

INDIVIDUALISATION OF PUNISHMENT, JUST DESERT AND INDIAN SUPREME COURT DECISIONS: SOME REFLECTIONS

*Dr. Anju Vali Tikoo **

Abstract

Punishment is imposed for social discipline and to do justice. And if the punishment itself becomes unjust on account of unbridled and unregulated sentencing discretion vesting in the judiciary, it would breed contempt about the justice delivery system and violate rule of law. Punishment may have retributive (just deserved) or utilitarian philosophical underpinnings depending upon the leanings of the governing class. But there is no denying the fact that it should be proportional to the crime irrespective of the underlying purpose be it in the 'just desert' model or utilitarian and individualised punishment. Proportionality is better secured in utilitarianism than in retributivism. Disproportionate sentence signifies harsh penalties for incapacitation and general deterrence. The context of this paper is to evaluate the notion of 'individualisation of punishment' and compare it with 'Just desert'. It critically examines how this concept of 'individualisation of punishment' and 'just desert' has led to uncertainties, inconsistencies, illogicality and undermined the principle of stare decisis in Supreme Court judges' sentencing discretion in India.

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III	Just Desert and Individualisation of Punishment: A Juxtaposition..
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I INTRODUCTION

CRIME AND punishment are related as cause and effect correlatives for ensuring the peaceful and harmonious co-existence of a given human society. To every action, there is a reaction. Though there are various theories justifying punishment for wrongdoers who break the social fabric of the society, yet there is no universally applicable rationale for punishment.

Whether one follows utilitarian approach¹ or retributive² philosophy, the principle of proportionality³ is the principal consideration in setting penalty levels. Principle of

*Assistant Professor, Faculty of Law, University of Delhi.

¹ Jeremy Bentham (1748-1832) propounded the philosophy of utilitarianism suggesting punishment should be proportional to the offence. That people will pursue pleasure or 'happiness' and be deterred by the imposition of 'pain' or restraint. Available at: http://compass.port.ac.uk/UoP/file/639aa3c6-7e3a-4f10-b9c6-a9c39a9ab257/1/Classicism_IMSLRN.zip/page_03.htm (last visited on June 30, 2017).

proportionality and perceived procedural fairness are key factors bringing about compliance with norms/ law. In contrast disproportionate sentencing arouses antipathy towards institutions or practices that condone such outcomes.

Towards the end of the last century, Andrew Von Hirsch' scholarly writings paved the way for the resurrection of 'just desert' as criminal sanctions⁴.The 'Just desert' concept underlines that the punishment should fit the crime. Even within the notion of 'deserved' punishment there are varying and subtle thought currents. Generally, to individualize punishment is to find the balance between the gravity of the offence and the individuality of the offender, then find the most appropriate penalty that is commensurate to crime committed.

The purpose of this paper is to analyse how in the name of 'individualisation of punishment' and 'just desert' huge sentencing discretion vests in the judiciary, and that this discretion is not uniformly exercised but individually applied in disregard to the theory of *just deserts*. The judges often reach different conclusions (sentence) even when the facts are so similar and overall conduct of the offenders has resulted in the same crime. The paper will endeavour to present a critique of the uncertainties and proffer a workable way out of the quagmire.

II PRINCIPLE OF JUST DESERT

The principle of Just Desert has been characterised by Tim Scanlon as, "the idea that when a person has done something that is morally wrong it is morally better that he or she should suffer some loss in consequence"⁵ In the context of punishment, it suggests that a person who has committed a criminal wrong deserves to suffer some loss, and it is the function of the system of punishment to impose that loss for the wrong done. That is, the –or, at least, a-function of the system of punishment is to ensure that the suffering that is deserved by a given offender for a given act is imposed on the offender⁶.

There are broadly three justifications underlying 'just desert'. These are (i) morally deserved argument, (ii) Fair play argument and (iii) Censure argument. For the (i) argument, according to Moore, "we ought to punish offenders because, and only because, they deserve to be punished.

² The essence of retribution (favored by Kantians and libertarians) is desert. With retribution we first say "he deserves it" and then we punish in a way that he deserved, and if that punishment serves as a deterrent then so be it..... Real justice and respect for a person's free will require punishing only those who deserve it without forcing them to change against their will or using them for our purposes, available at <http://web.uncg.edu/dcl/courses/viccrime/pdf/m7.pdf> (last visited on June 27, 2017)

³ The principle of proportionality in its simplest form means punishment should fit/equal the crime and it is the main objective of sentencing. This reflects the *lex talionis* of Old Testament reflecting an 'eye for an eye' philosophy, available at: <https://academic.oup.com/ojls/article-abstract/28/1/57/1559023/An-Eye-for-an-Eye-Proportionality-as-a-Moral?redirectedFrom=PDF> (last visited on May 15, 2017)

⁴ Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing*, (Oxford University Press, 2012).

⁵T. M. Scanlon, *What We Owe Each other* 274 (Harvard University Press, US, 1998).

⁶ M. Matravers, "Twenty First Century Punishment Post Desert" in M. Tonry(ed.) *Retributivism Has a Past- Has it a Future?*32 (OUP 2011).

Punishment is justified for a retributivist, solely by the fact that those receiving it, deserve it”⁷, whereas ‘fair play’ as retributive argument is based on a core which suggests, given a just ‘initial distribution of benefits and burdens’ in society, a criminal offence disturbs this equilibrium and needs to be rectified. It does so because the criminal free rides on the willingness of others to constrain the pursuit of their interests in accordance with the law. Of course in some sense the free rider “deserves” punishment and yet another reasoning underlying the justification of punishment is the need, to convey ‘censure’. Moral wrongdoing deserves censure, and when a society has declared some behaviour to be wrong, then censure is “owed” to the offender as “an honest response to his crime,” to his victims” as an expression of concern for their wronged status,” and to “the whole society, whose values the law claims to embody.”⁸

According to Andrew Von Hirsch and Ashworth,⁹ “the penal sanction should fairly reflect the ...harmfulness and culpability of the actor’s conduct”. This treats people fairly *i.e.*, like cases alike and different cases differently. Punishments should be proportional is based on the premise that people are reasoning agents and penalties should respect citizens as persons. Proportionality doesn’t provide the rationale for either having or not having a system of punishment. Rather that any system of punishment in its design and critique must respect the demands of proportionality. Since disproportionate punishment can be equated with punishment without guilt and does not result in justice. And justice should not only be done but should also seem to have been done. Also it needs to be borne in mind that followers of proportionate principle do not focus on factors underlying crime causation and hence for them every individual is a rational being and has freedom to make choices about his/ her conduct. That being so, for ‘just desert’ believers external socio- economic stimuli have no role in shaping the conduct of an individual. Accordingly they neither believe in reformation / rehabilitation of offenders (therapeutic jurisprudence) nor do they believe in restorative approaches in criminal justice administration.

