REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1531-1533 OF 2015

Vikas Yadav ...Appellant(s)

Versus

State of U.P. and Ors. Etc. Etc. ...Respondent(s)

WITH

CRIMINAL APPEAL NOS. 1528-1530 OF 2015

J U D G M E N T

Dipak Misra, J.

The appellants in this batch of appeals stand convicted for the offences under Sections 302, 364, 201 read with Section 34 of the Indian Penal Code (IPC). This Court while hearing the special leave petitions on 17.08.2015 had passed the following order:-

"Delay condoned.

> Having heard learned senior counsel for the petitioners at great length, we are of the view, that the impugned orders call for no interference whatsoever insofar as the conviction of the petitioners is concerned. The conviction of the three petitioners, as recorded by the courts below, is accordingly upheld.
>
> Issue notice, on the quantum of sentence, returnable after six weeks."

2. On 16.06.2015 leave was granted. Thus, we are only concerned with the legal defensibility and the justifiability of the imposition of sentence.

3. The arguments in these appeals commenced on issues of law. Mr. U.R. Lalit and Mr. Shekhar Naphade, learned senior counsel appearing for the appellant in Criminal Appeal Nos. 1531-1533 of 2015 and Mr. Atul Nanda, learned senior counsel appearing for the appellant in Criminal Appeal Nos. 1528-1530 of 2015 questioned the propriety of the sentence as the High Court has imposed a fixed term sentence, i.e., 25 years for the offence under Section 302 IPC and 5 years for offence under Section 201 IPC with the stipulation that both the sentences would run consecutively. It is apt to note here that separate sentences

have been imposed in respect of other offences but they have been directed to be concurrent. After advancing the arguments relating to the jurisdiction of the High Court as well as this Court on imposition of fixed term/period sentence, more so when the trial court has not imposed death sentence, the learned counsel argued that the factual score in the instant case did not warrant such harsh delineation as a consequence disproportionate sentences have been imposed.

4. Keeping in view the chronology of advancement of arguments, we think it apt to deal with the jurisdictional facet. If we negative the proposition advanced by the learned counsel for the appellants, then only we shall be required to proceed to deal with the facts as requisite to be stated for the purpose of adjudicating the justifiability of imposition of such sentence. If we accede to the first submission, then the second aspect would not call for any deliberation. At this juncture, it is necessary to state that the learned trial judge by order dated 30.05.2008 sentenced Vikas Yadav and Vishal Yadav to life imprisonment as well

as fine of one lakh each under Section 302 IPC and, in default of payment of fine, to undergo simple imprisonment for one year. They were sentenced to undergo simple imprisonment for ten years and fine of Rs. 50,000/- each for their conviction under Section 364/34 IPC, in default to undergo simple imprisonment for six months and rigorous imprisonment for five years and fine of Rs. 10,000/- each under Section 201/34 IPC, in default, simple imprisonment for three months. All sentences were directed to run concurrently. Sukhdev Yadav @ Pehalwan who was tried separately because of his abscondence in SC No. 76 of 2008 was convicted for the offences under Sections 302/364/34 IPC and Section 201 and by order dated 12.07.2011, he was sentenced to undergo life imprisonment and fine of Rs. 10,000/- for commission of the offence under Section 302 IPC, in default, to undergo rigorous imprisonment for two years; rigorous imprisonment for seven years and fine of Rs. 5,000/- for commission of the offence under Section 364 IPC, in default, to suffer rigorous imprisonment for six months; rigorous imprisonment for three years and fine of

Rs. 5,000/- for his conviction under Section 201 IPC, in default, to undergo further rigorous imprisonment for six months. All sentences were directed to be concurrent.

5. Be it noted, the prosecution, – State of NCT of Delhi preferred an appeal under Section 377 CrPC for enhancement of sentence of imprisonment of life to one of death for the offence under Section 302 IPC. The High Court addressed to number of issues, namely, (a) statutory provisions and jurisprudence regarding imposition of the death penalty; (b) death sentence jurisprudence – divergence in views; (c) life imprisonment – meaning and nature of; (d) the authority of the judiciary to regulate the power of the executive to remit the sentence or to put in other words jurisdiction of the court to direct minimum term sentence in excess of imposition of 14 years; (e) if there are convictions for multiple offences in one case, does the court have the option of directing that the sentences imposed thereon shall run consecutively and not concurrently; (f) honour killing – whether penalty of only the death sentence; (g) contours of the jurisdiction of the High

Court to enhance a sentence imposed by the trial court and competency to pass orders under Section 357 of the CrPC in the appeal by the State or revision by a complainant seeking enhancement of sentence; (h) sentencing procedure and pre-sentencing hearing nature of; (i) concerns for the victims – award of compensation to heal and as a method of reconciling victim to the offender; (j) State's liability to pay compensation; (k) fine and compensation – constituents, reasonability and adequacy; (l) sentencing principles; (m) jurisdiction of the appellate court while considering a prayer for enhancement of the sentence; (n) if not death penalty, what would be an adequate sentence in the present case; and (o) what ought to be the fitnes in the present case.

6. Apart from the said aspects, the High Court also addressed to certain aspects which are specific to the case at hand to which we will advert to at a later stage.

7. The High Court, after addressing the aspects which we have catalogued and some other fact specific issues, imposed the following sentences:-

"881. In view of the above discussion, we modify and enhance the sentence imposed by the judgments dated 30th May, 2008 upon the defendants Vikas Yadav, Vishal Yadav and 12th July, 2011 upon Sukhdev Yadav and direct that they shall be liable to undergo the following sentences :-

(I)

For commission of offences under	**Sentences awarded to each of Vikas Yadav & Vishal Yadav**	**Sentence awarded to Sukhdev Yadav**
Section 302/34 IPC	Life imprisonment which shall be 25 years of actual imprisonment without consideration of remission, and fine of Rs. 50 lakh each	Life imprisonment which shall be 20 years of actual imprisonment without consideration of remission, and fine of Rs.10,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment of 3 years.	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for one month.
Section 364/34 IPC	Rigorous imprisonment for 10 years with a fine of Rs.2 lakh each	10 years rigorous imprisonment with fine of Rs.5,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment for 6 months	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for 15 days
Section 201/34 IPC	Rigorous imprisonment for 5 years and a fine Rs.2 lakh each	5 years rigorous imprisonment with fine of Rs.5,000/-
	Upon default in payment of fine, they shall be liable to undergo rigorous imprisonment for 6 months	Upon default in payment of fine, he shall be liable to undergo simple imprisonment for 15 days

(II) It is directed that the sentences for conviction of the offences under Section 302/34 and Section 364/34 IPC shall run

concurrently. The sentence under Section 201/34 IPC shall run consecutively to the other sentences for the discussion and reasons in paras 741 to 745 above.

(III) The amount of the fines shall be deposited with the trial court within a period of six months from today.

(IV) We further direct that the fine amounts of Rs.50,00,000/- of each of Vikas Yadav and Vishal Yadav when deposited with the trial court, are forthwith disbursed in the following manner:

(i)	To the Government of Uttar Pradesh towards investigation, prosecution and defence of the cases with regard to FIR No.192/2002 P.S. Ghaziabad.	Rs.5,00,000/- from the deposit of the fine of each of the defendants
(ii)	To the Government of NCT of Delhi towards prosecution, filing and defence of litigation, administration of courts and witness protection with regard to FIR No.192/2002 P.S. Ghaziabad	Rs.25,00,000/- from the deposit of the fine of each of the defendants
(iii)	To Nilam Katara towards the costs incurred by her in pursuing the matter, filing petitions and applications as well as defending all cases after 16th/17th February, 2002 with regard to FIR No.192/2002 in all courts.	Rs.20,00,000/- from the deposit of the fine of each of the defendants

(V) Amount of fines deposited by Sukhdev Yadav and other fines deposited by Vikas Yadav and Vishal Yadav shall be forwarded to the Delhi Legal Services Authority to be utilised under the Victims Compensation Scheme.

(VI) In case an application for parole or remission is moved by the defendants before the appropriate government, notice thereof shall be given to Nilam Katara as well as Ajay Katara by the appropriate government and they shall also be heard with regard thereto before passing of orders thereon.

(VII) So far as Vikas Yadav is concerned, we also issue the following directions:

(i) The period for the admission in AIIMS from 10th October, 2011 to 4th November, 2011 (both days included) shall not be counted as a

period for which he has undergone imprisonment. His records and nominal rolls shall be accordingly corrected by the jail authorities.
(ii) Vikas Yadav shall make payments of the following amounts to the Government of NCT of Delhi:

(i)	Amounts paid to AIIMS	:	Rs.50,750/-
(ii)	Towards security deployment during AIIMS	:	Rs.1,20,012/-
(iii)	OPD visits	:	Rs.50,000/-
(iv)	Taxi fare	:	Rs.18,500/-
	Total	**:**	**Rs.2,39,262/-**

(VIII) So far as Vishal Yadav is concerned, we direct as hereafter :-

(i) The periods of the admissions in the Batra Hospital totalling 320 days [32 days (from 7th July, 2008 to 7th August, 2008); 24 days (from 14th August, 2008 to 6th September, 2008), 53 days (24th October, 2008 to 15th December, 2008); 100 days (from 25th February, 2009 to 6th June, 2009); 71 days (from 7th October, 2009 to 16th December, 2009); 36 days (from 29th September, 2010 to 3rd November, 2010); 4 days (from 14th October, 2011 to 17th October, 2011)] shall not be counted as a period which he has undergone imprisonment. His records and nominal rolls shall be accordingly corrected by the jail authorities.

