarest of rare case where the alternative option is unquestionably foreclosed". The questions laid down in paragraph 39 of *Machhi Singh* (supra) have not been answered in the particular case. No evidence as to the uncommon nature of the offence or the improbability of reformation or rehabilitation of the appellant has been adduced. *Bachan Singh* (supra) unambiguously sets out that death penalty shall be awarded only in the rarest of rare cases where life imprisonment shall be wholly inadequate or futile owing to the nature of the crime and the circumstances relating to the criminal. Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty. As laid down in *Shankar Kisanrao Khade* (supra), whether the person would be a threat to society or whether not granting death penalty would send a wrong message to society are additional factors to be looked at. No such analysis was undertaken by the High Court. The High Court has also failed to look at the aggravating and mitigating circumstances regarding the criminal as warranted by *Bachan Singh* (supra). The fact that the appellant had no previous criminal record apart from the acquittal in the Section 376, IPC, which was a false implication and the alleged motive did not weigh with the High Court as an important mitigating circumstance with respect to the criminal.

14. In the past four decades or so, this Court has been consistently echoing its concern on the constitutional ethos on value and dignity of life, when it said in *Bachan Singh* (supra) that 'extreme depravity' (paragraph 201), 'it is the duty of the State to adduce evidence that there is no probability that the accused can be reformed' (paragraph 206), 'liberal and expansive connotation' (paragraph 209), 'alternative option is unquestionably foreclosed' (paragraph 209) 'humane concern' (paragraph 209), 'real and abiding concern for dignity of human

life' (paragraph 209), in Machhi Singh (supra) that 'gravest case of extreme culpability' (paragraph 38), 'only when life appears to be an altogether inadequate punishment' (paragraph 28), 'mitigating circumstances should be given full weightage' (paragraph 38), in Santosh Bariyar (supra) that 'probability that the accused can be reformed and rehabilitated' (paragraph 57), 'the rarest of rare case is a negative precept' (paragraph 58), 'death is an exceptionally narrow opening' (paragraph 58), 'extraordinary burden on the Court to impose death' (paragraph 60), 'maximum weightage to mitigating circumstances and yet no alternative except death' (paragraph 39), 'highest standards of judicial rigor and thoroughness' (paragraph 61), and in Shankar Kisanrao Khade (supra) that 'possibility of reformation, young age of the accused, not a menace to the society, no previous track record' (paragraph 52) etc. These factors have not received due consideration by either the High Court or the Trial Court.

15. The appeal has been pending before this Court for the past four years. Since the appellant has been in jail, we wanted to know whether there was any attempt on his part for reformation. The superintendent of the jail has given a certificate that his conduct in jail has been good. Thus, there is a clear indication that despite having lost all hope, yet no frustration has set on the appellant. On the contrary, there was a conscious effort on his part to lead a good life for the remaining period. A convict is sent to jail with the hope and expectation that he would make amends and get reformed. That there is such a positive change on a death row convict, in our view, should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed. As held by the Constitution Bench in Bachan Singh (supra) it was the duty of the State to prove by evidence that the convict cannot be reformed or rehabilitated. That information not having been furnished by the State at the relevant time, the information now furnished by the State becomes all the more relevant. The standard set by the 'rarest of rare' test in Bachan Singh (supra) is a high standard. The conduct of the convict in prison cannot be lost sight of. The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform.

16. In the matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such a psychological/psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform. The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated.

17. Another aspect that has been overlooked by the High Court is the procedural impropriety of not having a separate hearing for sentencing at the stage of trial. A bifurcated hearing for conviction and sentencing was a necessary condition laid down in Santosh Bariyar (supra). By conducting the hearing for sentencing on the same day, the Trial court has failed to provide necessary time to the appellant to furnish evidence relevant to sentencing and mitigation.

18. For the abovementioned reasons, we hold that the imposition of death sentence was not the only option and hence the same needs to be commuted to imprisonment for life.

