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JUDICIAL DISCRETION IN SENTENCING OF OFFENDERS

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***Abstract*--No task confronting the criminal court judge is more of an enigma than that of sentencing the convicted offender. Trying a case, one English jurist put it, "is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty."' If anything, the problem of sentencing has grown all the more vexing since Justice Mc Ardle coined this pithy comment. Stated broadly, this state of affairs is an outgrowth of a marked trend toward greater flexibility in sentencing, a trend that appeared when classical penology began to lose its grip as a primary motivational force in the decisions of sentencing judges. One of the hallmarks of classical penology was its opposition to arbitrary sentencing powers vested in the judiciary. Accordingly, the appropriate punishment for an offense was to be calculated by legislative bodies rather than by individual judges. The task of the latter was to dispense punishment with uniformity, without regard for the offender's social class, his mental state or the circumstances surrounding his unlawful deed. Above all, it was to be meted out according to the terms of the statute violated, and not according to the judge's interpretation of how the law should be applied. Thus the tenets of classical penology narrowly circumscribed the sentencing prerogatives of the criminal court, and in jurisdictions where this philosophy held sway, judicial discretion in sentencing was minimal or altogether absent. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. But the fact that the determination of appropriate punishment in our country rests mainly on certain vague terms such as aggravating or extenuating circumstances or on its gravity does not serve the purpose of administration of Criminal Justice system. It is called vague because what is aggravating or extenuating for one judge need not/ will not be the same for the other.**

INTRODUCTION

According to Philip Stanhope, "Judgment is not upon all occasions required, but discretion always is." Discretion is the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives. Judicial discretion is a very broad concept because of the different kind of decisions made by judges within the same given circumstances. The exercise of discretionary power conferred on a judge is omnipotent in judicial proceedings. Some degree of discretion is unavoidable because legislature cannot foresee every eventuality which may come in judicial proceedings. The term judicial discretion has nowhere been defined in the statues though it is exercised regularly by courts of law. It is exercised when a judge is conferred a power under a statute that requires the judge to choose between several different, but equally valid, courses of action.[1]

Discretion is inevitable both in civil and criminal proceedings. It is impossible to foresee the eventualities in the judicial proceedings and for this purpose the power of discretion is conferred upon the judge to decide justly according to the facts and circumstances. It is for this reason that in every piece of legislation generally we find words like, "as courts deems proper", "as the court thinks reasonable", "as the court otherwise directs" and other similar expressions which confers discretionary power on the court. These expressions show that a court has unbridled freedom to decide a case according to his subjective satisfaction. Judges are been perceived as wielding wide range of power because of the discretion conferred on them. Now the question which arises "Is the judge free to exercise discretion according to his subjective satisfaction."

Sentencing of a convict basically denotes the culmination of judicial process which begins with the detection, enforcement of the law, prosecution and adjudication. Thus the importance of Sentencing lies in the fact that it becomes the face of Justice and a future deterrent for the prospective offender of law. The determination of

[1] Judicial Discretion and Sentencing Outcomes available at https://www.ncjrs.gov/pdffiles1/nij/grants/223974. (visited on 21/11/2017)

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appropriate punishment after the conviction of an offender is often a question of great difficulty as it always requires a careful consideration. Though the law prescribes the nature and the limit of the punishment permissible for an offence, it is the Court which has to determine in each case a sentence suited to the offence and the offender. The maximum punishment prescribed by the law of any offence is intended for the gravest of its kind and it is rarely necessary in practice to go up to the maximum. The measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, and character of the offender, his age, antecedents and other extenuating or aggravating circumstances.[2]

In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing. Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating the following:-

The Indian Penal Code prescribes offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum is prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option(s) is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.[3]

The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative." In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines. In an October 2010 news report, the Law Minister is quoted as having stated that the government is looking into establishing a "uniform sentencing policy" in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences. In India no uniform sentencing policy exists and sentence awarded to an offender reflect the individual philosophy of the judges. This is evident from the following facts.

The following statements given by the three prominent judgesof India shows the present condition of sentencing policy of India.

