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REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.454 OF 2006

Swamy Shraddananda @ Murali Manohar Mishra … Appellant

Vs.

State of Karnataka … Respondent

JUDGMENT

AFTAB ALAM,J.

1. Death to a cold blooded murderer or life, albeit subject to severe restrictions of personal liberty, is the vexed question that once again arises before this court. A verdict of death would cut the matter cleanly, apart from cutting short the life of the condemned person. But a verdict of imprisonment for life is likely to give rise to certain questions. (Life after all is full of questions!). How would the sentence of imprisonment

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for life work out in actuality? The Court may feel that the punishment more just and proper, in the facts of the case, would be imprisonment for life with life given its normal meaning and as defined in section 45 of the Indian Penal Code. The Court may be of the view that the punishment of death awarded by the trial court and confirmed by the High Court needs to be substituted by life imprisonment, literally for life or in any case for a period far in excess of fourteen years. The Court in its judgment may make its intent explicit and state clearly that the sentence handed over to the convict is imprisonment till his last breath or, life permitting, imprisonment for a term not less than twenty, twenty five or even thirty years. But once the judgment is signed and pronounced, the execution of the sentence passes into the hands of the executive and is governed by different provisions of law. What is the surety that the sentence awarded to the convict after painstaking and anxious deliberation would be carried out in actuality? The sentence of imprisonment for life, literally, shall not by application of different kinds of remission, turn out to be the ordinary run of the mill life term that works out to no more than fourteen years. How can the sentence of imprisonment for life (till its full natural span) given to a convict as a *substitute for the death sentence* be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice? These are the questions that arise for consideration in this case.

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2. The conviction of the appellant, Swamy Shardanannda @ Murali Manohar Mishra under Sections 302 and 201 of the Indian Penal Code has attained finality and is no longer open to scrutiny. The appellant was convicted by the learned XXV City Sessions Judge, Bangalore City, under the aforesaid two sections by judgement and order dated 20 May, 2005 in SC No.212/1994. The Sessions Judge sentenced him to *death* for the offence of murder and to a term of five years rigorous imprisonment and fine of rupees ten thousand for causing disappearance of evidences of the offence; in default of payment of fine the direction was to undergo simple imprisonment for one year. The appellant's appeal (Criminal Appeal No.1086 of 2005) against the judgment and order passed by the trial court and the reference made by the Sessions Judge under section 366 of the Code of Criminal Procedure (Criminal Referred Case No.6 of 2005) were heard together by the Karnataka High Court. The High Court confirmed the conviction and the death sentence awarded to the appellant and by judgment and order dated 19 September, 2005 dismissed the appellant's appeal and accepted the reference made by the trial court without any modification in the conviction or sentence. Against the High Court judgment the appellant has come to this Court in this appeal. The Appeal was earlier heard by a bench of two judges. Both the honourable judges unanimously upheld the appellant's conviction for the two offences but they were unable to agree to the punishment meted out to

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the appellant. S. B. Sinha J. felt that in the facts and circumstances of the case the punishment of life imprisonment, rather than death would serve the ends of justice. He, however, made it clear that the appellant would not be released from prison *till the end of his life*. M. Katju J., on the other hand, took the view that the appellant deserved nothing but death. It is thus on the limited, though very important and intractable question of sentence that this appeal has come before us.

3. This takes us to the facts of the case that has all the elements of high drama. It has a man's vile greed coupled with the devil's cunning; a woman's craving for a son, coupled with extreme credulity and gullibility and a daughter's deep and abiding love for her mother coupled with remarkable perseverance to see through the lies behind her mother's mysterious disappearance. But a man's life can not be decided in three sentences and we must see the prosecution case, as established up to this court in some greater detail.

4. Shakereh, the deceased victim of the crime, came from a highly reputed and wealthy background. She was the grand daughter of Sir Mirza Ismail, a former Dewan of the Princely State of Mysore and the daughter of Mr. Ghulam Hussain Namaze and Mrs. Gauhar Taj Namaze. She held vast and very valuable landed properties in her own right. Among her various properties was a bungalow at No.81, Richmond Road, Bangalore, constructed over nearly 38000 square foot of land that

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she had got in Hiba (oral gift) from her parent's side. Another was a large piece of land measuring 40,000 square foot on Wellington Street that she had got in dowry at the time of marriage. Shakereh was married to Mr. Akbar Khaleeli, a member of the Indian Foreign Service. They had four daughters from the marriage. Shakereh came to know the appellant, Murali Manohar Mishra who called himself Swamy Shraddananda, for the first time in 1983 when she and her family were visiting the erstwhile Nawab of Rampur in New Delhi. The appellant was introduced as someone who was looking after the Rampur properties and was said to be quite adept in managing urban landed estates. Shakereh, at that time was facing some difficulties under the urban land ceiling law and she asked the appellant to come over to Bangalore and help her in sorting out the problems concerning her properties. Soon thereafter Akbar Khaleeli was posted as a diplomat to Iran. In those days Iran was not a family-station for Indian diplomats and hence, he went alone leaving Shakereh behind in Bangalore. The appellant then came to Bangalore and started living in a part of her house, 81 Richmond Road, purportedly to assist in the proper management of her properties. Apparently, more than helping in property matters he worked on her suppressed though strong desire for a son and was able to convince her that with his occult powers he could make her beget a son. In 1985, Shakereh and Akbar Khaleeli got divorced. Shakereh then proceeded to marry the appellant. She paid no

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heed to the opposition from family and friends and finally got married to the appellant on 17 April, 1986 under the Special Marriage Act and the marriage was registered at the Sub-Registrar's Office, Mayo Hall, Bangalore. After marriage they lived together at 81 Richmond Road. For domestic chores they engaged a couple, a man called Raju to work as gardener-cum handyman and his wife Josephine to work as maid servant. They lived in the servant's quarter of the bungalow.

5. The daughters from the first marriage were most of the time staying abroad.

6. After marriage Shakereh not only showered her love and affection on the appellant but also her material wealth. She executed a testamentary will in his favour besides a general Power of Attorney appointing him as her agent and attorney. She opened a number of bank accounts jointly with the appellant and also took several bank lockers in their joint names. They also started together a private company called S. S. Housing Private Limited of which they alone were the partners.

7. Notwithstanding her matrimonial adventures Shakereh's relations with her daughters and her parents continued to be more or less as before. They met from time to time and kept in touch by speaking on the telephone at regular intervals.