Future of death penalty in India

19. Since Bachan Singh (supra) is a Constitution Bench decision of this Court, the Courts are bound to follow the principles laid down in the said judgment until it is duly revisited. But we cannot altogether ignore the fact that various Benches have, over a period of time, expressed concern regarding the inconsistent application of the principles laid down in Bachan Singh (supra) and have also taken forward the application of the principles to reduce such inconsistencies. In Santosh Bariyar (supra), the Court noted the global move away from death penalty and observed:

"109. ...it is now clear that even 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 threshold of "the rarest of rare cases" has been most variedly and inconsistently applied by the various High Courts as also this Court.

110. At this point we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty-the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either through law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to the legitimate aim of the measure in question. The Constitution of India provides for safeguards to give the individual adequate protection against arbitrary imposition of criminal punishment."

20. In Sangeet v. State of Haryana (2013) 2 SCC 452 the Court notes that "30. The application of the sentencing policy through aggravating and mitigating circumstances came up for consideration in Swamy Shraddananda (2) v. State of Karnataka. On a review, it was concluded in para 48 of the Report that there is a lack of evenness in the sentencing process. The rarest of rare principle has not been followed uniformly or consistently. Reference in this context was made to Alope Nath Dutta v. State of W.B. which in turn referred to several earlier decisions to bring home the point.

31. The critique in Swamy Shraddananda was mentioned (with approval) in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra while sharing this Court's "unease and sense of disquiet" in paras 109, 129 and 130 of the Report.

In fact, in para 109 of the Report, it was observed that: (Bariyar case)

"109. ... 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 threshold of 'the rarest of rare cases' has been most variedly and inconsistently applied by the various High Courts as also this Court."

32. It does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented.

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. It appears to us that even though Bachan Singh intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in Swamy Shraddananda and Bariyar. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in Bachan Singh seems to have been lost in transition."

21. In Shankar Kisanrao Khade (supra), this Court went to the extent of requesting the Law Commission of India for resolving "... the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."

22. In this context, it may be relevant to note that the Constitution Bench in Bachan Singh (supra) has made extensive reference to the 35th Report of Law Commission submitted in the year 1967, which justified the retention of death penalty. Interestingly, Report No. 262 submitted in the year 2015 prepared and submitted based on the request made by this Court has taken a different view, after extensive research and with reference to the international approach. To quote from the introduction of the Report No. 262 :-

"CHAPTER-I

INTRODUCTION

A. Reference from the Supreme Court

1.1.1. In Shankar kisanrao Khade v. State of Maharashtra ('Khade') (2013) 5 SCC 546 the Supreme Court of India, while dealing with an appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and granting clemency. The Court specifically called for the intervention of the Law Commission of India ('the Commission') on these two issues, noting that :

It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is

imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape- murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal. (Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 -para 148 (Emphasis supplied)

It does not prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India. (2013) 5 SCC 546-para 149. (Emphasis supplied)

1.1.2. Khade was not the first recent instance of the Supreme Court referring a question concerning the death penalty to the Commission. In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ('Bariyar') (2009) 6 SCC 498 lamenting the lack of empirical research on this issue, the Court observed :

We are also aware that on 18.12.2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law

Commission of India or the National Human Rights Commission may allow for an up-do-date and informed discussion and debate on the subject. (Emphasis supplied)

1.1.3. The present Report is thus largely driven by these references of the Supreme Court and the need for re-examination of the Commission's own recommendations on the death penalty in the light of changed circumstances."

23. Chapter -VII of Report No. 262 contains the Conclusions and Recommendations. To quote :-

"A. Conclusions

7.1.1 The death penalty does not serve the penological goal of deterrence any

more than life imprisonment. Further, life imprisonment under Indian law means imprisonment for the whole of life subject to just remissions which, in many states in cases of serious crimes, are granted only after many years of imprisonment which range from 30-60 years.

7.1.2 Retribution has an important role to play in punishment. However, it cannot be reduced to vengeance. The notion of "an eye for an eye, tooth for a tooth" has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme also be established. The need for police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

7.1.4 In the last decade, the Supreme Court has on numerous occasions expressed concern about arbitrary sentencing in death penalty cases. The Court has noted that it is difficult to distinguish cases where death penalty has been imposed from those where the alternative of life imprisonment has been applied. In the Court's own words "extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle". The Court has also acknowledged erroneous imposition of the death sentence in contravention of Bachan Singh guidelines. Therefore, the constitutional regulation of capital punishment attempted in Bachan Singh has failed to prevent death sentences from being "arbitrarily and freakishly imposed".