"*Every saint has a past, every sinner has a future."* Krishna Iyer J

"*Theory of reformation through punishment is grounded on the sublime philosophy that every man is born good, but circumstances transform him into a criminal*". KT Thomas J

"*Reformative theory is certainly important but too much stress to my mind cannot be laid down on it that basic tenets of punishment altogether vanish*". DP Wadhwa J

[2]Mahender K. Sharma, Minimum Sentencing for Offences in India: Law and Policy 49-50 (Deep and Deep Publications New Delhi, 1st edition., 1996)

[3] N.V. Paranjape, Criminology and Penology with Victimology 319 (Central Law Publications Allahabad, 16th edition., 2014)

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HOW JUDICIAL DISCRETION GREW

In order to comply with the demands of justice, sentencing must remain discretionary and the selection and the sentence selection in specific cases must remain exclusively a judicial task.[4] Turning from its ideological wellspring- the broad trend toward individualization to the area of procedure, there were three developments chiefly responsible for the revival and extension of judicial discretion.

First, there was an increase in the types of alternatives simultaneously open to the court at pronouncement of sentence. By sentencing alternative is meant a discrete disposition category which, in turn, may embrace a number of sub-alternatives. Thus, a capital offender can be executed in any one of several ways (e.g., gas chamber, electrocution, gallows, etc.), each falling under a single major alternative the death penalty. Relying on federal criminal procedure for illustrations, convicted offenders may be disposed of by: (a) the death penalty; (b) imprisonment; (c) fines; (d) probation; (e) deportation;" (f) vacating a judgment of conviction and granting a new trial if it is determined that the offender was mentally incompetent during his trial; and (g) judgment of acquittal.' Impressive as this inventory may seem, in no court can these alternatives be indiscriminately imposed on any offender. The death penalty cannot be invoked for misdemeanants; probation cannot be granted to capital offenders; an offender with legitimate citizenship cannot be deported. Indeed, it would be difficult to imagine even a hypothetical case in which the entire range of these alternatives might apply. There is no gainsaying the fact that many of these alternatives, to say nothing of still others no longer considered acceptable (e.g., corporal punishment), were used in the past. In terms of judicial discretion, however, what is unique about the present state of affairs in sentencing is not so much the mere availability of additional alternatives but the fact that more alternatives are simultaneously available. Previously the range of major sentencing alternatives at the court's disposal at a given time and for a given case was comparatively narrow.

Second, the increase in the number of alternatives simultaneously open to the court has been paralleled by an increase in the ways in which they can be combined into a single disposition. Imprisonment coupled with a fine has probably been the most prevalent form of "mixed sentence" over the years. More recently, a variation of this pattern has begun to emerge. California and the federal government now have "split-sentence" laws which provide for imprisonment followed by probation. "Mixed" and "split" sentences are indicative of the drift toward incorporating more different alternatives into a particular disposition. It is not unusual for a "mixed" sentence to include imprisonment on one count, and probation or a fine on another. In any event, the ability to fuse discrete alternatives into unitary sentences served to widen the court's area of choice.

Third, relatively recent innovations in sentencing procedures have given the trial judge more opportunity to exercise choice within certain sentencing alternatives. Let us examine how this can happen when imprisonment is the alternative in question. In most jurisdictions the prison terms imposed on convicted felons are set by the court, within limits defined by statute." This means that the judge, in the process of pronouncing sentence, is ordinarily compelled to make a minimum of two choices. He must select at least one sentencing alternative permitted by law- imprisonment in this case then ascertain the degree to which that alternative is to be implemented. Neither of these choices is present when the offense calls for a mandatory sentence.' But mandatory sentencing, as noted above, has been giving way to less rigid sentencing procedures, with the indefinite sentence often cited as the foremost example of this new flexibility. Since mandatory sentencing and judicial option are mutually exclusive, a seemingly valid inference is that the trend toward indefinite prison commitments automatically enlarged the sphere of judicial discretion. Such logic, however, oversimplifies what actually happened, and exaggerates the significance indefinite sentence statutes had for the discretion of the court. The fact of the matter is that indefinite sentences, when analyzed with the judge and not the offender as the point of reference, can be either mandatory or permissive.[5]