Just desert’ as a theory of criminal punishment, proposes reduced judicial discretion in sentencing and specific sentences for criminal conducts with little or no regard to the individual offender. It simply connotes “deserved punishment” or reward. It proposes that an offender must receive as appropriate punishment on the basis of what he/she deserves. And this ‘deservedness’ as already observed is not always based on ‘retaliation’ *i.e.* an ‘eye for an eye’ and rather can have other reasons like ‘equality, fair play and censure.’¹⁰

⁷ M. Moore,” The Moral Worth of Retribution” in Ferdinand Shoemann (ed.) *Responsibility, Character and the Emotions*” (Cambridge University Press, NY 1987).

⁸ R.A.Duff, *Trials and Punishments*50(Cambridge University Press, Cambridge 1986).

⁹*Supra* note 4 at 5.

¹⁰*Supra* note 7.

III JUST DESERT AND INDIVIDUALISATION OF PUNISHMENT: A JUXTAPOSITION

While the *Just desert* theory of retribution¹¹ looks back at the wrong committed, primarily focussing on crime and the need to assuage the victim by punishing wrongdoer, the notion of individualisation of punishment is based on utilitarianism,¹² is forward looking and considers deterrence, incapacitation and reformation as the goals of punishment. The thin line is that while deterrent approach aims to deter potential future criminal minds, the rehabilitative approach seeks to reform or rehabilitate the convict inside prison so that he will become a better and useful member of the community and can play a constructive role in society after his release from prison. The sentencing discretion vesting in the judges gives them the space to individualise punishment depending upon specific facts and circumstances of a particular case. Despite the fact that the Indian Supreme Court has, over the years, reiterated that punishment should fit the crime, this measure of proportionality is to be based exclusively on retributive or utilitarian rationale, has not been made explicit. And while deciding the quantum of punishment specifically in heinous offences, both the principles of 'just desert'¹³ and 'individualisation of sentence' go hand in hand.

Due mainly to the inability of the utilitarian approach with varying dimensions of deterrence, incapacitation or rehabilitation to effectuate a reduction in crime, philosophers and scholars have re-examined retribution as a viable justification for punishment.¹⁴ Disillusioned with Utilitarian philosophy for not being able to reduce the crime incidence in various jurisdictions across America, a regime of '*fixed penalties*' for certain offences has been adopted. Fixed penalties as the nomenclature suggests rules out judicial discretion and is implemented purely on certain pre-identifiable criteria of just deserved and proportionality of sentence.¹⁵ Till date, the fusion and/or combined application of all of them is yet to make much needed difference of ensuring a society free from criminalities.

¹¹*Ibid.*

¹²Jeremy Bentham (1748-1832) propounded the philosophy of utilitarianism suggesting punishment should be proportional to the offence. That people will pursue pleasure or 'happiness' and be deterred by the imposition of 'pain' or restraint. For details see *Supra* note 1.

¹³ *Supra* note 5 and 7

¹⁴ C.S., Lewis. *The Humanitarian Theory of Punishment*, 287(1970). Available at: <http://www.olen.com/edu/downloads/intro-philosophy/pchapter-7.pdf> last visited on July 7, 2017).

¹⁵There are several states in US where 'three strike laws' have been incorporated. Also known as habitual offender laws, the essence of these statutes is to punish severely any offender convicted of a third serious offence as an adult. The period of incarceration is long say from 25 years to even life imprisonment, that without any parole. These laws were brought for having a clear and understandable sentencing practices for violent and career criminals e.g. sexual offenders, robbery, serious assault, murder etc. See Washington, California, Minnesota laws on this theme.

IV INDIAN CRIMINAL JUSTICE SYSTEM

The legislative framework

In India there are two comprehensive codes dealing with the substantive and procedural aspect of criminal law. The Indian Penal Code, 1860 (IPC) defines the offences and also prescribes punishment for those offences in addition to identifying different kinds of punishments that may be awarded by the courts on trial. In addition to IPC there are some special and local laws dealing with those crimes which are not included in the IPC, e.g. Narcotic Drugs and Psychotropic Substances Act, 1985, Prevention of Food Adulteration Act, 1954, Prevention of Corruption Act, 1986, Sexual Harassment (prevention, protection and rehabilitation) Act, 2013 to name a few. These special laws may have their independent norms with reference to arrest, bail, proof etc. Still it is primarily the IPC that contains the paramount framework for proscribing conduct as criminal. The Criminal Procedure Code, 1973 consolidates the procedural detailing of the criminal justice administration machinery and mechanism. Thus it is a combination of these two codes along with the Indian Evidence Act, 1872 that forms the framework for criminal justice administration in India.

Link Indian Penal Code, 1860

Chapter III of IPC deals with punishments. Section 53 envisages primarily five kinds of punishment. These include Death Sentence, Life Imprisonment, Imprisonment (simple or rigorous), Forfeiture of Property, and Fine. Section 73 prescribes solitary confinement. Section 54 deals with commutation of sentence of death whereas section 55 deals with commutation of sentence of life imprisonment. Section 57 clarifies that life imprisonment is to be constructed as imprisonment for a period of 20 years. After the 2013 Criminal Law Amendment Act, section 376A, 376 D, 376E have added a new dimension to the 'life imprisonment' by specifying that it shall mean imprisonment for the remainder of that person's natural life.

Criminal Procedure Code, 1973

The Cr PC empowers the high courts and sessions courts to impose any of these sentences, except that in case death sentence is awarded by the sessions court, it has to be confirmed by the high court of the state. The subordinate judiciary has clearly specified powers and authority to try cases of specific nature and award punishments accordingly.

Individualisation of punishment and the judiciary: The legislative scheme

Generally the IPC and other special laws dealing with crime provide for a discretionary paradigm of sentencing. This is so because the maximum term of punishment is specified for a specific offence and the judge has the authority to determine the quantum of sentence to be awarded in a

given case upon conviction. The Law Commission of India in its 47th Report on the question of how sentence ought to be determined observed:¹⁶

A proper sentence is a composite of many factors, including the nature of offence, the circumstances-extenuating or aggravating- of the offense, the prior criminal record, if any, of the offender, the age of the offender, the professional or social record of the offender, the background of the offender with reference to the education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, of such a deterrent in respect to the particular type of offense involved.

