Md. Mannan @ Abdul Mannan vs State Of Bihar on 14 February, 2019

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Bench: Indira Banerjee, Mohan M. Shantanagoudar, N. V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION (CRIMINAL) NO. 308 OF 2011

IN

CRIMINAL APPEAL NO 379 OF 2009

MD. MANNAN @ ABDUL MANNAN …PETITIONE

VERSUS

...RESPONDEN

STATE OF BIHAR

ORDER

This application is for reopening the Review Petition (Crl.) No.308 of 2011 and for review of the final judgment and order dated 20.04.2011 passed by this Court dismissing Criminal Appeal No.379 of 2009 filed by the review petitioner and confirming his conviction, inter alia, under Section 201, 366A, 376 and 302 of the Indian Penal Code (IPC) and, inter alia, affirming the death sentence imposed on him under Section 302 of the IPC.

2. It appears that the petitioner, a mason, was engaged at the Reason: about 2.00 p.m., the petitioner gave money to the victim to bring betel for him from Hanuman Chowk. A little while later the petitioner also went to Hanuman Chowk, picked up the victim, an eight year old girl, on his bicycle and left talking with her. The victim and the petitioner were seen together by witnesses.

3. The victim did not return home, whereupon frantic searches were made. The victim was not found. It was learnt that the victim had been last seen with the petitioner.

4. The officer in-charge of Bahera Police Station, under which the village of the petitioner falls, was informed that the victim was missing. In course of investigation the petitioner, who had earlier been identified as the man with whom the victim had last been seen, riding on a bicycle, allegedly made a confessional statement in the presence of witnesses, confessing that he had raped and murdered the victim. The confessional statement was signed by the petitioner.

5. The petitioner is alleged to have disclosed the place where he had raped and killed the victim. It is the case of the prosecution, that on the basis of information given by the petitioner, the Investigating Officer went to the village Izaar Haat Bandh, where the dead body of the victim was recovered from the spot shown by the petitioner, amidst wheat and 'arahar' fields.

6. The dead body was identified as that of the victim. The doctor who conducted the post mortem opined that death was due to asphyxia and haemorrhage as a result of strangulation within 8 to 24 hours from the time of post mortem examination. The doctor also deposed that upon examination the vaginal swab collected from the victim showed "few intact spermatozoa". The medical evidence clearly established that the victim had been raped and murdered. However no DNA analysis of the spermatozoa was conducted by the prosecution.

7. By a judgment and order rendered on 29.5.2007 in Sessions Trial No.220/2004 arising out of GR No. 325/2004 Manigachi P. S. Case No.13 of 2004, the Additional District and Sessions Judge (Fast Track Court) No.30, on consideration of the evidence on record, held the petitioner guilty of charges under Sections 366A, 376, 302 and 201 of IPC. On the same day after hearing the applicant on the question of sentence, the Fast Track Court sentenced the petitioner to undergo rigorous imprisonment for 10 years for charge under Section 366A IPC, rigorous imprisonment for life for charge under Section 376 IPC, rigorous imprisonment for 7 years for charge under Section 201 IPC and death sentence for charge under Section 302 IPC. All the sentences except the sentence for the charge under Section 302 IPC were to run concurrently till execution of the death sentence under Section 302 IPC, whereby the convict was to be hanged by the neck till his death.

8. The learned Additional District and Sessions Judge, Fast Track court directed that the proceedings of the case be transmitted to the High Court of Judicature at Patna for confirmation of the death sentence. The petitioner filed an appeal being Criminal Appeal (DB) No.963 of 2007 in the High Court against his conviction and sentence.

9. The death sentence reference being Death Reference No.6 of 2007 was heard by the Division Bench of the High Court along with the Criminal Appeal (DB) No. 963 of 2007. The Division Bench,

after considering the materials on record, arrived at the finding that the charges against the petitioner under Sections 366A, 376, 302 and 201 had been proved beyond doubt and upheld the conviction. The appeal was dismissed and the death penalty awarded to the petitioner by the Trial Court was confirmed.

10. The petitioner filed a Special Leave Petition in this Court to appeal against the judgment and order of the High Court. Leave was duly granted.

11. The appeal being Criminal Appeal No.379 of 2009 was dismissed by this Court, by the judgment and order dated 20.4.2011, of which review has been sought, and the death sentence confirmed with the observation that the case fell in the category of the rarest of rare cases.

12. The petitioner filed a petition for review of the said judgment and order dated 20.4.2011. The said review petition was dismissed by circulation by the same two judges on 24.8.2011.