(ii) Vishal Yadav shall make payments of the following amounts to the Government of NCT of Delhi:

(i)	Provision of security during the above seven hospital admissions post conviction	:	Rs.14,75,184/-
(ii)	During OPD hospital visits	:	Rs.50,000/-
(iii)	Post conviction visits on taxi fare	:	Rs.14,700/-
	Total	**:**	**Rs.15,39,884/-**

(IX) The amounts directed to be paid by Vishal Yadav and Vikas Yadav at Sr. Nos.(VI) and (VII) above shall be deposited within four months of the passing of the present order.

(X) In the event of the failure to deposit the amount as directed at Sr. Nos.(VI), (VII) and (VIII), the defaulting defendant (Vikas Yadav and Vishal Yadav) shall be liable to undergo rigorous imprisonment of one year. It is made clear that these directions are in addition to the substantive sentences imposed upon them."

8. We think it appropriate to deal with the aspect of legal permissibility of the imposition of sentence first as the learned senior counsel appearing for the appellants had argued quite astutely with regard to the non-acceptability of such fixed term sentences and other facets relating to it. After we answer the said issue, if needed, we shall dwell upon the sustainability and warrantableness of the sentences in the facts of the case.

9. Learned senior counsel for the appellants have advanced the following propositions to bolster the first stand:-

(i) When the Indian Penal Code provides for only two punishments, i.e., imprisonment for life or death, the court by judge-made law cannot introduce a third category of punishment.

(ii) The prescription of third category of punishment is contrary to Sections 28 and 386 CrPC and Section 302 IPC.

(iii) Prescription of sentence is within the domain of the legislature and the court can only impose such sentence

what has been provided for by the legislature and not invent one.

(iv) Wherever the legislature has thought it appropriate, it has provided sentences by providing certain years, such as, offences punishable under Sections 376A, 376D and 392 IPC; Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985; and when it is not provided for in the IPC in respect of Section 302 IPC, the court cannot impose a third category of sentence as that would tantamount to legislation by the judiciary.

(v) When the court imposes a third category of sentence, there is either express or implied direction for not granting the remission as provided under Section 433-A after expiry of 14 years which is legally not permissible inasmuch as this Court in exercise of power under Article 142 of the Constitution cannot direct a statutory provision to be kept in abeyance as a mode of sentencing structure.

(vi) The Constitution Bench decisions in ***K.M. Nanavati v. State of Bombay***[1] ***and Sarat Chandra Rabha and others v. Khagendranath Nath and others***[2] have not been considered by the majority in ***Union of India v. V. Sriharan alias Murugan and others***[3] and it, therefore, requires reconsideration.

(vii) When the trial court has imposed the life sentence and the question of commutation does not arise, as a logical corollary, imposition of fixed term sentence is impermissible as has been held in ***Sahib Hussain alias Sahib Jan v. State of Rajasthan***[4] and ***Gurvail Singh alias Gala v. State of Punjab***[5]. In essence, in the absence of a death sentence, a fixed term sentence cannot be imposed. The appellate court, assuming has the authority, can impose only such sentence which could have been imposed by the trial court as has been clearly held in ***Jagat Bahadur v.***

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1 AIR 1961 SC 112

2 AIR 1961 SC 334

3 (2016) 7 SCC 1

4 (2013) 9 SCC 778

5 (2013) 10 SCC 631

State of Madhya Pradesh[6] *a*nd in ***Shankar Kerba Jadhav and others v. The State of Maharashtra***[7]***.***

(viii) The Court when imposes sentence by saying "fixed term sentence", it takes away the power of the executive which is constitutionally not permissible as per the pronouncements in ***K.M. Nanavati*** (supra), ***Sarat Chandra Rabha*** *(supra)* and ***A.R. Antulay v. R.S. Naik and another***[8].

(ix) There is remotely any warrant to direct the sentence for life and sentence imposed under Section 201 IPC to run consecutively, and it is a palpable error which cannot be countenanced, and in fact, it runs counter to the Constitution Bench decision in ***Muthuramalingam & Ors. v. State represented by Insp. of Police***[9].

(ix) The High Court has fallen into grave error by imposing 20 years of sentence on Sukhdev Yadav, whereas Vikas Yadav and Vishal Yadav had been sentenced for 25 years which demonstrates total non-application of mind.

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[6] AIR 1966 SC 945
[7] AIR 1971 SC 840
[8] (1988) 2 SCC 602
[9] 2016 (7) SCALE 129

(x) The issue of enhancement of sentence and fixed term was not referred to the Constitution Bench but the Constitution Bench has dealt with the same and, therefore, the decision in ***V. Sriharan*** (supra) suffers from impropriety.

10. Mr. Dayan Krishnan, learned senior counsel appearing for the State of NCT Delhi, in his turn, submits that the judgment rendered by the Constitution Bench in ***V. Sriharan*** (supra) is absolutely correct and is a binding precedent from all spectrums and does not require reconsideration. Learned senior counsel further argued that the judgment rendered by the Constitution Bench does not run counter to the principles set out in the earlier two judgments in ***K. Nanavati*** (supra) and ***Shankar Kerba Jadhav*** (supra) because the said judgments have been rendered in altogether different contexts and the opinion expressed therein has to be understood regard being had to the factual score that arose therein. According to the learned counsel for the State, the constitutional courts have power to pass fixed term sentence in the interest of justice.

Defending the imposition of sentence in the case, Mr. Krishnan would submit that when the State had preferred an appeal for enhancement of sentence, i.e., from imprisonment of life to death sentence, the decision of the High Court is absolutely flawless. It is argued by him that the direction for the life sentence and the sentence imposed under Section 201 IPC to be consecutive and not to run concurrently cannot be found fault with as the High Court has ascribed adequate reasons for the same and it is in consonance with the principle stated in ***Muthuramalingam*** (supra) and if there is any deviation therein, the same can be rectified by this Court.

11. Ms. Aparajita Singh, learned counsel appearing for the informant, supported the stand of the State and emphasized that in a crime of honor killing stringent punishment deserves to be imposed.

12. Presently, we shall proceed to deal with the contentions, and we make it clear the delineation thereof shall not be in strict seriatim as the contentions in a way overlap. Section 28 CrPC reads as follows:-

"**28. Sentences which High Courts and Sessions Judges may pass**.—

(1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years."

13. The submission of the learned senior counsel for the appellants is that the High Court can pass any sentence "authorised by law" and a Sessions Judge or an Additional Sessions Judge may pass any sentence authorised by law but for any sentence of death passed by any such Judge shall be subject to confirmation by the High Court and, therefore, no court can impose a sentence if it is not authorised by law. The fulcrum of the submission is that the said provision is substantive in nature and it is not in the realm of adjective law. In this context, our attention has been drawn to Section 386 CrPC. The said provision reads as follows:-

"**386. Power of the Appellate Court.—** After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of

> showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

14. Elaborating on the same, it is urged that an appellate court can impose a sentence what the trial Judge could have imposed. The appellate jurisdiction which is classically called 'error jurisdiction' only embraces to rectify the errors and thereafter impose the sentence. It may dismiss, alter or enhance the sentence depending upon the fact situation when an appeal is preferred, but it does not possess the jurisdiction to impose any sentence that does not have the sanction of law. In this context, learned senior counsel have drawn our attention to Section 53 IPC. It is as follows:-

> "**53. Punishments**.—The punishments to which offenders are liable under the provisions of this Code are—
> First — Death;
> Secondly.—Imprisonment for life;
> Fourthly —Imprisonment, which is of two descriptions, namely:—
> (1) Rigorous, that is, with hard labour;

(2) Simple;
Fifthly —Forfeiture of property;
Sixthly —Fine."

15. According to them, the court cannot travel beyond Section 53 IPC which deals with punishments. Section 302 IPC provides for punishment for murder. It is as follows:-

> "302. **Punishment for murder**.—Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

16. Mr. Lalit and Mr. Naphade would contend that the court can either impose sentence of imprisonment for life or sentence of death but any other fixed term sentence is totally inconceivable in terms of the statute. In respect of an offence under Section 302, life is the minimum and the maximum is the death sentence and, therefore, the court has a choice between the two and is not entitled to follow any other path, for that would be violative of the sanctity of Article 21 of the Constitution which clearly stipulates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Learned counsel for the appellants submit that imposition

of sentence for a fixed term is contrary to the procedure established by law and hence, impermissible.