8. Then by the end of May 1991, Shakereh suddenly and mysteriously disappeared. She was last met by her mother Mrs. Gauhar

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Namaze (examined before the trial court as PW-25) on 13 April, 1991. Her daughter, Sabah Khaleeli (examined as PW-5) last spoke to her on telephone on 19 April, 1991 and according to the two servants, Raju and Josephine (PWs-18 & 19 respectively), they last saw her in the company of the appellant in the morning of 28 May, 1991. Thereafter, Shakereh was not seen or spoken to by anyone. At that time she was about forty years old.

9. When Sabah did not receive any call from her mother nor was she able to get through to her on telephone she enquired about her from the appellant who said that she had gone to Hyderabad. In June 1991, when she contacted again he told her that her mother had gone to Kutch to attend the wedding of a wealthy diamond merchant. A week later he told her that Shakereh was keeping a low profile due to some income tax problems. Exasperated by the evasive and vague replies by the appellant, Sabah came down to Bangalore but found no trace of her mother in her house. The appellant then said that Shakereh was pregnant and she had gone to the United States of America to deliver the child. He also said that she had got herself admitted in Roosevelt Hospital. Sabah made enquiries and came to learn that Roosevelt Hospital records did not show admission of anyone by the name of Shakereh or matching her description. She confronted the appellant and accused him of giving false information about her mother. He tried to explain that Shakereh

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had, in fact, gone to London but she wanted to keep her whereabouts confidential. However all stories fabricated by the appellant about her mother lay totally exposed to Sabah when she called on him in a hotel room in Bombay and chanced upon the passport of her mother lying around. A glance at the passport made it clear that its holder had not gone to the United States or the United Kingdom or as a matter of fact anywhere out of the country. At this stage, she came to Bangalore and lodged a written complaint at Ashok Nagar Police Station where it was registered on 10 June 1992 simply as a woman missing complaint bearing Cr.No.417/1992.

10. The search for the 'missing' woman started in a rather lukewarm way but the appellant thought that the time had come to start covering his flanks. He went to the court seeking anticipatory bail. In the bail petition he declared his total innocence and stated that perennial litigation with close relations drove Shakereh to acute depression and in that state, while he was away from Bangalore, she left the house in a fit of anger without leaving any signs as to where she was headed. He was able to obtain anticipatory bail, initially on certain condition that was later on greatly relaxed.

11. The investigation by Ashok Nagar police station did not yield any results but the persistence of Sabah paid off. In March 1994, the Central Crime Branch (C.C.B.), Bangalore took over the investigation of the

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complaint about the 'missing' Shakereh. The case came under the charge of C. Veeraiah, CPI, CCB (PW 37) who, suspecting the role of the appellant in the disappearance of Shakereh, subjected him to close interrogation. Under intense interrogation the appellant broke down and owned up to having killed Shakereh. He narrated in detail the manner of her killing and disposing of her body. He stated that he put the body of Shakereh inside a large wooden box (that he had earlier got made for the purpose) and got the box dropped into a pit (that he had got specially dug up) in the grounds of 81 Richmond Road just outside their common bed-room. He then got the pit filled up by earth and the ground-surface cemented and covered up with stone slabs. He volunteered to take the Investigating Officer (IO) to the place and identify the exact spot where Shakereh lay buried inside the wooden box. The appellant made the following statement before the IO on 28 March 1994.

> "If I am taken I will show the place where the wooden box was prepared and the person who prepared it, the persons who transported the box and the people who helped in digging out the pit and the crow bar, spade, pan used for digging pit, the cement bags and the spot where Shakereh is buried and I exhume the dead body of the deceased and show you. The statement what all I had earlier given to Ashok Nagar police was a false statement given intentionally just to escape myself."

The IO then obtained an exhumation order from the Magistrate and after completing the other legal formalities, on March 30, 1994 brought the

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appellant to 81 Richmond Road along with the exhumation team. They were taken by the appellant to the rear of the house passing through the dinning hall and the kitchen. The place was open to the sky but was enclosed on all the four sides by high walls; the floor was made of kadapa slabs cemented at the joints. The place had no other access apart from the entry through the kitchen. There the appellant identified the exact spot where the wooden box, with the body of Shakereh inside it, lay buried and marked it with a piece of chalk. The exhumation process started at 10.30 a.m. and the whole process was video graphed (as per MO18).

12. As pointed out by the appellant, first the stone slabs were removed and the cemented portion below the slabs was broken up. Then the ground below was dug up and sure enough a large wooden box was found lying deep under. The box had inside it, on top, a foam mattress, a pillow and a bed-sheet. Under the mattress was a skeleton with a sleeping gown around it. The bones had all become disjointed. The skeleton and the long hair tufts lying around the skull were taken out and the forensic experts rearranged the bones and also fixed the skull and the mandibles. There was no doubt that it was a human skeleton. Mrs. Gauhar Taj Namaze identified a red stone ring and two black rings found in the wooden box (that must have slipped down the fingers after the flesh decayed away) as belonging to her daughter Shakereh. The sleeping

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gown that was around the skeleton was identified by the maid as belonging to her mistress Shakereh.

13. The post mortem examination was held on the same day from 4.45 to about 6 p.m.

14. The skull along with an undisputed photograph of Shakereh was sent to the Forensic Science Laboratory for matching and identification by Photo Superimposition method. The skeletal remains were subjected to D.N.A. fingerprinting. Both the tests gave the same result and left no room for doubt that the skeleton was of Shakereh.

15. On 31 March, 1994 the IO once again took the appellant to 81 Richmond Road. This time the appellant took the IO to the bedroom and showed the window that opened on the enclosed space from where the skeleton of the deceased was recovered on the previous day. He also explained that he had got the lower part of the room's wall broken down to make a clearing through which the wooden box containing Shakereh's body was pushed out of the room and into the pit. He also produced before the IO pills of eight different kinds and the cheque books of different bank accounts.

16. The other aspect of the case is equally significant in that it provides the motive for the murder. It came to light during investigation that after Shakereh disappeared (or, in retrospect, was killed by the appellant) he went about selling off her properties as fast as possible. On

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30 and 31 March, 1992, in two days, the appellant sold 34 plots carved out of Shakereh's properties to various people under registered sale-deeds using the General Power of Attorney executed by her in his favour. The joint bank accounts were simply used to deposit large sums being the sale proceeds of the lands sold by him and to withdraw the amounts as soon as those were credited to the account. Needless to say that from May 1991, it was the appellant alone who operated the joint bank accounts. He also literally cleaned out the bank lockers that Shakereh had taken in their joint names.

17. In all the meetings of the S. S. Housing Company, he represented the presence of Shakereh and signed the proceedings for himself and for her as holder of her General Power of Attorney. The proceedings of the meetings were regularly sent to their Chartered Accountant.