And for determination of sentence post- conviction, Cr PC envisages a separate phase of sentencing process under sections 235(2),¹⁷ 248(2) and 255(2). Generally after the pronouncement of conviction a separate date is fixed for hearing arguments on quantum of sentence where both the parties to the case are entitled to put evidence before the court relating to factors relevant for sentencing.¹⁸ Hearing on the sentence is mandatory and a punishment pronounced without giving an opportunity of hearing on sentence, within the mandated requirements of law shall be quashed in appeal. The final judgment is always at the end of hearing on sentence signifying the conclusion of trial. The court has the power to release a person on probation of good conduct or after admonition simply under the provisions of Cr PC or Probation of Offender” Act, 1958. The court may award Fine, compensation, imprisonment or capital punishment but it has to be a reasoned order. Sections 432 and 433, Cr PC empower the appropriate government to suspend, remit or commute sentence. Even the life imprisonment can be commuted to an imprisonment for a period not exceeding 14 yrs.¹⁹

Legislative scheme with respect to life imprisonment versus death sentence

Section 354(3) of Cr PC, 1973 marks a significant shift in the legislative policy underlying the Cr PC of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the penal code, were normal sentences. Now according to this changed legislative policy it is patent on the face of section 354(3) that the normal punishment for murder

¹⁶ Available at: <http://www.lawcommissionofindia.nic.in/welcome.html>.

¹⁷ Law Commission of India in its 48th report had pointed out the deficiency about lack of comprehensive information as to characteristics and background of the offender that was proving to be a bottle neck for consistent and rational sentencing policy. And s. 235(2) has been incorporated accepting that recommendation to have comprehensive information about the offender at the pre-sentence stage

¹⁸ *Allaudin Mian v. State of Bihar*, (1989) 3 SCC 5.

¹⁹ Cr PC, s. 433(b).

and six other capital offences under the penal code, is imprisonment for life (or imprisonment for a number of years) and death penalty is an exception.

Section 354(3) Cr PC states that , “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment *shall* state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”A combined reading of the aforementioned provisions makes it abundantly clear that judiciary in India has a significant role in sentencing process and they have unbridled discretion to exercise in so doing. Hence the sentencing in India is invariably a judge- centric function rather than being a principled sentence centric exercise. And the same gets further substantiated by an analysis of the following decisions of the Supreme Court of India.

Rationale underlying punishment: Indian Supreme Court approach

A perusal of the judgments delivered by the Supreme Court of India in cases pertaining to heinous offences reflects an *ad-hoc* and fluctuating attitude with reference to award of death penalty or life imprisonment. This is despite the landmark Constitution Bench decisions emphasizing the need to exercise judicious caution while dealing with cases where death penalty as an alternative punishment is prescribed under the law. The Supreme Court has not been consistent in advising which theories (or justifications) of punishments should be applied in criminal sentencing.²⁰ Different sets of judges serving the apex court at the same point of time have reflected their preferred but different theories while critiquing their fellow judges for adhering to other theories than their preferred ones. Hence we find judgments delivered by a given set of judges during a time period giving paramount importance to their preferred approaches. However, the court has acknowledged that sentencing generally poses a complex problem which requires a working compromise between competing views based on reformation, deterrent and retributive theories of punishment.

The following section deals with the evolution of sentencing discretion guidelines being laid down by the Supreme Court in landmark cases. Two broad themes of individualisation of punishment and just desert are apparent in the apex court decisions under section 354(3) of the Cr PC and these attitudes are being contextualised with the help of few of the many significant judgments of the Supreme Court to understand how the court has been able to balance the competing claims of same punishment for same offence versus individualisation of punishment. Despite the parameters for the exercise of discretion being supposedly laid down various judgments delivered by the apex court still reflect an *ad-hoc* attitude with reference to relying on any single punishment policy.

²⁰ Mrinal Satish *Discretion , Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 63 (Cambridge , 2016).

Individualisation of punishment and the Indian Supreme Court *Bachan Singh v. State of Punjab*²¹

Briefly, *Bachan Singh* was tried, convicted and sentenced to death under section 302, IPC for the murders of - Desa Singh, Durga Bai and Veeran Bai by the sessions judge of State of Punjab. On heated altercations between the parties, the appellant led others (acquitted) who armed themselves with spear and other dangerous weapons with which they gave several and deep cutting fatal blows to the deceased, which resulted in their deaths. The three murders were described as extremely heinous and inhuman. On appeal, the high court confirmed the death sentence pronounced on the appellant and dismissed his appeal. Being dissatisfied, he further appealed to the Supreme Court. The question before the Supreme Court Constitution bench was, *inter alia*, the sentencing procedure embodied in sub-section (3) of section 354 of the Cr PC, 1973.

In drawing up the guidelines, the Supreme Court hinged its opinion on the sentiments or feelings of the community. Therefore, the court ruled that death penalty shall be imposed for murder, if any of the following circumstances are decipherable:

- *Manner of Commission of Murder* - When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community;
- *Motive for Commission of murder* - When the murder is committed for a motive which evince total depravity and meanness)
- *Anti-Social or Socially abhorrent nature of the crime* - When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. And in cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
- *Magnitude of Crime*- When the crime is enormous in proportion.
- *Personality of Victim of Murder*: When the victim of murder is (a) an innocent child; (b) helpless woman; (c) victim is a person *vis-a-vis* whom the murderer is in a position of domination or trust; (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

Those steps, thereof, form the premises of any conclusion to be reached in each and every case. Reiterating *Jagmohan Singh*²² the court observed that death penalty serves as a deterrent against

²¹AIR 1980 SC 898; 1980 SCR (1) 645; (1980) 2 SCC 684.

criminal conducts. The court further ruled that while considering the question of sentence to be imposed for the offence of murder, the court must have regard to every relevant circumstance relating to the crime as well as the criminal.²³ That, Parliament has given a broad and clear guideline under section 354(3) which is to serve the purpose of loadstar to the court in the exercise of its sentencing discretion. Further with reference to standardisation of norms for sentencing, the court again referred to *Jagmohan* case reiterating infinite, unpredictable and unforeseeable variations even within a single category offence and went on to record that, "... standardisation of the sentencing process which leaves little room for the judicial discretiontends to sacrifice justice at the altar of blind uniformity."²⁴ It went on to appreciate the silent zones designedly left open by the Parliament in its legislative planning for fair play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing.

While strongly condemning the action of the appellant and the wave of heinous criminal activities in India, the court stated:²⁵

When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.

And before concluding categorically added:²⁶

...we cannot obviously feed into a judicial computer all such situations since they are astronomical imponderables in an imperfect and undulating society..... A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the *rarest of rare* cases when the alternative option is unquestionably foreclosed.

The apex court by the majority judgment rejected both grounds of challenge to the constitutionality of the sentencing procedure and death penalty provided under sections 354(3) of the Cr PC, 1973 and 302 IPC.

²²*Jagmohan Singh v. State of U.P.*(1973)1 SCC 20.It was a case that was decided on the basis of pre-1973 Code wherein 35th Report of the Law Commission of India on death penalty was discussed and observed that death penalty serves deterrent purpose.

²³*Id.*, para 164.

²⁴*Id.*, para 173.

²⁵*Id.*, para. 179.

²⁶*Id.*, 209.

Machhi Singh v. State of Punjab²⁷

No doubt that the identification and application of the 'rarest of rare' doctrine, enunciated in *Bachan Singh's case* needed some kind of precision. The main guidelines to be followed in its application was one of the issues that engaged the attention of the court in *Machhi Singh's case*.

