Rajendra Prahladrao Wasnik vs The State Of Maharashtra on 12 December, 2018

Equivalent citations: AIR 2019 SUPREME COURT 1, 2019 (12) SCC 460, AIRONLINE 2018 SC 827, 2019 CRI LJ 955, (2019) 194 ALLINDCAS 65 (SC), (2019) 199 ALLINDCAS 35 (SC), (2018) 15 SCALE 794, (2019) 106 ALLCRIC 717, (2019) 127 CUT LT 479, (2019) 194 ALLINDCAS 65, (2019) 199 ALLINDCAS 35, 2019 (1) ABR(CRI) 481, (2019) 1 ALD(CRL) 583, (2019) 1 CRILR(RAJ) 111, (2019) 1 JLJR 95, 2019 (1) KCCR SN 27 (SC), (2019) 1 PAT LJR 149, (2019) 4 MH LJ (CRI) 549, (2019) 73 OCR 504, 2019 CRILR(SC MAH GUJ) 111, 2019 CRILR(SC&MP) 111, AIR 2019 SC(CRI) 322

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Bench: Deepak Gupta, S. Abdul Nazeer, Madan B. Lokur

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

REVIEW PETITION (CRIMINAL) NOS. 306-307 OF 2013

IN

CRIMINAL APPEAL NOS. 145-146 OF 2011

Rajendra Pralhadrao Wasnik

versus

State of Maharashtra

JUDGMENT

Madan B. Lokur, J

1. ‘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 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.

2. These conflicting views make it very difficult for courts to take a decision and without expert evidence on the subject, courts are ill-equipped to form an objective opinion. But, a Constitution Bench of this Court in Bachan Singh v. State of Punjab1 has thrown its weight behind a humanitarian approach and mandated consideration of the probability of reform or rehabilitation of the criminal and required the prosecution to prove that it was not possible for the convict to be reformed or rehabilitated. However, the Constitution Bench left open a corridor of uncertainty thereby permitting, in the rarest of rare cases, the pronouncement of a sentence of death. It is this paradigm that confronts us in these petitions.

Background

3. The appellant is convicted for the rape and murder of a girl aged 3 years. The offence was committed in the intervening night of 2 nd and 3rd March, 2007. On the basis of circumstantial evidence led by the prosecution, the appellant was found guilty of and convicted for offences punishable under Sections 376(2)(f), 377 and 302 of the Indian Penal Code (IPC) by the Sessions Judge, Amravati in Sessions Trial No. 183 of 2007 (1980) 2 SCC 684 by a judgment dated 6th September, 2008.

4. With regard to the sentence to be awarded, the Trial Judge heard the prosecution and the appellant on 6th September, 2008 and again on 8th September, 2008 on which date he passed a preliminary order. The submissions of the Public Prosecutor as well as the learned counsel for the defence were heard on that date and reference was made to a decision of this Court in Shivaji alias Dadya Shankar Alhat vs. State of Maharashtra2. In the decision rendered by this Court it was observed in paragraph 27 of the Report as follows:

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

> based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable." (Emphasis supplied by us).
>
> (2008) 15 SCC 269 Thereafter, the learned Sessions Judge passed an order on 10th September, 2008 awarding the sentence of death to the appellant.

5. We have gone through the orders passed on 8 th September, 2008 as well as on 10th September, 2008 and find that the Sessions Judge has primarily discussed the nature and gravity of the offence and certain factors personal to the appellant such as the fact the he has a child who is 9 years of age and his parents are dependent upon him. The Sessions Judge also took into consideration the fact that there are two other cases pending against the appellant under similar provisions of law and he expressed the opinion that the pendency of those cases is a circumstance against the appellant. For this, reliance was placed on State of Maharashtra v. Shankar Krisanrao Khade3. It may be mentioned, en passant, that the view of the Bombay High Court in Shankar was not accepted by this Court in Shankar Kisanrao Khade v. State of Maharashtra4 in paragraphs 60 and 61 of the Report.

6. On an overall view of the circumstances of the case, the Sessions Judge concluded that any alternative option of punishment is unquestionably foreclosed and therefore the only sentence that could be awarded to the appellant is of capital punishment.

7. The appellant preferred an appeal against his conviction and 2008 ALL MR (Cri) 2143 (2013) 5 SCC 546 sentence before the Bombay High Court being Criminal Appeal No. 700 of 2008. This was heard along with Criminal Confirmation Case No. 3 of 2008. Both these were taken up for consideration and the conviction was upheld and capital punishment awarded to the appellant was confirmed by the High Court by a judgment and order dated 26th March, 2009.