13. By a judgment and order dated 2.9.2014 in W.P. (Crl.) No. 77 of 2014 (Mohd. Arif v. The Registrar of the Supreme Court1), a Constitution Bench of this Court held that, that review petitions in cases of death sentences should be heard in Open Court, by a three- Judge Bench. The Constitution Bench specifically permitted the reopening of review petitions in all cases where review petitions had been dismissed by circulation.

1 (2014) 9 SCC 737

14. There can be no doubt that in view of the judgment of this Court in Mohd. Arif (supra) the petitioner is entitled to have the application for review, which had been dismissed by circulation, reopened and heard in Open Court.

15. In this petition for review we need not consider the merits of the case, there being concurrent findings of the Trial Court, the High Court and of this Court. This review is only restricted to the question of whether death sentence should be commuted to life imprisonment.

16. In Bachan Singh vs. State of Punjab2, this Court, while upholding the validity of death sentence held, that imprisonment for life was the rule and death sentence an exception, to be imposed in the "rarest of rare" cases, recording special reasons. In Bachan Singh (supra), this Court in effect held that before exercising discretion to impose the extreme penalty of death sentence, aggravating and mitigating circumstances are required to be considered. Some of the mitigating factors would be the extreme mental or emotional disturbance in which the offence might have been committed, the possibility that the accused would not be a continuing threat to society, the possibility of reformation and rehabilitation of the accused, mental defect or disorder of the accused etc.

17. In Rajesh Kumar vs. State (through Govt. of NCT of Delhi)3, this Court observed:-

> "83. The ratio in Bachan Singh has received approval by 2 (1980) 2 SCC 684 3 (2011) 13 SCC 706 the international legal community and has been very favourably referred

to by David Pannick in Judicial Review of the Death Penalty: Duckworth (see pp. 104-

05). Roger Hood and Carolyn Hoyle in their treatise on The Death Penalty, 4th Edn. (Oxford) have also very much appreciated the Bachan Singh ratio (see p. 285). The concept of "rarest of rare" which has been evolved in Bachan Singh by this Court is also the internationally accepted standard in cases of death penalty.

84. Reference in this connection may also be made to the right based approach in exercising discretion in death penalty as suggested by Edward Fitzgerald, the British Barrister. [Edward Fitzgerald: The Mitigating Exercise in Capital Cases in Death Penalty Conference (3-5 June), Barbados: Conference Papers and Recommendations.] It has been suggested therein that right approach towards exercising discretion in capital cases is to start from a strong presumption against the death penalty. It is argued that "the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases" and Fitzgerald argues:

> "Such a restrictive approach can be summarised as follows: The normal sentence should be life imprisonment. The death sentence should only be imposed instead of the life sentence in the 'rarest of rare' cases where the crime or crimes are of exceptional heinousness and the individual has no significant mitigation and is considered beyond reformation." (Quoted in The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p. 285.)
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> 86. Taking an overall view of the facts in these appeals and for the reasons discussed above, we hold that death sentence cannot be inflicted on the appellant since the dictum of the Constitution Bench in Bachan Singh is that the legislative policy in Section 354(3) of the 1973 Code is that for a person convicted of murder, life imprisonment is the rule and death sentence, an exception, and the mitigating circumstances must be given due consideration. Bachan Singh further mandates that in considering the question of sentence the court must show a real and abiding concern for the dignity of human life which must postulate resistance to taking life through law's instrumentality. Except in the "rarest of rare cases" and for "special reasons" death sentence cannot be imposed as an alternative option to the imposition of life sentence".
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> 18. In Rajesh Kumar (supra), the accused was convicted of assault and murder of two helpless children in the most gruesome manner. This Court held that death sentence could not be inflicted, reiterating that life imprisonment was the rule and death sentence an exception only to be imosed in the "rarest of rare cases" and for "special reasons" when there were no mitigating circumstances.
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> 19. Section 235 of the Criminal Procedure Code (Cr.P.C.), reads as follows:-

> "235. Judgment of acquittal or conviction.—(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
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> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."
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> 20. Section 235 (2) of the CrPC is not a mere formality. It is obligatory on the part of the learned trial Judge to hear the accused on the question of sentence and deal with it. To quote Bhagwati J. in Santa Singh vs. State of Punjab4.

"2. .....This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after 4 (1976) 4 SCC 190 hearing him that the court can proceed to pass the sentence.

3. This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the argumentss concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislature, therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of guilt-and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.

.....The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances-extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobreity and social adjustment, the emotional and mental condition of 'the offender, the prospects for the rehabilitation of the offender, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the

legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused.

4. ....The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court.