18. The appellant also gave regular replies to the queries of the Income Tax authorities, one of which, of the year 1993 contains his signature and the signature of Shakereh which is apparently forged.

19. In light of the large amount of evidences unearthed against the appellant he was charged with the commission of murder of his wife Shakereh. As is evident, the case against the appellant was completely based on circumstantial evidence. But the prosecution proved its case to the hilt by examining 39 witnesses and producing before the court a large

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number of exhibits, both material (MOs. 1 to 33) and documentary (P1 to P267).

20. These are, in brief, the facts of the case. On these facts, Mr. Sanjay Hegde, learned counsel for the State of Karnataka, supported the view taken by Katju J. (as indeed by the High Court and the trial court) and submitted that the appellant deserved nothing less than death. In order to bring out the full horror of the crime Mr. Hegde reconstructed it before the court. He said that after five years of marriage Shakereh's infatuation for the appellant had worn thin. She could see through his fraud and see him for what he was, a lowly charlatan. The appellant could sense that his game was up but he was not willing to let go all the wealth and the lavish life style that he had gotten used to. He decided to kill Shakereh and take over all her wealth directly. In furtherance of his aim he conceived a terrible plan and executed it to perfection. He got a large pit dug up at a 'safe' place just outside their bed room. The person who was to lie into it was told that it was intended for the construction of a soak- pit for the toilet. He got the bottom of one of the walls of the bedroom knocked off making a clearing to push the wooden box through; God only knows saying what to the person who was to pass through it. He got a large wooden box (7x2x2 feet) made and brought to 81 Richmond Road where it was kept in the guest house; mercifully out of sight of the person for whom it was meant. Having thus completed all

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his preparations he administered a very heavy dose of sleeping drugs to her on 28 May, 1991 when the servant couple, on receiving information in the morning regarding a death in their family in a village in Andhra Pradesh asked permission for leave and some money in advance. However, before giving them the money asked for and letting them go, the appellant got the large wooden box brought from the guest house to the bedroom by Raju (with the help of three or four other persons called for the purpose) where, according to Raju, he saw Shakereh (for the last time) lying on the bed, deep in sleep. After the servants had gone away and the field was clear the appellant transferred Shakereh along with the mattress, the pillow and the bed sheet from the bed to the box, in all probability while she was still alive. He then shut the lid of the box and pushed it through the opening made in the wall into the pit, dug just outside the room, got the pit filled up with earth and the surface cemented and covered with stone slabs.

21. What the appellant did after committing murder of Shakereh was, according to Mr. Hegde even more shocking. He continued to live, like a ghoul, in the same house and in the same room and started a massive game of deception. To Sabah, who desperately wanted to meet her mother or at least to talk to her, he constantly fed lies and represented to the world at large that Shakereh was alive and well but was simply avoiding any social contacts. Behind the façade of deception he went on

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selling Shakereh's properties as quickly as possible to convert those into cash for easy appropriation. In conclusion Mr. Hegde submitted that it was truly a murder most foul and Katju J. was perfectly right in holding that this case came under the first, second and the fifth of the five categories, held by this Court as calling for the death sentence, in *Machhi Singh & Ors.* vs. *State of Punjab*, (1983) 3 SCC 470.

22. In order to properly appreciate the decision in *Machhi Singh* it would be necessary to first go to its precursor, the Constitution Bench decision in *Bachan Singh* vs. *State of Punjab*, AIR 1980 SC 898 and to an earlier Constitution Bench decision in *Jagmohan Singh* vs. *State of U.P.,* AIR 1973 SC 947, that is the precursor of *Bachan Singh*. The decisions in *Jagmohan Singh* and *Bachan Singh* deal with the recurrent debate on abolition of death penalty and are primarily concerned with the question of legitimacy of the death sentence. *Jagmohan* relates to the period when the requirement for the court to state reasons for *not* giving death sentence but giving the alternate sentence of life imprisonment in a capital offence was done away with by deletion of Section 367(5) in the Code of Criminal Procedure, 1898 and the requirement to state reasons *for* giving death sentence and *not* the alternate of life imprisonment under Section 354(3) of the Code of Criminal Procedure, 1973 was yet to be introduced. *Bachan Singh* relates to the period after the Code of Criminal Procedure, 1973 came into force that gives to the accused the

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right of pre-sentence hearing under Section 235(2) and under Section 354(3) casts an obligation on the court to state the 'special reasons' for awarding the sentence of death and not its alternate, the imprisonment for life or imprisonment for a term of years. On both occasions the court upheld the Constitutional validity of death sentence for murder and the other capital offences in the Penal Code.

23. We are not concerned here with the issue of the Constitutionality of death sentence that stands conclusively settled by two Constitution Bench decisions. What is of importance for our present purpose is that both the Constitution Benches firmly declined to be drawn into making any standardisation or categorisation of cases for awarding death penalty? It was strongly urged before the Court that in order to save the sentence of death from the vice of arbitrariness it was imperative for the Court to lay down guide lines, to mark and identify the types of murder that would attract the punishment of death, leaving aside the other kinds of murder for the lesser option of the sentence of imprisonment for life. In *Jagmohan* the Court turned down the submission observing (in paragraph 25 of the judgment) as follows:

> "In India this onerous duty is cast upon Judges and for more than a century the Judges are carrying out this duty under the Indian Penal Code. The *impossibility* of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentence is as already pointed out, liable

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> to be corrected by superior courts. *Laying down of standards to the limited extent possible as was done in the Model Judicial Code would not serve the purpose. The exercise of judicial discretion on well recognized principles is in the final analysis the safest possible safeguards for the accused.”*
>
> (Emphasis added)

Barely seven years later, the same argument was advanced with even greater force before another Constitution Bench in *Bachan Singh* vs. *State of Punjab* (supra). It was contended that under Section 354(3) the requirement of giving ‘special reasons’ for awarding death sentence was very loose and it left the doors open for imposition of death penalty in an arbitrary and whimsical manner. It was further contended that for the sake of saving the Constitutional validity of the provision the Court must step in to clearly define its scope by unmistakably marking the types of grave murders and other capital offences that would attract death penalty rather than the alternate punishment of imprisonment for life.

24. As on the earlier occasion, in *Bachan Singh* too the Court rejected the submission. The Court did not accept the contention that asking the Court to state special reasons for awarding death sentence amounted to leaving the Court to do something that was essentially a legislative function. The Court held that the exercise of judicial discretion on well established principles and on the facts of each case was not the same as to legislate. On the contrary, the Court observed, any attempt to

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standardise or to identify the types of cases for the purpose of death sentence would amount to taking up the legislative function. The Court said that a 'standardization or sentencing discretion is a policy matter which belongs to the sphere of legislation' and 'the *Court would not* by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do.'