8. The High Court considered the question of sentence to be awarded to the appellant. (We are not concerned with the merits of the conviction). It appears from a reading of the judgement that learned counsel for the appellant argued in the Bombay High Court on the question of sentence awarded to the appellant and the primary submission made for commuting the death sentence to life imprisonment was that the case was one of circumstantial evidence. Reference was made to Laxman Naik v. State of Orissa5, Dhananjoy Chatterjee alias Dhana v. State of W.B.6, State of Maharashtra v. Bharat Fakira Dhiwar7¸ State of Maharashtra v. Suresh8, Adu Ram v. Mukna9 and Molai and Another v. State of M.P.10

9. Thereafter, the High Court held as follows:

> "We have carefully considered the facts of the present case in light of the above judicial precedents and find that the learned Trial Judge rightly held that the appellant deserved capital punishment. The appellants conduct exhibits total disregard for human values and shows a totally depraved, brutal and scheming mind taking advantage of a helpless child, showing no concern (1994) 3 SCC 381 (1994) 2 SCC 220 (2002) 1 SCC 622 (2000) 1 SCC 471 (2005) 10 SCC 597 AIR 2000 SC 177 = (1999) 9 SCC 581 that his lust extinguished the flame of life in the child. We,

> therefore, confirm the sentence of death imposed upon the appellant for offence punishable under Section 302 of the Penal Code. We also dismiss the convict's appeal and maintain his convictions as well as sentences imposed." (Emphasis supplied by us).

10. Feeling aggrieved by the decision rendered by the High Court, the appellant preferred appeals in this Court being Criminal Appeal Nos. 145- 146 of 2011. These appeals were dismissed by a judgment and order dated 29th February, 201211.

11. Review Petitions were then filed by the appellant being R.P. (C) Diary No. 26107 of 2012 which came to be dismissed by an order dated 7th March, 2013.

12. Thereafter, in a completely different case, a Constitution Bench of this Court in Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India12 considered two basic issues in cases where death sentence had been pronounced by the High Court. These two issues were: (1) whether the hearing of cases in which death sentence has been awarded should be by a Bench of at least three if not five judges of this Court, and (2) whether the hearing of review petitions in death sentence cases should not be by circulation, but should only be in open court.

13. In considering these issues, the Constitution Bench held that Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37 (2014) 9 SCC 737 henceforth in every appeal pending in this Court in which death sentence has been awarded by the High Court, only a Bench of three judges will hear the appeal. The Constitution Bench was not persuaded to accept the submission that the appeal should be heard by five judges. With regard to the oral hearing in open court, it was held that a limited oral hearing ought to be given in cases where death sentence is awarded and that would be applicable in pending review petitions and such review petitions filed in future. This direction would also apply where a review petition is already dismissed but the death sentence is not executed. In such cases, the convict can apply for reopening the review petition within one month from the date of the decision rendered by the Constitution Bench. However, in cases where even a curative petition is dismissed, it would not be proper to reopen such matters.

14. In the present appeal, a curative petition had not been filed by the appellant and therefore in view of the decision of the Constitution Bench, the review petitions were restored by an order dated 24th March, 2015 and that is how they have come up for consideration before us after a gap of more than 3½ years.

Submissions

15. It was submitted by learned counsel for the appellant that there are a variety of factors that require to be taken into consideration while awarding the death sentence, keeping in mind the view expressed by this Court in Bachan Singh. Despite this, learned counsel confined himself to four principal contentions before us only on the question of commuting the death sentence to one of life imprisonment. The four contentions urged were:

1. The conviction was based on circumstantial evidence and in such cases, the death sentence should ordinarily not be awarded.

2. The probability of reform and rehabilitation of the appellant was not considered either by the Trial Court or by the High Court or even by this Court despite several decisions mandating such a consideration. It was submitted that there is a probability that the appellant can be reformed and rehabilitated.

3. Vital DNA evidence was not placed before the Trial Court or taken into consideration contrary to the provisions of Section 53-A of the Criminal Procedure Code, 1973 (for short 'Cr.P.C')13 and Section 164-A of Section 53A. Examination of person accused of rape by medical practitioner. – (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a sub-

inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. (2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely.–

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) Other material particulars in reasonable detail. (3) The report shall state precisely the reasons for each conclusion arrived at. (4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section. the Cr.P.C.14

4. The reference to the past history of the appellant was not warranted.

We propose to deal with the submissions in seriatim. Circumstantial evidence

16. In the cases of Laxman Naik, Dhananjoy Chatterjee and Molai referred to by the High Court, there is no discussion one way or the other whether the death penalty should or should not be awarded on a conviction based on circumstantial evidence. What was discussed was the brutality of 164A. Medical examination of the victim of rape. – (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:–

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail. (3) The report shall state precisely the reasons for each conclusion arrived at. (4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained. (5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section. (7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf. Explanation. – For the purposes of this section, “examination” and “registered medical practitioner” shall have the same meanings as in section 53.

the crime which warranted the imposition of the death penalty. These decisions do not take forward the case of the appellant.

17. We now consider the cases cited before us by learned counsel for the parties on the award of death sentence based on circumstantial evidence.

18. In Bishnu Prasad Sinha v. State of Assam15 this Court effectively accepted the proposition in paragraph 55 of the Report that ordinarily death penalty would not be awarded if the connection is proved by circumstantial evidence, coupled with some other factors that are advantageous to the convict. It was held as follows:

> "55. The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, Appellant 1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt." (Emphasis supplied by us).

