dismissed without giving any reasons. He also submitted that though the review petitioner had initially approached the Secretary, Supreme Court Legal Service Committee (SCLSC) which assigned the case to its panel lawyer who drafted the special leave petition and filed the same in the Court, even before it could come up for hearing, the family of the review petitioner had made an application dated December 26, 2014 to the Secretary, SCLSC for withdrawal of the legal aid, as the review petitioner wanted the case to be presented through his own advocate. Notwithstanding the same, the advocate who was assigned the case by SCLSC appeared in the matter on January 06, 2015 when the special leave petition of the review petitioner and his co-accused persons was dismissed *in limine*.

6. By orders in Review Petition No. 388 of 2015, where also the special leave petition was dismissed in identical manner *in limine* and without giving reasons, we have allowed the review, inter alia, on the ground that in such cases a deeper scrutiny coupled with reasons in support of death penalty should be given by the Court. Adopting the reasoning in the said case, this review petition also stands allowed and as a consequence, SLP(Criminal) No. 111 of 2015 is restored to its original number.

***Result*:-** Review petition allowed.

ABC 2019 (I) 104 SC
ACQUITTAL & BAIL CASES

SUPREME COURT OF INDIA

(Kurian Joseph, Deepak Gupta & Hemant Gupta, JJJ.)

Criminal Appeal No(s). 1482-1483 of 2018
[Arising Out of S.L.P. (Criminal) No(S). 5898-5899 of 2014]
(From Chhattisgarh High Court)
Decided on 28 November, 2018

CHHANNU LAL VERMA ***- Appellant(s).***

Versus

STATE OF CHHATTISGARH ***- Respondent(s).***

Law Covered*:-** ***(A) Indian Penal Code, 1860 — Sections 302, 307, 506(2) & 450— Conviction under — Death penalty — No evidence as to the uncommon nature of the offence or the improbability of reformation or rehabilitation of the appellant has

been adduced— whether the person would be a threat to society or whether not granting death penalty would send a wrong message to society — no such analysis was undertaken by the High Court — The High Court has also failed to look at the aggravating and mitigating circumstances regarding the criminal — The fact that the appellant had no previous criminal record — apart from the acquittal in the Section 376, IPC which was a false implication & the alleged motive did not weigh with the High Court as an important mitigating circumstance with respect to the criminal — Held, these factors have not received due consideration by either the High Court or the Trial Court— the imposition of death sentence was not the only option— Death sentence commuted to life imprisonment. (Para 13, 14 & 18)

(B) Criminal Jurisprudence — Death penalty — Awarding of —Held, death penalty shall be awarded only in the rarest of rare cases — where life imprisonment shall be wholly inadequate or futile owing to the nature of the crime & the circumstances relating to the criminal— Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty . (Para 13)

(C) Criminal Jurisprudence — Death penalty — Factors to be considered while imposing — 'extreme depravity' — 'it is the duty of the State to adduce evidence that there is no probability that the accused can be reformed' — 'liberal and expansive connotation' — 'alternative option is unquestionably foreclosed' — 'humane concern' — 'real & abiding concern for dignity of human life' — 'gravest case of extreme culpability' — 'only when life appears to be an altogether inadequate punishment' — 'mitigating circumstances should be given full weightage' — 'probability that the accused can be reformed and rehabilitated'— 'the rarest of rare case is a negative precept' — 'death is an exceptionally narrow opening' — 'extraordinary burden on the Court to impose death' — 'maximum weightage to mitigating circumstances and yet no alternative except death' — 'highest standards of judicial rigor and thoroughness' — 'possibility of reformation, young age of the accused, not a menace to the society, no previous track record' etc. (Para 14)

(D) Criminal Jurisprudence — Death penalty — Commuting to life sentence — Conduct of the death convict in jail — Certificate by the superintendent of the jail — conduct of accused in jail has been good — Held, there is a clear indication that despite having lost all hope, yet no frustration has set on the appellant — On the contrary,

there was a conscious effort on his part to lead a good life for the remaining period — death penalty commuted to life sentence. (Para 15)

(E) Criminal Jurisprudence — Death penalty — Commuting to life sentence — Conduct of the death convict in jail — Held, a positive change on a death row convict — should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed — The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform. (Para 15)

(F) Criminal Jurisprudence — Death penalty — Reformation of the death convict in jail — possibility of — Held, without the assistance of a psychological/psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform — The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated. (Para 16)