17. We shall first see how the Constitution Bench in ***V. Sriharan*** (supra) has dealt with this aspect. The three-Judge Bench in ***Union of India v. V. Sriharan alias Murugan and others***[10] framed certain questions for consideration by the Constitution Bench. The Constitution Bench in ***V. Sriharan*** (supra) reproduced the said questions and thereafter formulated the core questions for answering the same. After adverting to the same, the Court observed that the issues raised were of utmost critical concern for the whole country as the decision on the questions would determine the procedure for awarding sentence and the criminal justice system. Thereafter, the Court referred to the authority in ***Swamy Shraddananda (2) v. State of Maharashtra***[11] and framed the following questions:-

> "**2.1.** Maintainability of this writ petition under Article 32 of the Constitution by the Union of India.

[10] (2014) 11 SCC 1
[11] (2008) 13 SCC 767

2.2. (*i*) Whether imprisonment for life means for the rest of one's life with any right to claim remission?

(*ii*) Whether as held in *Shraddananda case (2)*, a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?

2.3. Whether the appropriate Government is permitted to grant remission under Sections 432/433 of the Criminal Procedure Code, 1973 after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its constitutional power(s) under Article 32?

2.4. Whether the Union or the State has primacy for the exercise of power under Section 432(7) over the subject-matter enlisted in List III of the Seventh Schedule for grant of remission?

2.5. Whether there can be two appropriate Governments under Section 432(7) of the Code?

2.6. Whether the power under Section 432(1) can be exercised *suo motu*, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not?

2.7. Whether the expression "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?"

18. We have reproduced the entire paragraph for the sake of completeness and understanding. The issues that have been raised by Mr. Lalit and Mr. Naphade fundamentally relate to the issues in para 2.2. The majority in the

Constitution Bench, after referring to the decisions in ***Maru Ram v. Union of India and others***[12], ***Gopal Vinayak Godse v. State of Maharashtra and others***[13] and ***State of Madhya Pradesh v. Ratan Singh and others***[14], opined that the legal position is quite settled that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Criminal Procedure Code by the appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz. the President or the Governor of the State respectively. The Court referred to the decision in ***Ashok Kumar alias Golu v. Union of India and others***[15], wherein it was specifically ruled that the decision in ***Bhagirath v. Delhi Administration***[16] does not run counter to ***Godse*** (supra) and ***Maru Ram (supra)***. The relevant paragraph from ***Ashok Kumar*** (supra) is reproduced below:-

[12] (1981) 1 SCC 107
[13] AIR 1961 SC 600
[14] (1976) 3 SCC 470
[15] (1991) 3 SCC 498
[16] (1985) 2 SCC 580

> "*15*. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or constitutional power has been exercised under Articles 72/161 of the Constitution. In *Bhagirath case* the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim the benefit of Section 428 of the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him".

19. Referring to Section 57 IPC, the decision in ***Ashok Kumar*** (supra) reiterated the legal position as under:-

> '*9*. … The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose.'

20. It has been held in ***V. Sriharan*** (supra) that the said observations are consistent with the ratio laid down in ***Godse*** (supra) and ***Maru Ram*** (supra).

21. Thereafter, the majority in ***V. Sriharan*** (supra) quoted a paragraph from ***Bhagirath's*** case (supra) which pertained to set-off under Section 428 CrPC which is to the following effect:-

> "11. ... The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in *Gopal Vinayak Godse*, imprisonment for the remainder of life."

22. Thereafter, the Court in ***V. Sriharan*** (supra) observed:-

> "We fail to see any departure from the ratio of *Godse case*; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the Court while allowing the appeal/writ petition. The Court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that orders have been passed by the appropriate authority under Section 433 of the Criminal Procedure Code'.

> These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set-off the period of detention as undertrial would enure to the benefit of the convict provided the appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of *Bhagirath* case, therefore, does not run counter to the ratio of this Court in *Godse* or *Maru Ram*.
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> xxxxx xxxxx
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> **61.** Having noted the abovereferred to two Constitution Bench decisions in *Godse* and *Maru Ram* which were consistently followed in the subsequent decisions in *Sambha Ji Krishan Ji*[17], *Ratan Singh*, *Ranjit Singh*[18], *Ashok Kumar* and *Subash Chander*[19]. The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Criminal Procedure Code".

23. After so stating, the majority addressed to the concept of remission. It opined that:-

> "As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or

[17] (1974) 1 SCC 196
[18] (1984) 1 SCC 31
[19] (2001) 4 SCC 458

other relevant rules based on his/her good behaviour or such other stipulations prescribed therein. The other remission is the grant of it by the appropriate Government in exercise of its power under Section 432 of the Criminal Procedure Code. Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid down in *Swamy Shraddananda (2).*"

24. After dwelling upon the said aspect, the Court referred to the principles stated in paragraphs 91 and 92 in ***Swamy Shraddananda (2)*** (supra). It adverted to the facts in ***Swamy Shraddananda (2)*** (supra) and analysed that this Court had made a detailed reference to the decisions in ***Bachan Singh v. State of Punjab***[20], ***Machhi Singh and others v. State of Punjab***[21], and ***Jagmohan Singh v. State of U.P.***[22] where the principle of rarest of the rare case was formulated. After referring to the said decisions, the

[20] (1980) 2 SCC 684
[21] (1983) 3 SCC 470
[22] (1973) 1 SCC 20

majority reproduced paragraphs 34, 36, 43, 45, and 47 of ***Swamy Shraddananda (2)*** (supra) and came to hold that:-

> "**66.** After noting the above principles, particularly culled out from the decision in which the very principle, namely, "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of the rare case principle nor *Machhi Singh* categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, *Aloke Nath Dutta* v. *State of W.B.*[23] This Court in *Swamy Shraddananda (2)* also made a reference to a report called "*Lethal Lottery, The Death Penalty in India*" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puducherry wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred to and one of the main facets made in the Report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such inconsistencies and lamented over the same in the following words in para 52: [*Swamy Shraddananda (2) case*, SCC p. 790]
>
> > "*52.* The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand

[23] (2007) 12 SCC 230

> there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus, the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

25. The larger Bench endorsed the anguish expressed by the Court and opined that the situation is a matter of serious concern for this Court and it wished to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. Be it noted, the three-Judge Bench in ***Swamy Shraddananda*** *(supra)* took note of the plan devised by the accused, the betrayal of trust, the magnitude of criminality and the brutality shown in the commission of the ghastly crime and the manner in which the deceased was sedated and buried while she was alive. The Court, taking into consideration the materials brought on record in

entirety, imposed the sentence of fixed term imprisonment instead of sentence of death.

26. The issue arose before the Constitution Bench with regard to the mandate of Section 433 CrPC. The majority took note of the fact that the said provision was considered at length and detailed reference was made to Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the IPC in ***Swamy Shraddananda(2)*** *(supra)* to understand the sentencing procedure prevalent in the Court. Thereafter, the majority reproduced paragraphs 91 and 92 from the said judgment which we think are required to be reproduced to appreciate the controversy:-

> "91. The legal position as enunciated in *Kishori Lal*[24], *Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan*[25] and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few .cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.
>
> 92. The matter may be looked at from a slightly different angle. The issue of sentencing has two

[24] *Kishori Lal v. King Emperor*, 1914 SCC OnLine PC 81
[25] (2001) 6 SCC 296

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."

[Emphasis supplied]

27. Thereafter, the majority adverted to the concurring opinion of Fazal Ali, J. in ***Maru Ram'***s case and reproduced copiously from it and opined thus:-

> "Keeping the above hard reality in mind, when we examine the issue, the question is "whether as held in *Shraddananda (2)*, a special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is good in law? When we analyse the issue in the light of the principles laid down in very many judgments starting from *Godse*, *Maru Ram*, *Sambha Ji Krishan Ji*, *Ratan Singh*, it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's lifespan".

28. At that juncture, the issue arose with regard to the interpretation of Section 433-A CrPC. In that context, the majority opined:-

> "In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A CrPC assumes significance. His contention was that under Section 433-A CrPC what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and up to the end of one's lifespan. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said .section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person shall not be released from prison unless he had served *at least* fourteen years of imprisonment" (emphasis supplied). Therefore, when the minimum imprisonment is prescribed under the statute, there will be every justification for the court which considers the nature of offence for

> which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases. For a statutory authority competent to consider a case for remission after the imposition of punishment by court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his *mens rea* to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict."
>
> (Emphasis Supplied)

29. As we notice, there has been advertence to various provisions of IPC, namely, Sections 120-B(1), 121, 132, 194, 195-A, 302, 305, 307 (Second Part), 376-A, 376-E, 396 and 364-A and certain other provisions of other Acts. The Court observed that death sentence is an exception rather than a rule and where even after applying such great precautionary

prescription when the trial courts reach a conclusion to impose the maximum punishment of death, further safeguards are provided under the Criminal Procedure Code and the special Acts to make a still more concretised effort by the higher courts to ensure that no stone is left unturned before the imposition of such capital punishments. After so stating, the majority referred to the report of Justice Malimath Committee and Justice Verma Committee, and in that context, observed that:-

> "**91.** We also note that when the Report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in *Swamy Shraddananda (2)*. Insofar as Justice Verma Committee Report of 2013 is concerned, the amendments introduced after the said Report in Sections 370(6), 376-A, 376-D and 376-E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well-thought out principles stated in *Swamy Shraddananda (2)*. In fact, Justice Verma Committee Report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to *Mohd. Munna*[26], *Rameshbhai Chandubhai Rathod (2)* v. *State of Gujarat*[27] and *State of U.P.* v. *Sanjay Kumar*[28] and nothing more. Further, the said amendment can

[26] (2005) 7 SCC 764
[27] (2011) 2 SCC 764
[28] (2012) 8 SCC 537

> only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end of the convict's lifespan.