19. In Aloke Nath Dutta v. State of West Bengal16 the principle that death penalty should ordinarily not be awarded in a case arising out of circumstantial evidence was broadly accepted along with the rider that there should be some "special reason" for awarding the death penalty. It (2007) 11 SCC 467 (2007) 12 SCC 230 was held in paragraph 174 of the Report as follows:

> "174. There are some precedents of this Court e.g. Sahdeo v. State of U.P. [(2004) 10 SCC 682] and Sk. Ishaque v. State of Bihar [(1995) 3 SCC 392] which are authorities for the proposition that if the offence is proved by circumstantial evidence ordinarily death penalty should not be awarded. We think we should follow the said precedents instead and, thus, in place of awarding the death penalty, impose the sentence of rigorous imprisonment for life as against Aloke Nath. Furthermore we do not find any special reason for awarding death penalty which is imperative." (Emphasis supplied by us).

20. In Swamy Shraddananda v. State of Karnataka17 this Court sounded a note of caution in paragraph 87 of the Report that convictions based on seemingly conclusive circumstantial evidence should not be presumed to be fool-proof. It was held:

> "87. It has been a fundamental point in numerous studies in the field of death penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as foolproof incidences and the fact that the same are based on circumstantial evidence must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as

> conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder." (Emphasis supplied by us).

21. In Swamy Shraddananda the view taken by Justice S.B. Sinha was that on the facts of the case, death sentence was not warranted but that the (2007) 12 SCC 288 appellant should be awarded life sentence which must be meant as sentence for life. However, Justice Markandey Katju differed on the sentence to be awarded and expressed the view that the case was one where the murder was cold-blooded, calculated and diabolic. The learned Judge was of opinion that the case fell within the category of rarest of rare cases and it would be a travesty of justice if the death sentence is not affirmed. Accordingly, the learned Judge affirmed the death sentence.

22. In view of the difference of opinion with regard to the quantum of punishment, the matter was referred to a larger Bench of three learned judges. The decision of the larger Bench is reported as Swamy Shradddananda (2) v. State of Karnataka18.

23. The larger Bench took the view that the case was one of circumstantial evidence only. However, considering the entire facts of the case, the Bench expressed its opinion on the quantum of punishment taking into consideration the gap in imprisonment between life imprisonment (which is normally 14 years) and death. While considering this, it was held that in view of the gap, the Court might be tempted into endorsing the death penalty but that it would be far more just, reasonable and a proper course of action to expand the options and bridge the gap. This would be a re-assertion of the Constitution Bench decision in Bachan Singh besides (2008) 13 SCC 767 being in accord with the modern trends of penology. Consequently, the death sentence was unanimously substituted by life imprisonment with a direction that the convict must not be released from prison for the rest of his life or for the actual term as specified in the order, as the case may be. The view expressed by Justice S.B. Sinha was endorsed and it was directed that the convict shall not be released from prison till the rest of his life. The view expressed by this Court in paragraphs 92 to 95 of the Report is reproduced below:

> "92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the

> options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.
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> 93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases.

This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684] besides being in accord with the modern trends in penology.

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

95. In conclusion, we agree with the view taken by Sinha, J. We accordingly substitute the death sentence given to the appellant by the trial court and confirmed by the High Court by imprisonment for life and direct that he shall not be released from prison till the rest of his life. (Emphasis supplied by us)."

24. In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra19 this Court clearly laid down the law in paragraph 167 of the Report to the effect that while there is no prohibition in law in awarding a death sentence in a case of circumstantial evidence, but that evidence must lead to an exceptional case. It was said:

> "167. The entire prosecution case hinges on the evidence of the approver. For the purpose of imposing death penalty, that factor may have to be kept in mind. We will assume that in Swamy Shraddananda (2), this Court did not lay down a firm law that in a case involving circumstantial evidence, imposition of death penalty would not be permissible. But, even in relation thereto the question which would arise would be whether in arriving at a conclusion some surmises, some hypothesis would be necessary in regard to the manner in which the offence was committed as contradistinguished from a case where the manner of occurrence had no role to play. Even where sentence of death is to be (2009) 6 SCC 498 imposed on the basis of the circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case." (Emphasis supplied by us).

25. In Sebastian v. State of Kerala20 there is a brief reference to death penalty in a case of circumstantial evidence in paragraphs 17 and 18 of the Report. While commuting the death sentence to one of life imprisonment, this Court relied upon Swamy Shraddananda (2) and held:

> "17. The learned counsel for the appellant has finally urged that the death sentence in the circumstances was not called for. He has pointed out that the case rested on circumstantial evidence and the death penalty should not ordinarily be awarded in such a case. It has further been emphasised that the appellant was a young man of 24 years of age at the time of the incident.
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> 18. We are of the opinion that in the background of these facts, the death penalty ought to be converted to imprisonment for life but in terms laid down by this Court in Swamy Shraddananda (2) v. State of Karnataka [(2008) 13 SCC 767] as his continuance as a member of an ordered society is uncalled for." (Emphasis supplied by us).

26. In Ramesh v. State of Rajasthan21 this Court referred to Bariyar and in paragraph 68 and paragraph 69 of the Report, it was held:

> "68. ..... The Court, thus, has in a guided manner referred to the quality of evidence and has sounded a note of caution that in a case where the reliance is on circumstantial evidence, that factor has to be taken into consideration while awarding the death sentence. This is also a case purely on the circumstantial evidence. We should not be understood to say that in all cases of circumstantial evidence, the death sentence cannot be given.
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> (2010) 1 SCC 58 (2011) 3 SCC 685
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> 69. In fact in Shivaji v. State of Maharashtra this Court had awarded death sentence though the evidence was of circumstantial nature. All that we say is that the case being dependent upon circumstantial evidence is one of the relevant considerations.