In that case, a violent dispute between two families resulted in the loss of 17 lives in five separate incidents. The appellant and his associates were tried by the sessions court. This appellant was among the four who were sentenced to death. His death penalty was confirmed by the High Court of Punjab of necessitating an appeal to the Supreme Court. While hearing the appeal, the apex court considered and laid down what would amount to normal guidelines to be followed so as to clarify the 'rarest of rare' cases formula, for imposing death sentence, as spelled out in *Bachan Singh's case*.²⁸

To start with, the court held that the extreme penalty of death need not be inflicted except in *gravest cases of extreme culpability*.²⁹ The challenge facing the lower courts, the academia and researchers is how to specifically determine the ingredients of or what amounts to gravest cases of extreme culpability. In what can be understood as the Supreme Court's response to the question, the apex court stated that 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'.

Again, from the reasoning of the justices, the Supreme Court seems to have one answer to these. It is that, "Life imprisonment is the rule and death sentence is an exception." In other words death sentence will be imposed only when life imprisonment appears to be an altogether inadequate punishment. This in addition to 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. These lines of reasoning further intensify the impasse.

Those guidelines are governed by one word – 'discretion' of the judge(s). Being so, matters of discretion can hardly have an ABC end-to-end formula. Furthermore, strictly upholding "Life imprisonment as the rule and death sentence is an exception" is jeopardising the, retributive and deterrence theories of punishment. Will a prospective offender, fully aware and rationalises on the fact that "Life imprisonment is the rule and death sentence is an exception" be still deterred from furthering his criminal enterprise?

Murderous criminal may take advantage of that rule, by reducing the level of brutality and extremism as an escape route. If that happens, will the objective of the sentence still stand served? As if unmindful of the palpable fears, the Supreme Court went ahead to hold that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so

²⁷ (1983) 3 SCC 470.

²⁸ *Supra* note 19.

²⁹ *Id.*, para 38(i).

the mitigating circumstances has 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. Probably prioritising the rehabilitative and restorative theories of criminal punishment,³⁰ all these go to the benefit of the offender and the offended is left out of the picture. This is individualisation not generalisation of sentencing procedure. Justice should be dispensed to all parties, be functionally backward by addressing the grievances of victim(s) and forwarding looking too in ensuring that the convict does not become a burden on the resources of the society and be able to constructively participate in social group . Otherwise, the search for solution to individualisation of sentencing is still early in the day.

In *Santosh Kumar Singh v. State*,³¹ the accused, a lawyer and senior of the deceased Priyadarshini Mattoo, a student of faculty of law, University of Delhi ,raped and murdered her at her home when she was all alone. It was established by the prosecution that prior to the fateful day, Santosh the accused who was the son of a high profile police officer, had been stalking the deceased for almost two years and that the deceased had been provided with a body guard on her complaint to the police of such harassment by the accused. Also, that it was the rejection of all the overtures made by the accused to the deceased over a period of time, that he wanted to ensure that if the deceased doesn't accept his advances then she should not be allowed to become someone else' too.

Despite the evidence against the accused, the trial court for some strange reasons, acquitted him. On appeal, the high court reversed the judgment of the trial court and passed comments against the trial court for error apparent on the face of the decision on the basis of available evidence. Aggrieved by the decision of the High Court of Delhi convicting the accused on both counts of rape and murder and awarding death sentence, he moved an appeal before the Supreme Court.

H. S. Bedi J of the Supreme Court speaking for the court held that sentencing part is a difficult function and 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.

Focusing on mitigating circumstances the court though upheld conviction of the accused but substituted 'death penalty' with 'life imprisonment' on the ground that:³²

...the High Court has reversed a judgment of acquittal based on circumstantial evidence, the appellant was a young man of 24 at the time of the incident and, after acquittal, had got married and was the father of a girl child. Undoubtedly, also the appellant would have had time for reflection over the events of the last

³⁰ Anju Vali Tikoo, *From Punishment to Restoration: A Quest for Real Justice* (Pragati Publications, New Delhi, 2017)

³¹ (2010) 9 SCC 747.

³²*Id.*, para 37.

fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family. On the contrary, there is nothing to suggest that he would not be capable of reform.

The court talked of aggravating circumstances in unequivocal terms and noticed the tendency of parents to be over indulgent to their progeny often resulting in the most horrendous of situations like the instant one where an accused belongs to a category with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two.³³ Though the court put on record the alarming incidents of such class reality of the society still it held that the balance sheet tilts marginally in favor of the appellant, and the ends of justice would be met if the sentence awarded to him is commuted from death to life imprisonment.³⁴

Going by the reasoning given by the court considering that the accused got married and has a girl child ,forgetting and forgiving his past conduct of stalking for almost two years despite being a lawyer, the manner and motive of crime commission and to cap it all suggesting the possibility of reform after the demise of his high profile police officer father, leaves one with utter confusion about the plight of the victim and the collective conscience of society which has otherwise been used as a justification by court in pronouncing death sentence.³⁵

Yet again in the landmark decision of *Santosh Kumar Bariyar v. State of Maharashtra*³⁶ the Supreme Court overruled death penalty. It was a case of kidnapping for ransom and murder. The deceased Kartikraj, was the son of Ramraj who at the relevant time was the Manager of NABARD Bank. The accused hatched a conspiracy to kidnap him and demand Rs.10/- lakh as ransom since they wanted quick money and were unemployed. The deceased was the friend of one of the five accused and was invited by him for an evening party. It is alleged that they consumed liquor and the deceased while going to toilet fell down on account of inebriated condition, became unconscious and passed away. Scared as the accused were on account of this development, *Santosh Bariyar* suggested to dispose of the body and in a brutal manner the body of deceased Kartikraj was cut into pieces, stuffed into poly bags and then disposed of by throwing the bags at different places. The SC overruled death penalty confirmed by the high court and instead awarded life imprisonment giving weightage to the factors like *no previous crime record, not being professional killers, unemployed searching for jobs resulting in need for money etc.*³⁷ While commuting death sentence the court took into account the fact of conviction being proved on the evidence/testimony of an accomplice turned approver who had been granted pardon. The exercise of sentencing function being a principled exercise is very important to the

³³*Id.*, para 38

³⁴*Ibid.*

³⁵ See *Dhananjay Chatterjee v. State of West Bengal*, (1994) 2 SCC 220. The case has been discussed under the caption of 'Just Desert' in the later pages of this article.

³⁶ (2009) 6 SCC 498.