(G) Criminal Jurisprudence — Death penalty — bifurcated hearing for conviction & sentencing — not conducted by trial Court — Held, Procedural impropriety of not having a separate hearing for sentencing at the stage of trial has been overlooked by the High Court — A bifurcated hearing for conviction & sentencing was a necessary condition. (Para 17)

(H) Criminal Jurisprudence — Death penalty — hearing for conviction & sentencing conducted same day — Held, By conducting the hearing for sentencing on the same day, the Trial court has failed to provide necessary time to the appellant to furnish evidence relevant to sentencing and mitigation. (Para 17)

(I) Criminal trial — Impact of public discourse on the trial, conviction & sentence in a case— Duty of the Court — to be constitutionally correct even when its view is counter-majoritarian — After all, the society's perspective is generally formed by the emotionally charged narratives— Such narratives need not necessarily be legally correct, properly informed or procedurally proper. (Para 24)

(J) Death penalty — Awarding of — Burden of satisfaction on the Court — Held, the burden to be satisfied by the Judge in awarding this punishment must be high— The irrevocable nature of the sentence and the fact that the death row convicts are, for that period, hanging between life and death are to be duly considered— Every

death penalty case before the court deals with a human life that enjoys certain constitutional protections and if life is to be taken away, then the process must adhere to the strictest and highest constitutional standards. (Para 25)

Facts:- *It is alleged that the appellant entered a house and caused fatal injuries to three inmates with a knife. Thereafter, he entered another house with blood-stained knife and assaulted a woman and inflicted grievous injuries, thereafter he fled from the spot. The Sessions Court convicted the appellant for murder, attempt to murder, threatening to kill and house trespass and sentenced him to undergo life imprisonment, imposed fines and awarded him death sentence. With a view that the way the accused picked and chose the people indicated that the act was pre-meditated and since the appellant exhibited cruelty in the process, the Court held it as a case under the rarest of the rare cases category. The conviction was upheld by the High Court. Mens rea for the offence was cited that he was previously charged of rape with one of the deceased persons and detained in jail for a year although he was later acquitted. In the present appeal it was submitted that at least the sentence may be commuted to life. After weighing various issues and referring authorities on death penalty the death sentence was commuted to life imprisonment.*

Law of relief:- ***In case of awarding a death penalty a bifurcated hearing for conviction & sentencing is a necessary condition.***

Held:- Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty. As laid down in **Shankar Kisanrao Khade** (supra), whether the person would be a threat to society or whether not granting death penalty would send a wrong message to society are additional factors to be looked at. No such analysis was undertaken by the High Court. (Para-13)

In the past four decades or so, this Court has been consistently echoing its concern on the constitutional ethos on value and dignity of life, when it said in **Bachan Singh** (supra) that 'extreme depravity' (paragraph 201), 'it is the duty of the State to adduce evidence that there is no probability that the accused can be reformed' (paragraph 206), 'liberal and expansive connotation' (paragraph 209), 'alternative option is unquestionably foreclosed' (paragraph 209) 'humane concern' (paragraph 209), 'real and abiding concern for dignity of human life' (paragraph 209), in

Machhi Singh (supra) that 'gravest case of extreme culpability' (paragraph 38), 'only when life appears to be an altogether inadequate punishment' (paragraph 28), 'mitigating circumstances should be given full weightage' (paragraph 38), in **Santosh Bariyar** (supra) that 'probability that the accused can be reformed and rehabilitated' (paragraph 57), 'the rarest of rare case is a negative precept' (paragraph 58), 'death is an exceptionally narrow opening' (paragraph 58), 'extraordinary burden on the Court to impose death' (paragraph 60), 'maximum weightage to mitigating circumstances and yet no alternative except death' (paragraph 39), 'highest standards of judicial rigor and thoroughness' (paragraph 61), and in **Shankar Kisanrao Khade** (supra) that 'possibility of reformation, young age of the accused, not a menace to the society, no previous track record' (paragraph 52) etc. These factors have not received due consideration by either the High Court or the Trial Court. (Para-14)