We have only noted it as one of the circumstances in formulating the sentencing policy....." (Emphasis supplied by us).

27. In Sushil Sharma v. State (NCT of Delhi)22 this Court considered the peculiar facts of the case and did not award the death penalty since the only evidence was circumstantial and there were some factors that were to the advantage of the appellant. It was held in paragraph 101 of the Report as follows:

> "101. We notice from the above judgments that mere brutality of the murder or the number of persons killed or the manner in which the body is disposed of has not always persuaded this Court to impose death penalty. Similarly, at times, in the peculiar factual matrix, this Court has not thought it fit to award death penalty in cases, which rested on circumstantial evidence or solely on approver's evidence. Where murder, though brutal, is committed driven by extreme emotional disturbance and it does not have enormous proportion, the option of life imprisonment has been exercised in certain cases....." (Emphasis supplied by us).

28. Finally, in Kalu Khan v. State of Rajasthan23 this Court referred to Swamy Shraddananda and in paragraph 31 of the Report it was held, on the facts of the case, that the balance of circumstances introduces an uncertainty in the "culpability calculus" and therefore there was an alternative to the imposition of the death penalty. Accordingly, the (2014) 4 SCC 317 (2015) 16 SCC 492 sentence was commuted to imprisonment for life.

29. The result of the above discussion is that ordinarily, it would not be advisable to award capital punishment in a case of circumstantial evidence. But there is no hard and fast rule that death sentence should not be awarded in a case of circumstantial evidence. The precautions that must be taken by all the courts in cases of circumstantial evidence is this: if the court has some doubt, on the circumstantial evidence on record, that the accused might not have committed the offence, then a case for acquittal would be made out; if the court has no doubt, on the circumstantial evidence, that the accused is guilty, then of course a conviction must follow. If the court is inclined to award the death penalty then there must be some exceptional circumstances warranting the imposition of the extreme penalty. Even in such cases, the court must follow the dictum laid down in Bachan Singh that it is not only the crime, but also the criminal that must be kept in mind and any alternative option of punishment is unquestionably foreclosed. The reason for the second precaution is that the death sentence, upon execution, is irrevocable and irretrievable.

30. Insofar as the present case is concerned, learned counsel for the appellant did not lay much stress on commuting the death sentence to one of life imprisonment only on the basis of the circumstantial evidence on record. Therefore, we need not examine the nature of the crime and other factors or detain ourselves in this regard. We have referred to the various decisions cited by learned counsel only for completeness of the record and to reaffirm the view that ordinarily death sentence should not be awarded in a conviction based on circumstantial evidence.

Reform, rehabilitation and re-integration into society

31. The discussion on the reform or rehabilitation of a convict begins with the acknowledgement in Bachan Singh that the probability that a convict can be reformed and rehabilitated is a valid consideration for deciding whether he should be awarded capital punishment or life imprisonment. This Court has also accepted the view that it is for the State to prove by evidence that the convict is not capable of being reformed and rehabilitated and should, therefore, be awarded the death sentence.

32. This view has been accepted universally in all the decisions that were cited before us by learned counsel for the appellant.

33. In Prakash Dhawal Khairnar (Patil) v. State of Maharashtra24 the probability of reform and rehabilitation of the convict was considered by this Court. It was held that the convict did not have any criminal tendency and was gainfully employed. Though the crime was heinous, it would be difficult to hold that it was the rarest of rare cases. It could not be held that (2002) 2 SCC 35 the appellant would be a menace to society and there was no reason to believe that he could not be reformed or rehabilitated. Accordingly, the death penalty was converted into imprisonment for 20

years.

34. In Lehna v. State of Haryana25 it was held that the special reasons for awarding the death sentence must be such that compel the court to conclude that it is not possible to reform and rehabilitate the offender. It was said in paragraph 14 of the Report as follows:

> 14. .....Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3).

There is another provision in the Code which also uses the significant expression "special reason". It is Section 361..... Section 361 which is a new provision in the Code makes it mandatory for the court to record "special reasons" for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors....." (Emphasis supplied by us).

(2002) 3 SCC 76

35. In Bariyar this Court referred to the law laid down in Bachan Singh to the effect that capital punishment should be awarded only in the rarest of rare cases and then held in paragraph 66 of the Report that there must be clear evidence to indicate that the convict is incapable of reform and rehabilitation. It was held as follows:

> "66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other

> circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh sets the bar very high by introduction of the rarest of rare doctrine." (Emphasis supplied by us).

36. In Ramesh a reference was made to Shivaji and Bachan Singh in paragraph 69 of the Report and it was held while reiterating the view expressed in Bariyar that the reformation and rehabilitation of a convict is a mitigating circumstance for the purposes of awarding punishment and the State should, by evidence prove that the convict was not likely to be reformed.

37. In Sandesh v. State of Maharashtra26 this Court once again acknowledged the principle that it is for the prosecution to lead evidence to show that there is no possibility that the convict cannot be reformed.

38. Similarly, in Mohinder Singh v. State of Punjab27 it was held in paragraph 23 of the Report as follows:

> "……As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme." (Emphasis supplied by us).