21. In Santa Singh (supra), Bhagwati, J. set aside the sentence of death and remanded the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the petitioner in the aforesaid case of being heard with regard to the question of sentence, in accordance with the provisions of Section 235(2) CrPC as interpreted in Santa Singh (supra).

22. In Dagdu and Others vs. State of Maharashtra 5, a three- Judge Bench of this Court referred to Santa Singh (supra) and held that the mandate of Section 235(2) CrPC had to be obeyed in letter and spirit. Chandrachud, J. held:-

> "79. ... The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court." 5 (1977) 3 SCC 68

23. In Machhi Singh & Others vs. State of Punjab 6, this Court held:-

> "38. ... (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

24. In Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra7, this Court observed and held:-

> "157. The doctrine of proportionality, which appears to be the premise whereupon the learned trial Judge as also the High Court laid its foundation for awarding death penalty on the appellant herein, provides for justifiable reasoning for awarding death penalty. However, while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand falls within the rarest of the rare case.
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> 158. The reasons assigned by the courts below, in our opinion, do not satisfy Bachan Singh test. Section 354(3) of the Code provides for an exception. General rule of doctrine of proportionality, therefore, would not apply. We must read the said provision in the light of Article 21 of the Constitution of India. Law laid down by Bachan Singh and Machhi Singh interpreting Section 354(3) of the Code should be taken to be a part of our constitutional scheme.
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> 159. Although the Constitutional Bench judgment of the Supreme Court in Bachan Singh did not lay down any guidelines on determining which cases fall within the "rarest of rare" category, yet the mitigating circumstances listed in and endorsed by the judgment give reform and rehabilitation great importance, even requiring the State to prove that this would not be possible, as a precondition before the court awarded a 6 (1983) 3 SCC 470 7 (2009) 6 SCC 498 death sentence. We cannot therefore determine punishment on grounds of proportionality alone. There is nothing before us that shows that the appellant cannot reform and be rehabilitated.
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> 162. Further indisputably, the manner and method of disposal of the dead body of the deceased was abhorrent and goes a long way in making the present case a most foul and despicable case of murder.

However, we are of the opinion, that the mere mode of disposal of a dead body may not by itself be made the ground for inclusion of a case in the "rarest of rare" category for the purpose of imposition of the death sentence. It may have to be considered with several other factors.

25. In Ajay Pandit and Another vs. State of Maharashtra 8, this Court held:-

> "47. Awarding death sentence is an exception, not the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC."

26. In Mohinder Singh vs. State of Punjab9, this Court held:-

> "22. The doctrine of "rarest of rare" confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of "rarest of rare" and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.
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> 8 (2012) 8 SCC 43 9 (2013) 3 SCC 294
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> 23. In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end to anything to do with life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. 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 would be pointless and completely devoid of any 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 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".

27. In Panchhi and Others vs. State of U.P.10, this Court observed:-

> "20. ... No doubt brutality looms large in the murders in this case particularly of the old and also the tender- aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the 'rarest of rare cases' as indicated in Bachan Singh case."

28. In Mukesh and Another v. State (NCT of Delhi) and Others11, a three-Judge Bench of this Court considered the earlier judgments of this Court referred to above and deemed it appropriate 10 (1998) 7 SCC 177 11 (2017) 3 SCC 717 to give opportunity to the accused to file affidavits to bring on record mitigating circumstances for reduction of the sentence.

29. In Haru Ghosh v. State of W.B.12, this Court commuted death sentence to life imprisonment in case of a dastardly murder of two helpless persons for no fault of theirs. This Court, however, in commuting death sentence took into consideration the following factors:-

> i. There was no pre-mediation on the part of the accused;
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> ii. The act was on the spur of the moment;
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> iii. The accused was not armed with any weapon;
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> iv. It was unknown under what circumstances the accused had entered the house of the deceased and what prompted him to assault the boy; and v. The cruel manner in which the murder was committed could not be the guiding factor and the accused himself had two minor children.

30. In Haru Ghosh (supra), this Court observed, "....the cruel manner in which the murder was committed and the subsequent action on the part of the accused in severing the parts of the body of the deceased, do not by themselves become the guiding factor in favour of death sentence."

31. In Lehna v. State of Haryana13, this Court observed and held that the mental condition of the accused which led to the assault could not be ignored, though the same may not be relevant to judge 12 (2009) 15 SCC 551 13 (2002) 3 SCC 76 culpability. It is certainly a factor while considering the question of sentence.

32. In the aforesaid case even though three lives had been lost by reason of the crime, this Court modified the punishment by commuting death sentence to life imprisonment, observing that there was no evidence of any diabolic planning to commit the crime, though the act was cruel.