The superintendent of the jail has given a certificate that his conduct in jail has been good. Thus, there is a clear indication that despite having lost all hope, yet no frustration has set on the appellant. On the contrary, there was a conscious effort on his part to lead a good life for the remaining period. A convict is sent to jail with the hope and expectation that he would make amends and get reformed. That there is such a positive change on a death row convict, in our view, should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed. As held by the Constitution Bench in **Bachan Singh** (supra) it was the duty of the State to prove by evidence that the convict cannot be reformed or rehabilitated. That information not having been furnished by the State at the relevant time, the information now furnished by the State becomes all the more relevant. The standard set by the 'rarest of rare' test in **Bachan Singh** (supra) is a high standard. The conduct of the convict in prison cannot be lost sight of. The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform. (Para-15)

In the matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such a psychological/ psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform. The State has to

bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated. (Para-16)

Another aspect that has been overlooked by the High Court is the procedural impropriety of not having a separate hearing for sentencing at the stage of trial. A bifurcated hearing for conviction and sentencing was a necessary condition laid down in **Santosh Bariyar** (supra). By conducting the hearing for sentencing on the same day, the Trial court has failed to provide necessary time to the appellant to furnish evidence relevant to sentencing and mitigation. (Para-17)

It is also a matter of anguishing concern as to how public discourse on crimes have an impact on the trial, conviction and sentence in a case. The Court's duty to be constitutionally correct even when its view is counter-majoritarian is also a factor which should weigh with the Court when it deals with the collective conscience of the people or public opinion. After all, the society's perspective is generally formed by the emotionally charged narratives. Such narratives need not necessarily be legally correct, properly informed or procedurally proper. (Para-24)

Till the time death penalty exists in the statute books, the burden to be satisfied by the Judge in awarding this punishment must be high. The irrevocable nature of the sentence and the fact that the death row convicts are, for that period, hanging between life and death are to be duly considered. Every death penalty case before the court deals with a human life that enjoys certain constitutional protections and if life is to be taken away, then the process must adhere to the strictest and highest constitutional standards. Our conscience as judges, which is guided by constitutional principles, cannot allow anything less than that. (Para-25)

Counsel:- ***For Appellant(s):*** *Mr. Radha Shyam Jena, Adv.*

For Respondent(s): *Mr. Dharmendra Kumar Sinha, Adv.*

Cases Referred:-

1. *Bachan Singh v. State of Punjab, (1980) 2 SCC 684, (Para-6)*
2. *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, (Para-6)*
3. *Sonu Sardar v. State of Chhattisgarh, (2012) 4 SCC 97, (Para-7)*
4. *Machhi Singh v. State of Punjab, (1983) 3 SCC 470, (Para-10)*
5. *Kisanrao Khade v. State of Maharashtra,(2013) 5 SCC 546, (Para-12)*
6. *Sangeet v. State of Haryana, (2013) 2 SCC 452, (Para-20)*

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7. *Swamy Shraddananda (2) v. State of Karnataka(Para-20)*
8. *Aloke Nath Dutta v. State of W.B., (Para-20)*
9. *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (Para-20)*
10. *Shankar kisanrao Khade v. State of Maharashtra ('Khade') (2013) 5 SCC 546, (Para-22)*
11. *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ('Bariyar') (2009) 6 SCC 498, (Para-22)*
12. *Kehar Singh v. Union of India-(1989) 1 SCC 204 paras 7,10 & 16, (Para-23)*
13. *Shatrughan Chauhan v. Union of India- (2014) 3 SCC1 -paras 55-56, (Para-23)*

JUDGMENT

KURIAN JOSEPH, J.: - 1. Leave granted.

2. These appeals are filed against the order of the High Court of Chhattisgarh dated 11.04.2014 confirming the death sentence awarded to the appellant by the Sessions Judge, Durg vide its judgment in Sessions Trial No. 288/2011 dated 25.06.2013. The appellant has challenged both the conviction and the sentence.

3. The brief facts in the present case are as follows. On 19.10.2011, it is alleged that the appellant entered the house of Anandram Sahu, Firanteen Bai (wife of Anandram Sahu) and Smt. Ratna Sahu (daughter-in-law of Anandram). The appellant caused fatal injuries to Anandram, Ratna Sahu and Firanteen Bai with a knife. Thereafter, the appellant entered the house of Durga Banchhor with a blood-stained knife and assaulted Meera Banchhor and inflicted grievous injuries. When Durga Banchhor tried to intervene, she was pushed away by the appellant who then fled from the spot.