³⁷*Id.* at 96. Available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=34632> (last visited on May 29,2017).

independent, objective and unpartisan image of judiciary. Quoting Von Hirsch and Andrew Ashworth,³⁸ the court observed:³⁹

There is a fundamental relationship between the legitimacy of sentence belonging to a particular potency and the reasons accorded by the court to justify the same. The reasons which are accorded by the court to justify the punishment should be able to address the questions relating to fair distribution of punishment amongst similarly situated convicts and the appropriate criteria for the punishment. The sentencing process, based on precedents around Bachan Singh, should help us to determine specific, deserved sentences in particular cases. It is important to note here that principled application of rarest of rare dictum does not come in the way of individualized sentencing. With necessary room for sentencing, consistency has to be achieved in the manner in which rarest of rare dictum has to be applied by courts. Bachan Singh expressly barred one time enunciation of minute guidelines through a judicial verdict. The court held that only executive is competent to bring in detailed guidelines to regulate discretion. On this count judicial restraint was advocated. But at the same time, it actively relied on judicial precedent in disciplining sentencing discretion to repel the argument of arbitrariness and Article 14 challenge. An embargo on introduction of judicial guidelines was put therein but organic evolution of set of principles on sentencing through judicial pronouncements was not ruled out. This is how precedent aids development of law in any branch of law and capital sentencing cannot be an exception to this. "Principled reasoning" flowing from judicial precedent or legislation is the premise from which the courts derive the power. The movement to preserve substantial judicial discretion to individualize sentences within a range of punishments also has its basis in the court's ability to give principled reasoning.

So, two considerations are crucial- the antecedents or criminal record of the offender and the circumstances leading to the crime of murder committed. This can be further clarified to mean that if the offender is a first offender or has no criminal record then he stands a good chance of being sentence to life imprisonment instead of death, irrespective of the offence committed.⁴⁰ In other words, the attention of the court goes away from the crime and the victim and leniently focuses on the personality of the offender. Is that the most appropriate and objective reasoning to be prioritised? If so, how have the interests or right of the victim/family and that of the larger society catered for? How many times should a person commit crime before he will be adjudged a

³⁸ Andrew Von Hirsch and Andrew Ashworth, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning Proportionate Sentencing: Exploring The Principles*, (Oxford University Press, 2005)

³⁹ *Supra* note 36 at 51-52.

⁴⁰ *Ibid.* Also see *Sunil Dutt Sharma v. State* (Govt. of NCT of Delhi) AIR 2013 SC (Cri) 2342 is an illustrations of this notion.

danger' to the lives of others? To restore public confidence, these need to be taken into consideration.

This is an illustrative case with reference to the evolution of death penalty since *Bachan Singh* judgment. Citing categories of cases where death penalty was commuted and the other where it was not commuted the Supreme Court bench of S.B. Sinha and Cyriac Joseph.JJ. found it to be a fit case to commute death sentence and award life imprisonment instead. It is intriguing as to how against the backdrop of facts that there was a conspiracy to kidnap none other than a friend for ransom, and the manner in which they planned and executed the entire crime how the apex court could still hold that they were not professional killers, unemployed resulting in need of money and be able to justify commutation. Character of the accused being educated, unemployed youth in need of money cannot be given so much of weightage to rule out the death sentence in the face of aggravating manner and motive of commission of crime. If this is how we are supposed to evaluate and balance aggravating and mitigating circumstances then it would result in total loss of faith in human social relations and consequent anomie which the law is bound to prevent in the name of law and order. And punishment is to ensure social discipline and social solidarity.

*Sunil Dutt Sharma*⁴¹ is yet another illustrative case where the accused-appellant was tried for offences under sections 302 and 304-B of the IPC for causing the death of his wife. He was acquitted of the offence under section 302 IPC on the benefit of doubt though found guilty under section 304-B of the IPC following which the sentence of life imprisonment was imposed and affirmed by the high court. Hence, the appeal under article 136 to the Supreme Court to determine whether sentence of life imprisonment to the accused-appellant is in any way excessive or disproportionate so as to require interference by this Court.

The Supreme Court while quoting section 304-B(2) of the IPC which prescribes mandatory minimum imprisonment of seven years which may extend to imprisonment for life also mentioned other provisions of IPC which include similar expressions with reference to the quantum of sentence. Highlighting the power and authority conferred by the language in different provisions of the IPC, the apex court observed that:

...(It) indicates the enormous discretion vested in the Courts in sentencing an offender who has been found guilty of commission of any particular offence. Nowhere, either in the Penal Code or in any other law in force, any prescription or norm or even guidelines governing the exercise of the vast discretion in the matter of sentencing has been laid down except perhaps, Section 354(3) of the Code of Criminal Procedure, 1973 which, inter alia, requires the judgment of a Court to state the reasons for the sentence awarded when the punishment prescribed is imprisonment for a term of years. In the above situation, naturally, the sentencing power has been a matter of serious academic and judicial debate to discern an

⁴¹*Sunil Dutt Sharma v. State (Govt. of NCT of Delhi)* AIR, 2013 SC (Cri.) 2342.

objective and rational basis for the exercise of the power and to evolve sound jurisprudential principles governing the exercise thereof.

While referring to *Jagmohan Singh*, *Bachan Singh*, *Machhi Singh* as watersheds in the search for jurisprudential principles in the matter of sentencing, the court focused on *Sangeet*⁴² and *Shankar Kisanrao Khade*⁴³ and noted that the attempt at evolution of a principle based sentencing policy as distinguished from a judge centric one has suffered some amount of derailment/erosion. In fact, the several judgments noted and referred to in *Sangeet*⁴⁴ were found to have brought in a fair amount of uncertainty in application of the principles in awarding life imprisonment or death penalty, as may be, and the varying perspective or responses of the court based on the particular facts of a given case rather than evolving standardized jurisprudential principles applicable across the board.

Relying heavily on the concurring opinion of Madan B. Lokur, J. in *Shankar Kisanrao Khade*⁴⁵ dealing exhaustively with the judgments rendered by this court in the last 15 years the Court quoted paragraphs 106 and 122 wherein death penalty has been converted to life imprisonment and also the cases wherein death penalty has been confirmed. However, in paragraph 123 of the report the cases where the reasons have been deviated from have also been noticed. Noting the differential interpretation of the rarest of rare doctrine from *Bachan Singh* and the principle of proportionality, the apex court in *Sunil Dutt* went on to observe,

Are we to understand that the quest and search for a sound jurisprudential basis for imposing a particular sentence on an offender is destined to remain elusive and the sentencing parameters in this country are bound to remain judge centric? The issue though predominantly dealt with in the context of cases involving the death penalty has tremendous significance to the Criminal Jurisprudence of the country inasmuch as in addition to the numerous offences under various special laws in force, hundreds of offences are enumerated in the Penal Code, punishment for which could extend from a single day to 10 years or even for life,...

The identified principles could provide a *sound objective basis* for sentencing thereby *minimizing individualized and judge centric perspectives*. Such principles bear a fair amount of affinity to the principles applied in foreign jurisdictions. *The difference is not in the identity of the principles; it lies in the realm of application thereof to individual situations*. While in India application of the principles is left to the judge hearing the case, in certain foreign jurisdictions such principles are formulated under the authority of the statute and are applied on principles of categorization of offences which approach, however, has been found by the

⁴²Criminal Appeal Nos. 490-491 of 2011.

