1 SCOB [2015] AD 1

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha, Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.116 OF 2010.
(From the judgment and order dated 2.3.2010 passed by the High Court Division in Writ Petition No.8283 of 2005.)

WITH

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.374 OF 2011.
(From the judgment and order dated 25.5.2011 passed by the High Court Division in Death Reference No.13 of 2006 with Criminal Appeal No.453 of 2006 with Jail Appeal No.131 of 2006.)

AND

JAIL PETITION NOS.18 OF 2008, 03 OF 2009, 01 OF 2010, 08 OF 2010, 16 OF 2010, 2-3 OF 2011, 05 OF 2012 & 7-8 OF 2012.

Bangladesh Legal Aid and Services Trust (BLAST) and others:	Appellants. (In C.A. No.116 of 2010)
Shafiqul Islam:	Petitioner. (In Crl. P. No.374 of 2011)
Masuk Miah:	Petitioner. (In Jail P. No.18 of 2008)
Md. Nazrul Islam:	Petitioner. (In Jail P. No.3 of 2009)
Abdur Rashid @ Raisha @ Haji Shab:	Petitioner. (In Jail P. No.1 of 2010)
Raju Ahmed @ Raja Miah:	Petitioner. (In Jail P. No.8 of 2010).
Abdul Kader:	Petitioner. (In Jail P. No.16 of 2010).
Akidul Islam @ Akidul Sheikh:	Petitioner. (In Jail P. No.2 of 2011).
Md. Babul Miah:	Petitioner. (In Jail P. No.3 of 2011).
Idris Sheikh:	Petitioner. (In Jail P. No.5 of 2012).
Idris Sheikh:	Petitioner (In Jail P. No.7 of 2012).
Shahjahan @ Haider @ Kutti:	Petitioner In Jail P.No.8 of 2012.

=Versus=

Bangladesh, represented by the Secretary, Ministry of Home Affairs, Dhaka and others:	Respondents. (In C.A. No.116 of 2010)
The State:	Respondent. (In all the petitions)
For the Appellants: (In C.A. No.116 of 2010)	Mr. M. I. Farooqui, Senior Advocate (with Mr. A.B.M. Bayezid, Advocate), instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.
For the Petitioner: (In Crl. P. No.374 of 2011)	Mrs. Sufia Khatun, Advocate-on- Record.
For the Petitioner: (In Jail P. Nos.18 of 2008, 3 of 2009, 8 of 2010, 2-3 of 2011, 5 of 2012, 7 of 2012 and 8 of 2012)	Mr. A.B.M. Bayezid, Advocate.
For the Petitioner: (In jail P. Nos.1 of 2010 and 16 of 2010)	Mr. Helaluddin Mollah, Advocate.
For the Respondent: (In C.A. No.116 of 2010)	Mr. Mahbubey Alam, Attorney General, (with Mr. Momtazuddin Fakir, Additional Attorney General).

For the Respondent: (In Crl. P. No.374 of 2011)	Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Mahmuda Begum, Advocate-on-Record.	Date of hearing: 18th February, 2015, 3rd March, 2015 and 5th May, 2015. Date of Judgment: 5th May, 2015.
For the Respondent: (In all the Jail Petitions)	Mr. Mahbubey Alam, Attorney General.	

We would like to point out here that whenever the High Court Division grants certificate it ought to have formulated the points on which the certificate is granted containing *inter alia* that the case involves a question of law as to the interpretation of the Constitution or that the question is a substantial one.

...(Para 3)

Abolition of Death Penalty is not Possible:

Our social conditions, social and cultural values are completely different from those of western countries. Our criminal law and jurisprudence have developed highlighting the social conditions and cultural values. The European Union has abolished death penalty in the context of their social conditions and values, but we cannot totally abolish a sentence of death in our country because the killing of women for dowry, abduction of women for prostitution, the abduction of children for trafficking are so rampant which are totally foreign to those developed countries. ...(Para 5)

Rule of law is the basic rule of governance of any civilized society. The scheme of our Constitution is based upon the concept of rule of law. To achieve the rule of law the Constitution has assigned an onerous task upon the judiciary and it is through the courts, the rule of law unfolds its contents. One of the important concept of the rule of law is legal certainty. Judicial review of administrative action is an essential part of rule of law and so is the independence of judiciary. ...(Para 10)

Only provision in which the court cannot exercise the discretionary power in awarding the sentence is section 303, which provides that "whoever, being under sentence of imprisonment for life commits murder shall be punished with death". I find no rational justification for making a distinction in the matter of punishment between two classes of offenders, one is, under the sentence of life imprisonment, who commits murder whilst another, not under the sentence of life imprisonment. ...(Para 15)

In sub-section (3) of section 6 of the Ain of 1995, if similar offence is committed by more than one person all of them will be sentenced to death. Suppose 5 persons are involved in the commission of the crime of them two directly participated in the commission of rape and other three persons abeted the offence. If these three persons are sentenced to death with other two, it will be contrary to norms and the sentencing principles being followed over a century. .... (Para 46)

A law which is not consistent with notions of fairness and provides an irreversible penalty of death is repugnant to the concepts of human rights and values, and safety and security.

... (Para 46)

A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, *ultra vires* the Constitution and accordingly they are declared void.

...(Para 50)

In section 11(Ka) of the Ain of 2000, it is provided that if death is caused by husband or husband's, parents, guardians, relations or other persons to a woman for dowry, only one sentence of death has been provided leaving no discretionary power for the tribunal to award a lesser sentence on extraneous consideration. This provision is to the same extent *ultra vires* the Constitution. ...(Para 51)

Since we hold that Sub-Sections (2) and (4) of Section 6 of the Ain, 1995 and Sub-sections (2) and (3) of Section 34 of the Ain of 2000 are *ultra vires* the Constitution, despite repeal of the Ain of 1995, all cases pending and the appeals pending under the repealed Ain shall be regulated under the said law, but on the question of imposing sentence, the sentences prescribed in respect of those offences shall hold the field until new legislation is promulgated. I hold that there was total absence of proper application of the legislative mind in promulgating those Ains, which may be rectified by amendments. In respect of section 303 of the Penal Code, the punishment shall be made in accordance with section 302 of the Penal Code. It is hereby declared that despite repeal of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, the pending cases including appeal may be held under the repealed Ain, while dealing with the question of sentence, the alternative sentences provided in the corresponding offences prescribed in the Nari-O-Shishu Nirjatan Daman Ain, 2000 shall be followed. ...(Para 52)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. The constitutionality of section 6(2) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, (Ain XVIII of 1995) and section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Ain VIII of 2000) has been called in question by the appellant Md. Sukur Ali, a death row convict, who has been convicted by the Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Manikgonj for sexually assaulting to death of Sumi Akhter, a minor girl aged at about 7 years. The Bishesh Adalat sentenced him to death and the High Court Division also confirmed the death sentence and this Division also affirmed the sentence. A review petition was also filed before this Division. This review petition was also dismissed. Thereafter the appellant along with another moved the High Court Division challenging the mandatory death penalty provided in section 6(2) of the Ain as *ultra vires* the Constitution.