It depends on the jurisdiction in question. Moreover, this is also true of so called definite sentences, and could just as easily be extended to the indeterminate sentence if ever it became something other than a statutory rarity. In indefinite sentence jurisdictions judicial discretion in establishing the length of incarceration can occur in a

[4]Graeme Brown, Criminal Sentencing as Practical Wisdom 10 (Hart Publishing Oxford, 1st edition., 2017)

[5]Judicial Sentencing Discretion Revived available at: digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1215&context=pl (visited on 23/11/2017)

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number of ways. In some jurisdictions the judge can set the minimum, in others the maximum, and in still others he is authorized to set both minimum and maximum. No matter which method prevails, the limit(s) he chooses cannot exceed the limit(s) stipulated by law. What is especially relevant here is that the trial judge, if vested with this power, can exercise at least one choice over and above his selection of imprisonment as the sentencing alternative. On the other hand, in some indefinite sentence jurisdictions the minimum and maximum are determined by law. If the judge decides for imprisonment, he has no second choice; he must impose a term with predetermined upper and lower limits. By way of contrast, there are so called definite sentence jurisdictions where the court's discretion is scarcely impaired. There was a time when a definite sentence was identical to a mandatory sentence, with the judge constrained to impose the penalty set forth in the law. At present a definite sentence usually means one in which the minimum and maximum coincide. It need not be mandatory, for often the term of imprisonment maybe set initially by a judge, a jury, or an administrative body, as well as by statute.

However is the fact that the principle of flexibility inherent in the indefinite sentence has been extended to facets of sentencing other than the setting of minimum and maximum limits on incarceration. Even when the judge elects to imprison an offender there usually remains an impressive number of residual options he may invoke. He might impose a fine, consecutive or concurrent terms, or later choose to modify his sentence. Particularly with such sentencing alternatives as probation and the fine, the degree of latitude at the court's command is extensive. On balance, then, the influence of indefinite prison sentences on judicial discretion probably has been neither as great nor as direct as is commonly assumed. But the principle of flexibility that underlies indefinite sentencing has enlarged the area of option within certain other sentencing alternatives.[6]

THE PROBLEM WITH JUDICIAL DISCRETION

When the applause, for having finally succeeded in giving Judges an absolute discretion whether or not to impose death in certain murder cases, subsides, we may perhaps realize the true significance of what we have done. We have imposed on individual Judges the awesome responsibility of solely deciding whether or not to impose the death penalty. Would such an imposition even on Judges experienced in criminal practice always lead to desirable outcomes? Judicial discretion has and always will play a vital role in the criminal justice system. However, its desirability in the sentencing process depends largely on the manner in which it is exercised. Obviously, such discretion must not be exercised in an arbitrary or irrational fashion leading to unjust and inconsistent outcomes. This is all the more important in respect of the discretionary death penalty. It is the irreversible nature of the death penalty and its categorical difference from other forms of punishment that make any possibility of inconsistency in sentencing unacceptable.[7]

On the other hand, a reluctance to impose the penalty in deserving cases will also defeat the intent of Parliament that the death penalty must remain as a deterrent punishment in our law. Because consistency in sentencing in like cases is so much about equality of treatment, fairness and ultimately justice, ensuring consistency in sentencing is crucial. Any inconsistency in the imposition of the death penalty will thus be an unwelcome outcome and will lead to both injustice and public disquiet. Sentencing benchmarks and guidelines have been set by judiciaries the world over to have some semblance of consistency. Indeed, the Singapore Court of Appeal has had occasion to admonish even High Court Judges for not following its sentencing guidelines.

In Public Prosecutor *v* UI[8], Chief Justice Chan Sek Keong, in delivering the judgment of the majority in the Court of Appeal, highlighted the importance of consistency in sentencing:

A high level of consistency in sentencing is desirable as the presence of consistency reflects well on the fairness of a legal system. In contrast, the presence of inconsistency in sentencing diminishes the idea of justice being equal to all in a legal system; it also leads to public cynicism about the legal system in question and eventually, to the loss of public confidence in the administration of justice.