4. The Sessions Court convicted the appellant for murder under Section 302 of the IPC, attempt to murder under Section 307 IPC, threatening to kill under Section 506 (2) IPC and house trespass under Section 450 IPC and sentenced him to undergo life imprisonment, imposed fines and awarded him death sentence. The Court took the view that this is a case of the rarest of the rare category. The way the appellant also picked and chose the people indicated that the act was pre-meditated. And since the appellant exhibited cruelty in the process, the Court held it as a case under the rarest of the rare cases category and the appellant was awarded death sentence.

5. The High Court while confirming the conviction and death sentence, relied upon the testimony of PW-15 Sonu who is a child witness, PW-11 Durga Bai, PW-8 Basanta, PW-9 Sukhdev Yadav and PW-10 Jailal Dhankar, apart from post-mortem reports. The aggravating and mitigating circumstances were also considered. While balancing the aggravating and mitigating circumstances, the following have been viewed as aggravating circumstances:

i. That the appellant has committed murder of three persons.

ii. That the appellant knew what he was doing and the consequences thereof and yet he committed the offence.

iii. That the murder of Ratna Bai was committed as he was previously charged of rape with the deceased Ratna and detained in jail for a year although he was later acquitted.

iv. Apart from committing murder of three persons, he has also caused grievous injuries to three persons.

v. That two of the deceased and one of the injured persons were women.

The only mitigating circumstance that the Court took note of was the fact that the appellant had been previously accused of committing rape and was detained in jail for one year only to be acquitted later. Another factor that the High Court placed reliance on was that the appellant either feigned ignorance to or denied the questions put to him by the Trial Judge. The Court thus drew the inference that he did not make a case that the offence was committed by him in an emotional or highly disturbed state of mind owing to false implication in the rape case. The Court held that "the appellant did not mitigate the circumstance for not imposing the death sentence." In conclusion, the High Court held that the aggravating circumstances outweighed the mitigating circumstances and the case thus fell within the ambit of rarest of the rare case which calls for the imposition of death penalty. Having regard to the strong evidence on record, Mr. Colin Gonsalves, learned senior counsel for the appellant finally, and according to us rightly, submitted that at least the sentence may be commuted to life.

6. The learned senior counsel has pointed out that the hearing for conviction and sentencing was done on the same day in violation of the guidelines laid down in ***Bachan Singh v. State of Punjab, (1980)***

2 SCC 684 and that the appellant should have been given ample time to adduce evidence in mitigation and thereafter to be heard on the question of sentence. Reliance has also been placed on ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498*** wherein the Court held that under Sections 235(2) and 354(3) of the Code of Criminal Procedure, 1973 there is a mandate for a full-fledged and bifurcated hearing and recording of "special reasons" if the court is inclined to award death sentence. The Trial Court has solely looked at the brutality of the crime to impose death penalty whereas **Bachan Singh** (supra) and **Santosh Bariyar** (supra) unambiguously have held that aggravating and mitigating circumstances with regard to both the crime and the criminal need to be collected before imposing death penalty. Another contention raised by the appellant is that the High Court has erred in holding that the appellant did not mitigate the circumstance for not imposing death penalty when the onus to elicit information necessary for the purpose of sentencing is on the court as held in **Bachan Singh** (supra). It is also argued that the High Court has overlooked the condition laid down in **Bachan Singh** (supra) that the State has to prove that the accused does not demonstrate any probability of reformation or rehabilitation. On the above-mentioned grounds, the counsel for the appellant prays that the death sentence imposed be commuted to imprisonment for life.

7. According to the counsel for the respondent State, the *mens rea* of the appellant was of high degree and intensity and that the Courts were right in imposing death penalty. It has also been pointed out that the appellant had a previous criminal background with the same family in a Section 376 IPC case and thus it is a case where he has failed to reform himself. The respondent has also advanced arguments based on the testimony of the child witness, placing reliance on ***Sonu Sardar v. State of Chhattisgarh, (2012) 4 SCC 97.*** The blows delivered by the appellant were intended to commit murder as all the injuries were severe and inflicted on vital parts. The counsel also pointed out that the appellant had previous enmity with the family and the murder was carried out in cold blood and in a premeditated manner, without any provocation from the victims. The appellant has not attempted to establish that the act was committed by him due to emotional instability caused by the false implication in a rape case with one of the deceased. In short, the appellant has not mitigated the circumstances for avoiding death sentence.