25. The Court also rejected the other submission that unless it precisely defined the scope of Section 354(3) and clearly marked the types of grave murders and capital offences there would always be the chance of imposition of death penalty in an arbitrary and whimsical manner. In paragraph 168 of the judgment the Court observed as follows:

> "Now, remains the question whether this Court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders."

It discussed the issue at length from paragraphs 169 to 195 and firmly refused to do any categorisation or standardisation of cases for the purpose of death sentence. In the lengthy discussion on the issue, the Court gave over half a dozen different reasons against the argument urging for standardisation and categorisation of cases; it also cited the American experience to show the futility of any such undertaking. A perusal of that part of the judgment shows that a very strong plea was made before the Court for standardisation and categorisation of cases for

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the purpose of death sentence. Nonetheless the Court remained resolute in its refusal to undertake the exercise. In this regard the court agreed with the view earlier taken in *Jagmohan* and observed that it was not possible to make an exhaustive enumeration of aggravating or mitigating circumstances which should be taken into consideration when sentencing an offender. It extracted the passage from *Jagmohan* that quoted with approval the observation from an American decision in *McGautha* vs. *California,* (1971) 402 US 183

> "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury/Judge would need."

It also reiterated the observation in *Jagmohan* that such "standardisation" is well-nigh impossible.

26. Arguing against standardisation of cases for the purpose of death sentence the Court observed that *even within a single category offence there are infinite, unpredictable and unforeseeable variations*. No two cases are exactly identical. *There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus*. The Court further observed that *standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity.*

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27. It is significant to note that the Court was extremely wary of dealing with even the question of indicating the broad criteria which should guide the Courts in sentencing a convict of murder. It reminded itself of the observation of Stewart, J. in *Greg* vs. *Georgia*, 'while we have an obligation to ensure that the constitutional bounds are not overreached, we may not act as judges as we might as legislatures'. Having thus cautioned itself, though the Court recorded the suggestions of Dr.Chitale, one of the counsels appearing in the case, as regards the 'aggravating circumstances' and the 'mitigating circumstances', it was careful not to commit itself to Dr. Chitale's categories. In paragraph 200 the judgment recorded the 'aggravating circumstances' suggested by Dr.Chitale, but in paragraph 201 it observed as follows:

> "*Stated broadly,* there can be no objection to the acceptance of these indicators but as we have indicated already, *we would prefer not to fetter judicial discretion* by attempting to make an exhaustive enumeration one way or the other."

Similarly, in paragraph 204 the judgment recorded the 'mitigating circumstances' as suggested by Dr.Chitale. In paragraph 205, however, it observed as follows:

> "We will do no more than to say that these are undoubtedly *relevant circumstances and must be given great weight* in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance."

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In the end, the Court following the decision in *Jagmohan* left the sentencing process exactly as it came from the legislative, flexible and responsive to each case on its merits, subject to the discretion of the Court and in case of any error in exercise of the discretion subject further to correction by the Superior Court(s). The Court observed:

> "In *Jagmohan*, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallized by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan – as we have discussed already – do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted *only in gravest cases of extreme culpability*; (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also."

Earlier in the judgment while reaffirming *Jagmohan*, subject of course to certain adjustments in view of the legislative changes (section 354(3) the Court observed:

> "*The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.* Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other

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> capital offences punishable in the alternative with death under the Penal Code, *the extreme penalty should be imposed only in extreme cases.*"
>
> (Emphasis added)

In conclusion the Constitution Bench decision in Bachan Singh said:

> "………It is, therefore, imperative to voice the concern that courts, aided by the *broad illustrative guidelines* indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, *life imprisonment is the rule and death sentence an exception.* A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done *save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*"
>
> (Emphasis added)

The *Bachan Singh* principle of 'rarest of rare cases' came up for consideration and *elaboration* in the case of *Machhi Singh*. It was a case of extraordinary brutality. On account of a family feud Machhi Singh the main accused in the case, along with eleven accomplices, in course of a single night, conducted raids on a number of villages killing seventeen people, men, women and children for no reason other than they were related to one Amar Singh and his sister Piyaro Bai. The death sentence awarded to Machhi Singh and two other accused by the Trial Court and affirmed by the High Court was also confirmed by this Court. In *Machhi Singh* the Court put itself in the position of the 'Community' and

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observed that though the 'Community' revered and protected life because 'the very humanistic edifice is constructed on the foundation of reverence for life principle' it may yet withdraw the protection and demand death penalty,

> "It may do so 'in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance :
>
> I. **Manner of commission of murder**
>
> When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
>
> (i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

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(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

(a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when

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such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when

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> the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

In *Machhi Singh* the Court held that for practical application the rarest of rare cases principle must be read and understood in the background of the five categories of murder cases enumerated in it. Thus the standardisation and classification of cases that the two earlier Constitution Benches had resolutely refrained from doing finally came to be done in Machhi Singh.

28. In *Machhi Singh* the Court crafted the categories of murder in which 'the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in *Machhi Singh* was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the *Machhi Singh* categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society

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compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made to day. Relying upon the observations in *Bachan Singh*, therefore, we respectfully wish to say that even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in *Bachan Singh* itself.

29. The matter can be looked at from another angle. In *Bachan Singh* it was held that the expression "special reasons" in the context of the provision of Section 354(3) obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. It was further said that on

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conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. In conclusion it was said that the death penalty ought not to be imposed save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Now, all these expressions “special reasons”, “exceptional reasons”, “founded on the exceptional grave circumstances”, “extreme cases” and “the rarest of the rare cases” unquestionably indicate a *relative category* based on comparison with other cases of murder. *Machhi Singh* for the purpose of practical application sought to translate this relative category into absolute terms by framing the five categories. (In doing so, it is held by some, Machhi Singh considerably enlarged the scope for imposing death penalty that was greatly restricted by Bachan Singh!).

30. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to

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him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The court is in a position to judge 'the rarest of rare cases' or an 'exceptional case' or an 'extreme case' only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison. More important are the cases of murder of the worst kind, and their number is by no means small, in which the culprits, though identifiable, manage to escape any punishment or are let off very lightly. Those cases never come up for comparison with the cases this Court might be dealing with for confirmation of death sentence. To say this is because our Criminal justice System, of which the court is only a part, does not work with a hundred percent efficiency or anywhere near it, is not to say something remarkably new or original. But the point is, this Court, being the highest court of the Land, presiding over a Criminal Justice System that allows culprits of the most dangerous and revolting kinds of murders to slip away should be extremely wary in dealing with death sentence and should resort to it, in the words of *Bachan Singh*, only when the other alternative is unquestionably foreclosed. We are not

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unconscious of the simple logic that in case five crimes go undetected and unpunished that is no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence.

31. That is not the end of the matter. Coupled with the deficiency of the Criminal Justice System is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* laid down the principle of the rarest of rare cases. *Machhi Singh*, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently. In *Aloke Nath Dutta* vs. *State of West Bengal*, 2006 (13) SCALE 467, Sinha J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict (see paragraphs 154 to 182, pp.504-510 SCALE). He finally observed that 'courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar' and further 'it is

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evident that different benches had taken different view in the matter'. Katju J. in his order passed in this appeal said that he did not agree with the decision in *Aloke Nath Dutt* in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju J. may be right that there can not be an absolute rule excluding death sentence in all cases of circumstantial evidence (though in *Aloke Nath Dutta* it is said 'normally' and not as an absolute rule). But there is no denying the illustrations cited by Sinha J. which are a matter of fact.

32. The same point is made in far greater detail in a report called, "Lethal Lottery, The Death Penalty in India" compiled jointly by Amnesty International India and Peoples Union For Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see chapter 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

33. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.

34. 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

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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 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 lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied.

35. These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant.

36. Coming now to the facts of the case it is undeniable that the appellant killed Shakereh in a planned and cold blooded manner but at least this much can be said in his favour that he devised the plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most. Further though the way of killing appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim. Thirdly, as noted by Sinha J. the appellant confessed his guilt at least partially before the High Court.

37. We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not

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highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court. The hangman's noose is thus taken off the appellant's neck.

38. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the appellant was taken in custody on 28 March, 1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment *when awarded as a substitute for death penalty* would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and

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sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior Courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh and others* vs. *State of Punjab*, (1979) 3 SCC 745. In paragraph 14 of the judgment this Court held and observed as follows:

> "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad* case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, *at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large.* This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."
>
> [Emphasis added]

We think that it is time that the course suggested in Dalbir Singh should receive a formal recognition by the Court.

39. As a matter of fact there are sufficient precedents for the Court to take such a course. In a number of cases this court has substituted death

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penalty by life imprisonment or in some cases for a term of twenty years with the further direction that the convict would not be released for the rest of his life or until the twenty year term was actually served out. In this case too Sinha J. passed exactly the same order. After declining to confirm the death sentence given to the appellant he proceeded to give the following direction.

> "However, while saying so, we (sic) direct that in a case of this nature 'life sentence' *must be meant to be 'life sentence'*. Such a direction can be given, as would appear from some precedents."

Sinha J. then mentioned the following five cases in which this Court had passed similar orders.

40. In *Subhash Chander* vs. *Krishan La & others,* (2001) 4 SCC 458, five accused persons, including Krishan Lal were put on trial for committing multiple murders. The trial court acquitted one of the accused but convicted the rest of them and sentenced each of them to death. In the death reference/appeals preferred by the convicted accused, the High Court confirmed the conviction of all the four accused but commuted their death sentence to life imprisonment. One Subhash Chander (PW-2) came to this Court in appeal. On a consideration of the material facts this Court felt that the High Court was not justified in commuting the sentence of death of at least one accused, Krishan Lal. But then the counsel appearing on his behalf implored that instead of

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death penalty this Court might order for imprisonment of Krishan Lal for the remaining period of his life. This Court took note of the counsel's submission as follows:

> "Faced with the situation Mr. U. R. Lalit, Senior Counsel appearing for the aforesaid respondents submitted that instead of depriving Krishan Lal (A-1) of his life, the Court can pass appropriate order to deprive the aforesaid accused person of his liberty throughout his life. *Upon instructions, the learned Senior Counsel submitted that the said Krishan Lal, if sentenced to life imprisonment would never claim his premature release or commutation of his sentence on any ground.* We record such a submission made on behalf of the said accused, upon instructions."
>
> (Emphasis added)

This Court accepted the plea made by the counsel and passed the following order:

> "However, in the peculiar circumstances of the case, apprehending imminent danger to the life of Subhash Chander and his family in future, taking on record the statement made on behalf of Krishan Lal (A-1), we are inclined to hold that *for him the imprisonment for life shall be the imprisonment in prison for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the rules made for the purposes of grant of commutation and remissions*."
>
> (Emphasis added)

In *Subhash Chander* this court referred to an earlier judgment in *State of M.P.* vs. *Ratan Singh,* (1976) 3 SCC 470, in which it was held that a

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sentence of imprisonment for life means a sentence for the entire life of the prisoner *unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure*. The Court also referred to the earlier decisions in *Sohan Lal* vs. *Asha Ram,* (1981) 1 SCC 106 (This is a mistake since Sohan Lal is a completely different case; apparently the reference was to *Maru Ram* vs. *Union of India* on page 107 of the same report), *Bhagirath* vs. *Delhi Administration,* (1985) 2 SCC 580 and *Zahid Hussein* vs. *State of West Bengal,* (2001) 3 SCC 750.

41. In *Shri Bhagwan* vs. *State of Rajasthan,* (2001) 6 SCC 296, the appellant, who was 20 years old at the time of commission of the offence, had come to this Court, condemned to death by the trial court and the High Court. According to prosecution, he had killed five members of a family by mercilessly battering them to death. The manner of killing was brutal and the circumstances of the crime exhibited crass ingratitude on the appellant's part. The motive was theft of gold ornaments and other articles belonging to the victim family. In this case, K. G. Balakrishnan, J. (as the Hon'ble the Chief Justice was at that time) who wrote the judgment for the Court commuted the death sentence awarded to the appellant to imprisonment for life subject to the direction that he would not be released from the prison until he had served out at least 20 years of imprisonment including the period already undergone by him. In this

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case there is also a very useful discussion with regard to the provisions of commutation and remission in the Code of Criminal Procedure and the prison rules to which we shall advert later on in this judgment.

42. In *Prakash Dhawal Khairnar (Patil)* vs. *State of Maharashtra,* (2002) 2 SCC 35, the condemned appellant had committed the murder of his own brother, their mother and four members of his brother's family because the deceased brother was not partitioning the property which the appellant claimed to be joint family property. In the totality of circumstances this Court set aside the death sentence awarded to the appellant but directed that for the murders committed by him, he would suffer imprisonment for life and further that he would not be released from prison until he had served out at least 20 years of imprisonment including the period already undergone by him. For giving such a direction, the court referred to the decisions in *Shri Bhagwan* (supra) and *Dalbir Singh V. The State of Punjab,* (1979) 3 SCC 745.