39. In Birju v. State of Madhya Pradesh28 this Court explained the necessity of considering the probability of reform and rehabilitation of the convict by referring to the provisions of the Probation of Offenders Act, 1958 where a convict is placed under probation in a case where there is a possibility of reform. It was held in paragraph 20 of the Report:

> "20. In the instant case, the High Court took the view that there was no probability that the accused would not commit criminal acts of violence and would constitute a continuing threat to the society and there would be no probability that the accused could be reformed or rehabilitated……. Courts used to apply reformative theory in certain minor offences and while convicting persons, the courts sometimes release the accused on probation in terms of Section 360 CrPC and Sections 3 and 4 of the Probation of Offenders Act, 1958. Sections 13 and 14 of the Act provide for appointment of Probation Officers and the nature of duties to be performed. Courts also, while exercising power under Section 4, call for a report from the Probation Officer. In our view, while (2013) 2 SCC 479 (2013) 3 SCC 294 (2014) 3 SCC 421 awarding sentence, in appropriate cases, while hearing the accused under Section 235(2) CrPC, courts can also call for a report from the Probation Officer……. Courts can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of the accused being reformed and rehabilitated." (Emphasis supplied by us).

40. In Anil v. State of Maharashtra29 this Court implemented the reform and rehabilitation theory. In fact, in paragraph 33 of the Report a direction was issued that while dealing with offences like Section 302 of the IPC, the criminal courts may call for a report to determine whether the convict could be reformed or rehabilitated. This Court noted the duty of the criminal courts to ascertain whether the convict can be reformed and rehabilitated and it is the obligation of the State to furnish materials for and against the possibility of reform and rehabilitation. It was held as follows:

> 33. In Bachan Singh this Court has categorically stated, "the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society", is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar. Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be (2014) 4 SCC 69 reformed or rehabilitated, which depends upon the facts and circumstances of each case." (Emphasis supplied by us).

41. In Mahesh Dhanaji Shinde v. State of Maharashtra30 this Court considered the conduct of the convicts and on the facts before it, it was concluded that they were capable of living a changed life if they are rehabilitated in society. In any event, the State had not contended that the convicts were beyond reformation and could not lead a changed life if they are rehabilitated in society.

42. In Sushil Sharma this Court acknowledged that among various factors, one of the factors required to be taken into consideration for awarding or not awarding capital punishment is the probability of reform and rehabilitation of the convict. This acknowledgement was made in paragraph 103 of the Report, in which it was said:

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

> down in several authoritative pronouncements of this Court in the facts and attendant circumstances of each case." (Emphasis supplied by us).
>
> (2014) 4 SCC 292

43. At this stage, we must hark back to Bachan Singh and differentiate between possibility, probability and impossibility of reform and rehabilitation. Bachan Singh requires us to consider the probability of reform and rehabilitation and not its possibility or its impossibility.

44. Finally, in a recent decision of this Court, in Chhannu Lal Verma v. State of Chhattisgarh31 the necessity of deciding whether there is any probability of reformation and rehabilitation of the convict was emphasised in cases where there is a possibility of imposition of the death penalty. It was held in paragraph 15 of the Report as follows:

> "15. ……. 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……." (Emphasis supplied by us).

45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the Criminal Appeal Nos. 1482-1483 of 2018 [Arising out of S.L.P. (Criminal) Nos. 5898-5899 of 2014] Decided on November 28, 2018 courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3) of the Cr.P.C. and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

46. If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the Trial Court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

47. Consideration of the reformation, rehabilitation and re-integration of the convict into society cannot be over-emphasised. Until Bachan Singh, the emphasis given by the courts was primarily on

the nature of the crime, its brutality and severity. Bachan Singh placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in Bariyar and in Sangeet v. State of Haryana32 where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social re- integration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social re-integration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible.

48. In other words, directing imprisonment for a period greater than 14 (2013) 2 SCC 452 years (say 20 or 25 years) could unquestionably foreclose the imposition of a sentence of death, being an alternative option to capital punishment. DNA evidence

49. While Section 53-A of the Cr.P.C. is not mandatory, it certainly requires a positive decision to be taken. There must be reasonable grounds for believing that the examination of a person will afford evidence as to the commission of an offence of rape or an attempt to commit rape. If reasonable grounds exist, then a medical examination as postulated by Section 53-A(2) of the Cr.P.C. must be conducted and that includes examination of the accused and description of material taken from the person of the accused for DNA profiling. Looked at from another point of view, if there are reasonable grounds for believing that an examination of the accused will not afford evidence as to the commission of an offence as mentioned above, it is quite unlikely that a charge-sheet would even be filed against the accused for committing an offence of rape or attempt to rape.

50. Similarly, Section 164-A of the Cr.P.C. requires, wherever possible, for the medical examination of a victim of rape. Of course, the consent of the victim is necessary and the person conducting the examination must be competent to medically examine the victim. Again, one of the requirements of the medical examination is an examination of the victim and description of material taken from the person of the woman for DNA profiling.

51. There can be no doubt that there have been remarkable technological advancements in forensic science and in scientific investigations. These must be made fully use of and the somewhat archaic methods of investigations must be given up. In Krishna Kumar Malik v. State of Haryana33 this Court referred to Section 53-A of the Cr.P.C. and observed that after the enactment of this provision with effect from 23 rd June, 2006 "it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused".