2. The High Court Division upon hearing the parties though declared section 6(2) of the Ain, 1995 ultravires the Constitution, refrained from declaring section 34 of the Ain of 2000 unconstitutional and also did not declare the sentence of the condemned prisoner to be unlawful. It was observed that the provision of mandatory death penalty is ultra-vires the Constitution, inasmuch as, when the legislature prescribes any punishment as mandatory, the hands of the court become a simple rubberstamp of the legislature and that this certainly discriminates and prejudices the court's ability to adjudicate properly taking into account all facts and circumstances of the case. The High Court Division granted a certificate under Article 103(2)(a) of the Constitution without, however, formulating any point observing that "in the light of the decision of this court and since the constitutional right of the convict petitioner is still in question". It was further observed that 'the punishment prescribes in section 6(2) of the Ain is such that if the Bishesh Adalat finds the accused guilty it can do no more than to impose the mandatory punishment of death".

3. We would like to point out here that whenever the High Court Division grants certificate it ought to have formulated the points on which the certificate is granted containing inter alia that the case involves a question of law as to the interpretation of the Constitution or that the question is a substantial one. In arriving at the conclusion it has considered an unreported case of the Judicial Committee of the Privy Council in Patrick Reyes V. The Queen in Privy Council Appeal No.64 of 2001 and Bachan Singh V. State of Punjab, (1980) 2 SCC 375, Matadeen V. Pointu (1999) 1 AC 98 and some other cases. It has been held that where the offender is not a habitual criminal or a man of violence "then it would be the duty of the court to take into accounts his character and antecedents in order to come to a just and proper decision". It held that the court must have always discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The court, it is observed, "may not be degraded to the position of simply rubberstamping the only punishment which the legislature prescribed". The substance of the opinion of the High Court Division is that the legislature cannot prescribe only one mandatory period of sentence leaving no discretion of the court to award a lesser sentence in the facts and circumstances of the case. The High Court Division was of the view that any provision of law which provides a mandatory death penalty cannot be in accordance with the Constitution as it curtails the court's jurisdiction to adjudicate on all issues brought before it including the imposition of an alternative sentence upon the accused if he is found guilty of such offence. A pertinent question of public importance as to the constitutionality of two sections of the Ains of 1995 and 2000 has surfaced which requires to be addressed in the context of our constitutional dispensation.

4. Before we consider the question, it is to be noted that over the violence of women, the first legislation introduced on this soil is Cruelty to Women (Deterrent Punishment) Ordinance, 1983. Under this law the offences of kidnapping and abducting women for unlawful purposes, trafficking of women, causing death of women for dowry, causing rape to death of women, attempts to causing death or causing grievous hurt in committing rape to women and abetement of those offences are included as schedule offence under the Special Powers Act, 1974. This piece of legislation is followed by another legislation namely, Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995. In this piece of legislation, 'children' within the meaning of the Children Act, 1974 is included as the victims with women and the horizon of offences is also widened, that is to say, offences relating to death with corrosive substances, causing grievous hurt with corrosive substances; rape; causing death by sexual assault or causing injury by sexual assault or attempt to commit rape, women trafficking; abduction of women for immoral purposes, causing death for dowry or attempts to commit offence for dowry; causing grievous injury for dowry; child trafficking; abduction of child for the purpose of ransom and instigation to commit any of the offences were included in the said Ain. The Cruelty to Woman (Deterrent Punishment) Ordinance was repealed by this Ain. Another piece of legislation on the same subject matter has surfaced namely; Nari-O-Shishu Nirjatan Daman Ain, 2000. In this Ain also the horizon of offences has been expanded and alternative sentences in respect of almost all offences except one has been provided. However, in section 34, it was provided that the cases instituted or pending for trial under the repealed Ain including the appeals pending against any order, judgment or sentence shall continue as if the Ain of 1995 has not been repealed. Although the Ain of 1995 was repealed, by this saving clause the pending cases initiated under the Ain of 1995 have been kept alive and the trials and the punishment have to be guided under the repealed Ain.

5. Our social conditions, social and cultural values are completely different from those of western countries. Our criminal law and jurisprudence have developed highlighting the social conditions and cultural values. The European Union has abolished death penalty in the context of their social conditions and values, but we cannot totally abolish a sentence of death in our country because the killing of women for dowry, abduction of women for prostitution, the abduction of children for trafficking are so rampant which are totally foreign to those developed countries. In some cases we notice the killing of women or minor girls by pouring corrosive substances over petty matters, which could not be imagined of to be perpetrated in the western countries. We would not incorporate principles foreign to our Constitution or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differ from ours. We cannot altogether abolish the sentence of death taking the philosophy of European Union.

6. It was argued that the irrevocability of the death sentence should be looked at a moral approach, that is to say, the severity of capital punishment and the strong feelings shown by certain sections of public opinion in stretching deeper questions of human value. On the advancement of technology which reached the doors of remote areas of the country, poor and uneducated people cannot control their temptation of riding a motorbike or passing leisure time enjoying television programmes with a coloured television, and the offenders resort to such inhuman acts when their demand for dowry of a motorbike or a coloured television is not met by the victims. Sometimes they demand cash for going abroad. They torture them to death as a tool to justify their claim. This apart, having regard to the variety of the social upbringing of the citizens, to the disparity in the level of education in the country, to the disparity of the economic conditions, it is my considered view that this country cannot risk the experiment of abolition of capital punishment. To protect the illiterate girls, women and children from the onslaught of greedy people deterrent punishment should be retained. Therefore, it is difficult to lip chorus with the activists regarding the opinion of abolition of death sentence.

7. Even in awarding a death sentence, it cannot be said that such sentence is awarded without safeguarding the offender. There are procedural safeguards in our prevailing laws. If an offender commits an offence which is punishable to death, who is unable to engage a defence lawyer, he is provided with a defence counsel at the cost of the State. He is also provided with all documents free of cost which are relevant for taking his defence before commencement of the trial. Even if he is sentenced to death, the sentence shall not be executed unless such sentence is confirmed by the High Court Division. As soon as a sentence of death is given to a prisoner, he is provided with a copy of the judgment free of cost so that he can prefer a jail appeal. In every Central Jail where the condemned prisoners are kept, the jail authorities provide them sufficient facilities to prefer jail appeals. Besides, in course of hearing of a death reference and the jail appeal, if there be any, if the High Court Division finds that the convict has not engaged a lawyer, it directs the State to appoint a State defence lawyer on his behalf free of cost. Similar facilities are available in this Division. Even after confirmation of death sentence, the condemned prisoner can prefer an appeal as of right in the Appellate Division. Therefore, there are sufficient safeguards provided to an offender who is facing trial of an offence punishable to death or is sentenced to death.