33. Learned counsel appearing on behalf of the applicant submitted that since his arrest on 28.2.2004 the applicant has undergone about 15 years in custody and 11 years as a convict sentenced to death, lodged in virtual solitary confinement in a single cell high security ward in Bhagalpur Prison in Bihar.

34. In Shatrughan Chauhan and Anr. vs. Union of India & Ors.14, this Court considered and discussed the possibility of condemned convicts, who are sentenced to death developing mental disorder, upon reference to relevant provisions of the U.P. Jail Manual and similar provisions of other jail manuals. This Court observed:

> "86. The above materials, particularly, the directions of the United Nations international conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear, "insanity" is a relevant supervening factor for consideration by this

Court.

> 87. In addition, after it is established that the death convict is insane and it is duly certified by the competent doctor, undoubtedly, Article 21 protects him and such person cannot be executed without further clarification from the competent authority about his 14 (2014) 3 SCC 1 mental problems. It is also highlighted by relying on commentaries from various countries that civilised countries have not executed death penalty on an insane person. ..... In view of the well-established laws both in the national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment."

35. In Shatrughan Chauhan (supra), this Court also referred to Sunil Batra vs. Delhi Administration & Ors.15, and reiterated that if solitary confinement was illegal, the same punishment could not be scuffled into the legal system by naming it differently. If prolonged solitary confinement of a death sentence convict is a ground for commutation of death sentence, solitary confinement, in effect, on ground of high security or otherwise would also be a ground for commutation of death sentence.

36. Counsel further submitted that the Trial Court has convicted the petitioner and sentenced him to death considering the inhuman and brutal nature of the crime alone. The findings of the Trial Court with regard to the criminal antecedents is not based on any cogent materials. The Trial Court merely recorded the submission of the public prosecutor that the petitioner had been accused in another trial in which the petitioner had "managed his acquittal in the garb of compromise"(para 29).

37. Citing the judgment of this Court in Birju vs. State of Madhya Pradesh16 Counsel submitted, and rightly that only convictions which have attained finality can be considered as 15 (1978) 4 SCC 494 16 (2014) 3 SCC 421 "aggravating circumstances".

38. Counsel submitted that the Trial Court did not give opportunity to the petitioner to show mitigating circumstances, notwithstanding a duty to hear the accused under Section 235(2) of the Code of Criminal Procedure (Cr.PC) on the question of sentence.

39. As argued by learned counsel appearing on behalf of the petitioner, the accused had the right to be provided with legal aid at all stages, including the stage of consideration of the question of sentence. After the conviction of the petitioner, he should have been given the benefit of being accompanied by a social worker to guide and counsel him and also to help him to get an effective hearing on the question of sentence.

40. In this case, the petitioner was not accompanied by a social worker. Furthermore the legal aid provided to the petitioner was inadequate. The legal aid lawyer representing the applicant argued against the conviction, but did not seek the opportunity to draw attention of the Court to mitigating circumstances for imposition of sentence of life imprisonment in place of death. He only submitted that the petitioner had falsely been implicated.

41. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The Trial Court made no attempt to elicit relevant facts. Nor did the Trial Court give any opportunity to the petitioner the opportunity to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.

42. Contrary to the dictum of this Court, inter alia, in Dagdu (supra) and Santa Singh (supra) the petitioner was not given a real, effective and meaningful hearing on the question of sentence under Section 235(2) of the Cr.P.C. The death sentence imposed on the petitioner is liable to be commuted to life imprisonment on this ground.

43. The records reveal that after the judgment and order of conviction was pronounced on 29.5.2007, the matter was directed to be put up on 31.5.2007 for hearing on the point of sentence. However, on the same day i.e., 29.5.2007 itself the petitioner was produced from jail custody and death sentence was imposed. The order imposing the death sentence is extracted hereinbelow for convenience:-

“26. Convict Md. Mannan @ Abdul Mannan produced from jail custody.

27. Heard learned P.P and learned lawyer for the convict on the point of passing sentence against the convict.

28. Learned lawyer for the convict has again repeated in his submission that the convict has been falsely implicated in this case.

29. On the other learned P.P. has firmly asserted that the guilt of the convict in respect of the charges framed against him has been proved beyond shadow of all reasonable doubts which can only be treated as barbarous act and crime against the whole society beyond imagination. It is also submitted that the convict was an accused in another S.T. No.172/93 which was disposed by the Court of Learned District & Sessions Judge, Darbhanga on 18.9.1993 in which the convict managed his acquittal in the garb of compromise. It is submitted by the learned P.P. to award maximum sentence against the convict in this case.