[6]Geraldine Mackenzie, How Judges Sentence 78-79 (The Federation Press Sydney, 1st edition., 2005)
[7]Dean J. Champion, Sentencing: A Reference Handbook 35-36 (ABC-CLIO Inc California, 1st edition., 2008)
[8] 4 SLR 500; [2008] SGCA 35

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Judicial experience in India and the US, which have in place the discretionary death penalty for first-degree murder, highlights some of the problems of judicial discretion. In India, for example, the death penalty is only imposed on crimes which have been deemed by Judges as the "rarest of the rare" offences which has resulted in a de facto abolition of the death penalty by the judiciary. Much literature has centered on how the "rarest of the rare" formula has resulted in the death penalty being arbitrarily and inconsistently applied or withheld in India. As noted by one commentator, there is "no consistent or reliable pattern under which Judges will exercise their discretion. The gnawing uneasiness that the same case if heard by a different set of Judges may have resulted in a different punishment will always rankle in the minds of those successful death row convicts facing the noose". This is especially so in cases which involve rape and murder, dowry killings and honour killings. For instance, in the case of Dhanajoy v State of West[9] Bengal and Rao sahib v State of Maharashtra[10], both accused had committed rape and murder of their victim aged thirteen and four and a half years old respectively. However, only Dhananjoy's sentence was upheld while Rao saheb's death sentence was reduced to life imprisonment by the Supreme Court.

In the US, some notable cases also suggest that the death penalty has been meted out inconsistently. For example, Timothy McVeigh, who was responsible for the bombing of Oklahoma City building in 1995 in which more than 100 people were killed, was executed but his accomplice Terry Nichols was given life sentences despite being found guilty of conspiracy in the same crime. Another unintended consequence of the move towards judicial discretion is that even perceived inconsistency in imposing the death penalty will provide fodder to the death penalty abolitionist school. Amnesty International, for example, has readily relied on its study of Court decisions involving rape and murder in India in support of its claim that there is "ample evidence to show that the death penalty (in India) has been an arbitrary, imprecise and abusive means of dealing with defendants".[11]

There are a number of other questions that arise with this new found discretion in murder cases. What is to be the may have some underlying philosophical and other personal differences in their approach to imposing the death penalty. If the choice of either life of death is largely influenced by a Judge's subjective inclinations then the consequences of that decision will be unjustly borne by the offender or the public. As noted by authors Julian V. Roberts and David P. Cole, "there may well be variation among judges in terms of sentencing purposes and the sentence imposed: judges may favor different sentencing purposes, which will give rise to different disposition", thereby resulting in disparity in sentencing. Such subjectivity has the potential to cause like cases to be sentenced differently. It is interesting to note that from ancient times the law has attempted to deal with similar dilemmas Judges face. Some familiar doctrines have provided creative solutions to such problems.

One such example is the concept that an accused person can only be convicted if his guilt is proved "beyond a reasonable doubt". The origins of this cherished doctrine apparently lie in ancient Christian theology. The "beyond a reasonable doubt" rule was originally not intended to protect the accused, as we believe the rationale of the rule to be to-day, but to protect "the souls of the jurors against damnation".

In a criminal trial in the Christian past, the fate of the Judge was apparently as much at stake as the fate of the accused. Convicting an innocent person was regarded as a potential mortal sin. The result was that Judges and jurors were reluctant to convict and impose the then standard "blood punishments" of execution and mutilations. Philosopher William Paley described the situation in 1785 when English jurors were reluctant to convict as they experienced "a general dread lest the charge of innocent blood should lie at their doors". The reasonable doubt rule came about only because of this religious reluctance to convict. The rule was thus not designed to make it more difficult for the jurors to convict, but to make it easier for them to do so by assuring

[9](1994) 2 SCC 220
[10]1994 Cri L J 3792
[11] The Death Penalty and the Desirability of Judicial Discretion available at http://www.lawgazette.com.sg/2013-03/697.htm (visited on 25/11/2017)

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them that they could convict without risking their own salvation so long as they had no "reasonable doubts" as to the accused person's guilt.[12]

JUDICIAL DISCRETION IN SENTENCING OF OFFENDERS

Section 53 of the Indian Penal Code, 1860 in Chapter III deals with the kinds of punishments which can be inflicted on the offenders[13]. These are as follows:

- Death penalty,
- Imprisonment for life,
- Imprisonment,
- Forfeiture of property and
- Fine.