8. Now the question is whether section 6(2) of the Ain, 1995 and section 34 of Ain of 2000 *are ultra* vires the Constitution. In this connection Mr. M. I. Faruqui, learned counsel appearing for the appellant argues that every citizen is guaranteed to enjoy the protection of law and to be treated in accordance with law, but in this case the condemned prisoner has not been treated in accordance with law because to safeguard his right guaranteed under the Constitution to be treated in accordance with law by the court, the court cannot exercise its discretionary power other than the one imposed by the legislature. He further submits that the Executive, the Judiciary and the Legislature being the creation of the Constitution, any transgression by any of the organs of the Republic can be assailed on the ground that such transgression is protected by Article 44 and in this case, the power of the judiciary has been transgressed by the executive by legislating a provision which is inconsistent with Articles 31 and 35(5) of the Constitution. It is finally contended that no action detrimental to the life, liberty, body and reputation of a citizen can be taken away except in accordance with law.

9. From the trend of the arguments it appears to me that the respondent is seeking quashment of his sentence as being inconsistent with the fundamental tenets enshrined in certain clauses in Part III of the Constitution which are as under:

> "27. All citizens are equal before law and are entitled to equal protection of law.
>
> '31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
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> '32. No person shall be deprived of life or personal liberty save in accordance with law.
>
> '35(1) .....
>
> (2) .....
>
> (3) .....
>
> (4) .....
>
> (5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."

10. The first safeguard is equal protection of law and no citizen should be deprived of enjoying the protection of law. The second protection is that the State or its machinery cannot take any action against a citizen detrimental to his life otherwise than in accordance with law. The third safeguard is that no citizen shall be deprived of life or personal liberty except in accordance with law and finally, no citizen shall be subjected to cruel or inhuman treatment. Rule of law is the basic rule of governance of any civilized society. The scheme of our Constitution is based upon the concept of rule of law. To achieve the rule of law the Constitution has assigned an onerous task upon the judiciary and it is through the courts, the rule of law unfolds its contents. One of the important concept of the rule of law is legal certainty. Judicial review of administrative action is an essential part of rule of law and so is the independence of judiciary. The principle of equal protection is almost in resemblance with the equal protection clause of the Fourteenth Amendment of the United States Constitution which declares that 'no State shall deny to any person within its jurisdiction the equal protection of the laws'. Professor Wills dealing with this clause sums up the law as prevailing in the United States that 'It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It only requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'.

11. The second clause of Article 27 is also in resemblance with the last clause of section 1 of the Fourteenth Amendment of the Constitution of the United States of Amirica. Hughes, CJ. in West Coast Hotel Co. V. Parrish (1936) 300 US 379 in dealing with the content of the guarantee of equal protection of laws observed:

> "This court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degree of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest'. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied'. There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."

12. Mc. Kenna,J. in Heath and Milligan Mfg. Co, V. Worst (1907) 207 US 338 observed:

> "Classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal, and

oppressive legislation ..... Exact wisdom and nice adaptation of remedies are not required by the 14th Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

13. According to the learned counsel, though deprivation of life is constitutionally permissible, a sentence of death must be given according to the procedure established by law. Under this principle it is argued that the provision of sentence contained in sub-sections (2) and (4) of section 6 is draconian under severity, inasmuch as, it takes away courts legitimate jurisdiction to exercise their jurisdiction not to impose the death sentence in appropriate cases and compel them to shut its eyes to mitigating circumstances. Therefore, the provision is unconstitutional being violative to Articles 31 and 35(5).

14. If we look at the penal provisions contain in the Penal Code, except an offence punishable under section 303, in respect of other offences, though maximum sentences are provided, by the same time wide discretion has been given to the court in awarding the minimum sentences, for example, an offence of sedition is punishable under section 124A of the Penal Code - the maximum punishment prescribes for the offence is imprisonment for life and no minimum sentence is provided for. So, the court has ample power to exercise its discretion to award a sentence to the offender. In respect of offence of waging war against any government of Asiatic Power in alliance with Bangladesh, the maximum sentence is imprisonment for life and no minimum sentence is provided. Even in case of murder, there is provision for maximum and minimum sentence. In respect of causing grievous hurt without provocation if an injury is caused with any instrument which is punishable under section 325, the maximum sentence is seven years and no minimum sentence is prescribed, and if the grievous hurt is caused with any instrument of shooting or any sharp cutting weapon or by means of any poison or corrosive substance or explosive substance, the maximum sentence is imprisonment for life and no minimum sentence is provided. In respect of criminal breach of trust by a public servant, the maximum sentence is imprisonment for life and the minimum sentence is left with the discretion of the court so also in respect of an offence of forgery of valuable security. So it depends upon the facts and circumstances of each case.

15. We find wide discretion is given to a court in awarding sentence which attract aforesaid offences. The object of giving such discretionary power to the courts is obvious, say, if a grievous hurt is caused with a sharp cutting weapon which caused fracture of a finger, though the offence is grievous in nature and punishable under section 326, the court will not give the same sentence if the eyes of a victim is gauged by using similar instrument. In the earlier case the court can exercise its discretion in awarding a lesser sentence but in the latter case the court's discretion would be to award the maximum sentence prescribed in the section. Only provision in which the court cannot exercise the discretionary power in awarding the sentence is section 303, which provides that "whoever, being under sentence of imprisonment for life commits murder shall be punished with death". I find no rational justification for making a distinction in the matter of punishment between two classes of offenders, one is, under the sentence of life imprisonment, who commits murder whilst another, not under the sentence of life imprisonment.

16. The framers of the Penal Code while enacting section 303 had ignored several aspects of cases which attract the application of section 303 and of questions which are bound to arise under it. In those days jail officials were Englishmen and with a view to preventing assaults by the indigenous breed upon the white officers, they had in their mind one kind of case. That is why the Indian 42nd Law Commission Report observed that 'the primary object of making the death sentence mandatory for an offence under this section seems to be to give protection to the prison staff.' I have had no reason of doubt that the procedure by which the offence authorises the deprivation of life is unfair and unjust. The purpose and object of promulgating a provision of law has to be fair, just, not fanciful or arbitrary. More so, section 303 prescribes the sentence to be passed to an offender convicted of murder while undergoing sentence of imprisonment for life. Section 300 fastens the special requirements of murder upon the definition of culpable homicide. Culpable homicide sans special characteristics of murder is culpable homicide not amounting to murder. If any of the five exceptions attracts a case it will be culpable homicide not amounting to murder. For the purpose of fixing punishment proportionate to the gravity of the offence the Penal Code prescribes three degrees of culpable homicide. If we maintain the mandatory sentence, the exceptions provided in section 300 have to be ignored which will be illogical. So the courts must have the options to decide whether or not offence of a given case is culpable homicide amounting to murder.