30. The purpose of referring to the aforesaid analysis is only to understand the gravity and magnitude of a case and the duty of the Court regard being had to the precedents and also the sanction of law.

31. Dealing with the procedure as a substantive part, the majority opined that:-

> "Such prescription contained in the Criminal Procedure Code, though procedural, the substantive part rests in the Penal Code for the ultimate confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Criminal Procedure Code and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal Code and the Criminal Procedure Code, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment".
>
> [Underlining is ours]

32. We need not advert to other aspects that have been dwelt upon by the Constitution Bench, for we are not concerned with the same. The submission of the learned senior counsel for the appellants is that there is an apparent error in the Constitution Bench decision as it has treated the provisions of CrPC as procedural. On a reading of the decision, it is manifest that the majority has explained how there is cohesive co-existence of CrPC and IPC. We may explain it in this manner. Section 28 CrPC empowers the court to impose sentence authorized by law. Section 302 IPC authorizes the court to either award life imprisonment or death. As rightly submitted by Mr. Lalit and Mr. Naphade, there is a minimum and maximum. Life imprisonment as held in ***Gopal Vinayak Godse*** *(supra)*, ***Ratan Singh*** *(supra)*, ***Sohan Lal v. Asha Ram and others***[29] and ***Zahid Hussein and others v. State of W.B. and another***[30] means the whole of the remaining period of the convict's natural life. The convict is compelled to live in

[29] (1981) 1 SCC 106
[30] (2001) 3 SCC 750

prison till the end of his life. Sentence of death brings extinction of life on a fixed day after the legal procedure is over, including the ground of pardon or remission which are provided under Articles 71 and 161 of the Constitution. There is a distinction between the conferment of power by a statute and conferment of power under the Constitution. The same has been explained in ***Maru Ram*** (supra) and ***V. Sriharan*** (supra). Recently, a two-Judge Bench in ***State of Gujarat & Anr. v. Lal Singh @ Manjit Singh & Ors.***[31] in that context has observed thus:-

> "In Maru Ram (supra) the constitutional validity of Section 433-A CrPC which had been brought in the statute book in the year 1978 was called in question. Section 433-A CrPC imposed restrictions on powers of remission or commutation in certain cases. It stipulates that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment. The majority in Maru Ram (supra) upheld the constitutional validity of the provision. The Court distinguished the statutory exercise of power of remission and exercise of

[31] AIR 2016 SC 3197 : 2016 (6) SCALE 105

power by the constitutional authorities under the Constitution, that is, Articles 72 and 161. In that context, the Court observed that the power which is the creature of the Code cannot be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States, for the source is different and the substance is different. The Court observed that Section 433-A CrPC cannot be invalidated as indirectly violative of Articles 72 and 161 of the Constitution. Elaborating further, the majority spoke to the following effect:-

> "... Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. ..."

33. In ***Kehar Singh and another v. Union of India and another***[32] the Constitution Bench has opined that the power to pardon is part of the constitutional scheme and it should be so treated in the Indian Republic. There has been further observation that it is a constitutional responsibility of great significance to be exercised when the

[32] (1989)1 SCC 204

occasion arises in accordance with the discretion contemplated by the context. The Court has also held that exercise of the said power squarely falls within the judicial domain and can be exercised by the court by judicial review. In ***Epuru Sudhakar and another v. Govt. of A.P. and others***[33] , in the concurring opinion, S.H. Kapadia, J. (as His Lordship then was) stated thus:-

> "Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations."

And, again:-

[33] (2006) 8 SCC 161

> "... The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of 26 Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future."

34. We have referred to the aforesaid aspect extensively as it has been clearly held that the power of the constitutional authorities under Article 71 and Article 161 of the Constitution has to remain sacrosanct but the power under Section 433-A CrPC which casts a restriction on the appropriate functionary of the Government can judicially be dealt with.

35. To elaborate, though the power exercised under Article 71 and Article 161 of the Constitution is amenable to judicial review in a limited sense, yet the Court cannot exercise such power. As far as the statutory power under Section 433-A is concerned, it can be curtailed when the Court is of the considered opinion that the fact situation deserves a sentence of incarceration which be for a fixed term so that power of remission is not exercised. There are many an authority to support that there is imposition of fixed term sentence to curtail the power of remission and scuttle the application for consideration of remission by the convict. It is because in a particular fact situation, it becomes a penological necessity which is permissible within the concept of maximum and the minimum. There is no dispute over the maximum, that is, death sentence. However, as far as minimum is concerned the submission of the learned counsel for the appellants is courts can say "imprisonment for life" and nothing else. It cannot be kept in such a strait-jacket formula. The court, as in the case at hand, when dealing with an appeal for enhancement of

sentence from imprisonment of life to death, can definitely say that the convict shall suffer actual incarceration for a specific period. It is within the domain of judiciary and such an interpretation is permissible. Be it noted, the Court cannot grant a lesser punishment than the minimum but can impose a punishment which is lesser than the maximum. It is within the domain of sentencing and constitutionally permissible.

36. We must immediately proceed to state that similar conclusion has been reached by the majority in ***V. Sriharan*** (supra) and other cases, Mr. Lalit and Mr. Naphade would submit that the said decision having not taken note of the principles stated in ***K.M. Nanavati*** (supra) and ***Sarat Chandra Rabha*** (supra) is not a binding precedent. In ***K.M. Nanavati*** (supra), the question that arose before the Constitution Bench pertained to the extent of the power conferred on the Governor of a State under Article 161 of the Constitution; and whether the order of the Governor can impinge on the judicial power of this Court with particular reference to its power under Article 142 of

the Constitution. Be it stated, the petitioner therein was convicted under Section 302 IPC and sentenced to imprisonment for life. After the judgment was delivered by the High Court and the writ was received by the Sessions Judge, he issued warrant of arrest of the accused for the purpose of sending him to the police officer in-charge of the City Sessions Court. The warrant was returned unserved with the report that it could not be served in view of the order passed by the Governor of Bombay suspending the sentence upon the petitioner. In the meantime, an application for leave to appeal to Supreme Court was made soon after the judgment was pronounced by the High Court and the matter was fixed for hearing. On that day, an unexecuted warrant was placed before the concerned Bench which directed that the matter is to be heard by a larger Bench in view of the unusual and unprecedented situation. A Special Bench of five Judges of the High Court heard the matter and the High Court ultimately held that as the sentence passed upon the accused had been suspended, it was not necessary for the accused to surrender and,

therefore, Order XXI Rule 5 of the Supreme Court Rules would not apply to the case. The High Court opined that the order passed by the Governor was not found to be unconstitutional. A petition was filed for special leave challenging the conviction and sentence and an application was filed seeking exemption stating all the facts. The matter was ultimately referred to the Constitution Bench, and the larger Bench analyzing various facets of the Constitution, came to hold thus:-

> "21. In the present case, the question is limited to the exercise by the Governor of his powers under Article 161 of the Constitution suspending the sentence during the pendency of the special leave petition and the appeal to this court; and the controversy has narrowed down to whether for the period when this court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence

for the period when this court is in seizin of the case could have been granted by this court itself. If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. But it was contended by Mr Seervai that the words of the Constitution, namely, Article 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument insofar as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Sections 401 and 426 of the Code of Criminal Procedure and Articles 142 and 161 of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Article 142 is not covered by Article 161 and similarly what is covered by Section 426 is not covered by Section 401. On that interpretation Mr Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending cage judicially."

And again:-

"As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only

> operate until the matter became sub judice in this court on the filing of the petition for special leave to appeal. After the filing of such a petition this court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply Rule 5 of Order 21 or to exempt the petitioner from the operation of that Rule. It would be for this court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this court."

37. Relying on the same, it is urged that when a constitutional court adds a third category of sentence, it actually enters into the realm of Section 433-A CrPC which rests with the statutory authority. According to the learned senior counsel for the appellants, after the conviction is recorded and sentence is imposed, the court has no role at the subsequent stage. But when higher sentence is imposed, there is an encroachment with the role of the executive. In this context, learned senior counsel have drawn our attention to the principles stated in another Constitution Bench judgment in ***Sarat Chandra Rabha***

(supra), wherein it has been held that the effect of pardon is different than remission which stands on a different footing altogether. The Constitution Bench, explaining the same, proceeded to state thus:-

> "4. ... In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's *Constitutional Law* on the effect of reprieves and pardons vis-à-vis the judgment passed by the court imposing punishment, at p. 176, para 134:
>
> > "A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial

> power over sentences. 'The judicial power and the executive power over sentences are readily distinguishable,' observed Justice Sutherland. To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment'."

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment, and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was. Therefore the terms of Section 7(*b*) would be satisfied in the present case and the appellant being a person convicted and sentenced to three years' rigorous imprisonment would be disqualified, as five years had not passed since his release and as the Election Commission had not removed his disqualification."