52. The necessity of taking advantage of the advancement in scientific investigation was the subject matter of discussion in State of Gujarat v. Kishanbhai.34 In that case, this Court lamented the failure of the investigating agency to take advantage of scientific investigations. It was said:

> "12.7.5. There has now been a great advancement in scientific investigation on the instant aspect of the matter. The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture whether or not the blood of the victim [deleted] was, in fact on the clothes of the respondent-accused Kishanbhai. This scientific investigation would have unquestionably determined whether or not the respondent-accused was linked with the crime. Additionally, DNA profiling of the (2011) 7 SCC (2014) 5 SCC 108 blood found on the knife used in the commission of the crime (which the respondent-accused Kishanbhai had allegedly stolen from Dineshbhai Karsanbhai Thakore, PW 6), would have uncontrovertibly determined, whether or not the said knife had been used for severing the legs of the victim [deleted], to remove her anklets.

12.7.6. In spite of so much advancement in the field of forensic science, the investigating agency seriously erred in not carrying out an effective investigation to genuinely determine the culpability of the respondent-accused Kishanbhai." (Emphasis supplied by us).

53. More recently, in Mukesh and Anr. v. State (NCT of Delhi)35 there is a brief reference to Section 53-A and Section 164-A of the Cr.P.C. What is important in this brief reference is the acknowledgment that DNA evidence is being increasingly relied upon by courts. It was observed in paragraphs 216 and 217 as follows:

> "216. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a party of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner." "217. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must." (Emphasis supplied by us).

54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is (2017) 6 SCC 1 available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53-A and Section 164-A of the Cr.P.C. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the Trial Court, an adverse consequence would follow for the prosecution.

55. In Mukesh a separate opinion was delivered by Justice Banumathi and in paragraph 455 of the Report it was held that DNA profiling is an extremely accurate way of comparing specimens and

such testing can make a virtually positive identification. It was stated:

> "455. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders." (Emphasis supplied by us).

56. In the context of importance of scientific and technological advances having been made, we may recall the observation of this Court in Selvi v. State of Karnataka36 in paragraph 220 of the Report that "The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts."

57. Insofar as the present petitions before us are concerned, there is no dispute that samples were taken from the body of the accused and sent for DNA profiling. However, the result was not produced before the Trial Court. There is absolutely no explanation for this and in the absence of any justification for not producing the DNA evidence, we are of the view that it would be dangerous, on the facts of this case, to uphold the sentence of death on the appellant.

Prior history of the convict or criminal antecedents

58. The history of the convict, including recidivism cannot, by itself, be a ground for awarding the death sentence. This needs some clarity. There could be a situation where a convict has previously committed an offence and has been convicted and sentenced for that offence. Thereafter, the convict commits a second offence for which he is convicted and sentence is required to be awarded. This does not pose any legal challenge or difficulty. But, there could also be a situation where a convict has committed an offence and is under trial for that offence. During the pendency of the trial he commits a second offence for which he is convicted (2010) 7 SCC 263 and in which sentence is required to be awarded.

59. Sections 54 of the Indian Evidence Act, 1872 prohibits the use of previous bad character evidence except when the convict himself chooses to lead evidence of his good character. The implication of this clearly is that the past adverse conduct of the convict ought not to be taken into consideration for the purposes of determining the quantum of sentence, except in specified circumstances.

60. There are exceptions to this general rule. For example, Section 376- E of the IPC provides as follows:

> "376E. Punishment for repeat offenders. - Whoever has been previously convicted of an offence punishable under Section 376 or Section 376-A or Section 376AB, or Section 376D or Section 376DA or Section 376DB and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death."

61. Similarly, Section 16(2) of the Prevention of Food Adulteration Act, 1954 provides as follows:

> "16. Penalties. – (1) xxx xxx xxx (2) If any person convicted of an offence under this Act commits a like offence afterwards it shall be lawful for the court before which the second or subsequent conviction takes place to cause the offender's name and place of residence, the offence and the penalty imposed to be published at the offender's expense in such newspapers or in such other manner as the court may direct. The expenses of such publication shall be deemed to be part of the cost attending the conviction and shall be recoverable in the same manner as a fine."

62. Finally, it is worthwhile to refer to Section 75 of the IPC which provides for enhanced punishment for certain offences under Chapter XII or Chapter XVII of the IPC after previous convictions. This Section reads as follows:

> "75. Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.–Whoever, having been convicted, -
>
> (a) by a Court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years."

63. The scope of Section 75 of the IPC was discussed in the 42nd Report of the Law Commission of India in the following words:

> "[This] is an attempt to deal with the problem of habitual offenders and recidivism. Other penal systems also have tried to grapple with this complex problem, but nowhere have the attempts met with marked success, perhaps because the causes of crime are themselves complex. Because the previous sentence has failed both in its object of reforming the offender and in its object of deterring him from crime, the law, as a measure of last resort, concentrates on protecting society from the offender by sending him to jail for a longer term than before."