17. Chandrachud, C.J. in Mithu V. State of Punjab (1983) 2 SCC 277 observed that murders can be motiveless in the sense that is a given case, the motive which operates on the mind of the offender is not known or is difficult to discover. But by and large, murders are committed for any one or more of a variety of motives which operate on the mind of the offender, whether he is under a sentence of life imprisonment or not. Such motives are too numerous and varied to enumerate but hate, lust, sex, jealous, gain, revenge and a host of

weaknesses to which human flesh is subject are common for the generality of murders. I fully endorse to the above views. Suppose, an offender was sentenced to imprisonment for life for any of the offences mentioned above was released from the custody either on bail or on parole and on reaching home he noticed that his wife was involved with immoral acts with her paramour. On seeing the incident he lost his self control and committed murder of that person. Would his act attract an offence of capable homicide amounting to murder? The answer is in negative. His case covers the Exception-1 of section 300 and his act attracts an offence of capable homicide not amounting to murder.

18. The authors of the Penal Code had, in many cases not fixed a minimum as well as maximum sentence. The Select Committee, however, questioned the propriety of the minimum sentence in all cases and was of the opinion that the prescribed minimum would be a matter of hardship and even injustice in view of the definition of the offences in general terms and of the presence of mitigating circumstances. Accordingly they had so altered the Code as to leave the minimum sentence for all offences, except those of the gravest nature, to the discretion of the court. But in respect of some heinous offences i.e. offences against State, murder, attempt to commit murder and the like, they had thought it right to fix a minimum sentence. (See proceedings of the Legislative Council of the Governor-General of India, Ed. 1856 P.718). The authors of the Penal Code had in mind, where there is a statutory maximum sentence, it should be reserved for the worst type of offence falling within the definition of the offence. The Code prescribes the minimum of seven years imprisonment for offences under section 397 and 398. In all other offences, there is no minimum. The maximum sentence even after commutation by the government fixed for a single offence is 20 years in section 55 while the lowest term for one offence is 24 hours in section 510.

19. Sentencing an offender is an important branch of the law. The International Union of Criminal Law of French group in 1905 recommended that 'there should be organised in the faculties of law special teaching theoretical and practical for the whole range of penal studies (and) the certificate in penal studies awarded should be taken into consideration for nomination to and advancement in the Magistracy'. (Radzinowiez, L. In search of Criminology, Ex. 1961 P.70). Subsequently the Ninth International Prison Congress in 1925 resolved at its London meeting that 'judicial studies should be supplemented by criminological ones. The study of criminal psychology and penology should be obligatory for all who wish to judge in criminal cases. Such Judges should have a full knowledge of prisons and similar institutions and should visit them frequently.' But they are wanting in our country as in many other countries.

20. The Supreme Court of India in B.G. Goswami V. Delhi administration, (1974) 3 SCC 85 has struck a balance between deterrence and reformation by following the golden means: 'The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designated to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law-abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of sentence. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentence both loose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal'. The courts have always had in mind the need to protect society from the persistent offenders but by the same time, they are not oblivious to the system prevailing in the country for, it has not gone for in cutting out the risk of conviction of innocent persons because of the peculiar character of the people and of the law-enforcing agencies.

21. The Supreme Court of India struck-down section 303 as violative of Articles 14 and 21 of the Constitution on the philosophy that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law in Mithu V. State of Punjab, (1983) 2SCC 277. In Dilip Kumar Sharma V. State of M.P., (1976) 1 SCC 560, though the court was not concerned with the question of the vires of section 303, Sarkaria,J. observed that section 303 is "Draconian in severity, relentless and in inexorable in operation". While considering the contours of section 303 Y.V. Chandrachud, C.J. in Dilip Kumar Sharma while dealing with sentencing process observed that if the legislature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases and compels them to shut their eyes the mitigating circumstances is unconstitutional. He observed that the other class of cases in which, the offence of murder is committed by a life convict while he is on parole or on bail may now be taken up for consideration. A life convict who is released on parole or on bail may discover that taking undue a advantage of his absence, a neighbour has established illicit intimacy with his wife. If he finds them in an amorous position and shoots the seducer on the spot, he may stand a fair chance of escaping from the charge of

murder, since the provocation is both grave and sudden. But if, on seeing his wife in the act of adultery, he leaves the house, goes to a shop, procures a weapon and returns to kill her paramour, there would be evidence of what is called *mens rea*, the intention to kill. And since, he was not acting on the spur of the moment and went away to fetch a weapon with murder in his mind, he would be guilty of murder. It was further observed: 'It is a travesty of justice not only to sentence such a person to death but to tell him that he shall not be heard why he should not be sentenced to death. And, in these circumstances, now does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death? In ordinary life, we will not say it about law. It is not reasonable to add insult to injury. But, apart from that, a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'theft', 'breach of trust' or 'murder'.

22. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. He concluded his argument as under: "The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

23. In Jagmohan Singh V. State of UP, (1973) 1SCC 20, one Shivraj Singh, father of Jagbir Singh and cousin of Jagmohan Singh was murdered and one Chhotey Singh was charged for that murder but eventually he was acquitted by the High Court. The ill-feeling between Chhotey Singh and Jagbir Singh, father of Shivraj Singh continued. Both of them were minors at the time of the murder of Shivraj Singh. Jagmohan Singh armed with a pistol and Jagbir Singh armed with a lathi concealed themselves in a bajra field emerged there from as Chhotey passed by to go to his field for fetching fodder. Jagmohan Singh asked Chhotey Singh to stop so that the matter between them could be settled once for all. Chhotey Singh being frightened tried to run away but he was chased by Jagmohan Singh and shot in the back who died on the spot. Jagmohan Singh was sentenced to death. The High Court found no extenuating circumstances and confirmed the death sentence. Under the sentencing principle provided in section 367(5) of the Code of Criminal Procedure as stood in India by amendment by Act XXVI of 1955, to award a sentence of death was the normal and a life sentence for reasons to be recorded in writing. This provision was done away by the new Code of 1973, the corresponding provision is section 354(3) and it is left to the discretion of the court whether the death sentence or lesser sentence should be imposed. The judgment shall state the reasons for the sentence to be awarded and in case of sentence of death, the special reasons for such sentence is to be given. It was observed that 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 lying 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 as already pointed out, liable 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-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

24. It was held:

> "If the law has given to the Judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another. ..... The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination ..... Further, the discretion of judicial officers is not arbitrary and the law provides for revision by superior courts of orders passed by the Subordinate courts. In such circumstances, there is hardly any ground for apprehending any capricious discrimination by judicial tribunals. Crime as crime

> may appear to be superficially the same but the facts and circumstances of a crime are widely different and since a decision of the court as regards punishment is depended upon a consideration of all the facts and circumstances, there is hardly any ground for challenge under Article 14."