8. In **Bachan Singh** (supra) while upholding the constitutional validity of death penalty in India, it was held that under Section 354 (3) of the Code of Criminal Procedure, 1973, imprisonment for life is the rule and death sentence is the exception. The Court emphasized the need for principled sentencing without completely trammeling the discretionary powers of the judges. It also held that the "special reasons" that are required to be recorded while awarding death sentence means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Some of the aggravating and mitigating circumstances indicated in **Bachan Singh** (supra) are: -

Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

Mitigating circumstances: In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

9. The Court also clarified that while determining the punishment, due regard must be given to the crime as well as the criminal. The aggravating and mitigating circumstances would have to be viewed from the perspective of both the crime and the criminal. The relevant discussion reads thus:

> **"201.** …As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability

assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

(Emphasis supplied)

However, the Court has emphasised that the list of aggravating and mitigating circumstances provided above are not exhaustive and the scope of mitigating factors in death penalty must receive a liberal and expansive construction by the courts. Paragraph 209 reads as follows:

> **"209.** There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide- lines 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 supplied)

10. In ***Machhi Singh v. State of Punjab, (1983) 3 SCC 470*** the Court summarised the findings in **Bachan Singh** (supra) and held as follows:

"**38.** In this background the guidelines indicated in *Bachan Singh* case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh* case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

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

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

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so." (Emphasis supplied)

11. It is evident that the Court in **Bachan Singh** (supra) has set a very high threshold of "rarest of rare cases when the alternative option is unquestionably foreclosed" for the grant of death penalty. The meaning and ambit of this expression has been discussed in **Santosh Bariyar** (supra). The Court also emphasised the need for a bifurcated hearing for the purpose of conviction and sentencing. The relevant portion reads:

"56. At this stage, *Bachan Singh* informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission.

57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this context, Guideline 4 in the list of mitigating circumstances as borne out by *Bachan Singh* is relevant. The Court held: (SCC p. 750, para 206)

> "206. (4) The probability that the accused can be reformed and rehabilitated.
>
> The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above."

In fine, Bachan Singh mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

58. The rarest of rare dictum breathes life in "special reasons" under Section 354(3). In this context, Bachan Singh laid down a fundamental threshold in the following terms: (SCC p. 751, para 209)

> "209. … 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 supplied)

An analytical reading of this formulation would reveal it to be an authoritative negative precept. The "*rarest of rare cases*" is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in the form of "when the alternative option is unquestionably foreclosed".

59. Thus, in essence, the rarest of rare dictum imposes a wide-ranging embargo on award of death punishment, which can only be revoked if the facts of the case successfully satisfy double qualification enumerated below:

1. that the case belongs to the rarest of rare category,

2. and the alternative option of life imprisonment will just not suffice in the facts of the case.

60. The *rarest* of *rare* dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the *rarest* of *rare* dictum places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.

61. The background analysis leading to the conclusion that the case belongs to the rarest of rare category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the rarest of rare aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted: (Bachan Singh case, SCC p. 738, para 161)

> "161. … 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."" (Emphasis supplied)

12. In Shankar ***Kisanrao Khade v. State of Maharashtra,(2013) 5 SCC 546*** this Court looked at the manner in which the aggravating

and mitigating circumstances are to be weighed and how the rarest of rare test is to be applied while awarding death sentence and held thus:

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R -R test). R-R test depends upon the perception of the society that is "society- centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges." (Emphasis supplied)

13. In our opinion, the High Court has erroneously confirmed death penalty without correctly applying the law laid down in **Bachan Singh** (supra), **Machhi Singh** (supra), **Santosh Bariyar** (supra) and **Shankar Kisanrao Khade** (supra). The decision to impose the highest punishment of death sentence in this case does not fulfil the test of "rarest of rare case where the alternative option is unquestionably foreclosed". The questions laid down in paragraph 39 of **Machhi Singh** (supra) have not been answered in the particular case. No evidence as to the uncommon nature of the offence or the improbability of reformation or rehabilitation of the appellant has been adduced. **Bachan Singh** (supra) unambiguously sets out that

death penalty shall be awarded only in the rarest of rare cases where life imprisonment shall be wholly inadequate or futile owing to the nature of the crime and the circumstances relating to the criminal. Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty. As laid down in **Shankar Kisanrao Khade** (supra), whether the person would be a threat to society or whether not granting death penalty would send a wrong message to society are additional factors to be looked at. No such analysis was undertaken by the High Court. The High Court has also failed to look at the aggravating and mitigating circumstances regarding the criminal as warranted by **Bachan Singh** (supra). The fact that the appellant had no previous criminal record apart from the acquittal in the Section 376, IPC, which was a false implication and the alleged motive did not weigh with the High Court as an important mitigating circumstance with respect to the criminal.