The main objectives of the criminal justice system can be categorized as follows:

1. To prevent the occurrence of crime.
2. To punish the transgressors and the criminals.
3. To rehabilitate the transgressors and the criminals.
4. To compensate the victims as far as possible.
5. To maintain law and order in the society.
6. To deter the offenders from committing any criminal act in the future.

Relevant Provisions: The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in S.235, S.248, S.325, S.360 and S.361. S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgment of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime. The section provides a quasi-trial to ensure that the convict is given a chance to speak for himself and give opinion on the sentence to be imposed on him. The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if none of these will affect the sentence. Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work. This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed. Similarly section 248(2) provides that where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 325 or section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.[14]

Section 29 and Section 325 Criminal Procedure Code, 1973: In case of an offender other than a Juvenile, a Magistrate of First Class, under section 29 of Cr.P.C., may pass a sentence of imprisonment for a term not exceeding 3 years or fine not exceeding ten thousand rupees or both. Here it is important to note that under many categories of offences punishment prescribed is more than the above prescribed limit, however while passing sentence in such cases magistrate cannot exceed the sentencing limits but he has an option under S. 325Cr.P.C. to forward accused to the Chief Judicial Magistrate. A sentence of imprisonment in default, as per S.30 Cr.P.C., should not be in excess of power u/s 29 Cr.P.C. and should not exceed 1/4th of the term of

[12] Loraine Gelsthorpe, Exercising Discretion 50-51 (Routledge Taylor and Francis Group New York, 5th edition., 2011)

[13] 53. Punishments.—The punishments to which offenders are liable under the provisions of this Code are—
(First) — Death; 1[Secondly.—Imprisonment for life;] 2[***]
(Fourthly) —Imprisonment, which is of two descriptions, namely:—
(1) Rigorous, that is, with hard labour;
(2) Simple;
(Fifthly) —Forfeiture of property;
(Sixthly) —Fine.

[14] S.N. Mishra, The Code of Criminal Procedure 394 (Central Law Publications Allahabad, 18th edition., 2013)

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imprisonment which the magistrate is empowered to inflict. However, it may be in addition to substantive sentence of imprisonment for the maximum term awarded by the Magistrate u/s29.

Section 31 Criminal Procedure Code, 1973 and Section 71 Indian Penal Code: In case of conviction of several offences at one trial, as per S.31 Cr.P.C., the court may pass separate sentences, subject to the provisions of S.71 of the I.P.C. The aggregate punishment and the length of the period of imprisonment must not exceed the limit prescribed by S.71 I.P.C. S. 71 I.P.C. provides (1) that where an offence is made up of parts each of which parts is itself an offence the offender can be punished only for one of such offences. (2) That where an offence falls under two or more definitions of offences or where several acts, each of which is a offence, constitute when combined a different offence, then the punishment could be awarded only for any one of such offences. These are rules of substantive law whereas S.31 Cr.P.C. is a procedural law. In case of several sentences to run concurrently it is not necessary to send offender for trial before higher court only for the reason that aggregate punishment for several offences is in excess of punishment which the magistrate is competent to inflict on conviction of single offence. However, proviso to S.31 Cr.P.C. Provides that (a)in no case shall such person be sentenced to imprisonment for a longer period that 14 years (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for single offence.

Section 360 Cr.P.C.-Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behavior. Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.[15]

Section 361. Cr.P.C.-Special reasons to be recorded in certain cases.

Where in any case the Court could have dealt with,-

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

[15] Ibid 515.