64. It is worthwhile to note that the three provisions of law quoted above deal with instances where there is a prior conviction and do not deal with the pending trial of a case involving an offence. Therefore, while it is possible to grant an enhanced sentence, as provided by statute, for a recurrence of the same offence after conviction, the possibility of granting an enhanced sentence where the statute is silent does not arise. Consequently, it must be held that in terms of Section 54 of the Indian Evidence Act the antecedents of a convict are not relevant for the purposes of awarding a sentence, unless the convict gives evidence of his good character.

65. The importance of a conviction as against a pending trial was emphasised in Mohd. Farooq Abdul Gafur v. State of Maharashtra37 wherein the presumption of innocence was adverted to as a human right and it was held in paragraph 178 of the Report:

> "178. In our opinion the trial court had wrongly rejected the fact that even though the accused had a criminal history, but there had been no criminal conviction against the said three accused. It had rejected the said argument on the ground that a conviction might not be possible in each and every criminal trial. In our opinion unless a person is proven guilty, he should be presumed innocent. Further, nothing has been brought on behalf of the State even after all these years, that the criminal trials that had been pending against the accused had resulted in their conviction. Unless the same is shown by the documents on records we would presume to the contrary. Presumption of innocence is a human right. The learned trial Judge should also have presumed the same against all the three accused. In our opinion the alleged criminal history of the accused had a major bearing on the imposition of the death sentence by the trial court on the three accused. That is why in our opinion he had erred in this respect." (Emphasis supplied by us).
>
> (2010) 14 SCC 641

66. However, in Gurmukh Singh v. State of Haryana38 while this Court did not consider or discuss the prior history of the convict as a factor for sentencing, it was noted in paragraph 23 of the Report that one of the relevant factors for consideration before awarding an appropriate sentence to the convict would be the number of other criminal cases pending against him. In our opinion, this does not lay down the correct law since it overlooks the presumption of innocence. It was held in paragraph 23 of the Report as follows:

> "23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:
>
> (a) to (j) xxx xxx xxx
>
> (k) Number of other criminal cases pending against the accused;

(l) to (m) xxx xxx These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused." (Emphasis supplied by us).

67. In Bantu v. State of M.P.39 this Court noted that there was nothing on record to indicate that the appellant had any criminal antecedents nor could it be said that he would be a grave danger to the society at large despite the fact that the crime committed by him was heinous. It was held (2009) 15 SCC 635 (2001) 9 SCC 615 in paragraph 8 of the Report as follows:

"8. However, the learned counsel for the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where the accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the deceased, it is probable that death might have occurred because of gagging her mouth and nosetrix [nostril] by the accused at the time of incident so that she may not raise a hue and cry. The death, according to him, was accidental and an unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence." (Emphasis supplied by us).

68. In Amit v. State of Maharashtra40 this Court adverted to the prior history of the appellant and noted that there is no record of any previous heinous crime and also there is no evidence that he would be a danger to society if the death penalty is not awarded to him. It was held in paragraph 10 of the Report:

"10. The next question is of the sentence. Considering that the appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death penalty is not awarded. Though the offence committed by the appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases……." (Emphasis supplied by us).

(2003) 8 SCC 93

69. In the case of Rahul v. State of Maharashtra41 this Court noted that there was no adverse report about the conduct of the appellant therein either by the jail authorities or by the probationary officer and that he had no previous criminal record or at least nothing was brought to the notice of the Court. It was observed in paragraph 4 of the Report as follows:

"4. We have considered all the relevant aspects of the case. It is true that the appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27-11-1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him." (Emphasis supplied by us).

70. Similarly, in Surendra Pal Shivbalakpal v. State of Gujarat42 the absence of any involvement in any previous criminal case was considered to be a factor to be taken into consideration for the purposes of awarding the sentence to the appellant therein. It was held in paragraph 13 of the Report as follows:

"13. The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the (2005) 10 SCC 322 (2005) 3 SCC 127 occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case. We confirm conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302 IPC is commuted to life imprisonment." (Emphasis supplied by us).

71. The importance and significance of a conviction as against a pending trial was the subject matter of discussion in the Supreme Court of Canada. In Her Majesty The Queen v. Norman Skolnick43 Coke's Institutes was partially "modified" to the effect that a person cannot be sentenced for the third offence before he has been convicted of the second offence; nor can that person be sentenced for the second offence before he has been convicted for the first offence. The second offence must be committed after the first conviction and the third offence must be committed after the second conviction. The principle appears to be that the accused does not face the jeopardy of an increased penalty unless he has previously been convicted and sentenced.

72. Similarly, the Supreme Court of the Northern Territory of Australia in Scott Nathan Schluter v. Robin Laurence Trenerry44 took the view that escalating the period of actual imprisonment could be justified if there is a [1982] 2 SCR 47 (1997) 6 NTLR 194 second finding of guilt. If that second finding of guilt is missing then there "would be no opportunity for the multiple offender, not previously charged, to become aware of the certainty of the severity of punishment for the proscribed criminal behaviour."

73. It is therefore quite clear from the various decisions placed before us that the mere pendency of one or more criminal cases against a convict cannot be a factor for consideration while awarding a sentence. Not only is it statutorily impermissible (except in some cases) but even otherwise it violates the fundamental presumption of innocence – a human right - that everyone is entitled to.