14. In the past four decades or so, this Court has been consistently echoing its concern on the constitutional ethos on value and dignity of life, when it said in **Bachan Singh** (supra) that 'extreme depravity' (paragraph 201), 'it is the duty of the State to adduce evidence that there is no probability that the accused can be reformed' (paragraph 206), 'liberal and expansive connotation' (paragraph 209), 'alternative option is unquestionably foreclosed' (paragraph 209) 'humane concern' (paragraph 209), 'real and abiding concern for dignity of human life' (paragraph 209), in **Machhi Singh** (supra) that 'gravest case of extreme culpability' (paragraph 38), 'only when life appears to be an altogether inadequate punishment' (paragraph 28), 'mitigating circumstances should be given full weightage' (paragraph 38), in **Santosh Bariyar** (supra) that 'probability that the accused can be reformed and rehabilitated' (paragraph 57), 'the rarest of rare case is a negative precept' (paragraph 58), 'death is an exceptionally narrow opening' (paragraph 58), 'extraordinary burden on the Court to impose death' (paragraph 60), 'maximum weightage to mitigating circumstances and yet no alternative except death' (paragraph 39), 'highest standards of judicial rigor and thoroughness' (paragraph 61), and in **Shankar Kisanrao Khade** (supra) that 'possibility of reformation, young age of the accused, not a menace to the society, no previous track record' (paragraph 52) etc. These factors have not

received due consideration by either the High Court or the Trial Court.

15. The appeal has been pending before this Court for the past four years. Since the appellant has been in jail, we wanted to know whether there was any attempt on his part for reformation. The superintendent of the jail has given a certificate that his conduct in jail has been good. Thus, there is a clear indication that despite having lost all hope, yet no frustration has set on the appellant. On the contrary, there was a conscious effort on his part to lead a good life for the remaining period. A convict is sent to jail with the hope and expectation that he would make amends and get reformed. That there is such a positive change on a death row convict, in our view, should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed. As held by the Constitution Bench in **Bachan Singh** (supra) it was the duty of the State to prove by evidence that the convict cannot be reformed or rehabilitated. That information not having been furnished by the State at the relevant time, the information now furnished by the State becomes all the more relevant. The standard set by the 'rarest of rare' test in **Bachan Singh** (supra) is a high standard. The conduct of the convict in prison cannot be lost sight of. The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform.

16. In the matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such a psychological/ psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform. The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated.

17. Another aspect that has been overlooked by the High Court is the procedural impropriety of not having a separate hearing for sentencing at the stage of trial. A bifurcated hearing for conviction and sentencing was a necessary condition laid down in **Santosh Bariyar** (supra). By conducting the hearing for sentencing on the same day, the Trial court has failed to provide necessary time to the appellant to furnish evidence relevant to sentencing and mitigation.

18. For the abovementioned reasons, we hold that the imposition of death sentence was not the only option and hence the same needs to be commuted to imprisonment for life.

February 2019

Future of death penalty in India

19. Since **Bachan Singh** (supra) is a Constitution Bench decision of this Court, the Courts are bound to follow the principles laid down in the said judgment until it is duly revisited. But we cannot altogether ignore the fact that various Benches have, over a period of time, expressed concern regarding the inconsistent application of the principles laid down in **Bachan Singh** (supra) and have also taken forward the application of the principles to reduce such inconsistencies. In **Santosh Bariyar** (supra), the Court noted the global move away from death penalty and observed:

> **"109.** …it is now clear that even the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the Bachan Singh threshold of "the rarest of rare cases" has been most variedly and inconsistently applied by the various High Courts as also this Court.
>
> **110.** At this point we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty—the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either through law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to the legitimate aim of the measure in question. The Constitution of India provides for safeguards to give the individual adequate protection against arbitrary imposition of criminal punishment."