7.1.5 There exists no principled method to remove such arbitrariness from capital sentencing. A rigid, standardization or categorization of offences which does not take into account the difference between cases is arbitrary in that it treats different cases on the same footing. Anything less categorical, like the Bachan Singh framework itself, has demonstrably and admittedly failed.

7.1.6 Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems

besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system.

7.1.7 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence which was not placed before the courts. (*Kehar Singh v. Union of India* - (1989) 1 SCC 204 paras 7,10 & 16) Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. Further, the Supreme Court in *Shatrughan Chauhan v. Union of India*-(2014) 3 SCC1 -paras 55-56) has recorded various relevant considerations which are gone into by the Home Ministry while deciding mercy petitions.

7.1.8 The exercise of mercy powers under Article 72 and 161 have failed in acting as the final safeguard against miscarriage of justice in the imposition of the death sentence. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive confirms that retaining the death penalty is not a requirement for effectively responding to insurgency, terror or violent crime.

B. Recommendation

7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

7.2.2 The march of our own jurisprudence-from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to rarest of rare cases - shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity,

the Commission feels that time has come for India to move towards abolition of the death penalty.

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war." (Emphasis supplied)

Having regard also to the said Report of the Law Commission that the constitutional regulation of capital punishment attempted in *Bachan Singh* (supra) has failed to prevent death sentences from being "arbitrarily and freakishly imposed" and that capital punishment has failed to achieve any constitutionally valid penological goals, we are of the view that a time has come where we view the need for death penalty as a punishment, especially its purpose and practice.

24. It is also a matter of anguishing concern as to how public discourse on crimes have an impact on the trial, conviction and sentence in a case. The Court's duty to be constitutionally correct even when its view is counter-majoritarian is also a factor which should weigh with the Court when it deals with the collective conscience of the people or public opinion. After all, the society's perspective is generally formed by the emotionally charged narratives. Such narratives need not necessarily be legally correct, properly informed or procedurally proper. As stated in Report No. 262 of the Law Commission "the Court plays a counter-majoritarian role in protecting individual rights against majoritarian impulses. Public opinion in a given case may go against the values of rule of law and constitutionalism by which the Court is nonetheless bound" and as held by this Court in *Santosh Bariyar* (supra) public opinion or people's perception of a crime is "neither an objective circumstance relating to crime nor to the criminal". In this context, we may also express our concern on the legality and propriety of the people engaging in a "trial" prior to the process of trial by the court. It has almost become a trend for the investigating agency to present their version and create a cloud in the collective conscience of the society regarding the crime and the criminal. This undoubtedly puts mounting pressure on the courts at all the stages of the trial and certainly they have a tendency to interfere with the due course of justice.

25. Till the time death penalty exists in the statute books, the burden to be satisfied by the Judge in awarding this punishment must be high. The irrevocable nature of the sentence and the fact that the death row convicts are, for that

period, hanging between life and death are to be duly considered. Every death penalty case before the court deals with a human life that enjoys certain constitutional protections and if life is to be taken away, then the process must adhere to the strictest and highest constitutional standards. Our conscience as judges, which is guided by constitutional principles, cannot allow anything less than that."

Justice Kurian took the view having regard to the report of the Law Commission that time has come to abolish the capital punishment. Hon'ble Justice Deepak Gupta and Hon'ble Hemant Gupta concurred with the judgment delivered by Justice Kurian. However, Justice Deepak Gupta, speaking for himself and for Justice Hemant Gupta, observed as under:

"1 We have had the privilege of going through the erudite judgment delivered by our learned brother Justice Kurian Joseph. We are in full agreement with all that is stated in the judgment except the following observations in Para 23:

"Having regard also to the said Report of the Law Commission that the constitutional regulation of capital punishment attempted in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, has failed to prevent death sentences from being "arbitrarily and freakishly imposed" and that capital punishment has failed to achieve any constitutionally valid penological goals, we are of the view that a time has come where we view the need for death penalty as a punishment, especially its purpose and practice. "

2 In our view, since the Constitution Bench in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, has upheld capital punishment, there is no need to reexamine the same at this stage."