38. The analysis made in the aforesaid passage is to be appropriately appreciated. In the said case, the controversy

arose with regard to the rejection of the nomination paper of the returned candidate on the ground that he was not disqualified under Section 7(b) of the Representation of the People Act, 1951. The Election Tribunal came to hold that the nomination paper of the candidate was wrongly rejected and the allegation pertaining to corrupt practice was not established. On the first count, the election was set aside. The successful candidate preferred an appeal before the High Court which came to hold that the nomination paper of the respondent before it was properly rejected. However, it concurred with the view expressed as regards corrupt practice by the tribunal. The rejection of nomination paper of the candidate was found to be justified by the High Court as he had been sentenced to undergo rigorous imprisonment for three years and five years had not passed since his release. He was sentenced to three years but the sentence was remitted by the government in exercise of power under Section 401 of old CrPC. The contention of the appellant before the tribunal was that in view of the remission, sentence, in effect, was reduced to a period of

less than two years and, therefore, he could not be said to have incurred disqualification within the meaning of Section 7(b) of the said Act. The High Court formed the opinion that the remission of sentence did not have the same effect as free pardon and would not have the effect on reducing the sentence passed on the appellant. In that context, this Court has held what we have quoted hereinabove. What is being sought to be argued on the basis of the aforequoted passage is that the court does not have any role in the matter of remission. It is strictly within the domain of the executive.

39. On a careful reading of both the decisions, we have no iota of doubt in our mind that they are not precedents for the proposition that the court cannot impose a fixed term sentence. The power to grant remission is an executive power and it cannot affect the appeal or revisional power of the court. The powers are definitely distinct. However, the language of Section 433-A CrPC empowers the executive to grant remission after expiry of 14 years and it only enables

the convict to apply for remission. There can be a situation as visualized in ***Swamy Shraddananda (2)*** (supra).

40. Learned senior counsel would submit that it is a judicial innovation or creation without sanction of law and according to them, the majority view of the Constitution Bench is not a seemly appreciation of Section 433-A CrPC. In our considered opinion, the majority view is absolutely correct and binding on us being the view of the Constitution Bench and that apart, we do not have any reason to disagree with the same for referring it to a larger Bench. We are of the convinced opinion that the situation that has been projected in ***Swamy Shraddananda (2)*** (supra) and approved in ***V. Sriharan*** (supra) speaks eloquently of judicial experience and the fixed term sentence cannot be said to be unauthorized in law. Section 302 IPC authorizes imposition of death sentence. The minimum sentence is imprisonment for life which means till the entire period of natural life of the convict is over. The courts cannot embark upon the power to be exercised by the Executive

Heads of the State under Article 71 and Article 161 of the Constitution. That remains in a different sphere and it has its independent legal sanctity. The court while imposing the sentence of life makes it clear that it means in law whole of life. The executive has been granted power by the legislature to grant remission after expiry of certain period. The court could have imposed the death sentence. However, in a case where the court does not intend to impose a death sentence because of certain factors, it may impose fixed term sentence keeping in view the public concept with regard to deterrent punishment. It really adopts the view of "expanded option", lesser than the maximum and within the expanded option of the minimum, for grant of remission does not come in after expiry of 14 years. It strikes a balance regard being had to the gravity of the offence. We, therefore, repel the submission advanced by the learned senior counsel for the appellants.

41. In this context, another submission deserves to be noted. It is canvassed by the learned senior counsel for the appellants that the issue of enhancement and scope of

enhancement was not referred to the Constitution Bench. The reference order which has been quoted in ***V. Sriharan*** (supra) has been brought to our notice to highlight the point that in the absence of a reference by the concerned Bench, the Constitution Bench could not have adverted to the said aspect. The said submission is noted only to be rejected. The larger Bench has framed the issues which deserve to be answered and, as seen from the entire tenor of the judgment, it felt that it is obliged to address the issue regard being had to the controversy that arises in number of cases. In fact, as is evincible, question Nos. (i) and (ii) of paragraph 2.2 have been specifically posed in this manner. We do not think that there is any impediment on the part of the Constitution Bench to have traversed on the said issues. In fact, in our view, the Constitution Bench has correctly adverted to the same and clarified the legal position and we are bound by it.

42. The next contention which is canvassed on behalf of the appellants is that when the High Court exercised the power under Section 368 CrPC and thinks of commuting

the death sentence, then only it can pass a fixed term sentence and not otherwise. In this regard, we have been commended to the authorities in ***Sahib Hussain*** (supra) and ***Gurvail Singh*** (supra). In ***Sahib Hussain*** (supra), the Court took note of the decision in ***Shri Bhagwan v. State of Rajasthan***[34] wherein this Court had commuted the death sentence imposed on the appellant therein and directed that the appellant shall undergo the sentence of imprisonment for life with the further direction that the appellant shall not be released from the prison unless he had served out at least 20 years of imprisonment including the period already undergone by him. The authority in ***Prakash Dhawal Khairnar (Patil) v. State of Maharashtra***[35] was noticed wherein the Court set aside the death sentence and directed that the appellant therein shall suffer imprisonment for life but he shall not be released unless he had served out at least 20 years of imprisonment including the period already undergone by him. The two-Judge Bench referred to ***Ram Anup Singh and others***

[34] (2001) 6 SCC 296
[35] (2002) 2 SCC 35

v. State of Bihar[36], ***Nazir Khan and others vs. State of Delhi***[37], ***Swamy Shraddananda (2)*** (supra), ***Haru Ghosh v. State of West Bengal***[38], ***Ramraj v. State of Chhattisgarh***[39], ***Neel Kumar alias Anil Kumar v. State of Haryana***[40], ***Sandeep v. State of U.P.***[41] and ***Gurvail Singh*** (supra) and held that:-

> "It is clear that since more than a decade, in many cases, whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, this Court reiterated minimum years of imprisonment of 20 years or 25 years or 30 years or 35 years, mentioning thereby, if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period…."

Thereafter, the Court referred to ***Swamy Shraddananda (2)*** (supra) and the pronouncement in ***Shri Bhagwan*** (supra) and opined thus:-

> "36. It is clear that in *Swamy Shraddananda*, this Court noted the observations made by this Court in *Jagmohan Singh* v. *State of U.P.* and five years after the judgment in *Jagmohan case*,

[36] (2002) 6 SCC 686
[37] (2003) 8 SCC 461
[38] (2009) 15 SCC 551
[39] (2010) 1 SCC 573
[40] (2012) 5 SCC 766
[41] (2012) 6 SCC 107

> Section 433-A was inserted in the Code imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433-A another Constitution Bench of this Court in *Bachan Singh* v. *State of Punjab*, with reference to power with regard to Section 433-A which restricts the power of remission and commutation conferred on the appropriate Government, noted various provisions of the Prisons Act, Jail Manual, etc. and concluded that reasonable and proper course would be to expand the option between 14 years' imprisonment and death. The larger Bench has also emphasised that: [*Swamy Shraddananda (2) case*, SCC p. 805, para 92]
>
> "*92.* ... 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."
>
> In the light of the detailed discussion by the larger Bench, we are of the view that the observations made in *Sangeet case*[42] are not warranted. Even otherwise, the above principles, as enunciated in *Swamy Shraddananda* are applicable only when death sentence is commuted to life imprisonment and not in all cases where the Court imposes sentence for life."

43. Learned senior counsel have emphasized on the last part of the aforequoted passage to buttress the stand that when the trial judge had not imposed the death sentence, the question of commutation did not arise and hence the

[42] *Sangeet v. State of Haryana*, (2013) 2 SCC 452

High Court could not have imposed a fixed term sentence and could have only affirmed the sentence of imprisonment for life.

44. In ***Gurvail Singh*** (supra), the Court was dealing with the petition under Article 32 of the Constitution for issue of a direction to convert the sentence of the petitioner from 30 years without remission to a sentence of life imprisonment and further to declare that this Court is not competent to fix a particular number of years (with or without remission) when it commutes the death sentence to life imprisonment while upholding the conviction of the accused under Section 302 IPC. The two-Judge Bench referred to the decision in ***Sangeet*** (supra) which has also been referred in ***Sahib Hussain*** (supra) and, thereafter, the Court observed:-

> "6. The issue involved herein has been raised before this Court time and again. Two-Judge as well as three-Judge Benches have several times explained the powers of this Court in this regard and it has consistently been held that the Court cannot interfere with the clemency powers enshrined under Articles 72 and 161 of the Constitution of India or any rule framed thereunder except in exceptional circumstances. So far as the remissions, etc. are concerned, these are executive powers of the State under

which, the Court may issue such directions if required in the facts and circumstances of a particular case."

After so stating, the Court referred to ***Swamy Shraddananda (2)*** (supra) and ***State of Uttar Pradesh. v. Sanjay Kumar***[43] and reproduced a passage from ***Sanjay Kumar*** (supra) which we think seemly to quote:-

"24. … The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the 'rarest of rare cases', warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the

[43] (2012) 8 SCC 537

> same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A of the Code of Criminal Procedure."