20. In ***Sangeet v. State of Haryana, (2013) 2 SCC 452*** the Court notes that

> **"30**. The application of the sentencing policy through aggravating and mitigating circumstances came up for

consideration in ***Swamy Shraddananda (2) v. State of Karnataka***. On a review, it was concluded in para 48 of the Report that there is a lack of evenness in the sentencing process. The rarest of rare principle has not been followed uniformly or consistently. Reference in this context was made to ***Aloke Nath Dutta v. State of W.B***. which in turn referred to several earlier decisions to bring home the point.

31. The critique in *Swamy Shraddananda* was mentioned (with approval) in ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*** while sharing this Court's "unease and sense of disquiet" in paras 109, 129 and 130 of the Report. In fact, in para 109 of the Report, it was observed that: (Bariyar case)

"109. … the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the Bachan Singh threshold of 'the rarest of rare cases' has been most variedly and inconsistently applied by the various High Courts as also this Court."

32. It does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented.

33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh*. It appears to us that even though *Bachan Singh* intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in Swamy Shraddananda and Bariyar. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in Bachan Singh seems to have been lost in transition."

21. In **Shankar Kisanrao Khade** (supra), this Court went to the extent of requesting the Law Commission of India for resolving "… the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."

22. In this context, it may be relevant to note that the Constitution Bench in **Bachan Singh** (supra) has made extensive

refence to the 35th Report of Law Commission submitted in the year 1967, which justified the retention of death penalty. Interestingly, Report No. 262 submitted in the year 2015 prepared and submitted based on the request made by this Court has taken a different view, after extensive research and with reference to the international approach. To quote from the introduction of the Report No. 262 :-

"CHAPTER-I

INTRODUCTION

A. Reference from the Supreme Court

1.1.1. In ***Shankar kisanrao Khade v. State of Maharashtra ('Khade') (2013) 5 SCC 546*** the Supreme Court of India, while dealing with an appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and granting clemency. The Court specifically called for the intervention of the Law Commission of India ('the Commission') on these two issues, noting that :

> It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. **Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal. (Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 -para 148** (Emphasis supplied)
>
> It does not prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards. **While the standard applied by the judiciary is that of the rarest of rare principle**

(however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known.Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. **This may also need to be considered by the Law Commission of India. (2013) 5 SCC 546-para 149**. (Emphasis supplied)

1.1.2. *Khade* was not the first recent instance of the Supreme Court referring a question concerning the death penalty to the Commission. In ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ('Bariyar') (2009) 6 SCC 498*** lamenting the lack of empirical research on this issue, the Court observed :

We are also aware that on 18.12.2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. **Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-do-date and informed discussion and debate on the subject.** (Emphasis supplied)

1.1.3. The present Report is thus largely driven by these references of the Supreme Court and the need for re-examination of the Commission's own recommendations on the death penalty in the light of changed circumstances."

23. Chapter -VII of Report No. 262 contains the Conclusions and Recommendations. To quote :-

"A. Conclusions

7.1.1 The death penalty does not serve the penological goal of deterrence any more than life imprisonment. Further, life imprisonment under Indian law means imprisonment for the whole of life subject to just remissions which, in many states in cases of serious crimes, are granted only after many years of imprisonment which range from 30-60 years.

7.1.2 Retribution has an important role to play in punishment. However, it cannot be reduced to vengeance. The notion of "an eye for an eye, tooth for a tooth" has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme also be established. The need for police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

7.1.4 In the last decade, the Supreme Court has on numerous occasions expressed concern about arbitrary sentencing in death penalty cases. The Court has noted that it is difficult to distinguish cases where death penalty has been imposed from those where the alternative of life imprisonment has been applied. In the Court's own words "extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle". The Court has also acknowledged erroneous imposition of the death sentence in contravention of *Bachan Singh* guidelines. Therefore, the constitutional regulation of capital punishment attempted in Bachan Singh has failed to prevent death sentences from being "arbitrarily and freakishly imposed".

7.1.5 There exists no principled method to remove such arbitrariness from capital sentencing. A rigid, standardization

or categorization of offences which does not take into account the difference between cases is arbitrary in that it treats different cases on the same footing. Anything less categorical, like the *Bachan Singh* framework itself, has demonstrably and admittedly failed.

7.1.6 Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over -stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system.