127 It is extremely difficult to lay down any straight-jacket formula or any fixed parameters when it comes to imposition of capital punishment. The following guidelines which emerge from *Bachan Singh* case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

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

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

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

(iv) A balance sheet of aggravating and mitigating circumstances has to be

drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

128 In the words of eminent Jurist R. Venkatesan Iyengar "Death penalty is like a 'just' war. For example, there is nothing wrong in finding a terrorist or a serial murderer to death. By putting an end to the life of a terrorist or a serial murderer you eliminate the threat to the lives of many people. Also there is nothing wrong in sentencing a murderer who has committed a barbaric and unspeakable crime. Death penalty to such criminal is not only just, but it also serves to satisfy the collective conscience of the society that justice has seemingly been done not only to the victims but also to the entire society."

129 Lord Denning appearing before the Royal Commission on 'capital punishment' expressed his following views :

"Punishment is the way in which society expresses its denunciation of wrongdoing and in order to maintain respect for law, it is essential that punishment inflicted for grave crimes should reflect revulsion felt by the great majority of the citizens. For them it is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because the wrong-doer deserves it, irrespective of whether it is deterrent or not."

130 Punishment serves numerous social-control functions, but it is usually justified on the principles of retribution, incapacitation, deterrence, rehabilitation, and/or restoration. The specific principles that underlie these dominant philosophies for punishment are summarized below.

- **RETRIBUTION:** One of the oldest and most basic justification for punishment involves the principles of revenge and retribution. This equation of punishment with the gravity of the offense is embedded in the Judeo-Christian tradition in the Mosaic laws of the Old Testament that emphasize the idea of "an eye for an eye." Neither constrained by questions of offender culpability nor directed at preventing future wrongdoing, offenders under a retributive philosophy simply get what they deserve. Punishment is justified on its own grounds, a general principle that has remained popular throughout Western history in both law and widespread public beliefs about how justice should be dispensed in democratic societies.

- **INCAPACITATION:** A primary utilitarian purpose for punishment involves various actions designed to decrease the physical capacity of a person to commit criminal or deviant acts. This principle of incapacitation focuses on the elimination of individuals' opportunity for crime and deviance through different types of physical restraints on their actions. The conditions of confinement may be so deplorable that they reduce the offender's subsequent desire to engage in misconduct, but such a deterrent effect is not a necessary component of

incapacitation in its pure and earliest form.

- **DETERRENCE:** The doctrine of deterrence asks a fundamental question about the relationship between sanctions and human behavior: Are legal. And extralegal sanctions effective in reducing deviance and achieving conformity? Punishment is said to have a deterrent effect when the fear or actual imposition of punishment leads to conformity. The deterrent value of punishments is directly linked to the characteristics of those punishments. Specifically, punishments have the greatest potential for deterring misconduct when they are severe, certain, and swift in their application. Punishments are also widely assumed to be most effective for instrumental conduct (i.e. deliberate actions directed at the achievement of some explicit goal) and for potential offenders who have low commitment to deviance as a livelihood (e.g. the person is not a professional criminal).

- **REHABILITATION:** Although it may seem contradictory or at least somewhat odd to assert that we punish for the treatment and reform of offenders, this basic principle underlies the rehabilitation purpose of punishment. The ultimate goal of rehabilitation is to restore a convicted offender to a constructive place in society through some combination of treatment, education, and training"; The salience of rehabilitation as a punishment philosophy is indicated by the contemporary jargon of "correctional facilities," "reformatories," and "therapeutic community" now used to describe jails, prisons, and other institutions 'of incapacitation.

131 As noted by another Jurist and Chairman of the Committee on Reforms of Criminal Justice System, the Hon'ble Dr. Justice V. S. Malimath in his Report "In fixing a sentence many factors are relevant e.g., the nature of offence, the mode of commission of the offence, the utter brutality of the same, depravity of the mind of the accused."

132 We have reached to a stage where we should now undertake the exercise of drawing a balance-sheet of the aggravating and mitigating circumstances. The aggravating circumstances are as under:

[1] The victim was an innocent child aged four years and five months at the time of the commission of the crime.