45. Thereafter, the two-Judge Bench referred to the pronouncement in ***Sahib Hussain*** (supra) and opined thus:-

> "12. Thus, it is evident that the issue raised in this petition has been considered by another Bench and after reconsidering all the relevant judgments on the issue the Court found that the observations made in *Sangeet* were unwarranted i.e. no such observations should have been made. This Court issued orders to deprive a convict from the benefit of remissions only in cases where the death sentence has been commuted to life imprisonment and it does not apply in all the cases wherein the person has been sentenced to life imprisonment."

46. Mr. Krishnan, learned senior counsel appearing for the State, in his turn, has commended us to three passages from ***V. Sriharan*** (supra). They read as under:-

> "103. In fact, while saying so we must also point out that such exercise of power in the imposition of death penalty or life imprisonment by the Sessions Judge will get the scrutiny by the Division Bench of the High Court mandatorily when the penalty is death and invariably even in respect of life imprisonment gets scrutinised by the Division Bench by virtue of the appeal remedy provided in the Criminal Procedure Code. Therefore, our conclusion as stated above can be reinforced by stating that the punishment part of such specified offences are always examined at least once after the Sessions Court's verdict by the High Court and that too by a Division Bench consisting of two Hon'ble Judges.
>
> 104. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said

> punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.
>
> 105. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court".

Relying on the aforesaid passages, it is contended by him that the decisions cited by the appellants are, no more good law and, in fact, have been impliedly overruled in view of what has been stated by the Constitution Bench.

47. We do not think it appropriate to enter into the said debate. In the instant case, the prosecution had preferred an appeal under Section 377 CrPC before the High Court for enhancement of sentence of imposition of life to one of death. On a reading of the said provision, there can be no

trace of doubt that the High Court could have enhanced the sentence of imposition of life to death. In this context, we may usefully refer to ***Jashubha Bharatsinh Gohil and others v. State of Gujarat***[44] wherein it has been ruled thus:-

> "12. It is needless for us to go into the principles laid down by this Court regarding the enhancement of sentence as also about the award of sentence of death, as the law on both these subjects is now well settled. There is undoubtedly power of enhancement available with the High Court which, however, has to be sparingly exercised. No hard and fast rule can be laid down as to in which case the High Court may enhance the sentence from life imprisonment to death. ..."

Thus, the power is there but it has to be very sparingly used. In the instant case, the High Court has thought it appropriate instead of imposing death sentence to impose the sentence as it has done. Therefore, the sentence imposed by the High Court cannot be found fault on that score.

[44] (1994) 4 SCC 353

48. At this stage we think it appropriate to deal with another facet of the said submission. It is strenuously urged that the High Court can impose the punishment what the trial court can impose. In **Jagat Bahadur** (supra) it has been held that:-

> "An appeal court is after all 'a Court of error', that is, a court established for correcting an error. If, while purporting to correct an error, the court were to do something which was beyond the competence of the trying court, how could it be said to be correcting an error of the trying court? No case has been cited before us in which it has been held that the High Court, after setting aside an acquittal, can pass a sentence beyond the competence of the trying court. Therefore, both on principle and authority it is clear that the power of the appellate court to pass a sentence must be measured by the power of the court from whose judgment an appeal has- been brought before it."

49. In ***Jadhav*** (supra) the Court ruled that:-

> "An appeal is a creature of a statute and the powers and jurisdiction of the appellate court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial court. It cannot and ought not to do something which the trial court was not competent to do. There does not seem to be any

fetter to its power to do what the trial court could do."

50. We have reproduced the said passages as the learned senior counsel appearing for the appellant would contend as the court of appeal is only a "Court of error" and its jurisdiction should be co-extensive with that of the trial court. Both the decisions dealt with different kind of offences where the sentence has been prescribed to be imposed for a particular by the trial court and in that context the Court held that the appellate court could not have imposed a sentence beyond the competence of the trial court. If the trial court has no jurisdiction to impose such a sentence, the High Court as a "Court of error" cannot pass a different harsher sentence. There can be no dispute over the proposition stated in the said two authorities. But in the case at hand, the appellants were convicted under section 302 IPC and the trial court could have been impose the sentence of death and that apart, the appeal has been preferred by the State. Thus, the ratio laid down in the said authorities is not applicable to the case at hand.

51. The next submission that is put forth is that the decision in ***V. Sriharan*** (supra) runs counter to the principles stated in ***A.R. Antulay*** (supra). Explicating the said stand, it is argued that in the said case the Constitution Bench had directed that the case of the petitioner should be tried by the learned Judge of the High Court as he was tried for the offence under the Prevention of Corruption Act, 1988. The Bench of seven-Judges recalled that order on three counts, namely, a trial under the Prevention of Corruption Act, 1988 has to be held by a special Judge appointed under the said Act and this Court has no jurisdiction to direct the trial to be held by a High Court Judge; that the statutory right of the petitioner for filing an appeal to the High Court could not be taken away by this Court; and that the earlier direction abridged the right of the petitioner therein under Articles 14 and 21 of the Constitution. Drawing an analogy it is contended that ***V. Sriharan*** (supra) takes away the statutory right of the convict to apply for commutation/remission under Sections 432 and 433 CrPC, and also affects the right under Article

21 of the Constitution. Learned senior counsel for the appellants would contend that the principles stated in ***A.R. Antulay*** (supra) have not been kept in view in ***V. Sriharan*** (supra) and, therefore, it is not a binding precedent and a two-Judge Bench should either say that it is *per incuriam* or refer it to a larger Bench. With regard to declaring a larger Bench judgment *per incuriam*, learned senior counsel for the appellants have drawn inspiration from the authority in ***Fibre Boards Private Limited, Bangalore v. Commissioner of Income-Tax, Bangalore***[45]. In that case, the two-Judge Bench referred to ***Mamleshwar Prasad v. Kanhaiya Lal***[46] and ***State of U.P. and another v. Synthetics and Chemicals Ltd. and another***[47] and took note of the earlier Constitution Bench judgment in ***State of Orissa v. M.A. Tulloch and Co.***[48], and held thus:-

> "35. The two later Constitution Bench judgments in *Rayala Corpn. (P) Ltd. v. Director of Enforcement*[49] and *Kolhapur Canesugar Works Ltd. v. Union of India*[50] also did not have the

[45] (2015) 10 SCC 333
[46] (1975) 2 SCC 232
[47] (1991) 4 SCC 139
[48] (1964) 4 SCR 461
[49] (1969) 2 SCC 412
[50] (2000) 2 SCC 536

> benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression "repeal" in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in *M.A. Tulloch & Co.* that only the form of repeal differs but there is no difference in intent or substance. If even an implied repeal is covered by the expression "repeal", it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act."

52. Be it noted, the Court followed the principles stated in ***M.A. Tulloch and Co.*** (supra) and not in ***Rayala Corpn. (P) Ltd.*** (supra). In ***State of U.P. v. Synthetics and Chemicals Ltd.***[51] a two-Judge Bench of this Court held that one particular conclusion of a Bench of seven-Judges in ***Synthetics and Chemicals Ltd. and others v. State of U.P. and others***[52] as *per incuriam.* The two-Judge Bench in ***Synthetics and Chemicals Ltd.*** (supra) opined thus:-

> "36. The High Court, in our view, was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. We are firmly of the view that the decision of this Court in *Synthetics*[53] is not an

[51] (1991) 4 SCC 139
[52] (1990) 1 SCC 109
[53] (1990) 1 SCC 109

> authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or *per incuriam* and has, therefore, no effect on the impugned levy."

53. The observations speak for themselves. We are not inclined to enter into the doctrine of precedents and the principle of *per incuriam* in the instant case. Suffice it to say that the grounds on which it is urged that the Constitution Bench decision in ***V. Sriharan*** (supra) runs counter to the larger Bench decision in ***A.R. Antulay*** (supra) are fallacious. In ***A.R. Antulay*** (supra), the High Court had no jurisdiction to try the case under the Prevention of Corruption Act, 1988 and consequently, by virtue of a direction the accused was losing the right to appeal. Both could not have been done and that is why, the larger Bench reviewed the Constitution Bench judgment. For better appreciation, we may reproduce what Mukherjee, J. (as His

Lordship then was) speaking for three learned Judges had to say:-

> ".. By reason of giving the directions on February 16, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "*actus curiae neminem gravabit*" — an act of the court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law."

And again:-

> "In the aforesaid view of the matter the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16-2-1984 as indicated before are set aside and quashed. The trial shall proceed in accordance with law, that is to say under the Act of 1952 as mentioned hereinbefore."
>
> The majority concurred with the said opinion.

54. In the case at hand, the question of forum of trial does not arise. What is fundamentally argued is that the right of

the appellants to submit an application is abrogated. An attempt has been made to elevate the same to a constitutional right. The right of an appeal and abrogation thereof by a direction of this Court is totally different and that is the principle which compelled the larger Bench to recall its order. They applied the principle of *ex debito justitiae* and passed the order reproduced hereinabove.