⁴³(2013) 5 SCC 546.

⁴⁴*Supra* note 42.

⁴⁵*Supra* note 43 at para10 and 14.

Constitution Bench in *Bachan Singh* to be inappropriate to our system. *The principles being clearly evolved and securely entrenched, perhaps, the answer lies in consistency in approach.*

And the court ruled that, “We see no reason as to why the principles of sentencing evolved by this Court over the years though largely in the context of the death penalty will not be applicable to all lesser sentences so long as the sentencing judge is vested with the discretion to award a lesser or a higher sentence resembling the swing of the pendulum from the minimum to the maximum.”

And finally deciding the quantum of appropriate punishment the Court ruled:⁴⁶

Applying the above parameters to the facts of the instant case it transpires that the death of the wife occurred within two years of marriage. The proved facts...do not disclose any extraordinary, perverse or diabolic act on the part of the accused-appellant to take an extreme view of the matter... at the time of commission of the offence, *the accused-appellant was about 21 years old and as on date he is about 42 years.* The *accused-appellant also has a son who was an infant at the time of the occurrence.* He has *no previous record of crime.* On a cumulative application of the principles that would be relevant to adjudge *the crime and the criminal test, we are of the view that the present is not a case where the maximum punishment of life imprisonment ought to have been awarded to the accused-appellant....some of the injuries on the deceased, though obviously not the fatal injuries, are attributable to the accused-appellant.* In fact... injuries No. 1 (Laceration 1” x ½” skin deep on the side of forehead near hair margin) and 2 (Laceration 1 ½” x 1” scalp deep over the frontal area) on the deceased had been caused by the accused-appellant with a pestle. *The said part of the order of the learned trial court has not been challenged in the appeal before the High Court.* Taking into account the said fact, we are of the view that in the present case the minimum sentence prescribed i.e. seven years would also not meet the ends of justice. *Rather we are of the view that a sentence of ten years RI would be appropriate.* Consequently, we modify the impugned order and impose the punishment of ten years RI on the accused-appellant for the commission of the offence under Section 304-B of the Penal Code.

This clearly demonstrates that the court having made up its mind on some intuitive feelings can justify the quantum of sentence on giving primacy to mitigating circumstances even in the face of aggravating circumstances for *e.g., Santosh Bariyar case.* Having analyzed few judgments of

⁴⁶*Supra* note 38(emphasis added). See also *Ravindra Triambak Choutmal v.State of Maharashtra* (1996) 4 SCC 148.This again was a case of dowry death where the husband having killed the wife cut her body into pieces, put it in a gunny bag and then into a trunk. And then lowered into earth by digging a pit and burying it there to remove evidence. B. L. Hansaria J commuting death sentence to life imprisonment reasoned that since dowry deaths are too common these days so it is not a case fitting into rarest of rare category.

the Supreme Court using utilitarian principle in individualizing punishment in heinous offences, the following section deals with the deserved punishments on the basis of retributive philosophy in almost similar set of circumstances.

Just Desert and the Indian Supreme Court

In *Sushil Murmu*⁴⁷ a bench of JJ. Doraiswamy Raju and Arijit Pasayat deciding a case of human sacrifice of a 9 year old boy for appeasing the deity for personal prosperity observed:⁴⁸

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 civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment.....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*.

The principle of proportion between 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. *Judges in essence affirm that 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 traffic results 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.*

⁴⁷*Sushil Murmu v. State of Jharkhand* (2004) 2 SCC 338.

⁴⁸*Ibid.* emphasis added.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. *Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise.*

Rejecting the appeal and confirming the death sentence the apex court observed that:⁴⁹

A bare look at the fact situation of this case shows that the appellant was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation. He had at the time of occurrence a child of same age as the victim and yet he diabolically designed in a most dastardly and revolting manner to sacrifice a very hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless child's head was severed. Even if the helpless and imploring face and voice of the innocent child did not arouse any trace of kindness in the heart of the accused, *the nonchalant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of most superlative degree in conception and cruel in execution.* The tendency in the accused and for that matter in any one who entertains such revolting ideas cannot be placed on par with even an intention to kill some but really borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts of law, as well. The socially abhorrent nature of the crime committed also ought not to be ignored in this case. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so described is the question. Superstition is a belief or notion, not based on reason or knowledge, in or of the ominous significance of a particular thing or circumstance, occurrence or the like but mainly triggered by thoughts of self- aggrandizement and barbaric at times as in the present case. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious color can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenseless child.”

⁴⁹*Ibid* at para 23. (emphasis added). Contrasting it with *Santosh Bariyar* case in the context of disposal of the dead body having cut into pieces and then disposed of in bags, one judgment (*Sushil Murmu*, 2004) rationalizes the award of death punishment while the other (*Santosh Bariyar*, 2009) safely plays it down and instead talks on reformatory and rehabilitative theories pronounces lesser sentence.

Dhananjay Chatterjee v. State of West Bengal⁵⁰

This is a case to be compared with Santosh Kumar⁵¹ in almost similar circumstantial matrix but different sentencing outcome. Dhananjay, a security guard, was convicted on the charges of rape coupled with murder of an 18 year old girl, Hetal, of the apartments in which the deceased lived with her family. A. S. Anand J, delivering the judgment referred to para 14 of Bachan Singh case highlighting the increase in crime incidence. The court ruled;

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartments, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenseless school-going girl of 18 years. If the security guards behave in this manner, who will guard the guards? The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman, and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscious. There are no extenuating or mitigating circumstances whatsoever in the case. We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded pre-planned brutal murder, without any provocation, after committing rape on an innocent and defenseless young girl of 18 years, by the security guard certainly makes this case a 'rare of the rarest' cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death."

⁵⁰ *Dhananjay Chatterjee v State of West Bengal* (1994) 2 SCC 220.(emphasis added)

⁵¹ *Supra* note 29.

Dhananjay was hanged to death in Alipore Jail, Kolkata, on 14th August, 2004 (his 39th birthday) after his multiple mercy petitions were rejected by the President of India. Looking back to the case of *Santosh Singh*⁵² discussed above, one finds exact similarity in the fact scenario with *Dhananjay* coupled with the distinguishing fact that accused Santosh was a lawyer from a well to do family in contrast to *Dhananjay* who was merely a security guard and obviously belonged to the marginalized section of society. Comparing the two fact situations, one can hardly find a justifiability of different sentences in the two instances. Also, it is pertinent to note that for retaining faith in the implementation of the criminal justice administration, an objective, and impartial judicial machinery is a *sine qua non*. It is because of such disparate judgments in the name of sentencing discretion that, the principled sentencing becomes Judge centric depending purely upon their individual biases and prejudices.