74. Insofar as the present case is concerned, it has come on record that there are two cases pending against the appellant for similar offences. Both these were pending trial. Notwithstanding this, the Trial Judge took this into account as a circumstance against the appellant. It would have been, in our opinion, far more appropriate for the Sessions Judge to have waited, if he thought it necessary to take the pendency of these cases into consideration, for the trials to be concluded. For ought we know, the two cases might have been foisted upon the appellant and he might have otherwise been proved not guilty.

75. We may generally mention, in conclusion, that there is really no reason for the Trial Judge to be in haste in awarding a sentence in a case where he might be considering death penalty on the ground that any other alternative option is unquestionably foreclosed. The convict would in any case remain in custody for a fairly long time since the minimum punishment awarded would be imprisonment for life. Therefore, a Trial Judge can take his time and sentence the convict after giving adequate opportunity for the prosecution as well as for the defence to produce material as postulated in Bachan Singh so that the possibility of awarding life sentence is open to the Trial Judge as against the death sentence. It must be appreciated that a sentence of death should be awarded only in the rarest of rare cases, only if an alternative option is unquestionably foreclosed and only after full consideration of all factors keeping in mind that a sentence of death is irrevocable and irretrievable upon execution. It should always be remembered that while the crime is important, the criminal is equally important insofar as the sentencing process is concerned. In other words, courts must “make assurance double sure”.45

76. We may note here, by way of a post script that during the course of submissions, it was stated by learned counsel for the appellant that in the meanwhile the appellant had been convicted in one of the pending cases, that is, State of Maharashtra v. Raju @ Rajendra judgement Wasnik (S.T. No. 162 of 2007). This case was decided by the Sessions Judge, Amravati, Shakespeare's Macbeth, Act IV, Scene i Maharashtra on 18th April, 2016. The Trial Judge imposed a sentence of imprisonment for life on the appellant upon his conviction, while taking note that in the present case, the appellant had been awarded the death sentence.

77. A perusal of the website of the eCourts Project of the eCommittee of the Supreme Court revealed that in fact there were a total of four cases against the appellant, including the one that we are dealing with. In paragraph 38 of the decision rendered by the Sessions Judge in S.T. No. 162 of 2007 it was recorded as follows:

> “[38] The victim of this crime was aged about 9 to 10 years old and prosecution proved that the accused committed rape on her. It appears from the facts and circumstances and record that in Crime No.23/2007 of police station Kholapurigate, Amravati (S.T.No.183/2007) the accused was convicted and sentenced to death for

the offence punishable under sections 302, 376(2)(f) and 377 of Indian Penal Code. He is also convicted in Crime No.31/2007 of police station Daryapur (S.T.No.112/2007) and he is sentenced to suffer imprisonment for life for the offence punishable under section 376(2)(f) of Indian Penal Code. He is also convicted in Crime No.21/2006 of police station Chikhaldara, District Amravati (S.T.No.66/2007) and he is sentenced to suffer imprisonment for life for the offence punishable under sections 363, 366, 376(2)(f), 302 and 201 of Indian Penal Code. The death sentence in S.T.No.183/2007 is confirmed up to the Hon'ble Supreme Court of India and it appears that the Mercy Petition filed by the accused also came to be rejected by the Hon'ble President of India. The accused committed the offence of same nature i.e. rape on minor and innocent girl. It is his 4th offence of same nature in which the offence under sections 363, 366 and 376(2)(f) of Indian Penal Code is proved against the accused. It appears that the accused is in habit to commit rape on minor girl. Taking in to consideration the gravity of offence and the facts and circumstances, I am of the opinion that the accused is not deserved for leniency and according to me, the following punishment would meet the ends of justice.....” We have not been informed whether the conviction orders passed against the appellant have been set aside or not. We are therefore proceeding on the basis that the appellant has been awarded a sentence of death in the present case and a sentence of imprisonment for life in the three other cases decided against him, subject to any order passed by the appellate court.

78. We must however express our shock and anguish that the appellant had the opportunity to commit the offences alleged against him on more than one occasion. This could have been possible only if the appellant had been on bail and our shock and anguish is that in the background of the facts before us, the appellant was actually granted bail.

Conclusion

79. Insofar as the present petition is concerned, we are of opinion that for the purposes of sentencing, the Sessions Judge, the High Court as well as this Court did not take into consideration the probability of reformation, rehabilitation and social re-integration of the appellant into society. Indeed, no material or evidence was placed before the courts to arrive at any conclusion in this regard one way or the other and for whatever it is worth on the facts of this case. The prosecution was remiss in not producing the available DNA evidence and the failure to produce material evidence must lead to an adverse presumption against the prosecution and in favour of the appellant for the purposes of sentencing. The Trial Court was also in error in taking into consideration, for the purposes of sentencing, the pendency of two similar cases against the appellant which it could not, in law, consider. However, we also cannot overlook subsequent developments with regard to the two (actually three) similar cases against the appellant.

80. For all these reasons, we are of opinion that it would be more appropriate looking to the crimes committed by the appellant and the material on record including his overall personality and

subsequent events, to commute the sentence of death awarded to the appellant but direct that he should not be released from custody for the rest of his normal life. We order accordingly.

81. The petitions stand disposed of accordingly.

……J.
(Madan B. Lokur)

……J.
(S. Abdul Nazeer)

New Delhi;
December 12, 2018

...……..J.
(Deepak Gupta)