30. Considering the submission of the respective sides and nature of the charges against the convict I find that the guilt of the convict is not only heinous and barbarous but crime against the society in general. The convict has been found guilty of rape and murder of a minor girl committed in a gruesome and premeditated manner after kidnapping her which can only be treated as inhuman and brutal act.

31. The purpose of law will be served by awarding maximum sentence against the convict. Convict Md. Mannan @ Abdul Mannan is therefore sentenced to undergo R.I. for 10 years for charge u/s 366 A IPC, R.I. for life for charge u/s 376 I.P. and R.I. for seven years for charge u/s 201 IPC and

awarded death sentence for charge u/s 302 IPC. All the sentence except sentence for charge u/s 302 IPC shall run concurrently till execution of death sentence for charge u/s 302 I.P.C. whereby the convict shall be hanged by the neck till his death.

32. Let entire proceeding of this case be transmitted to the Hon'ble High Court, Patna for confirmation of capital punishment."

44. On a perusal of the order of sentence, it is patently clear that the learned lawyer representing the petitioner only submitted that the petitioner had falsely been implicated in the case. He did not at all make any submission with regard to the sentence. He did not seek further time to prepare himself, though the question of life and death of a convict was involved. The Trial Court proceeded on the basis of the submission of the learned Public Prosecutor that the charges had been proved beyond reasonable doubt.

45. The Trial Court found, and rightly, that the crime committed was barbarous, and a crime against society, beyond imagination. The question is whether death penalty should have been imposed.

46. The Trial Court has apparently been swayed by the submission of the learned Public Prosecutor that the convict, that is, the petitioner, had been an accused in another Sessions Trial being ST No.172/93 which was disposed of by the Court of the learned District and Sessions Judge, Darbhanga on 18.9.1993. The Trial Court commented that "the convict managed his acquittal in the garb of compromise".

47. The Trial Court has apparently not perused the order dated 18.9.1993 passed by the Court of the District and Sessions Judge, Darbhanga on 18.9.1993. The petitioner having been acquitted by a Court of law, the Trial Court ought not to have been swayed by the unsubstantiated submission of the learned Public Prosecutor that the convict "had managed" his acquittal.

48. The Trial Court found the guilt of the convict i.e. the petitioner, not only heinous and barbarous, but a crime against society in general, as he had been found guilty of rape and murder of a minor girl, committed in a gruesome and per-meditated manner, after kidnapping her, which could only be termed as inhuman and brutal.

49. There can be no doubt that rape and murder of a 8 year old girl shocks the conscience. It is barbaric. There is, however, no evidence to support the finding that the murder was pre-meditated. The petitioner did not carry any weapon. Moreover, the Trial Court has apparently not considered the question of whether the crime is the rarest of rare crimes as mandated by the Supreme Court in Bachan Singh (supra).

50. The reasoning of the High Court for confirming the extreme penalty of death sentence is extracted hereinbelow for convenience:-

> "26. The trial court has awarded the extreme penalty of death sentence to the appellant on the basis of submissions in respect of criminal antecedents of the

> appellants and also on the finding that the guilt is not only heinous and barbarous but crime against the society in general. It has been submitted that the criminal antecedents of the appellant should not have been taken into consideration by the trial court and hence the special reasons give by the trial court for awarding death penalty is vitiated in law.
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> 27. I have considered the entire facts and the aforesaid submissions for deciding whether the death penalty awarded to the appellant should be confirmed or not. In this regard it is noticed that appellant is a matured man aged about 42-43 years. He has committed the heinous and barbarous crime of rape and murder of a girl aged about 7 years who was thin built and of 4' height. Such a child was incapable of arousing lust in normal situation. She was kidnapped in a planned manner because she was innocent and could not understand the design of the appellant. She became helpless victim of a diabolic middle aged man whom the child could trust as an elder person. The medical evidence shows the cruel manner of causing injuries on the face, nails and body of the child at the time of committing rape which was followed by murder. This was all pre-planned as is apparent from the manner of kidnapping and selection of a lonely place where crime was committed and body concealed. Crime of this nature against a child girl is definitely a crime against the society. The facts of the case, the offences taken together along with the age of the victim and the age of the appellant clearly bring the case in the category of 'rarest of the rare cases" in which interest of justice requires award of maximum penalty. In such a case award of a lesser punishment would not be appropriate and adequate.

Hence even after ignoring the material regarding criminal antecedents of the appellant, I am of the view that the appellant deserves extreme penalty of death. Hence, the death penalty awarded to the appellant by the trial court is confirmed and the reference is answered in affirmative. The appeal of the appellant is dismissed."