An illustrative case of what would be an appropriate and 'just deserved' punishment is *Swamy Shraddananda@Murali v. State of Karnataka*.⁵³ This is the case of a self-styled godman Swami Shraddananda for murdering his wife Begum Shakereh Namazi Khaleeli. Shakereh married Shraddananda in 1986 after divorcing her husband, Akbar Khaleeli, a former diplomat, in 1985. She was the granddaughter of the former Dewan of Mysore. Shraddananda had drugged Shakereh, placed her body in a coffin and buried it in a corner of the compound of her palatial bungalow on Richmond Road on April 28, 1991. When Shakereh's daughters from her earlier marriage questioned Shraddananda about their mother, he had told them that she had gone abroad.

The trial judge, B.S. Thotad, in May 2005 sentenced Swami Shraddananda, who was earlier known as Murli Manohar Mishra, to death for murdering Shakereh and for destroying evidence and the High Court of Karnataka confirmed the death sentence.

Faced with an appeal against death penalty in this case, the Supreme Court held that the court may feel' that the punishment more just and proper, in the facts of the case, would be imprisonment for life till the last breath without remission. That the court may be of the view that the punishment of death awarded by the trial court and confirmed by the high court needs to be substituted by life imprisonment. And that the court, in its judgment, may make its intent explicit and state clearly that the sentence handed over to the convict is imprisonment till his last breath or, life permitting, imprisonment for a term not less than twenty. The sole question that came before the court was the issue of the justness of 'sentence' not conviction *per se*.

Aftab Alam J delivered the judgment. Speaking on behalf of the bench, Aftab Alam J, distinguished the contextual setting of *Machhi Singh* and categorically highlighted the changed socio- economic scenario of 21st century. The emergence of organised crime, terrorist activities,

⁵²*Supra* note 29.

⁵³ (2008) 13 SCC 767 paras 43- 59.

private armies, custodial deaths, fake encounters, gang rapes, parliamentary bombings, along with the professional criminals emerging on criminal scene certainly are a class apart from the categories visualised by *Machhi Singh* guidelines and hence these cannot be taken as inflexible, absolute or immutable.⁵⁴

Referring to Alope Nath Datta it was observed that the 'courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar' and further 'it is evident that different benches had taken different view in the matter'. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this court depends a good deal on the personal predilection of the judges constituting the bench. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the court lead to a marked imbalance in the end results. These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant.

Commenting on the facts of the case, the court noted that:⁵⁵

...the appellant killed Shakereh in a planned and cold blooded manner but at least this much can be said in his favor that he devised the plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most. That although the way of killing appeared quite ghastly it may be said that it did not cause any mental or physical pain to the victim. And finally as noted by Sinha J. the appellant confessed his guilt at least partially before the High Court.

Referring to seven decisionsdelivered by the apex court it said:

...We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court. The hangman's noose is thus taken off the appellant's neck.

After a detailed analysis of the practice of remission of life sentence which is mechanically exercised and results in release of convicted prisoner on completion of fourteen years of imprisonment including undertrial detention the court:⁵⁶

...The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an

⁵⁴ *Id.* at para 43.

⁵⁵ *Ibid.* (emphasis added).

⁵⁶ *Supra* note 53 at para 66-68.

appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, *that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence*. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.

Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* (supra) besides being in accord with the modern trends in penology.

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

The task of sentencing function of the Indian judiciary, sometimes, is a matter of 'feelings' of the judges and may not be strictly statutory provisional pronouncement. That further attests to the fact that gravity of punishment is individualised - differs or varies from individual to individual case. It could also be a 'view' and the intent may be implicit in the minds of the arbiters.

After reviewing its previous decisions on the issue, wherein similar facts were differently, individually and not uniformly decided, the court took a stand on *Swamy Shraddananda*. The court *felt* that life imprisonment would serve the *end of justice* rather than death penalty. Consequently, it substituted the death sentence awarded to the appellant by the trial court and confirmed by the high court with imprisonment for life and *directed that he shall not be released from prison till the rest of his life*. And the same again came up for consideration in *Rajiv Gandhi*

assassination case. Faced with the question, ‘whether imprisonment for life in terms of section 53 read with section 45 of the IPC meant imprisonment for rest of the life of a convict undergoing life imprisonment and whether as per the principles enunciated in *Swamy Shraddananda* a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life without any remission?’ The Constitution Bench in this case of *UOI v. Sriharan @ Murugan* delivering the judgment F.M.I.Kalifulla J on behalf of five judge bench on December 2, 2015 ...held quoting Justice Fazal ali in *Maru Ram*;....

It is true that there appears to be a modern trend of giving punishment a color of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective....reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. We feel that where deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country .Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals.

Upholding the ruling in *Shraddananda* case the court held;

...Starting from *Godse* (supra), *Maru Ram* (supra), *Sambha Ji Krishan Ji* (supra), *Ratan Singh* (supra), it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one’s life span. it can be said without any scope of controversy ...having regard to the proportionality of the crime committed, it is decided that *the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his life or for a specific period of 20 years, or 30 years or 40 years*, such a conclusion should survive without any interruption....considering the nature of offence and the conduct of the offender including his *mens rea* to (we) direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, for imposition of the appropriate sentence befitting the criminal act committed by the convict.

According to recognition to the ongoing debates, Supreme Court noted that it was not out of place to mention that, in all of recorded history, that there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. More importantly, *the court admitted that there are no statutory guidelines to regulate punishment in India.*

Again in *Ram Naresh*,⁵⁷ a case pertaining to gang rape and murder by strangulation of the deceased by 4 accused between the age group of 21 to 31 years the Supreme Court through Swatantra Kumar J. observed “...while determining the questions related to sentencing policy the court has to follow certain principles which are the loadstar in the imposition or otherwise of death sentence”. Underscoring the importance of balancing the aggravating and mitigating circumstances in the context of awarding death penalty it held:⁵⁸

The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and punishment is the principle of “*just deserts*” that serves as the foundation of every criminal sentence that is justifiable. In other words, the “doctrine of proportionality” has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, *the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large... Thus, the court should keep in mind the retributive and deterrent aspect of punishment while awarding the extreme penalty of death.*

Deliberating on the quantum of sentence the court while referring to other judgments of the court in *Shraddananda and Bantu* case considered the young age of all four accused, that the deceased who being the estranged wife of Ram Naresh’s brother has been noted as *only a mistress* though had two children with the man with whom she had been living without marriage, that perhaps the death was caused co- accidentally in the course of committing gangrape on account of gagging of the victim by her saree, that owing to the soured relationship between the parties this diabolical crime was committed but the accused are not a ‘social menace’ and hence the death sentence was commuted to life imprisonment for twenty one years without remission.

