

Death sentence of Dhananjay Chaterjee was executed on 14th August 2004, and he was hanged till death, after affirmation by the Supreme Court and rejection of his mercy Petition by the Hon'ble president. The case against him was that he hit a girl aged 14 years, brutally on head, and while the girl was dying, she was raped by the accused. Result: ultimately the girl died. The session's court considered it as the rarest of rare case. High Court affirmed the death sentence and the appeal against the High Courts order was dismissed by the S.C.

While the majority of people in this country welcomed the execution, there were a few organizations and people who straight away outlaw capital punishment for any kind of offence and therefore, they opposed Dhananjay's death sentence as well. All this opposition led to a big drama before the sentence was executed and a desperate attempt was made to keep the issue of death sentence alive.

We as the member of this legal fraternity have seen this question being tossed up a no. of times and every time it has been settled down by the honorable Courts. None of us would like to go into the debate of "whether capital punishment should be abolished or not" again. However, at this point of time when the issue is still raging, it will be appropriate to remind ourselves as to how the legislatures and the apex Court have dealt with this issue every time it has come up before them. Another issue is regarding the extent of judicial discretion.

Beginning: -

The Indian penal code was drafted by the 1st law commission of India and it goes without saying that it is one of the most wonderfully drafted laws in India. This is what the authors of the Code had to say about death as a punishment:-

"We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the state has been committed."

It may be pertinent to mention here that the Indian Criminal jurisprudence is based on a combination of deterrent and reformatory theories of punishment. While the punishments are to be imposed to create deter amongst the offenders, the offenders are also to be given opportunity for reformation. Keeping these theories in mind, the legislatures drafted Sec. 354 (3) of the Cr.P.C. This subsection basically lays down that special reasons are to be recorded by the Court for imposing death punishment in capital offences. Thus, the position of law after Cr.P.C. 1973 became that the general rule was life imprisonment while the death sentence was to be imposed only in special cases.

Jagmohan's Case:-

The question of constitutional validity of Sec. 302, I.P.C. was discussed in detail by the SC in **Jagmohan V/s State of U.P**. Apart from the constitutional validity, the SC also discussed position in other countries, the structure of Indian Criminal law, various policies and bills proposed in the parliament, the extent of Judicial discretion etc. On the question of constitutional validity the Court observed:-

"The Cr.P.C. requires that the accused must be questioned with regard to the circumstances appearing against him in the evidence. He is also questioned generally on the case and there is an opportunity for him to say whether he wants to say In important cases like murder, the Court always gives a chance to the accused to address the Court on the question of Sentence. Under the Cr.P.C. after convicting the accused, the Court has to pronounce the sentence according to law..."

On all these grounds the SC rejected the argument that under Sec. 302, I.P.C., life of convict is taken without any procedure established by law and therefore, it violates Art. 21 of the constitution. Thus, the SC settled this controversy long back in 1973. However even after Jagmohan's case this question came up again and again.

Bachan Singh's Case:-

The next important case, and which can be termed as a milestone in the Indian Criminal Jurisprudence is the case of Bachan Singh V/s State of Punjab. So strong were the principles laid down by the apex court in this case that the principles are being followed even now despite the fact that SC itself has expressed the need to review criminal jurisprudence from time to time.

Firstly we must understand why **Jagmohan's Case** was reviewed. After Cr. P.C. 1973, death sentence ceased to be the normal penalty for murder [354 (3)]. Another reason was that **Maneka Gandhi's case** gave a new interpretation to Art. 14, 19 and 21 and their interrelationship. Main issues before the SC were constitutional validity of Sec. 302 of the I.P.C. as well as constitutional validity of Sec. 354 (3) of Cr.P.C. While answering the question of reasonableness of death penalty, the constitution bench also discussed various other issues.

These issues were:

Whether death sentence serves any penological purpose?

Views of famous Jurists and sociologists from all over the world.

Various foreign cases and position in other countries.
 Circumstances which can aggravate or mitigate death punishment
 Cases in which the death sentence should be inflicted, and
 The extent of judicial discretion and need of guidelines.

J. Sarkaria delivered the judgment for majority discussing all these issues at length, and the SC, with the majority of 4:1 rejected the challenges to the constitutionality of Sec. 302 I.P.C. as the 354 (3) of Cr. P.C.

J. Bhagwati was the only one to dissent. He said :-

" I am of the opinion that Sec. 302 of the I.P.C. in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Art. 14 and 21 of the constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence".