43. In *Ram Anup Singh & others V. State of Bihar,* (2002) 6 SCC 686, there were a father and his two sons before this court. They had killed the father's brother, the brother's wife, his daughter and his son-in-law. On conviction for the murders the father was sentenced to life imprisonment but the two sons were given the death penalty. This Court once again interfered and set aside the death sentence awarded by the trial court and confirmed by the High Court to the two sons and instead

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sentenced them to suffer rigorous imprisonment for life with the condition that they would not be released before completing an actual term of 20 years including the period of imprisonment already undergone by them. Reference was made to the decisions in *Shri Bhagwan, Dalbir Singh* and *Prakash Dhawal Khairnar (Patil)* (supra).

44. The fifth decision mentioned by Sinha J. was in *Mohd. Munna* vs. *Union of India*, (2005) 7 SCC 417. In this case it was basically held that in the absence of an order of remission formally passed by the appropriate government, there was no provision in the Penal Code or in the Code of Criminal Procedure under which a sentence of life imprisonment could be treated as for a term of 14 years or 20 years and further that a convict undergoing imprisonment for life could not claim remission as a matter of right.

45. To this list of five cases mentioned by Sinha J. one could add one or two more.

46. In *Jayawant Dattatraya Suryarao* vs. *State of Maharashtra*, (2001) 10 SCC 109, this Court had before it a batch of five analogous cases. There were three appeals on behalf of three of the accused convicted by the trial court; another appeal by the State in regard to the accused who were acquitted by the trial court and a death reference in regard to one of the appellants, Subhashsingh Shobhanathsingh Thakur (A-6) who was given sentences of death on two counts, one under the

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provisions of the Terrorist and Disruptive Activities (Prevention) Act (TADA) and the other under section 120-B of the Penal Code. According to the prosecution case the appellants, along with a number of other co-accused, armed with highly sophisticated weapons had raided J.J.Hospital in Mumbai where the victim, a member of another underworld gang, was admitted for treatment. In the hospital they made indiscriminate firing killing not only their target but also two policemen who were on guard duty and injuring several others. The court confirmed the conviction of appellant No.6 but modified the sentence from death penalty to imprisonment for life – **till rest of life**. For the direction given by it the court referred to the decisions in *Subhash Chander* (supra), *State of Madhya Pradesh* (supra), *Shri Bhagwan* (supra), *Sohan Lal* (supra), *Bhagirath* vs. *Delhi Administration* (supra) and *Zahid Hussein* (supra).

47. In *Nazir Khan & others* Vs. *State of Delhi,* (2003) 8 SCC 461, three of the appellants before the Court were sentenced to death for committing offences punishable under Section 364-A read with Section 120-B, IPC. They were also convicted under the provisions of Terrorist and Disruptive Activities (Prevention) Act (TADA) with different terms of imprisonment for those offences. This Court, however, commuted the death sentence of the three appellants but having regard to the gravity of the offences and the dastardly nature of their acts directed for their

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incarceration for a period of 20 years with the further direction that the accused-appellants would not be entitled to any remission from the term of 20 years. Reference was made to the earlier decisions in *Ashok Kumar* vs. *Union of India,* (1991) 3 SCC 498 and *Sat Pal* vs. *State of Haryana,* (1992) 4 SCC 172.

48. On a perusal of the seven decisions discussed above and the decisions referred to therein it would appear that this Court modified the death sentence to imprisonment for life or in some cases imprisonment for a term of twenty years with the further direction that the convict must not be released from prison for the rest of his life or before actually serving out the term of twenty years, as the case may be, mainly on two premises; one, an imprisonment for life, in terms of section 53 read with section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner and two, a convict undergoing life imprisonment has no right to claim remission. In support of the second premise reliance is placed on the line of decisions beginning from *Gopal Vinayak Godse* vs. *The State of Maharashtra*, 1961 (3) SCR 440 and coming down to *Mohd. Munna* vs. *Union of India* (supra).

49. In course of hearing of the appeal before us strong doubts were raised over the application of the second premise for putting a sentence of imprisonment beyond remission. It was contended that to say that a convict undergoing a sentence of imprisonment had no right to claim

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remission was not the same as the Court, while giving the punishment of imprisonment, suspending the operation of the statutory provisions of remission and restraining the appropriate government from discharging its statutory function.

50. In this connection an interesting development was brought to our notice. We were informed that *Subhashsingh Shobhanathsingh Thakur* whose death sentence was modified by this Court to imprisonment for life – **till rest of life** by its judgment dated 5 November, 2001 in *Jayawant Dattatraya Suryarao* vs. *State of Maharashtra*, (supra) has filed a writ petition under Article 32 of the Constitution before this Court (Writ Petition (Criminal) No. 36 of 2008: *Subhashsingh Shobhanathsingh Thakur* vs. *The State of Maharashtra*) challenging, on substantially the same grounds, the order of the Court, in so far as it directed for the non application of the statutory provisions of remission to his case.

51. Our attention was also invited to a decision of this Court in *State (Government of NCT of Delhi)* vs. *Prem Raj*, (2003) 7 SCC 121. In this case, Prem Raj, the accused respondent before the court was convicted by the trial court under Section 7 read with Section 13(1)(d) and 13(2) of the Prevention of Corruption Act and was sentenced to undergo rigorous imprisonment for two years and a fine of Rs.500/- under Section 7. He was additionally sentenced to undergo imprisonment for 3-1/2 years and

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a fine of Rs.1, 000/- under Section 13(2) of the Act, subject to the direction that the two sentences would run concurrently. In appeal, on a plea made on the question of sentence, a learned Single Judge of the High Court enhanced the amount of fine to Rs.15, 000/- in lieu of the sentences of imprisonment and directed that on deposit of the amount of fine the State government, being the 'appropriate government' would formalize the matter by passing an appropriate order under Section 433 (c) of the Code of Criminal Procedure. This Court, on appeal by the State, held that the question of remission lay within the domain of the appropriate government and it was not open to the High Court to give a direction of that kind. In the case of *Prem Raj* the Court referred to two earlier decisions in *Delhi Administration* vs. *Manohar Lal*, (2002) 7 SCC 222 and *State of Punjab* vs. *Kesar Singh,* (1996) 5 SCC 495 and in paragraph 13 of the decision observed as follows :

> "An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Admn. (now NCT of Delhi)* vs. *Manohar Lal.* The Bench speaking through one of us (Doraiswamy Raju,J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In *State of Punjab* vs. *Kesar Singh,* this Court observed as follows [though it was in the context of Section 433(b)]: (SCC pp.595-96, para 3)"
>
> "The mandate of Section 433 Cr. P. C. enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his

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> release before expiry of the sentence as imposed by the courts…..That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 Cr. P. C. vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside."