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(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so.[16]

Provisions under Probation of Offenders Act,1958

Section 3. Power of court to release certain offenders after admonition.—When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition. Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

Section 4. Power of court to release certain offenders on probation of good conduct.—(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behavior. Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond. (2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender. (4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender. (5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.[17]

JUDICIAL PRONOUNCEMENTS RELATING TO PRINCIPLES OF SENTENCING

In *Bachan Singh vs State of Punjab*[18]The hon'ble Apex court while interpreting S. 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of extreme culpability and secondly, in making the choice of sentence due regard must be paid to the circumstances of the offender also. The court thus evolved the principle of rarest of rare cases.

[16] Ibid 516.
[17] N.V. Paranjape, Criminology and Penology with Victimology 834-35 (Central Law Publications Allahabad, 16th edition., 2014)
[18] AIR 1980 SC 898.

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In *Machhi Singh v. State of Punjab*,[19] the hon'ble Apex court observed that the accused appellants, as a result of a family feud and motivated by feeling of reprisal, committed as many as 17 murders of men, women and children. The Court, while justifying the death sentence imposed on the appellants, recollected with approval the principles laid down in Bachan Singh and supplemented them with a few more elaborate guidelines regarding the test of 'rarest of rare' cases as given below :

(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?

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

Aggravating Circumstances:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
2. The offence was committed while the offender was engaged in the commission of another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.
6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
7. The offence was committed by a person while in lawful custody.
8. The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.
12. When there is a cold blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.[20]

Mitigating Circumstances:

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.
2. The age of the accused is a relevant consideration but not a determinative factor by itself.
3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

[19] AIR 1983 SC 957

[20] K.D. Gaur, Indian Penal Code 612 (Universal Law Publishing Gurgaon, 6th edition.,2016)

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5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
7. Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though prosecution has brought home the guilt of the accused.

While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the load star besides the above considerations in imposition or otherwise of the death sentence.

The Hon'ble Apex Court in *Rajendra Pralhadrao Wasnik Vs. State of Maharashtra*,[21]held that "Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule.

Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavor to do complete justice between the parties".

The Hon'ble Apex court in *State of Madhya Pradesh vs Mehtab*,[22] has observed that, "we find force in the submission, it is the duty of the court to award just sentence to a convict against whom charge is proved. While mitigating and aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also the victim and the society."

In *Gurubachan Sing Vs. Satpal Singh*,[23] the Apex Court cautioned saying that exaggerated devotion to rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion as they destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law.

In *Norbetro Vs. Mrs. Prema Nalband,*[24] The Hon'ble Bombay High Court held that; "Admittedly, post dated cheques dated 30.9.1999 were given to the complainant in June of that year and till date the complainant has not received her dues except for the said sum of Rs.30,000/.Considering the amount of cheques namely Rs.4.12 lacs, substantive sentence of five days would look like a flee bite sentence. In my view considering the said amount of Rs.4.12 lacs substantive sentence of 15 days Simple Imprisonment could also not be considered to be adequate and considering the same in my views there is absolutely no scope for further reduction of the said sentence." In this case the Trial Court has sentenced the accused to undergo Simple Imprisonment for a period of 15 days and awarded the compensation to the complainant from accused of Rs.50,000/.

Till the revision before the Hon'ble High Court, accused had also undergone the period of five (5) days and it was urged from the side of accused that the sentence would be reduced to the said period of five days undergone by the accused. Hon'ble High court giving above observation confirmed the sentence passed by Trial Court. While dealing with the case in respect of offence of outraging modesty of woman punishable under Sec. 354 of I.P.C., The Hon'ble Bombay High Court in *Bhagwat Ganpat Taide Vs. The State of Maharashtra*,[25] observed that; "The petitioner/accused was a teacher. Imparting knowledge is a noble profession. The petitioner was in a position of *loco parentis* to his pupil. Instead of imparting knowledge petitioner was indulging in

[21] AIR 2012 SC 1377
[22] Cri. appeal no. 290/2015, dated 13/02/2015
[23] AIR 1990 SC 209
[24] 2006 (1) AIR Bom.R,481
[25] 2006 (3) AIR Bom.R,250

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molestations of young girls of tender age. If the conduct of the petitioner is considered this is not fit case for showing leniency." In this case Trial Court convicted accused for this offence sentencing him to suffer Rigorous Imprisonment for three months and fine of Rs.2,000/- in default R.I. for 20 days. This sentence was confirmed by the Hon'ble High Court.