Some of the observations made by the apex court in Bachan Singh's case are worth noting. On the question of reasonableness of death penalty, the SC observed- ".....if notwithstanding the view of the abolitionists to the contrary, a very large segment of people, the world over, including: sociologists, legislature, Jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion canalized through the peoples representatives in parliament, has repeatedly including the one made recently to abolish or specifically restrict the area of death penalty, if death penalty is still a recognized legal sanction for murder or some types of murder in most of the civilized countries in the world.

If the framers of the Indian constitution were fully aware of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th report and subsequent reports of law commission suggesting retention of death penalty, and recommending revision of the Cr.P.C. and the insertion of the new sections 235 (2) and 354 (3) were before the Parliament when it took up revision of the Cr.P.C., it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in sec. 302, Penal Code is unreasonable and not in the public interest. The impugned provision in Sec. 302, violates neither the letter nor the ethos of Article 19". [Para 132]

This view of the SC was supposed to negate any chance of a controversy in future on the question of death sentence. On the question of " Whether death Penalty serves any penological purpose?", the SC considered a no. of opinions from all over the world. Out of them, the opinion of Sir James Fitzjames Stephen, the great Jurist, who was concerned with the drafting of I.P.C. is very important to mention- " No other punishment deters man so effectually from committing crimes as the punishment of death. This is one of those propositions which is difficult to prove simply because they are in themselves more obvious than any proof can make them.

In any secondary punishment, however terrible, there is hope, but death is death, it's terrors cannot be described more forcibly. " These views are very strong answers to the people who oppose death punishment with the arguments that it does not serve penological purpose.

When can death sentence be inflicted

Now comes the questions as to when should the courts be inclined to inflict death sentence to an accused? As have been stated earlier, after Cr.P.C., 1973, death sentence is the exception while life imprisonment is the rule. Therefore, by virtue of section 354(3) of Cr.P.C., it can be said that death sentence be inflicted in special cases only. The apex court modified this terminology in **Bachan Singh's Case** and observed- " A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed..".

To decide whether a case falls under the category of rarest of rare case or not was completely left upon the court's discretion. However the apex court laid down a few principles which were to be kept in mind while deciding the question of sentence. One of the very important principles is regarding aggravating and mitigating circumstances. It has been the view of the court that while deciding the question of sentence, a balance sheet of aggravating and mitigating circumstances in that particular case has to be drawn. Full weightage should be given to the mitigating circumstances and even after that if the court feels that justice will not be done if any punishment less than the death sentence is awarded, then and then only death sentence should be imposed.

Again in Machhi Singh vs. State of Punjab the court laid down:-

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

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

(b). Are there circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offenders?" The principles laid down by the apex court were reiterated in its latest judgment in **Sushil Murmu Vs. State of Jharkhand**:-

"In rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded."

The SC has also discussed such circumstance in various cases. These circumstances include:

Murder committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

Murder- for a motive which evinces total depravity and meanness.

Murder of a Scheduled cast or Scheduled tribe- arousing social wrath (not for personal reasons). Bride burning/ Dowry death.

Murderer in a dominating position, position of trust or in course of betrayal of the motherland.

Where it is enormous in proportion.

Victim- innocent child, helpless woman, old/infirm person, public figure generally loved and respected by the community.

If upon taking an overall view of all the circumstances and taking into account the answers to the question posed by way of the test of rarest of rare cases, the circumstances of the case are such that death penalty is warranted, the court would proceed to do so.

Judicial discretion:-

For all the offences, in which death sentence is the punishment, it may be noted that it is not the only punishment, it is the extreme penalty. Thus, these sections, by virtue of their very wordings themselves, provide for a discretion which is to be vested in the courts to decide the quantum of punishment. So the ultimate judicial discretion to decide whether death sentence is to be imposed or not, have been vested in courts right from the inception of Penal Code in 1860. However the manner of exercising this discretion has undergone various changes with the changing time and evolution of new principles. There is also a debate going on, about the extent of this judicial discretion.

In **Jagmohan's Case** the SC held :-

"The structure of our criminal law which is principally contained in the IPC and the Cr.P.C. undertakes the policy that when the legislatures have defined an offence with clarity and prescribed the maximum punishment, therefore a wide discretion in the matter of fixing the degree of punishment should be allowed to judges."

Thus the SC was in favor of wide discretion to be given to judges for deciding the degree of punishment.

However, this wide direction was restricted by section 354(3) of Cr.P.C. 1973 which laid down the law that for death sentence special reasons are to be recorded, meaning thereby, that death sentence is to be imposed in special cases only.

In a case the court observed:-

"The discretion to impose the sentence of death or life imprisonment is not so wide after all section 354 (3) has narrowed the discretion. Death sentence is ordinarily ruled out and can only be imposed for special reasons. Judges are left with the task of discovering 'Special reasons'.