25. The preponderance of the judicial opinion is that the structure of prevailing criminal law underlines the policy that when the legislature has defined an offence with sufficient clarity and prescribed the maximum punishment therefor, a wide discretion in the matter of fixing degree of punishment should be allowed to the court. The policy of the law in giving a very wide discretion in the matter of punishment to the court has its origin in the impossibility of laying down standards. In Jagmohan Singh, an example was given such as, in respect of an offence of criminal breach of trust punishable under section 409, the maximum sentence prescribed is imprisonment for life and the minimum could be as low as one day's imprisonment and fine. It was observed from the above that, if any standard is to be laid down with regard to several kinds of breaches of trust by the persons referred in that section, that would be an impossible task. All that could be reasonably done by the legislature is to tell the court that between the maximum and the minimum prescribed for an offence, it should, on balancing the aggravating and mitigating circumstances as disclosed in the case, judicially decide what would be the appropriate sentence.

26. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination. The discretion reposed on a judicial officer is not arbitrary and the law provides for revision by superior courts. In such circumstances, there is hardly any ground for apprehending factious discrimination by a judicial tribunal. In Jagmohan, the Supreme Court declined to declare death sentence unconstitutional on the reasonings that the court is primarily concerned with all the facts and circumstances in so far as they are relevant to the crime and how it was committed and since at the end of the trial, the offender is liable to be sentenced, all the facts and circumstances bearing upon the crime are legitimately brought to the notice of the court.

27. In Maneka Gandhi V. Union of India, AIR 1978 SC 597, a seven member constitutional Bench of Supreme Court held that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21. Article 21 of the Indian Constitution provides no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 32 of our Constitution is couched with similar language.

28. The High Court Division has stressed upon the case of Bachan Singh V. State of Panjab, (1980) 2 SCC 684. The ratio in the above case is not applicable for, the question involved in that case was with regard to the constitutional validity of death penalty for murder provided in section 302 and the sencing procedure embodied in sub-section (3) of Section 354 of the Code of Criminal procedure corresponding to sub-section (5) of section 367 of our Code with the difference that in the Indian provision, in case of awarding death sentence 'the special reasons for such sentence' must be assigned. Bachan Singh was sentenced to death for the murder of three persons. His sentence was confirmed by the High Court. In course of hearing of the leave petition a constitutional point was raised as to the validity of death penalty provided in section 302. A constitutional Bench by majority held that death sentence provided in section 302 of the Penal Code is reasonable and 'in the general public interest, do not offend Article 19, or its 'ithos'; nor do they in any manner violate Article 21 and 14'. It was observed that 'In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first-degree which, in the absence of ameliorating circumstances, is punishable with death. Such rigid categorization would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of murder or its further classification'. Then, it is observed, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of aggravating circumstances which may form the basis of special reasons in section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

29. The position in England as stated in the Halsbury's Laws of England, 4th Edition, Vol.11 page 287 Para 481 as follows:

> "A very wide discretion in fixing the degree of punishment is allowed to the trial judge except for the offence of murder, for which the court must pass a sentence of imprisonment for life, and for a limited number of offences in respect of which the penalty is fixed by law including those of offences for which the sentence of death must be pronounced.

As regards most offences, the policy of the law is to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit. The exercise of this discretion is a matter of prudence and not of law, but an appeal lies by the leave of the Court of Appeal against any sentence not fixed by law, and, if leave is given, the sentence can be altered by the court. Minimum penalties have in some instances been prescribed by the enactment creating the offence."

30. In awarding the maximum sentence in respect of an offence the position of law prevailing in our country is a bit different. It is provided in our Code of Criminal Procedure that if the prosecution wants to award the maximum/enhanced sentence of the offence charged with against an offender, it shall be stated in the charge the fact of his previous conviction of any offence or the punishment of a different kind for a subsequent offence, the date and place of previous conviction. However a statement of previous conviction in the charge is not necessary where such conviction is to be taken into consideration, not for the purpose of awarding enhanced sentence under section 75 of the Penal Code but merely for the purpose of the punishment to be awarded within the maximum fixed for the offence charged. This however does not deter the court or tribunal to award maximum sentence if the act of the offender is intentional and brutal one.

31. In 1974 the North Carolina State, USA, the general assembly modified to statute making death the mandatory sentence for all persons convicted of first decree murder. In James Tyone Woodson and Luby Waxton V. State of North Carolina, 428 US 280, the offenders were convicted of the first degree murder in view of their participation in an armed robbery of a food store. In the course of committing the crime a cashier was killed and a customer was severely wounded. The offenders were found guilty of the charges and sentenced to death. The Supreme Court of North Carolina affirmed the same. The U.S. Supreme Court granted leave to examine the question of whether imposition of death penalty in that case constituted a violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. Stewart,J. speaking for the court held that the said mandatory death sentence was unconstitutional and violated the Eighth Amendment observing that:

"A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating frailties of humankind. It treats all persons convicted of a designate offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. ..... While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eight Amendment, see Trop V. Dulles, 356 US, at 100, 2 I.Ed.2d 630, 78 S Ct 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death .... This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

32. In Ong Aha Chuan V. Public Prosecutor, (1981) AC 648, for trafficking heroin in Singapore, the accused persons were sentenced to death and there was mandatory death sentence for trafficking drug in schedule II of section 29. The conviction was challenged on the ground that section 29 of schedule II providing mandatory death sentence for possession of such quantity of drug was unconstitutional. The Privy Council was of the view that there was nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantity of heroin holding that the quantity that attracts death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good hearted Samaritan out of the kindness of his heart as was suggested in the course of argument. It was on the basis of Singapore's Constitution that does not have a comparable provision like the Eighth Amendment of the American Constitution relating to cruel and unusual punishment. It was observed that:

"Whenever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated with equal punitive treatment for similar legal guilt."

33. So the Privy Council distinguished the case and was of the view that the accused deserved death sentence as they carried drug intentionally and that the social object of the Drug Act is to prevent the growth of

drug addiction in Singapore by stamping out the illegal drug trade, in particular, the trade of those most dangerously addictive drugs, heroin and morphine.

34. The High Court Division heavily relied upon the opinions expressed by the Judicial Committee of the Privy Council in Patrick Reyes. Patrick Reyes shot death of Wayne Garbutt and his wife Evekyn. He was tried on two counts of murder and sentenced to death on each count as required by the law of Belize. His appeal was dismissed and petition for special leave was also dismissed by the Judicial Committee, but it granted leave to raise constitutional points namely; the constitutionality of the mandatory death penalty, which is said to infringe both the protection against subjection to inhuman or degrading punishment or other treatment under section 7 of the Constitution of Belize and the right to life is protected by sections 3 and 4. Section 102 of the Criminal Code provided 'Every person who commits murder shall suffer death'. By section 114 of the Code proof of murder requires proof of an intention to kill and in succeeding sections defences of diminished responsibility and provocation are provided. A proviso was added to section 102 of the Code in 1994 as under:

> "Provided that in the case of a class B murder (but not in the case of a class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life."