Relying upon the aforesaid two decisions this Court set aside the order of the court but left it open to the accused to move the appropriate Government for such relief as may be available in law. It was further clarified that it would be at the sole discretion of the Government to exercise the power conferred on it in accordance with law.

52. Before us it was submitted that just as the Court could not direct the appropriate government for granting remission to a convicted prisoner, it was not open to the Court to direct the appropriate government not to consider the case of a convict for grant of remission in sentence. It was contended that giving punishment for an offence was indeed a judicial function but once the judgment was pronounced and punishment awarded the matter no longer remained in the hands of the Court. The execution of the punishment passed into the hands of the executive and under the scheme of the statute the Court had no control over the execution.

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53. In our view, the submission is wholly misconceived and untenable and the decision in the case of *Prem Raj* has no application to the issue under consideration.

54. At this stage, it will be useful to take a very brief look at the provisions with regard to sentencing and computation, remission etc. of sentences. Section 45 of the Penal Code defines "life" to mean the life of the human being, unless the contrary appears from the context. Section 53 enumerates punishments, the first of which is death and the second, imprisonment for life. Sections 54 and 55 give to the appropriate Government the power of commutation of the sentence of death and the sentence of imprisonment for life respectively. Section 55A defines "appropriate Government". Section 57 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. It is now conclusively settled by a catena of decisions that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life. (See the decisions of this Court in *Gopal Vinayak Godse* vs. *The State of Maharashtra &others,* (1961) 3 SCR 440 (Constitution Bench); *Dalbir Singh & others* vs. *State of Punjab,* (1979) 3 SCC 745; Maru Ram vs. Union of India, (1981) 1 SCC 107 (Constitution Bench); *Naib Singh* vs. *State of Punjab,* (1983) 2 SCC 454; Ashok Kumar alias Golu vs. Union of India, (1991) 3 SCC 498; *Laxman*

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Naskar (Life Convict) vs. *State of W.B.,,* (2000) 7 SCC 626; *Zahid Hussein* vs. *State of West Bengal,* (2001) 3 SCC 750; *Kamalanantha* vs. *State of Tamil Nadu,* (2005) 5 SCC 194; *Mohd.Munna* vs. *Union of India,* (2005) 7 SCC 416 and *C.A.Pious* vs. *State of Kerala,* (2007) 8 SCC 312).

55. It is equally well-settled that Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. (See : *Gopal Vinayak Godse* (supra) and *Ashok Kumar alias Golu* (supra). The object and purpose of Section 57 will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code.

56. This takes us to the issue of computation and remission etc. of sentences. The provisions in regard to computation, remission, suspension etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the State respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the Constitutional provisions that are in the nature

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of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the Rules framed by the different States.

57. Section 432 of the Code of Criminal Procedure deals with the power to suspend or remit sentences and Section 433 with the power to commute sentences. Section 433A, that was inserted in the Code by an amendment made in 1978, imposes restriction on powers of remission or commutation in certain cases. It reads as follows:

> "**Restriction on powers of remission or computation in certain cases -** Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment 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 had at least fourteen years of imprisonment."

Section 434 gives concurrent power to the Central Government in case of death sentence and Section 435 provides that in certain cases the State Government must act only after consultation with the Central Government.

58. From the Prison Act and the Rules it appears that for good conduct and for doing certain duties etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days

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of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an under trial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life imprisonment, being for the rest of life, is by nature indeterminate.

59. Mr. U. U. Lalit, learned counsel appearing for the Informant, suggested that for applying remission to a sentence of imprisonment for life it would be necessary to first commute the sentence to a fixed term, say for a term of 20 years and then to apply the remissions earned by the prisoner to the commuted period and that would work out to 14 years of actual incarceration.

60. To throw light on the question Mr. Hegde submitted a note on remission of sentences of imprisonment as followed in the State of Karnataka, with specific reference to the facts of this case. The note also encloses the relevant extracts from the Karnataka Prison Rules, 1974 and the Karnataka Prison Manual, 1978. Chapter XII of the Karnataka Prison Manual deals with the remission system; Rule 215 defines remission of sentence and provides for three kinds of remissions, namely, ordinary remission, special remission and remission by the State Government. But

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what is significant for our purpose is the stipulation made in Rule 214(c) which reads as follows:

> "The sentence of all prisoners sentenced to imprisonment for life or to more than 20 years imprisonment in the aggregate to imprisonment for life and imprisonment for exceeding in the aggregate 20 years, shall for the these Rules *be deemed to be sentence of imprisonment for 20 years*
> .
>
> (Emphasis added)

In the note submitted by the counsel it is explained that the cases of life convicts are first considered for remission by an Advisory Board constituted under Rule 814. The proposals for premature release of life convicts, convicted after 18 December, 1978 (the date of introduction of Section 433A in the Code) are placed before the Advisory Board, as provided under Government Order No. HD 92 PRR 88, dated 17 July, 1989 on completion of 13 years and 8 months of imprisonment including the under trial period. The recommendations of the Board go to the Inspector General of Prisons together with all the records and are finally placed before the Government for considering the premature release of the prisoners on completing 14 years of imprisonment. The State Government considers the recommendations of the Advisory Board and gives directions either for the forthwith release of the prisoner or that the prisoner would be released in the ordinary course on the expiry of the sentence, less the period of remission earned. In case of a life convict if

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no order of premature release is passed there can be no release by the mere lapse of time since a life sentence is for the rest of life.

61. To the question whether any specific orders are passed by the Government to commute the sentence of life imprisonment to imprisonment for 20 years or less, the answer is given in the note, as follows:

> "In addition to what is stated in para 3.1, it may be added that cases of life imprisonment pass through the Advisory Board and their recommendations are examined by the Head of the Department viz., Additional Director General of Police and Inspector General of Prisons who later forwards them to the Government for passing final orders. That is how the sentence of life imprisonment is commuted for a term of 20 years or less as per provisions of Sections 54 and 55 of the IPC and Section 433A Cr. P. C."