55. Having adverted to the factual scenario, we have to understand the obtaining situation. In the present context, a convict is not permitted to submit an application under Section 433-A CrPC because of sentence imposed by a Court. There is no abrogation of any fundamental or statutory right. If the imposition of sentence is justified, as a natural corollary the principle of remission does not arise. The principle for applying remission arises only after expiry of 14 years if the Court imposes sentence of imprisonment for life. When there is exercise of expanded option of sentence between imprisonment for life and death sentence, it comes within the sphere or arena of sentencing, We have already held that the said exercise of expanded option is

permissible as has been held in many a judgment of this Court and finally by the Constitution Bench. The said exercise, on a set of facts, has a rationale. It is based on a sound principle. Series of judgments have been delivered by this Court stating in categorical terms that imprisonment for life means remaining of the whole period of natural life of the convict. The principle of exercise of expanded expansion has received acceptance because the Court when it does not intend to extinguish the spark of life of the convict by imposing the death sentence. We have already discussed that facet earlier and not accepted the submission to refer the matter to the larger Bench. We have no hesitation in holding that the principles stated in ***A.R. Antulay*** (supra) do not apply to the application to be preferred under Section 433-A CrPC, and, therefore, the judgment in ***V. Sriharan*** (supra) is a binding precedent.

56. The next aspect that is required to be deliberated upon is the factual score of the case that would include the genesis of crime, the nature of involvement, the manner in which it has been executed, the antecedents of the

appellants, the motive that has moved the appellants to do away with a young life, the gravity and the social impact of the crime, the suffering of the family of the victim, the fear of the collective when such a crime takes place, the category to which the High Court has fitted it, after expressing its disinclination not to impose the death sentence and other connected factors.

57. It is submitted by the learned counsel for the appellants that the imposition of fixed term sentence is highly disproportionate and unjustified in the particular facts of the case, for as the conviction is based on the circumstantial evidence and as per the materials brought on record only a single blow was inflicted not by any lethal weapon but by a hammer. Though the High Court has referred to various aggravating and mitigating circumstances, yet, it has misdirected itself by holding that the motive of crime is "honour killing". That apart, the High Court has taken into consideration the false plea of alibi, intimidation of witnesses, misleading of the police in the matter of recovery, intimidation of the public prosecutor,

the factum of abscondence, conviction in another case, the inhuman treatment of the deceased, commission of murder while the appellants had the trust of the deceased, the depravity of the mind, reflection of cold bloodedness in commission of the crime, the brutality that shocks the judicial conscience, absence of probability of reformation of the convicts and such other aspects of which some are not relevant and some have not been duly considered while imposing such harsh punishment.

58. It is urged by them, the approach of the High Court dealing with death penalty and arriving at the conclusion that the case is not a rarest of rare one has completely misdirected itself and, therefore, the imposition of fixed term sentence is wholly unsustainable. They have commended us to the authorities in ***Shankar Kisanrao Khade v. State of Maharashtra***[54]***, Oma alias Omprakash and another v. State of Tamil Nadu***[55]***, Mohd. Farooq Abdul Gafur and another v. State of***

[54] (2013) 5 SCC 546
[55] (2013) 3 SCC 440

***Maharashtra*[56], *Mohinder Singh v. State of Punjab*[57]** *and* ***Mangesh v. State of Maharashtra*[58].**

59. Learned counsel for the State submits that the crime was premeditated and diabolic in nature and the same is evincible from the discussion of the judgment of conviction of the High Court and the said findings are beyond assail as no leave has been granted in that regard and the Special Leave Petition has been dismissed. According to the learned counsel for the State, the said findings which find place in the judgment of conviction are not subject to criticism and can be relied upon to describe the nature of commission of crime. Mr. Krishnan, would further submit that the sentence imposed is not disproportionate.

60. On a careful scrutiny of the judgment of conviction, it is seen that the High Court has taken note of the facts that the deceased Nitish Katara and Bharti Yadav (sister of Vikas Yadav; first cousin sister of Vishal Yadav and; daughter of Shri D.P. Yadav who was also the employer of Sukhdev @ Pehalwan) were in an intimate relationship aiming towards

[56] (2010) 14 SCC 641
[57] (2013) 3 SCC 294
[58] (2011) 2 SCC 123

permanency; that the family members of Bharti Yadav, including Vikas and Vishal Yadav, were opposed to this relationship; that the aversion stemmed from the reason that Nitish Katara did not belong to the same caste as that of Bharti Yadav, that his family belonged to the service class and belonged to economically lower strata; that Vishal Yadav and Sukhdev @ Pehalwan had not been invited to the wedding and had no reason for being there, other than perpetration of the crime; that Nitish Katara was abducted from the wedding venue by the appellants with the common intention to murder him; that in furtherance of their common intention Nitish Katara was thereafter murdered by the appellants; that after murdering Nitish Katara, the appellants removed his clothes, wrist watch and mobile from his person and set aflame his dead body with the intention of preventing identification of the body and destroying evidence of the commission of the offence; that immediately after the incident, the three appellants absconded; that the dead body of Nitish Katara was found at 9.30 a.m. in the morning of 17th February, 2002 in a

completely burnt, naked and unidentifiable condition on the Shikharpur Road which was recovered by the Khurja Police; that the body was having a lacerated wound on the head, a fracture in the skull, laceration and hematoma in the brain immediately below the fracture; that Vikas and Vishal Yadav deliberately misled the police and took them to three places in Alwar (Rajasthan) to search for Tata Safari vehicle which was obviously not there; that Vikas and Vishal Yadav jointly misled the police to the taxi stand behind Shamshan Ghat(cremation ground) in Panipat to search for the Tata Safari which was again not there, and, enroute to Chandigarh for the same purpose, got recovered the Tata Safari Vehicle bearing registration No. PB-07H 0085 recovered from the burnt down factory premises of M/s. A.B. Coltex Limited; that the appellant Sukhdev @ Pehalwan absconded for over three and half years despite extensive searches, raids, issuance of coercive process, attachment even at his native village and that he could be arrested only on the 23rd of February, 2005 after he fired at police patrol party.

61. From the aforesaid findings recorded by the High Court it is vivid that crime was committed in a planned and cold blooded manner with the motive that has emanated due to feeling of some kind uncalled for and unwarranted superiority based on caste feeling that has blinded the thought of "choice available" to a sister - a representative of women as a class. The High Court in its judgment of conviction has unequivocally held that it is a "honour killing" and the said findings apart from being put to rest, also gets support from the evidence brought on record. The circumstantial evidence by which the crime has been established, clearly lead to one singular conclusion that the anger of the brother on the involvement of the sister with the deceased, was the only motive behind crime. While dwelling upon the facet of honour killing the High Court in the judgment of conviction has held:-

> "2023. The instant case manifests that even in a household belonging to the highest class in society, (one in which you can make day trips with friends from Ghaziabad to Mumbai just to celebrate a birthday; owns multiple businesses and properties, luxury vehicles etc.) what can happen to even a young, educated, articulate

> daughter if she attempted to break away from the conventional caste confines and explored a lifetime alliance with a member of another caste. Especially one who was also perceived to be of a lesser economic status.
>
> 2024. We have found that immediately after Shivani Gaur's wedding, Bharti was completely segregated and confined by her family. On the 17th of February 2002 itself, she was spirited away from her residence in Ghaziabad to Faridabad. The police could record her statement under Section 161 of the Cr.P.C. only on the 2nd of March 2002 that too under the eagle eye of her father, a seasoned politician. Shortly thereafter, she was sent out of India to U.K. and kept out of court for over three and a half years. Her testimony is evidence of the influence of her brothers and family as she prevaricates over trivial matters and denies established facts borne out by documentary evidence. Finally, when she must have been stretched to the utmost, she succumbs to their pressures when she concedes a deviously put suggestion.
>
> 2025. Undoubtedly, the family of Nitish Katara has suffered at his demise and thereafter. Having given our thought to this issue, we are of the view that apart from the deceased and his family, there is one more victim in an "honour killing"."

62. In this context we may refer with profit to the decision in ***Lata Singh v. State of U.P. and another***[59] wherein it has been observed that:-

[59] (2006) 5 SCC 475

> "The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when We have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes."

And again:-

> "We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism."

63. In ***Maya Kaur Baldevsingh Sardar and another v. State of Maharashtra***[60] this Court was constrained to observe thus:-

[60] (2007) 12 SCC 654

> "26. We also notice that while judges tend to be extremely harsh in dealing with murders committed on account of religious factors they tend to become more conservative and almost apologetic in the case of murders arising out of caste on the premise (as in this very case) that society should be given time so that the necessary change comes about in the normal course. Has this hands-off approach led to the creation of the casteless utopia or even a perceptible movement in that direction? The answer is an emphatic 'No' as would be clear from mushrooming caste-based organisations controlled and manipulated by self-appointed commissars who have arrogated to themselves the right to be the sole arbiters and defenders of their castes with the licence to kill and maim to enforce their diktats and bring in line those who dare to deviate. Resultantly the idyllic situation that we perceive is as distant as ever. In this background is it appropriate that we throw up our hands in despair waiting ad infinitum or optimistically a millennium or two for the day when good sense would prevail by a normal evolutionary process or is it our duty to help out by a push and a prod through the criminal justice system? We feel that there can be only one answer to this question."