The courts themselves were concerned for the way in which this discretion was being used. The court expressing its concern in **Dalbir Singh V/s State of Punjab** said :-

"Notwithstanding the catalogue of grounds warranting death sentence as an exceptional measure, 'life' being the rule, the judicial decisions have been differing (and dithering) at various levels with the result the need for a thorough re-examination has been forced on courts by counsel on both sides".

Though this problem was solved by the apex court itself to a very large extent by discussing various issues at length and laying down few very-very important guidelines. J.Sarkaria viewed in **Bachan Singh's case**:-

"It is imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along with high road of legislative policy outlined in Sec. 354(3)....."

Need of Guidelines:-

Thus, the SC, by laying down the guidelines in **Bachan Singh's case** and after that in **Machhi Singh's case** attempted to direct the courts toward a particular path while deciding the question of sentence. But the broader question is that, has that actually happened in last two and a half decades? A brief analysis of the cases decided

by the SC. Regarding the question of death sentence over last 25 years, will reveal how differing/dithering the judgments have been.

In **Kurami alias Mutha vs. State of Tamil Nadu**, the accused was a poor agriculturist and had a wife and five children to support, but considering the murder of two persons as brutal the death sentence was confirmed but this case was before Bachan Singh's case, and till that time the principle of aggravating and initiating circumstances was not laid down.

In **Mahesh V/s State of M.P.**, the accused were convicted for 5 murders. The cause of which was marriage of a lady belonging to higher caste with a harijan boy. The court held " To give the lesser punishment for the appellants would be to render the just icing system of this country suspect. The common man will lose faith in court. In such cases he understands and appreciates the language of deference more than the informative jargon."

While the very next year, in a brutal and dear case of bride burning the S.C. observed :-
" From the judgment of the High Court, it is apparent that death sentence is awarded more out of anger than on reasons.... Judicial discretion should not be allowed to be swayed by emotion and indignation. Ultimately the death sentence was commuted to life imprisonment.

In 1994, while deciding the case of Anshad Vs. State of Karnataka, the SC commuted death sentence to life imprisonment while the accused was convicted of a brutal, diabolical murder. The sentence was commuted because the SC felt that there are chances of reformation of accused. With due respect to the court's view, it is submitted that there still remains a question creating doubts on such judgments as to how to judge the chances of reformation of an accused in a particular case. However, it can be done on the line of SC's judgment in Javed Ahmed Abdul Hamid passawa VS. State of Maharashtra on this case. The death sentence of accused was affirmed in 1983, but later, on the basis of serious atonement., the SC commuted the sentence to life imprisonment.

Then comes the very important case of **Mohd. Chaman Vs. State (N.C.T.) of Delhi**. In this case a one and half year old girl was raped by the accused, and because of the heinous act, she sustained serious injuries and died. H.C. confirmed the death sentence awarded by the sessions Court. But the Hon'ble SC commuted the death sentence into life imprisonment, observing :-
"The crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires.... We are not persuaded to accept that the case can be called one of the ' rarest of rare cases' deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment".

Can it be said that justice was done? In order to avoid controversies and to put forward their liberal approach, Judges often change the degree of offence avoiding the guidelines laid down by the apex court itself. This should not happen. It is the basic duty of a judge to render justice in toto and while doing so he shall not get affected by any surrounding circumstances or controversies which may arise in future. But this is an idealistic approach and cannot be followed completely. Indian legal system is no different and it seems that the judges also get prejudiced with their surroundings and social circumstances. This could be the only reason that we see such different approaches being taken by different judges in offences of similar nature.

In the case of **Mohd. Chaman**, on the question of extent of judicial discretion, the court observed :-
" Such standardization is well nigh impossible. Firstly degree of culpability cannot be measured in any case. Secondly criminal cases cannot be categorized, there being infinite, unpredictable and unforeseeable variations. Thirdly in such categorization, the sentencing procedure will cease to be judicial. And fourthly, such standardization or sentencing discretion is policy matter belonging to the legislature beyond the courts functions".

Despite the fact that full discretion is given to judges, in ultimate analysis, it can safely be said that such wide discretion has resulted into enormously varying judgments, which does not portray a good picture of the justice delivery system. What is needed to be done; therefore; is to revise and review the guidelines and principles laid down in cases like Bachan Singh or Machhi Singh, or if it is felt that these guidelines still stand firm and fit perfectly in the present social scenario, then these guidelines have to be strictly complied with, so that the persons convicted for offence of similar nature are awarded punishments of identical degree.