7.1.7 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence which was not placed before the courts. (***Kehar Singh v. Union of India-(1989) 1 SCC 204 paras 7,10 & 16)*** Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. Further, the Supreme Court in ***Shatrughan Chauhan v. Union of India-***

(2014) 3 SCC1 -paras 55-56) has recorded various relevant considerations which are gone into by the Home Ministry while deciding mercy petitions.

7.1.8 The exercise of mercy powers under Article 72 and 161 have failed in acting as the final safeguard against miscarriage of justice in the imposition of the death sentence. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive confirms that retaining the death penalty is not a requirement for effectively responding to insurgency, terror or violent crime.

B. Recommendation

7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

7.2.2 The march of our own jurisprudence—from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than

terrorism related offences and waging war." (Emphasis supplied)

Having regard also to the said Report of the Law Commission that the constitutional regulation of capital punishment attempted in **Bachan Singh** (supra) has failed to prevent death sentences from being "arbitrarily and freakishly imposed" and that capital punishment has failed to achieve any constitutionally valid penological goals, we are of the view that a time has come where we view the need for death penalty as a punishment, especially its purpose and practice.

24. It is also a matter of anguishing concern as to how public discourse on crimes have an impact on the trial, conviction and sentence in a case. The Court's duty to be constitutionally correct even when its view is counter-majoritarian is also a factor which should weigh with the Court when it deals with the collective conscience of the people or public opinion. After all, the society's perspective is generally formed by the emotionally charged narratives. Such narratives need not necessarily be legally correct, properly informed or procedurally proper. As stated in Report No. 262 of the Law Commission ……."the Court plays a counter-majoritarian role in protecting individual rights against majoritarian impulses. Public opinion in a given case may go against the values of rule of law and constitutionalism by which the Court is nonetheless bound" and as held by this Court in **Santosh Bariyar** (supra) public opinion or people's perception of a crime is ……."neither an objective circumstance relating to crime nor to the criminal". In this context, we may also express our concern on the legality and propriety of the people engaging in a "trial" prior to the process of trial by the court. It has almost become a trend for the investigating agency to present their version and create a cloud in the collective conscience of the society regarding the crime and the criminal. This undoubtedly puts mounting pressure on the courts at all the stages of the trial and certainly they have a tendency to interfere with the due course of justice.

25. Till the time death penalty exists in the statute books, the burden to be satisfied by the Judge in awarding this punishment must be high. The irrevocable nature of the sentence and the fact that the death row convicts are, for that period, hanging between life and death are to be duly considered. Every death penalty case before the court deals with a human life that enjoys certain constitutional

protections and if life is to be taken away, then the process must adhere to the strictest and highest constitutional standards. Our conscience as judges, which is guided by constitutional principles, cannot allow anything less than that.

26. These appeals are hence partly allowed, commuting the death sentence to life imprisonment.

***Result*:-** Appeals partly allowed.

ABC 2019 (I) 130 SC
ACQUITTAL & BAIL CASES

SUPREME COURT OF INDIA

(Uday Umesh Lalit & R. Subhash Reddy, JJ.)

Criminal Appeal Nos.1583-1584 of 2018

[Arising out of S.L.P.(Crl.)Nos.7322-7323 of 2018]

(From Karnataka High Court)

Decided on 10 December, 2018

SHANTHAMALLESHAPPA ***- Appellant(s).***

Versus

STATE OF KARNATAKA ***- Respondent(s).***

Law Covered*:-** ***(A) Indian Penal Code, 1860 — Sections — 436 r/w 34 — material contradictions in the oral evidence — Interested testimony of witnesses — Independent person — non examination as a direct witness — Material contradictions in the evidence of PWs & the documentary evidence — Evidence of IO & witnesses — contradiction between — Material contradictions in the evidence of PW-1 and PW-2 and the contents of the mahazar. (Para 11 & 12)

(B) Indian Evidence Act, 1872 — Section — 3 — Relevant fact — Identification of accused — Time of incident — in night — absence of light — mischief by fire — Held, it was not the case of the prosecution that witness had seen the accused persons in the light emanated from fire— fatal to prosecution. (Para 11)

(C) Indian Evidence Act, 1872 — Section — 3 — Relevant fact — Vehicle used by accused — after offence accused fled away on the motor cycles —no identity of any of the motor cycles by registration number etc. —Fatal to prosecution. (Para 11)

(D) Indian Evidence Act, 1872 — Section — 3 — Relevant fact — Presence of witness — other witness is silent regarding the