[2] While the victim was playing with his friends, the accused No.1 with whom the victim had some acquaintance, as the accused No.1 was working in the office of the uncle of the victim, was successful in luring the victim to accompany him on his motorcycle.

[3] After being successful in kidnapping the victim from his lawful guardianship, the accused persistently made phone calls and demanded ransom of Rs.50 Lakh from the father of the victim.

[4] The father pleaded before the accused persons to release his son by accepting Rs.12 Lakh which the father was able to arrange at the earliest.

However, the accused persons declined to accept Rs.12 Lakh and threatened the father that if the amount of Rs.50 Lakh was not paid, they would kill the boy.

[5] The purchase of blades from a local vendor is a circumstance indicating the capable state of mind of the accused persons. They wanted to be prepared for the worst. The purchase of the blades and the use of the blades for the purpose of slitting the throat of the victim would reflect that the accused persons had in their mind to kill the boy if they would not receive the ransom amount.

[6] The accused persons threatened the father of the victim by saying that they would set the entire town of Visnagar on fire if he would involve the police in the episode.

[7] The accused persons in the last in a most ghastly manner slit the throat of the child and killed him. The body, thereafter, was dumped beneath the heap of earth while there was still some life left in the child.

[8] The original accused No.1 namely Akshaykumar Patel in the past was prosecuted for the offence of kidnapping for the purpose of ransom, but, later, came to be acquitted.

[9] An innocent and helpless boy aged four years and five months lost his life for no fault on his part and that too, in a most painful manner. It is the lust and greed of the accused for money that led the accused to commit a very heinous and gruesome crime.

[10] The mitigating circumstances for commuting death penalty into life sentence are as under:

(a) Both the accused at the relevant point of time were aged 20 and 21 years respectively. They had just attained majority.

(b) The accused No.2 Kuldeep Panchal has no criminal antecedent. He hails from a poor strata of society.

(c) There is no evidence on record to indicate that the accused persons cannot be reformed.

(d) The child was abducted for the purpose of money. There was no intention as such to cause any harm or kill the child until the situation for the accused persons went out of control and became very precarious. The fear of being exposed by the child led the accused persons to take the extreme step of killing the child.

133 The death penalty touches our deepest instincts. Fear; pain; abhorrence; revenge; insecurity; honour; indignation; hatred and a multitude of other emotions influence our opinions. When we hear of a particularly vicious crime, or live with daily insecurity that only seems to be increasing, or are close to the victim of a brutal act, we are overcome by intense reactions and may then feel the perpetrator should be put to death. But, this is exactly why it is so important

to take the time to reflect rationally about this issue - to base our opinion upon informed considerations consistent with our other values and the ends we really hope to achieve.

134 Everyone thinks human life is valuable. Some of those against the capital punishment believe that human life is so valuable that even the worst murderers should not be deprived of the value of their lives. They believe that the value of the offender's life cannot be destroyed by the offender's bad conduct even if they have killed someone. Some abolitionists don't go that far. They say that life should be preserved unless there is a very good reason not to, and that those who are in favour of capital punishment are the ones who have to justify their position.

135 The medieval philosopher and theologian Thomas Aquinas made this point very clearly:

"Therefore if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good... Therefore to kill a man, who retains his natural worthiness is intrinsically evil, although it may be justifiable to kill a sinner just as it is to kill a beast, for, as Aristotle points out, an evil man is worse than a beast and more harmful."

Aquinas is saying that certain contexts change a bad act (killing) into a good act (killing to repair the violation of justice done by the person killed, and killing a person who has forfeited their natural worthiness by killing).

136 In the words of late Justice V.R. Krishna Iyer, "Criminals are not born but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with the delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations".