35. This section was further amended by adding two subsections:

> (2) The proviso to sub-section (1) above shall have effect notwithstanding the rule of law or practice which may prohibit a jury from making recommendations as to the sentence to be awarded to a convicted person.
>
> (3) For the purpose of this section-
>
> 'Class A murder means:-
>
> (a).....
>
> (b) any murder committed by shooting or by causing and explosion;
>
> (c).....
>
> (d).....
>
> (e).....
>
> (f).....

36. The Judicial Committee of the Privy Council observed that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no harm being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.

37. It was further observed that Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted, the former is a judicial, the latter an executive, responsibility ..... It has been repeatedly held that not only determination of guilt but also determination of the appropriate measures of punishment are judicial not executive functions. The Judicial Committed held as under:

> "It follows that the decision as to the appropriate penalty to impose in the case of murder should be taken by the judge after hearing submissions and, where appropriate, evidence on the matter. In reaching and articulating such decisions, the judges will enunciate the relevant factors to be considered and the weight to be given to them, having regard to the situation in Saint Lucia. The burden thus laid on the shoulders of the judiciary is undoubtedly heavy but it is one that has been carried by judges in other

systems. Their Lordships are confident that the judges of Saint Lucia will discharge this new responsibility with all due care and skill."

38. This question again was agitated before the Privy Council in Fox V. The Queen, 2002(2) AC 284. Fox was convicted by the High Court of Saint Chrisopher and Nevis on two counts of murder and he was sentenced to death on each count pursuant to section 2 of the offences against the Prison Act, 1873, which prescribed a mandatory death sentence for murder. His appeal against conviction and sentence was dismissed by the Eastern Caribbean Court of Appeal (Saint Christopher and Navis). His appeal before the Judicial Committee was also dismissed, but on the question of sentence the Privy Council held that section 2 of the offences against the Prison Act, was inconsistent with section 7 of the Constitution and accordingly his sentence was quashed and the matter was remitted to the High Court to determine the appropriate sentence having regard to all the circumstances of the case. The Privy Council followed the dictum in Rayes.

39. This point was again came for consideration before the Privy Council in Bowe V. The Queen (2006) 1 WR 1623. Two persons were convicted for murder and sentenced to death in terms of section 312 of the Penal Code of The Bahamas. This provision was challenged to the extent that the provisions that persons other than pregnant women charged for murder under section 312 of the Code must be punished to death was unconstitutional. In allowing the appeal, the Privy Council formulated the principles which are relevant for consideration in a case of mandatory death sentence as under:

"(I) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted.
(II) The criminal culpability of those convicted for murder varies very widely.
(III) Not all those convicted of murder deserve to die.
(IV) Principles (I),(II) and (III) are recognized in the law or practice of all, or almost all states which impose the capital penalty for murder.
(V) Under an entrenched and codified Constitution of the Westminster model, consistently with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive."

40. The Conclusion of the Privy Council's opinion is as under:

"The Board will accordingly advise Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. So construed, it was continued under the 1973 Constitution. These appeals should be allowed, the death sentences quashed and the cases remitted to the Supreme Court for consideration of the appropriate sentences. Should the Supreme Court, on remission, consider sentence of death to be merited in either case, questions will arise on the lawfulness of implementing such a sentence, but they are not questions for the Board on these appeals."

41. In an unreported case in Barnard V. The Attorney General, Criminal Appeal No.10 of 2006, the above views have been approved by the Privy Council. In that case, the facts are that in Grenada, a revolutionary outfit was split into two factions, one of which was led by the accused Bernard Coard. In a violent accident Maurice Bishop, then Prime Minister of Grenada and others were executed by Coard's supporters. Over that incident, the accused persons were mandatorily sentenced to death for murder. The Privy Council allowed the appeal on the ground that the mandatory death sentence was unconstitutional and laid down the following principle:

"Fifthly, and perhaps most important, is the highly unusual circumstances that, for obvious reason, the question of the appellants' fate is so politically charged that it is hardly reasonable to expect any Government of Grenada, even 23 years after the tragic events of October 1983, to take an objective view of the matter. In their Lordships opinion that makes it all the more important that the determination of the appropriate sentence for the appellants, taking into account such progress as they have made in prison, should be the subject of a judicial determination".

42. The Supreme Court of Ugenda in Attorney General V. Susan Kigula, Constitutional Appeal No.3 of 2006, one of the questions was that the laws of Ugenda, which provide mandatory death sentence for certain offences was unconstitutional. The court held:

"Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution. We also agree with Professor Sempebwa, for the respondents, that the power given to the court under article 22(1) does not stop at confirmation of conviction. The Court has power to confirm both conviction and sentence. This implies a power not to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution."

43. The Kenyan Court of Appeal in Godfrey Ngotho Mutiso V. Republic, (Criminal Appeal No.17 of 2008) expressed the similar view as under:

> "The imposition of the mandatory death penalty for particular offences is neither authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of sentence.
>
> Mandatory death sentence is antithetical to fundamental human rights and there is no constitutional justification for it. A convicted person ought to be given an opportunity to show why the death sentence should not be passed against him.
>
> The imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum. Making the sentence mandatory would therefore be an affront to the human rights of the accused.
>
> Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively the word 'shall' ought to be construed as 'may'."

44. In the above conspectus the question is whether sub-sections (2) and (4) of section 6 of Ain, 1995 passed the test of reasonableness on the question of sentence. It is on record that within a space of 12 years, the legislature promulgated this law prescribing a hard sentence leaving nothing for the courts to exercise its discretionary power on the question of awarding sentence. In the Ordinance of 1983 similar nature of offence was prescribed in section 7 providing for alternative sentence of death or imprisonment for life. What prompted the legislature to make a u turn in seizing the discretionary power of the tribunal in the matter of awarding the sentence is not clear? In the preamble nothing was mentioned to infer the intention of the legislature which prompted to promulgate such draconian law. It was simply stated that "নারী ও শিশু সম্পর্কিত কতিপয় ঘৃন্য অপরাধের জন্য বিশেষ বিধান প্রনয়ন করা সমীচীন" The legislature abruptly took away the alternative sentence. Sub-section (2) of section 6 provides "যদি কোন ব্যক্তি ধর্ষন করিয়া কোন নারী বা শিশুর মৃত্যু ঘটায় বা ধর্ষন করার পর কোন নারী বা শিশু মৃত্যু ঘটায় তাহলে উক্ত দন্ডে দন্ডিত হইবে" There are two parts in this sub-section - the first part carries a meaning that if someone causes the death of a child or woman in committing rape is discernable. The second part is that after the commission of rape, if the victim dies then also the offender will be sentenced to death. The legislature is totally silent under which eventuality if the death is ensured the offender will be convicted for the offence. If secondary causes intervened the death, the offender certainly cannot be held responsible for causing death by rape. There is totally lack of reasonableness in the provision that even if the offender is a minor or an old person the court will be left with no discretionary power in the matter of awarding alternative sentence on extraneous consideration, which is a core sentencing principle i.e. giving a sentence proportionate to the offender's culpability.