51. As argued by learned counsel appearing on behalf of the petitioner, the High Court found the offence to be in the category of rarest of the rare cases, having regard to the nature of the offence and the age of the victim. The fact that no criminal antecedents had been brought on record has casually been brushed aside as irrelevant.

52. Counsel submitted, and rightly, that the High Court failed to appreciate that the Trial Court had erred in law in awarding death penalty, by proceeding on the basis that the petitioner had a criminal history, when he had been acquitted.

53. The High Court upheld the death penalty by concluding that the convict deserved death penalty "even after ignoring the material regarding criminal antecedents of the appellant". The High Court has not apparently considered the mitigating circumstances. This Court confirmed the death sentence on consideration of the brutality and heinousness of the crime and the age of the victim and formed opinion that the petitioner was a menace to the society and would continue to be so. He could not be reformed.

54. Counsel submitted that the brutality of the crime and age of the victim was not ground enough to inflict death sentence. Furthermore, the opinion of this Court that the petitioner would be a menace to society and could not be reformed had no basis. Learned counsel submitted that the petitioner had been convicted on circumstantial evidence, based on faulty investigation.

55. Counsel submitted that even though Dr. P.K. Das (4 th Prosecution Witness) had collected the vaginal swab of the victim, which upon examination showed "few intact spermatozoa", no DNA analysis was conducted or sought to be conducted by the prosecution for which adverse inference might be drawn. In support of the aforesaid submission, counsel placed reliance on Kalu Khan v. State of Rajasthan17 and Santosh Kumar (supra).

56. Notwithstanding the omission of the prosecution to conduct DNA analysis the Trial Court may have found the evidence sufficient to convict the petitioner. Moreover, as rightly argued by Counsel, the quality of evidence is a factor relevant to sentencing.

57. In Ramesh and Others v. State of Rajasthan 18, this Court observed and held:-

> "68. Practically, the whole law on death sentence was referred to in Santosh Kumar case. In para 56, the Court observed: (SCC p. 527) '56. ... The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission.'"

58. In Ram Deo Prasad v. State of Bihar 19, this Court referred 17 (2015) 16 SCC 492 18 (2011) 3 SCC 685 19 (2013) 7 SCC 725 to and relied upon the earlier judgments of this Court in Santosh Kumar Satishbhushan Bariyar (supra) and Ramesh and Others (supra) and reaffirmed that the quality of evidence was also a relevant factor in considering the question of death sentence. In the aforesaid case, this Court felt it unsafe to confirm the death sentence awarded for rape and murder of a four year old child.

59. In this case, the conviction of the petitioner is based on circumstantial evidence and the alleged extra judicial confession made by the petitioner to the police in course of investigation, on the basis of which certain recoveries were made. There is no forensic evidence against the petitioner. It would, in our view, be unsafe to uphold the imposition of death sentence on the petitioner.

60. In Sushil Sharma vs. State (NCT of Delhi) 20 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. This Court held:

> "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."

61. In Kalu Khan (supra), this Court referred to its earlier decision in Swamy Shraddananda (2) @ Murali Manohar Mishra 20 (2014) 4 SCC 317 vs. State of Karnataka21 and held, in the facts of the case, the balance of circumstances introduced an uncertainty in the "culpability calculus" and therefore there was an alternative to the imposition of the death penalty. Accordingly, the sentence was commuted to imprisonment for life.

62. In Santosh Kumar (supra) this Court clearly held 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 (20, 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 imposed on the basis of circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case."

63. In Sebastian @ Chevithiyan vs. State of Kerala 22, this Court held:

> "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 Shraddanada (2) vs. State of Karnataka [(2008) 13 SCC 767] as his continuance as a member of an ordered society is uncalled for.."

64. Counsel finally submitted that the legal aid lawyer 21 (2008) 13 SCC 767 22 (2010) 1 SCC 58 representing the petitioners had a positive onus to lead evidence regarding the possibility of reformation of the petitioner which he did not discharge. The evidence on reformation had to be independent of the circumstances of the crime. In this context, reliance has been placed on Rajesh Kumar (supra), Santosh Kumar Satishbhushan Bariyar (supra) and Lehna (supra).

65. Counsel argued that legal representation provided to the petitioner was ineffective at all stages. The petitioner was not represented by counsel before the Trial Court, at the time of framing of charge on 21.2.2004. On 6.6.2005 the petitioner made a request for legal aid. During the sentencing

the Counsel did not even seek time to place mitigating circumstances.

66. Learned counsel submitted that legal representation was not only ineffective in the Trial Court but also before the High Court and before this Court. Ineffective legal representation to defend the convict on the question of punishment is no legal representation and a ground for commutation of death sentence. This proposition finds support from the judgment of this Court in Ram Deo Prasad (supra).