Finally, the fact remains that determining the quantum of punishment by passing the appropriate sentence is quite onerous and still a challenge to the judges in India. The need or pressure on the judges to be more determinate and consistent makes the sentencing function even more demanding. There are numerous other circumstances that do justify the passing of lighter and different sentences between similar cases in India. This is notwithstanding the fact that the end results of the criminal conducts are one and the same. For instance, in the offence of murder, the fact that death was the result in a group of similar cases would not, *ipso facto*, compel the judges to pass death penalty on each offender. As can be seen from the analysed cases above, there are intervening circumstances that do alter the course of sentencing process. For instance, the nature of the crime, the age, personality, antecedents of the offender, the mode of the committing the crime, aggravation and other factors like possibility of reform, whether the convict would be a

⁵⁷ *Ram Naresh v. State of Chhattisgarh* (2012) 4 SCC 257.

⁵⁸ *Ibid.*

social menace etc. indeterminate, inexact factors sway the minds of the judges one way or the other.

Majority of the Justices in *Bachan Singh's case*, acknowledged that, "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."⁵⁹

The court noted further that, for persons convicted of murder, life imprisonment is the rule and death sentence an exception. That a real and abiding concern for the dignity of human life postulates resistance to taking a life through the instrumentality of the law. Indeed, that shouldn't be done save in the rarest of rare cases. That is, when the alternative option is unquestionably foreclosed.

The latest judgment in brutal gangrape, diabolic violation and murder of *Nirbhaya*⁶⁰ is a case in point wherein the Supreme Court confirmed death penalty on all four adult offenders on the charges of gangrape. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience and destroy the civilised marrows of the milieu in entirety." Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime.⁶¹ What is intriguing is that there is concurrent judgment of R. Banumathi J on the quantum of sentence reaching the same conclusion but with different and detailed reasoning. Though this clearly underscores the quantum of sentencing discretion vesting in the judiciary yet gives them the space to manoeuvre the demands of retribution and utility by 'balancing just desert and individualised punishment'.

As long as there is no clarity/certainty on the sentencing criteria being used by the Supreme Court, there will be no end to appeals coming to the apex court from lower court seeking to have their sentence(s) set aside or for variations or commutations. It is an undeniable fact that the statutory interpretation role is that of the judiciary to perform but there is every need to perform that role judiciously. Without dogmatically adhering to the doctrine of *stare decisis*, similar cases should be similarly decided. If there is any need to deviate from an earlier decision, to distinguish one case from another or to overrule and earlier one, there should be logical and parameters for so doing. Random and indeterminate sentencing criteria obscure the connotation of justice. Indeed, varying (increasing or decreasing, modifying or altering) the quantum/severity of punishments should be strictly logically undertaken.

It follows therefore, that in practice, there is much variance in the matter of sentencing. That, unlike several countries around the world with laws prescribing sentencing guidelines, there is no

⁵⁹*Supra* note 19 para. 207.

⁶⁰ *Mukesh v. State for NCT of Delhi* (SLP decided on 5th May, 2017 by three judge bench of JJ Dipak Misra, R Banumathi and Ashok Bhushan

⁶¹*Ibid.* para 356 of Justice Dipak Misra order

statutory sentencing policy in India till date. What the IPC prescribes is only the maximum punishments for offences and, in some cases, the minimum punishment. Consequently, Judges exercise very wide discretion within the statutory limits and the scope for arriving at sentence. The task of deciding the quantum of punishment is left to the judiciary to reach, after hearing the parties, evaluating/attaching weights to the pieces of evidence adduced. In the absence of such statutory guidelines, judges' discretions prevail. Here lies the major challenge of ensuring consistency, uniformity, regularity, logicity, stability and reliability on judgments.

Without unnecessarily over-flogging the points, the scope and concept of mitigating factors in the area of death penalty need not be given too liberal and expansive construction. Otherwise, the individualisation sentencing dilemma will be further deepened to the detriment of all the worshippers in the temple of justice and the society at large. Agreed that for persons convicted of murder, life imprisonment is the rule and death sentence an exception but the ancient *stare decisis et non quieta movere* should not be thrown overboard, less we'll be floating on the judicial ocean of uncertainties. The legislative sentencing guide under section 354(3) Cr PC may only serve as the foundation until a more narrowed down and comprehensive sentencing guideline is formulated.

V CONCLUSION

Till date, neither the legislature nor the judiciary has issued structured criminal sentencing guidelines in India. Section 235(2) Cr PC contains just a hearing procedure to be followed while deciding the quantum of sentence post- conviction. It is more of mercy plea, provisional opportunity wherein the convict should be called upon to show cause while the maximum penalty should not be imposed on him. The convict's submissions may be outside the facts in issue. The social-economic standing of the convict may mitigate the punishment and could influence the judge in deciding the sentence.

Fully aware of the absence and the need for the guidelines, what the Supreme Court has succeeded in doing is the provision of judicial guidance in the form of principles and factors that courts must take into consideration while exercising sentencing discretion. This is not enough and worrisome, as far as determining appropriate sentence is concerned. Worrisome because the ongoing individualisation of sentencing has created and still creates lots of uncertainties in the quantum of punishments being awarded by courts in almost similar sets of facts.

To ensure 'justice' in each and every case, punishment requires deliberations outside the nature of the crime committed and circumstances surrounding the commission. After conviction, it is obviously the duty of the judiciary to award appropriate sentence. The absence of statutory sentencing guidelines to assist judges in discharging this all important duty has left a wide vacuum in the machinery of justice dispensation in India. Widely leaving sentencing open to the discretion of the judges is not the most ideal criminal administration policy. The Malimath Committee Report on Criminal Law Reform (2003) recommended incorporation of sentencing guidelines for aiding the judiciary in deciding appropriate sentence. Even the Law Commission

of India in its 262nd Report on Death Penalty categorically recorded this disparity in sentencing, on account of personal leanings of judges, as one of the factors amongst others to recommend abolition of death penalty in all crimes except terrorism related offences.

Indian judiciary has come of age and deserve appropriate sentencing policy. Individualisation, non-uniform or random sentencing status in India needs to give way for certainty and logicity in the award of sentence. Having sentencing guidelines in place will enable the courts respond to the daily cry for justice and the yearnings of the community. The judges should be able to award appropriate punishment proportionate to crime committed. It is only by so doing that the retributive and just desert theories of criminal punishments can be met.

Quite a few committees set up by the government have emphasised the importance of having and/or adopting sentencing guidelines in India. That call is hereby re-iterated. Having such will definitely address individualisation of punishment and minimize the uncertainties surrounding the award sentences in India. The rights of the victim, the offender and the society should be simultaneously considered in any sentence that will pass the 'justice' test.

In the absence of or pending whenever the Parliament will do so, the Supreme Court should, as a matter of urgency, step in and salvage the situation. This apex court may be persuaded by guidelines available in other (similar) jurisdictions and lay down more precise but comprehensive guidelines for sentencing in India.