137 We are of the view that although there is a good deal of opposition to death penalty, yet it should remain on the statute book. One of the chief ends of the law of crimes is to punish the evil-doer so as to set an example to other like-minded persons and to deter them from committing the crime. Although the primary purpose of punishment is to deter, by fear, others who may be disposed to commit similar crimes, yet the secondary purpose is to prevent a repetition of the wrongdoing by disablement of the offender. The most effective mode of disablement is the death penalty which is confined to murder, rape and murder, high treason or other similar offences. There is a good deal of opposition to death penalty and it is now usually restricted to cases where the crime is of a heinous nature and has been committed with a good deal of pre- meditation in

cold-blood in a manner shocking the conscience of people in general. But still some are of the view that death penalty should be wholly abolished. In our opinion, it should remain on the statute book. Its presence there can itself act as a deterrent to those who may be disposed to commit pre-planned brutal murders of a shocking nature either with some base motive or on hire or for reward. In the matter of punishment as has been said above, the interests of the offender have to be weighed along with the interests of the society. If a particular offender is a menace to the society there should absolutely be no objection to inflicting the death penalty on him. The retributive aspect of the punishment is meant to gratify the instinct of revenge or retaliation which exists not merely in the individual wronged, but also by way of sympathetic extension in the society at large. People will not be disposed to resort to private revenge if they can have the offender brought to book and adequately punished for his crime through a Court of Law. Punishment of the wrong-doer is the vengeance of the wronged, and this reinforces the faith of the people in the administration of justice. If people can get away after committing serious crimes by being awarded nominal punishments, it may induce the person wronged and his friends and sympathizers to resort to private vengeance which is not at all desirable for maintaining peace and order in society.

138 In the overall view of the matter, more particularly, having regard to the aggravating factors vis-a-vis the mitigating circumstances, we are of the view that the case on hand does not warrant death penalty. At the same time, commuting death penalty to mere life sentence will also not be in the interest of justice.

"Not all scars show

Not all wounds heal

Not all illness can be seen

Not all pain is obvious

Remember this before passing judgment"

So said Avocado Wolfe. This quote applies not only while judging the accused, but also while judging the plight of the victim, if we take into account, the innocence, ignorance and inexpressiveness of the child. That is why it is said that though "silent" and "listen" are words spelled with the same letters, but for listening the silent cry of the child, justice would be an impossibility. The gruesome, brutal, and inhumane murder of the child, whose ambitions have been aborted and life aflamed, calls for a very severe punishment though not of death penalty.

139 It has been very aptly indicated in *Dennis Councle McGautha v. State of California* (402 US 183) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of

the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, should not be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against the societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". [see : State of M.P. vs. Saleem alias Chamaru and another reported in 2005(5) SCC 554].

140 Mr. H.K. Patel, the learned A.P.P. appearing for the State brought to our notice the judgment of the Supreme Court in the case of Swamy Shraddananda alias Murali Manohar Mishra vs. State of Karnataka [2008 (13) SCC 767] and submitted that even if this Court should not uphold the imposition of death sentence, it is a fit case where the life sentence should be clarified and amplified as one for the rest of the life of the accused persons. Even on the aspect of making such a clarification, the Supreme Court itself has clarified that the perception of imprisonment for life, as a sentence of imprisonment for 14 years, is not conclusive but having regard to the vast hiatus between imprisonment for 14 years and death sentence if in a given situation, a punishment greater than the imprisonment for 14 years is warranted, but stops short of being a rarest of rare case warranting imposition of death sentence, which is purely dependent on the facts and circumstances of each case, the Court may specify that the punishment of imprisonment for life may be for a longer period than 14 years; that remissions are not to be allowed and in a given case it can be co-extensive with the life of the convicted person.

141 Thus, taking into consideration the various judgments of the Supreme Court,

we are of the view that in spite of the fact that the appellants had committed a heinous crime and murdered an innocent, helpless and defenceless boy aged four years and five months, they are liable to be punished severely, but, it is not a case which falls within the category of the rarest of the rare cases. Hence, we set aside the death sentence and award life imprisonment. The appellants must serve a minimum of thirty years in jail without remission, before consideration of their case for premature release. However, it would be subject to the clemency power of the Executive.

142 In the result, both the conviction appeals fail and are hereby dismissed. The judgment and order of conviction passed by the Trial Court is hereby affirmed. However, the death sentence awarded by the Trial Court is set aside and is substituted with life imprisonment. The appellants shall serve a minimum of thirty years in jail without remission, before consideration of their case for premature release.