67. The learned counsel has drawn the attention of this Court to various orders of this Court where this Court has considered mitigating circumstances and commuted death sentence in cases involving rape and murder of a minor. Unfortunately, those orders could not be placed before the Trial Court. Had those orders been noticed, the petitioner may not have been awarded death sentence.

68. Relying on Mukesh and Anr. (supra), Counsel submitted that this Court can call for affidavit or materials gathered by the petitioner's counsel, to fix the lacunae in sentencing in the the courts below. The legal representatives of the petitioner have conducted interviews with the petitioner and his family members and the following factors require consideration:-

(i) Petitioner has lived his entire life in poverty.

(ii) He has never access to formal education

(iii) He started working at the age of 15 when his father was incapacitated for the remainder of his life after suffering a stroke.

(iv) Petitioner was married at the age of 22 and has five dependent children

(v) The petitioner struggled to support his wife and children

(vi) The family is in abject poverty.

69. Counsel further submitted that during conversation with the petitioner, he was found to lose sense of reality and talk about being possessed by imaginary personalities which he described as jinns. He claimed to lose control over his thoughts and actions when possessed. Counsel submitted that the petitioner suffered from instability of mind. In this regard, it has been submitted that:-

(i) petitioner had received multiple near fatal injuries in his head in the course of his life which have caused persistent headaches, loss of memory and disorientation.

(ii) The petitioner had been diagnosed and treated for meningeal tuberculosis or Brain TB for a year and half at Darbhanga Medical College around the year 1990.

Unfortunately records of the time cannot be traced.

(iii) Socio-economic conditions of the petitioner made it impossible for the petitioner to avail effective treatment for his mental instability.

70. There are transcripts of a consulting psychiatrist, Dr. Kaustubh Joag, who opined on 29.10.2008 that there is " a strong possibility that the petitioner might be suffering from organic (neurological) and/or mental health issues" and advised an assessment on the psychosis spectrum and on the organic brain damage which might have altered his behaviour. A copy of the opinion of Dr. Kaustubh Joag, MD has been made over. Dr. Joag is apparently a Psychiatrist of standing registered with Maharashtra Medical Council, who has several publications and is recipient of awards.

71. Counsel submits that if this Court gives the applicant an opportunity, an affidavit shall be filed placing the abovementioned factors on record. Counsel submits that in the light of deficient sentencing procedure as pointed out, this Court may consider the socio-economic conditions and the mental illness concerns of the petitioner as also other mitigating factors such as absence of criminal antecedents on record, to commute the death sentence imposed on the petitioner, to life imprisonment.

72. The review petition, filed about eight years ago, was as observed above, dismissed by circulation on 24.08.2011. Even thereafter, for almost three years the death sentence was not executed. This application for reopening the review and hearing the same in Open Court, has also been pending for over four years. Calling for affidavits would only delay the matter. The petitioner has for all these years virtually been in solitary confinement on some ground, may be the ground of his own security. This Court might also take judicial notice of the opinion of the psychiatrist, Dr. Joag which reveals that the petitioner is not mentally sound.

73. In Lehna (supra) Shatrughan Chauhan (supra), this Court held that mental illness is one of the supervening circumstances in commutation of death sentence to life imprisonment. The aforesaid view was confirmed by this Court in Navneet Kaur v. State (NCT of Delhi) and Another23.

74. The proposition of law which emerges from the judgments referred to above is itself death sentence cannot be imposed except in the rarest of rare cases, for which special reasons have to be recorded, as mandated in Section 354(3) of the Criminal Procedure Code. In deciding whether a case falls within the category of the rarest of rare, the brutality, and/or the gruesome and/or heinous nature of the crime is not the sole criterion. It is not just the crime which the Court is to take into consideration, but also the criminal, the state of his mind, his socio-economic background, etc. Awarding death sentence is an exception, and life imprisonment is the rule.

75. Therefore, before imposing the extreme penalty of death sentence, the Court would have to satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing materials.

76. The legal assistance provided to the convict at every stage including the stage of hearing on the question of sentence has to be 23 (2014) 7 SCC 264 effective and even if the accused has remained silent, the Court would be obliged and duty bound to elicit relevant factors. Opportunity should have been given to the convict to bring on record mitigating circumstances for reduction of the sentence and a balance struck between the aggravating and the mitigating circumstance.

77. The petitioner, as observed above, did not get the benefit of competent legal assistance. The Trial Court also did not make any attempt to elicit materials relevant to the imposition of death sentence. No affidavit was called for. The question of whether there were any mitigating circumstances was not addressed by the Trial Court or the appellate courts.