It is further stated in the note as follows:

> "Experience shows that in respect of life convicts *an assumption* can be made that the total sentence is 20 years and if the convict earns all categories of remissions in the normal course it may come to 6 years which is less than one third of 20 years. This is also in consonance with Order 214(C) of the Prisons Manual *which for the purposes of the rules deems a sentence of imprisonment for life to be a sentence of imprisonment for twenty years."*
>
> [Emphasis added]

In the note, it is further stated that in the event the appellant's sentence is modified to life imprisonment, his case for premature release would come up before the Advisory Board in January 2009. The Board shall

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then make its recommendation in light of the instructions contained in Chapter XLIV of the Karnataka Prisons Manual. The recommendation of the Board will be examined by the Head of the Department and thereafter the State Government will pass appropriate orders regarding commutation of his sentence.

62. We also got some enquiries made on the issue of premature release of a life convict in the State of Bihar and came to learn that the process follows basically a similar pattern. In Bihar too the order for early release of a convicted prisoner is passed by the State Government in the Department of Law (Justice) on the basis of recommendations made by the Bihar State Sentence Remission Board. But there also the significant thing is the conversion of life imprisonment into imprisonment for a fixed term. In this regard the Government Letter No.A/PM-03/81-550 dated 21 January, 1984 was brought to our notice. The letter begins by stating the Government decision that for grant of remission to a life convict and for his release from prison, *imprisonment for life will be deemed to be imprisonment for a term of 20 years*. Then in paragraph 1 in the letter, in its original form it was stated that a life convict would not be entitled to the benefit of set off under Section 428 of the Code of Criminal Procedure, 1973 for the period of incarceration as an under trial. Paragraph 1 of the letter was, however, deleted by letter No. 3115 dated 23 May, 1985 following the decision of this Court in *Bhagirath* vs.

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Delhi Administration (supra). Paragraph 2 of the letter as it originally stood stipulated that an accused who is given the punishment of imprisonment for life in a capital offence or whose death sentence is commuted to life imprisonment under Section 433 of the Code as well as an accused who was awarded life sentence after 18 December, 1978 would be released from prison (a) only on completion of 14 years of actual imprisonment; and (b) when the total period of their imprisonment and the days of remission add up to 20 years. Paragraph 2 of this letter too was later deleted by Government letter No. 2939, dated 29 June, 2007 that provided that the decision to release a convict undergoing life imprisonment for a capital offence or whose death sentence is commuted to life imprisonment would be taken by the State Government or by the State Sentence Remission Board constituted by the Government.

63. It is thus to be seen that both in Karnataka and Bihar remission is granted to life convicts by *deemed* conversion of life imprisonment into a fixed term of 20 years. The deemed conversion of life imprisonment into one for fixed term by executive orders issued by the State Governments apparently flies in the face of a long line of decisions by this Court and we are afraid no provision of law was brought to our notice to sanction such a course. It is thus to be seen that life convicts are granted remission and released from prison on completing the fourteen year term without any sound legal basis. One can safely assume that the position would be

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no better in the other States. This Court can also take judicial notice of the fact that remission is allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. The grant of remission is the rule and remission is denied, one may say, in the rarest of the rare cases.

64. Here, it may be noted that this has been the position for a very long time. As far back as in 1973, in *Jagmohan Singh* (supra) a Constitution Bench of this Court made the following observation:

> "In the context of our criminal law which punishes murderer, *one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.*"
>
> (Emphasis added)

Five years after *Jagmohan*, Section 433A was inserted in the Code of Criminal Procedure, 1973 imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433A another Constitution Bench of this Court in *Bachan Singh* (supra) made the following observation:

> "It may be recalled that in Jagmohan this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432 and 433,

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> so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years."

Thus all that is changed by Section 433A is that before its insertion an imprisonment for life in most cases worked out to a dozen years of imprisonment and after its introduction it works out to fourteen years' imprisonment. But the observation in *Jagmohan* that this cannot be accepted as an adequate substitute for the death penalty still holds true.

65. Earlier in this judgment it was noted that the decision in *Shri Bhagwan* (supra) there is a useful discussion on the legality of remission in the case of life convicts. The judgment in *Shri Bhagwan*, in paragraph 22, refers to and quotes from the earlier decision in *State of M.P.* vs. *Ratan Singh* (supra) which in turn quotes a passage from the Constitution Bench decision in *Gopal Vinayek Godse* (supra). It will be profitable to reproduce here the extract from *Ratan Singh*:

> "4. As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer res integra and stands concluded by a decision of this Court in *Gopal Vinayak Godse* v. *State of Maharashtra*, (1961) 3 SCR 440 where the Court, following a decision of the Privy Counsel in *Pandit Kishori Lal* v. *King Emperor,* AIR 1954 PC 64 observed as follows:

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> "Under that section a person transported for life or any other terms before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.
>
> If so the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act.
>
> * * * * *
>
> A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life".

The Court further observed thus:

> *"But the Prisons Act does not confer on any authority a power to commute or remit sentences*; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act…...Under the said rules the order of an appropriate Government under Section 401 Criminal Procedure Code, are a pre-requisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

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> The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release'.
>
> It is, therefore, manifest from the decision of this Court that the Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Indian Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Indian Penal Code. In other words, this Court has clearly held that a sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period the prisoner's death and remissions given under the Rules could not be regarded as a substitute for a sentence of transportation for life."

Further, in paragraph 23, the judgment in *Shri Bhagwan* observed as follows:

> "In *Maru Ram* vs. *Union of India***,** (1981) 1 SCC 107**,** a Constitution Bench of this Court reiterated the aforesaid position and observed that the inevitable conclusion is that since in Section 433A we deal only with life sentences, *remissions lead nowhere and cannot entitle a prisoner to release.* Further, in *Laxman Naskar (Life Convict)* **vs.** *State of W.B. & Anr.,* (2000) 7 SCC 626, after referring to the decision of the case of *Gopal Vinayak Godse* vs.

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> *State of Maharashtra,* (1961) 3 SCR 440, the court reiterated that sentence for "imprisonment for life" ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitled the convict to be released automatically before the full life term if served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose."

The legal position as enunciated in *Pandit Kishori Lal*, *Gopal Vinayak Godse, Mau Ram, Ratan Singh* and *Shri Bhagwan* 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.

66. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in

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

67. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a

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reassertion of the Constitution Bench decision in *Bachan Singh* (supra) besides being in accord with the modern trends in penology.

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

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

70. This appeal stands disposed off with the aforesaid directions and observations.

…………………………… J.

[B.N.Agrawal]

…………………………… J.

[G.S.Singhvi]

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..............................J.
[Aftab Alam]

New Delhi,

July 22, 2008.