45. The rules for assessment of punishment are contained in sections 71 and 72 of the Penal Code and section 35 of the Code of Criminal Procedure. The Penal Code provides the substantive law regulating the measure of punishment and does not affect the question of conviction, which relates to the province of procedure. The court is given the discretion to pass sentences varying with the character of the offender and the circumstances aggravating or mitigating under which the offence is committed. And the responsibility for determining the permissible range of sentences in each case remains with the court.

46. In sub-section (3) of section 6 of the Ain of 1995, if similar offence is committed by more than one person all of them will be sentenced to death. Suppose 5 persons are involved in the commission of the crime of them two directly participated in the commission of rape and other three persons abeted the offence. If these three persons are sentenced to death with other two, it will be contrary to norms and the sentencing principles being followed over a century. Sub-section (4) also provided that if more than one person sexually assaulted a woman or a child causing death after such rape, they will also be sentenced to death. This provision is so vague and indefinite that the courts cannot have any discretionary power to exercise its discretion particularly in a case where there is no direct evidence for causing rape and the case rests upon circumstantial evidence. However, if the courts find that the circumstances are such that the offenders are responsible for causing the rape to the victim, it will be logical to award the death sentence to all in the absence to direct evidence. In all cases while awarding a sentence of death which is a forfeiture of life of a person, the court always insists upon the direct evidence. In the absence of direct evidence it is very difficult to come to the conclusion that all the accused had sufficient means rea in the act of rape. But since the only sentence is provided for the offence the courts will be left with no option other than to award the death sentence. This is totally inhumane and illogical. A law which is not consistent with notions of fairness and provides an irreversible penalty of death is repugnant to the concepts of human rights and values, and safety and security.

47. It appears from the above provisions to us that there was lack of contrivance in drafting the laws. If an enactment is sloppily drafted so that the text is verbose, confused, contradictory or incomplete, the court cannot insist on applying strict and exact standards of construction. There is need for precision in drafting a provision in

an enactment has been recognized by Stephen,J. as noticed by Lord Thring in Re Castioni (1891) 1 QB 149 as under:

> "I think that my late friend, Mr. John Stuart Mill, made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to anyone who has ever had, as I have on many occasions, to draft Acts of Parliament, which, although; they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand, but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to understand it."

48. The court always keeps in mind while construing a statute to prevent no clause, sentence or word be declared superfluous, void or insignificant. It is also the duty of the court to do full justice to each and every word appearing in a statutory enactment. However, the court should not shut its eyes to the facts that the draftmen are sometimes careless and slovenly, and that their draftmanship result in an enactment which is unintelligible, is absurd.

49. True, the concept of due process is not available in our Constitution but if we closely look at Articles 27, 31 and 32 it will not be an exaggeration to come to the conclusion that the expressions "be treated in accordance with law" and 'No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment' used in Article 35(5) are cognate nature. In Article 31 it is also stated that no action detrimental to the life, liberty, body of any person shall be taken except in accordance with law. It is not the same that a person's life has been taken away by a provision of legislation without conclusively determining as to his guilt in the commission of the crime. Again in Article 32 it provides that no person shall be deprived of his life save in accordance with law. These concepts are more or less akin to the concept of the due process law. The provisions of sub-sections (2) and (4) of section 6 deprive a tribunal from discharging it's constitutional duties of judicial review whereby it has the power of using discretion in the matter of awarding sentence in the facts and circumstances of a case and thus, there is no gainsaying that Sub-Sections (2) and (4) of Section 6 of the Ain of 1995 as well as section 303 of the Penal Code run contrary to those statutory safe-guards which give a tribunal the discretion in the matter of imposing sentence. Similarly, section 10(1) of the said Ain stands on the same footing.

50. No law which provides for it without involvement of the judicial mind can be said to be constitutional, reasonable, fair and just. Such law must be stigmatized as arbitrary because these provisions deprive the tribunals of the administration of justice independently without interference by the legislature. These provisions while purporting to impose mandatory death penalty seek to nullify those statutory structure under sub-sections (3) and (5) of section 367 of the Code of Criminal Procedure, though these provisions are contained in general law, in the absence of prohibition, in view of section 5(2) the Code of Criminal Procedure, they hold the field. A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, *ultra vires* the Constitution and accordingly they are declared void.

51. While legislating the Ain of 2000 similar provisions have been provided in sub-sections (2) and (3) of section 9 providing alternative sentence. This shift in the attitude of the legislature, on the question of sentence within a space of five years justifies the unreasonableness in the repealed law. However, in section 11(Ka) of the Ain of 2000, it is provided that if death is caused by husband or husband's, parents, guardians, relations or other persons to a woman for dowry, only one sentence of death has been provided leaving no discretionary power for the tribunal to award a lesser sentence on extraneous consideration. This provision is to the same extent *ultra vires* the Constitution, inasmuch as, there is vagueness and uncertainty in determining the appropriate measure of punishment. It is said "স্বামীর পক্ষে অন্য কোন ব্যক্তি যৌতুকের জন্য উক্ত নারীর মৃত্যু ঘটায়" There is chance of victimizing any person to implicate in the offence and the tribunal will be left with no discretionary power to award an alternative sentence.

52. Since we hold that Sub-Sections (2) and (4) of Section 6 of the Ain, 1995 and Sub-sections (2) and (3) of Section 34 of the Ain of 2000 are *ultra vires* the Constitution, despite repeal of the Ain of 1995, all cases pending and the appeals pending under the repealed Ain shall be regulated under the said law, but on the question of imposing sentence, the sentences prescribed in respect of those offences shall hold the field until new legislation is promulgated. I hold that there was total absence of proper application of the legislative mind

in promulgating those Ains, which may be rectified by amendments. In respect of section 303 of the Penal Code, the punishment shall be made in accordance with section 302 of the Penal Code. It is hereby declared that despite repeal of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, the pending cases including appeal may be held under the repealed Ain, while dealing with the question of sentence, the alternative sentences provided in the corresponding offences prescribed in the Nari-O-Shishu Nirjatan Daman Ain, 2000 shall be followed.