In *Shailesh Jasvantbhai and Another Vs. State of Gujarat and Others*,[26] The Hon'ble Apex Court held that "In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

In *Brajendra Singh Vs. State of Madhya Pradesh*,[27]The Hon'ble Apex Court held that "The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh and thereafter, in the case of Machhi Singh. The aforesaid judgments, primarily dissect these principles into two different compartments one being the 'aggravating circumstances' while the other being the 'mitigating circumstance'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Code of Criminal Procedure.

In *State of Andhra Pradesh v Polamala Raju @ Rajarao*[28] a three judge bench of hon'ble Apex Court set aside a judgment of the High Court for non-application of mind to the question of sentencing and observed that "In that case, this Court reprimanded the High Court for having reduced the sentence of the accused convicted under Section 376, IPC from 10 years imprisonment to 5 years without recording any reasons for the same". This Court said: "We are of the considered opinion that it is an obligation of the sentencing court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence.....To say the least, the order contains no reasons, much less "special or adequate reasons". The sentence has been reduced in a rather mechanical manner without proper application of mind..."

In *State of M.P. v Bablu Natt*[29] The hon'ble Apex Court held that "Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of 13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC.

The Hon'ble Supreme Court in Shimbhu v. State of Haryana,[30]disapproved the reduction of sentence, than the prescribed minimum, in case of rape convicts, on the ground that the accused was "unsophisticated and illiterate citizen belonging to a weaker section of the society" that he was "a chronic addict to drinking" and had committed rape on the girl while in state of "intoxication" and that his family comprising of "an old mother, wife and children" were dependent upon him. These factors, the court said, did not justify recourse to the proviso to Section 376(2) of the I.P.C. to impose a sentence less than the prescribed minimum. In this judgment the court did not consider the compromise arrived between the victim and the accused as a ground for reduction of sentence.

[26] (2006) 2 SCC 359
[27] AIR 2012 SC 1552
[28] (2000) 7 SCC 75
[29] (2009) 2 SCC 272
[30] AIR 2014 SC 739

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In *State of M.P. v. Najab Khan*[31]also the court did not consider the compromise between the convict of the offence under section 326 of the I.P.C., and victim as a ground for reduction of sentence.

In *Shankar Kisanrao Khade v. State of Maharashtra*,[32] the Hon'ble Apex Court held that, an attempt was made to do away with the preparation of balance sheet of aggravating and mitigating circumstances for arriving at a decision on death sentence by substituting the said exercise with "Crime test", "Criminal test", and "PR test." While restating the "rarest of rare case" rule, Hon'ble Justice K.S.P. Radahakrishnan opined that to award death sentence the crime test has to be fully satisfied i.e. 100% and the criminal test shall be 0% and later it shall pass through "PR test." One doubts whether there can be any such cases where there will be 100%and 0% of crime test and criminal test respectively.

In *Sunil Dutt Sharma v. State (Govt. of NCT of Delhi)*,[33]the Hon'ble Apex Court has dealt with sentencing jurisprudence at length and opined that the principles of sentencing evolved by this Court over the years, though largely in the context of the death penalty, will be applicable to all lesser sentences so long as the sentencing Judge is vested with the discretion to award a lesser or a higher sentence.

In *Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India*,[34]The Hon'ble Apex Court observed that Crime and punishment are two sides of the same coin. Punishment must fit to the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing.

In *State of Madhya Pradesh Vs. Surendra Singh*,[35]based on the theory of proportionality, it is laid down by Hon'ble Apex Court that, "Undue sympathy to impose in adequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence".