64. In ***Arumugam Servai v. State of Tamil Nadu***[61]**,** the Court reiterated the principle stated in ***Lata Singh***(supra) and proceeded to state that:-

> "12. We have in recent years heard of "Khap Panchayats" (known as "Katta Panchayats" in

[61] (2011) 6 SCC 405

> Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh case3, there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal."

65. In ***Bhagwan Dass v. State (NCT of Delhi)***[62] the Court after referring to ***Lata Singh's case*** (supra) was in anguish to observe:-

> "....In our opinion honour killings, for whatever reason, come within the category of the rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilised behaviour. All persons who are planning to perpetrate "honour" killings should know that the gallows await them."

66. Be it stated, though the High Court treated the murder as "honour killing", yet regard being had to other factors did

[62] (2011) 6 SCC 396

not think appropriate to impose extreme penalty of death sentence. We may hasten to clarify that we have highlighted the factum of "honour killing", as that is a seminal ground for imposing the fixed term sentence of twenty-five years for the offences under section 302/34 IPC on the two accused persons, who though highly educated in good educational institutions, had not cultivated the ability to abandon the depricable feelings and attitude for centuries. Perhaps, they have harboured the fancy that it is an idea of which time had arrived from time immemorial and ought to stay till eternity.

67. One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman be a wife or sister or daughter or mother cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the

girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so called brotherly or fatherly honor or class honor by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions.

68. Apart from the issue of honour killing, the High Court has also adjudicated to the brutal manner in which the crime has been committed. Mr. Lalit, learned senior counsel has highlighted on infliction of a single blow. The High Court appreciating the material brought on record, has given a graphic description.

69. The High Court has also taken note of the impact of post-offence events and observed that the deceased was burnt to such a point that his own mother could only suggest the identification from the small size of one unburnt palm with fingers of the hand that the body appeared to be that of her deceased son. The identification had to be confirmed by DNA testing. While imposing the sentence,

the High Court has been compelled to observe that the magnitude of vengeance of the accused and the extent to which they had gone to destroy the body of the deceased after his murder shows the brutality involved in the crime and the maladroit efforts that were made to destroy the evidence. From the evidence brought on record as well as the analysis made by the High Court, it is demonstrable about the criminal proclivity of the accused persons, for they have neither the respect for human life nor did they have any concern for the dignity of a dead person. They had deliberately comatosed the feeling that even in death a person has dignity and when one is dead deserves to be treated with dignity. That is the basic human right. The brutality that has been displayed by the accused persons clearly exposes the depraved state of mind.

70. The conduct during the trial has also been emphasized by the High Court because it is not an effect to protect one-self, but the arrogance and the impunity shown in which they set up false defense and instilled shivering fear in the mind and heard of witnesses with the evil design of

defeating the prosecution case. In fact, as has been recorded by the High Court, the public prosecutor was also not spared. The factum of abscondance and non-cooperation with the investigating team and also an maladroit effort to mislead the investigators have been treated as aggravating circumstances on the basis of authorities in ***Praveen Kumar v State of Karnataka***[63] and ***Yakub Abdul Razak Memon v State of Maharashtra***[64].

71. The criminal antecedents of accused Vikas Yadav has been referred to in detail by the High Court. He was prosecuted in "Jesica Lal murder case" and convicted under Section 201/120-B IPC and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.2000 and, in default, of payment of fine, to further undergo imprisonment for three months. This Court in ***Sidhartha Vashisht alias Manu Sharma v State (NCT of Delhi)***[65] affirmed the conviction. The conclusion reached while affirming the decision of the High Court, is as follows:-

[63] (2003) 12 SCC 199
[64] (2013) 13 SCC 1
[65] (2010) 6 SCC 1

> "303. (9) The High Court has rightly convicted the other two accused, namely, Amardeep Singh Gill @ Tony Gill and Vikas Yadav after appreciation of the evidence of PWs 30 and 101."

During the period, the said Vikas Yadav was on bail, he committed the present crime.

72. Learned counsel for the appellants have submitted about the conduct of the appellants in jail during their custody and have highlighted that fourteen years in jail is of tremendous mental agony. In ***Maru Ram*** *(supra)*, Krishna Iyer, J., to appreciate the despair in custody, thought it apposite to reproduce the bitter expression, from the poem, namely, The Ballad of Reading Gaol by Oscar Wilde. The poet wrote:-

"I know not whether Laws be right,
Or whether Laws be wrong,
All that we know who lie in gaol
Is that the wall is strong;
And that each day is like a year,
A year whose days are long."
(emphasis added)

In the said judgment, further lines from the poem have been reproduced, which read thus:-

"Something was dead in each of us,

And what was dead was Hope.

* * *

The vilest deeds like poison weeds

Bloom well in prison air:

It is only what is good in Man"

Despite the aforesaid quotation in Maru Ram (supra), the Court upheld the validity of Section 433-A.

73. In ***V. Sriharan*** (supra), the majority in the Constitution Bench has succinctly stated thus:-

> " As far as the argument based on ray of hope is concerned, it must be stated that however much forceful the contention may be, as was argued by Mr.Dwivedi, the learned senior counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependants were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependants and everyone surrounding him was demolished in an unmindful and in some case in a diabolic manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of home should prevail and kept intact."

And again:-

> "Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright."

The said conclusion meets the argument so assiduously propounded by Mr. Lalit, learned senior counsel appearing for the appellant.

74. The next contention that is canvassed pertains to non-application of mind by the High Court while imposing the sentence, for two accused persons have been sentenced for twenty-five years and Sukhdev, the other appellant, has been sentenced to twenty years. The High Court, while dealing with Vikas Yadav and Vishal Yadav has opined that they had misused the process of law while in jail and in their conduct there is no sign of any kind of remorse or regret. As far as the Sukhdev is concerned, the High Court has taken his conduct in jail which had been chastened and punishment was imposed once. The High Court has taken note of the fact that Sukhdev was the employee of the father

of Vikas Yadav and he is a married man with five children and on account of his incarceration, his family is in dire stress. A finding has been returned that he is not a person of substantial means and has lesser paying capacity. On the basis of these facts and circumstances, the High Court has drawn a distinction and imposed slightly lesser sentence in respect of Sukhdev.

74A. Thus analyzed, we find that the imposition of fixed term sentence on the appellants by the High Court cannot be found fault with. In this regard a reference may be made to a passage from ***Guru Basavaraj vs State of Karnataka***[66], wherein while discussing about the concept of appropriate sentence, the Court has expressed thus:-

> "18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same

[66] (2013) 7 SCC 545

has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect – propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crimeincarcination meaning] has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be

> imposed. The discretion should not be in the realm of fancy. It should be embedded in conceptual essence of just punishment."

75. Judged on the aforesaid parameters, we reiterate that the imposition of fixed terms sentence is justified.

76. The next submission pertains to the direction by the High Court with regard to the sentence imposed under Section 201 to run consecutively. Learned counsel for the appellants have drawn our attention to the Constitution Bench decision in ***V. Sriharan*** *(supra)* . The larger Bench was dealing with the following question:-

> "Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial?"

77. Learned counsel appearing for the appellants have drawn out attention to the analysis whether a person sentenced to undergo imprisonment for life when visited with the "term sentence" should suffer them consecutively or concurrently. The larger Bench in that context has held thus:-

> "We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence."

78. In the instant case, the trial Court has imposed the life sentence and directed all the sentences to be concurrent. The High Court has declined to enhance the sentence from imprisonment for life to death, but has imposed a fixed term sentence. It curtails the power of remission after fourteen years as envisaged under Section 433-A. In such a situation, we are inclined to think that the principle stated by the aforesaid Constitution Bench would apply on all fours. The High Court has not directed that the sentence under Section 201/34 IPC shall run first and, thereafter, the fixed term sentence will commence. Mr. Dayan Krishnan, learned senior counsel appearing for the State

has argued that this Court should modify the sentence and direct that the appellants shall suffer rigorous imprisonment for the offence punishable under Section 201/34 IPC and, thereafter, suffer the fixed term sentences. Similar argument has been made in the written submission by the learned counsel for the informant. As the High Court has not done it, we do not think that it will be appropriate on the part of this Court in the appeal preferred by the appellants to do so. Therefore, on this score we accept the submission of the learned counsel for the appellants and direct that the sentence imposed for the offence punishable under Section 201/34 IPC shall run concurrently with the sentence imposed for other offences by the High Court.

79. The last plank of submission advanced by the learned counsel for the appellant pertains to imposition of fine by the High Court. The High Court has already given the reasons and also adverted to the paying capacities. The concept of victim compensation cannot be marginalized. Adequate compensation is required to be granted. The High Court has considered all the aspects and enhanced the fine,

determined the compensation and prescribed the default clause. We are not inclined to interfere with the same.

80. Consequently, the appeals are disposed of with the singular modification in the sentence i.e. the sentence under Section 201/34 IPC shall run concurrently. Needless to say, all other sentences and directions will remain intact.

.....,J.
(Dipak Misra)

.....,J.
(C. Nagappan)

New Delhi
October 3, 2016