53. Let us now consider the merits of the case in Civil Appeal No.116 of 2010. The appellant was sentenced to death by the Bishesh Adalat. On consideration the evidence this Division found that the victim Sumi Akter's whereabouts could not be traced out. Her mother Rahima Begum along with P.W.6 Abdur Rob searched from door to door. The house of the condemned prisoner Sukur Ali was found under lock and key and on entering into the house, the deadbody of the of the victim was found inside the house and it was detected that her wearing ornaments were missing and marks of injuries with emission of reddish liquid from her genital organ were found. The appellant was caught read handed by the people from Tepra and he was brought to the place of occurrence and before the witnesses, he had admitted the incident of rape and killing of the victim. The victim Sumi Akter was only 7 years old. The killing was brutal and diabolical. There was no extenuating ground to commute his sentence and accordingly his sentence was confirmed. We find no ground to review his sentence.

54. The appeal is therefore allowed in part.

Jail Petition No.8 of 2010

55. Condemned prisoner Razu Ahmed was convicted under section 10(1) of Nari-O-Shishu-Nirjatan (Bishesh Bidhan) Ain, 1995 for killing his wife Aklima. P.Ws.4, 6 and 12 proved that accused demanded dowry to the victim on previous occasions and on the day of occurrence on 9th January, 1997, he came to his father-in-law's house where Aklima was temporarily staying with her parents. The prosecution has been able to prove that the accused and the victim stayed in one room and at 5.30 a.m., her deadbody was recovered from a low lying boro paddy field. Accused took the plea of alibi and claimed that the victim was a patient of epilepsy. The tribunal and the High Court Division disbelieved his plea and on consideration of evidence of P.Ws.1, 2, 4, 6, 10 and 12 and the extra judicial confession of the accused came to a definite finding that the accused killed his wife. We find no cogent ground to infer otherwise. The petition is accordingly dismissed.

Jail Petition No.3 of 2009

56. In this petition the condemned prisoner Nazrul Islam was sentenced to death under section 10(1) of the Ain, 1995 for killing his wife Sufia Begum. Md. Abdul Mazid (P.W.5) and Abdur Razzaq (P.W.6) saw the victim while he was beating the victim at 1 a.m. These witnesses also saw the deadbody of the victim at 4 a.m. The deadbody of the victim was recovered on the ghat of the Pond of the accused. P.Ws.4, 6, 7, 8, 9, 10, 11 and 13 corroborated the prosecution case that the accused killed his wife for dowry. We find no cogent ground to interfere with the conviction and sentence of the petitioner. The petition is accordingly dismissed.

Jail Petition No.18 of 2008

57. In this case, victim Kulsum Begum, a minor girl of 12 years old was raped and killed by her cousin Masuk Mia, a rickshaw puller, on 16th February, 1999, on 8.30 a.m. Accused made an extra-judicial confession. P.Ws.4 and 5 proved the extra-judicial confession that he raped the victim and killed her. He also made a judicial confession and P.W.16 proved the confessional statement. The confessional statement is corroborated by the medical evidence. The Tribunal believed the prosecution case and convicted him under section 6(2) of the Ain of 1995 and awarded him death sentence. The High Court Division has confirmed the death sentence. We find no reason to interfere with the conviction and sentence.

Jail Petition No.16 of 2010

58. In this petition convict Abdul Kader challenged his conviction and sentence under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000. According to the prosecution case, accused was the husband of the victim Piyara Begum, who killed his wife by setting fire. P.Ws.6, 7, 9, 10 and 11 stated in one voice that the wife was done to death by her husband by arson by way of pouring kerosene oil. On the question of demand of dowry P.Ws.1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 corroborated each other. The High Court Division confirmed the sentence of death. We find no cogent ground to interfere with the conviction and sentence.

Jail Petition No.2 of 2011

59. In this case victim Most. Parvin was done to death by her husband Akidul Islam @ Akidul Sheikh for dowry. In this case P.Ws.1, 2 and 3 stated about the demand of dowry by the accused to the victim but there is no sufficient evidence on record that the victim was done to death for dowry. Though the cause of death was homicidal in nature, in the absence of the proof of demand of dowry for causing death, the conviction of the petitioner under section 11(Ka) of the Nari-O-Shishu Nirjatan-Daman-Ain is not justified. In view of the above, we convert his conviction to one under section 302 of the Penal Code and commute his sentence to imprisonment for life.

Jail Petition No.3 of 2011

60. In this case petitioner Md. Babul Mia along with Md. Salam @ Salam and one Md. Mozibur Rahman were convicted under section 6(4) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and sentenced to death. All the accused persons absconded in course of the trial of the case and they were tried in absentia. P.Ws.2, 5, 8 and 9 saw the accused petitioner with the victim and they also saw the deadbody of the victim immediate after of his departure from the room. P.Ws.3 and 4 also saw the petitioner who was talking with co-accused Mozibur beside the bank of the pond of dwelling house, where the victim was raped and killed. The medical evidence proved that the victim was raped before she was killed. In view of the above, we find no reason to interfere with the conviction and sentence.

Criminal Petition No.374 of 2011

61. In this case victim Asmaul Husna, wife of the petitioner was killed on 16th July, 2004 for dowry. The High Court Division noticed that the accused petitioner did not take the plea of alibi. P.Ws.1, 2, 3, 7 and 8 corroborated the prosecution case. The High Court Division believed them as reliable witnesses. The High Court Division noticed that her marriage with the accused was solemnized on 3rd April, 1994 for a dower of Tk.30,000/- and gradually their relationship deteriorated. She was subjected to physical and mental torture constantly by her husband for dowry of Tk.50,000/-. The High Court Division confirmed his death sentence. We find no cogent ground to interfere with the judgment.

62. The appeal is allowed in part. Sub-sections 2 and 4 of Section 6 o the (Bishesh Bidhan) Ain, 1995 and sub sections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and section 303 of the Penal Code are declared ultratires the Constitution. However, sentence passed against the respondent Md. Shukur Ali is maintained. The Criminal Petition No.374 of 2011, Jail Petition Nos.18 of 2008, 3 of 2009, 8 of 2010, 16 of 2010, 2-3 of 2011 are disposed of. Jail Petition Nos.1 of 2010, 5 of 2012, 7 of 2012 and 8 of 2012 shall be heard separately. Until new legislation is made the imposition of sentence in respect of offences in sub-section (2) and (4) of section 6 of the Ain of 1995 shall be regulated by the Nari-O-Shishu Nirjatan Daman Ain, 2000.

63. **Operative Part:**

a) Sub-sections (2) and (4) of section 6 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, sub-sections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and section 303 are declared ultravires the Constitution.

b) Despite repeal of the Ain of 1995, the pending cases and pending appeals in respect of those offences shall be tried and heard in accordance with the provisions of the Ain of 1995, but the sentences prescribed in respect of similar nature of offences in the Ain of 2000 shall be applicable.

c) There shall be no mandatory sentence of death in respect of an offence of murder committed by an offender who is under a sentence of life imprisonment.

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