78. As observed above, even though the hearing under Section 235(2) on the question of sentence was fixed on 31.5.2007, that is, two days after pronouncement of the judgment and order of conviction of the petitioner, on 29.5.2007, the hearing was preponed to 29.5.2007 itself after the petitioner was produced from jail custody and death sentence was imposed.

79. Imposition of death sentence on the same day after pronouncement of the judgment and order of conviction may not, in itself, vitiate the sentence, provided the convict is given a meaningful and effective hearing on the question of sentence under Section 235(2) Cr.P.C with opportunity to bring on record mitigating factors.

80. Preponement by the Trial Court of hearing under Section 235(2) Cr. P.C at short notice, which is in effect, no notice, appears to have denied the petitioner an effective hearing. The hearing under Section 235(2) was reduced to a mere formality. The Court hastily proceeded to impose death sentence considering the dastardly nature of the crime for which the petitioner had been convicted.

81. In this case, an eight year old innocent girl fell prey to the carnal desire and lust of the petitioner. It is not known whether there was any pre-meditation on the part of the petitioner to murder the victim. The circumstances in which he murdered the victim are also not known. The conviction is based on circumstantial evidence and extra judicial confession made by the petitioner to the police in course of investigation. There can be no doubt that the crime is abhorrent, but it is doubtful as to whether the crime committed by the petitioner can be termed as “rarest of the rare”.

82. There is also no material at all, not to speak of cogent material, to establish that the appellant was incapable of being reformed, that he would remain a threat to society, and that the only punishment that could be given, having regard to the nature of the crime, is death sentence.

83. The mere fact that the petitioner and/or his Counsel chose to remain silent on the question of sentence and did not make any submission with regard to the same in the Trial Court or the Higher Appellate Courts, does not debar the petitioner from agitating the existence of mitigating circumstances at this stage, since principles of constructive res judicata can have no application to matters relating to life and death.

84. It is open to the Court to either remit the question of sentence to the Trial Court for fresh consideration, after giving adequate opportunity of hearing or to remedy the breach by giving the petitioner a hearing, as held in Dagdu (supra). On overall consideration of all relevant facts and circumstances including the long pendency of proceedings, we have opted for the latter course.

85. It is well recognised worldwide, that owing to the difficult circumstances prevailing in prisons, such as, enforced solitude, inadequate health care, loss of livelihood etc., prisoners often develop mental illness after their admission into prison. The petitioner has been undergoing prolonged confinement which is solitary in effect for all practical purposes, though not termed solitary confinement. This Court, in the case of Shatrughan Chauhan (supra), while strongly relying upon international Conventions, has held "insanity" to be a pertinent supervening factor which must be taken into consideration by the courts while awarding death penalty. Moreover, this Court had held therein that Article 21 protects such persons from being executed without obtaining further clarification from the competent authority. Lastly, placing reliance upon laws operating in both international as well as national arenas, this Court concluded that mental illness is a relevant factor which warrants commutation of death sentence to life imprisonment.

86. It is also pertinent to note herein that the relevant Prison Rules also recognise the phenomenon of post-conviction mental illness and state that the execution of such persons shall be deferred, pending orders of the Government 24. In th elight of the aforesaid considerations, we conclude that the mental health of the petitioner at the time of execution is a relevant mitigating factor which must be taken into consideration in the present case. As observed above, there are materials put forward now, in the form of medical opinion, which show that the petitioner is not mentally sound. For the reasons discussed above, we are of the view that it would not be appropriate and/or safe to affirm the death sentence awarded to the petitioner.

87. In Swamy Shraddananda (supra), this court held:

> "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 year's imprisonment would amount to punishment at all."

88. In Mulla and Another v. State of U.P.25, this Court has 24 Bihar Prisons Manual 2012, Rule 642
25 (2010) 3 SCC 508 affirmed that it is open to the Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by the life imprisonment. This Court observed, "the court should be free to determine the length of imprisonment which will suffice the offence committed."

89. Even though life imprisonment means imprisonment for entire life, convicts are often granted reprieve and/or remission of sentence after imprisonment of not less than 14 years. In this case, considering the heinous, revolting, abhorrent and despicable nature of the crime committed by the petitioner, we feel that the petitioner should undergo imprisonment for life, till his natural death and no remission of sentence be granted to him.

90. We, therefore, commute the death sentence imposed on the petitioner to life imprisonment, till his natural death, without reprieve or remission.

91. The review petition is accordingly disposed of.

.....J. (N. V. RAMANA) .....J. (MOHAN M. SHANTANAGOUDAR) .....J. (INDIRA BANERJEE) FEBRUARY 14, 2019 NEW DELHI