NEED FOR STRUCTURED SENTENCING GUIDELINES

It is evident from few pronouncements that the judiciary in itself has felt the need for standard sentencing guidelines. In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.*[36], also noted the absence of judiciary-driven guidelines in India's criminal justice system, stating, "In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts, except for making observations with regard to the purport and object for which punishment is imposed upon an offender, had not

[31]AIR 2013 SC 2997
[32] 2013Cri.LJ 2595(SC)
[33] AIR 2013 SC (Cri) 2342
[34]2014 Cri.L.J. 4598
[35] AIR 2015 SC 3980
[36] Cri SLP No. 4285 of 2007 Decided on May 13, 2008

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issued any guidelines." The Court stated that the superior courts have come across a large number of cases that "show anomalies as regards the policy of sentencing," adding, "whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where the same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fines. For instance, in *Rameshwar Dayal v. State of U.P*,[37]the SC observed that, "One complex problem relating to the sentencing process is the lack of uniformity in the quantum of punishment given by different courts for the same or similar offences" and it also pointed out that the problem of disparity had not been solved satisfactorily so far. Later the Supreme Court in *Mohd. Chaman v. State*,[38] taking note on a decision of the Supreme Court of USA in *Gregg V. Gorgia*[39], observed that it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards. Nevertheless, these decisions do show that it is not impossible to lay down broad guidelines as distinguished from iron – cased standards, which will minimize the risk of arbitrary imposition of death penalty for murder and some other offences under the penal code. In 2013 the Supreme Court, in the case of *Soman v. State of Kerala,*[40] also observed the absence of structured guidelines: Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. Striking a fair balance between uniformity and judicial discretion of sentencing is of utmost importance in imposing the most suitable degree of punishment on an offender for a crime. The wide disparities of sentencing for similar offences reveal that the criminal justice system of India has failed in this regard. Sentencing policy, which is the most vital link in Criminal Justice system and which signifies the rule of Law in a State must be put forward by the Legislature or Judiciary. This is because, it is not just that there is disparity in sentencing, or in cases of death penalty or rape but there are other offences in the IPC which clearly brings similar disparities into light. It is time that we should imbibe the finer aspects of the successful Justice System in various parts of the world and make our Criminal Justice System stronger and more efficient.

CONCLUDING REMARKS

1. In ordering punishments if a judge leans too far towards uniformity he is not displaying the wisdom, compassion and judiciousness which the people expect from him. Rather the personality of the offender and the gravity of the offence should be the guiding factor for a judge in judicial sentencing. Age, antecedents, past criminal record, responsiveness and prospects of reformation of offender and circumstances of the commission of the offence should be taken into consideration.
2. Humanity, consciousness about societal values and frugality are some limiting factors in judicial sentencing. Disparity in decisions is due to disparity in judges and disparity in offenders and it is inevitable in a modern complex society.
3. The terms minimum and maximum may serve to mark the extremes of punishment, which require equal attention.
4. For professional criminals or political terrorists who indulge in ruthless violence and are a potential threat to the society, an extended period of preventive detention after serving the penal sentence may prove appropriate keeping in view the public safety and security against these dangerous hardened criminals.
5. Offences committed by public servants should be severely dealt with and deserve no leniency in sentencing.
6. The decision of a judge should not be out of tune with advancing society. He should command public confidence through his pragmatic pronouncements.
7. Political element with respect to future appointments or postings shall not hinder the process of administration of justice in anyway.

[37] 1978 SCR (3) 59
[38] (2001) 2 SCC 28
[39] 428 U.S. 153 (1976)
[40] (2013) 11 SCC 382

8. Sentencing by judge largely depends on the way the case is presented before him by the police or the prosecutor. Miscarriage of justice occurs when evidences are manipulated.
9. In order to eliminate chances of injustice due to miscalculated sentencing, the law provides for appeal in the higher courts.
10. Establishment of training institutes for young and new entrants into judicial services may be useful in equipping them with the necessary know how about the techniques of Judicial Sentencing which may go a long way in reasserting their role as dispensers of even handed justice.
11. In the absence of a foolproof, for correct assessment of the sentence, various circumstances relevant to the nature or gravity of crime should be considered by the court while using discretionary judgment in award or sentence to the accused person.

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