"Rarest of the rare case" – the Sentencing Policy in India

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"In our Judicial system, we have not been able to develop legal principles regarding sentencing.[1]*"*

The criminal justice system in India was found to weigh in favour of the accused and there was a fear that it did not focus on justice to the victims of crime. The present system of criminal justice is an adversarial system, whereby the presiding officer is largely passive and he/she has no scope to enquire beyond the facts and evidence presented by opponent lawyers. The committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, in March 2003, issued a report on considering the pros and cons of the adversarial system, in comparison with the 'inquisitorial system[2]' followed in the countries of France, Germany, Italy and other continental countries, finding that a fair trial is possible only in the adversarial system.

The basic and fundamental principles that are sacred and sacrosanct to the criminal justice sytem followed in India are (i) the presumption of

1 State of Punjab v. Prem Sagar and others (2008) 7 SCC 550

2 One of the examples of the Inquisitorial system is the Inquisitorial system followed in France – Judges are considered Judicial Police Officers/Judge of Instructions – who oversee the investigation and investigate the offence. The defence have limited rights to suggest questions to the Judge to be put to the witness at the time of trial.

innocence; (ii) the right to silence/right against self incrimination; and (iii) the burden on the prosecution to prove the guilt of the accused beyond all reasonable doubts. The aim of these principles being ensuring that no innocent person is punished. Though the principles were well intentioned, it was noticed that the rate of convictions were abysmally low and the punishment imposed were mostly erratic. The variation was such that it prompted Malimath Committee (2003) and the Committee on Draft National policy on Criminal Justice, 2008 (also known as the Madhava Menon Committee) to moot for a formulation of a Sentencing Policy in India.

A Sentencing Policy in common parlance can be referred to as a guideline given to the judiciary regarding the quantum and nature of punishment that can be imposed on an individual, when he is found guilty of a crime. Andrew Von Hirsch[3] and Nils Jareborg[4] have divided the process of determining sentence into stages of determining proportionality while determining a sentence namely:

1. What interests are violated or threatened by the standard case of the crime-physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy?

2. Effect of violating those interests on the living standards of a typical victim-minimum well being, adequate well-being, significant enhancement.

3 Andrew Von Hirsch is a legal philosopher and penal theorist and founding director of the Centre of Penal Theory and Penal Ethics at the Institute of Criminology, Faculty of Law, University of Cambridge.

4 Neils Jareborg is a Swedish Criminal Law Professor, Uppsala University

3. Culpability of the offender.

4. Remoteness of the actual harm as seen by a reasonable man. [See Andrew Ashworth, Sentencing and Criminal Justice, 2005 4th Ed.]

Before looking into the Indian scenario, it is worthwhile to look into the outline of the policies that govern the United Kingdom and the United States of America.

Sentencing Policy of The United Kingdom[5]:

As per the Coroners and Justice Act, 2009, a Sentencing Council was set up in the United Kingdom. The Council consisted of 14 members out of which 8 were judicial members and 6 were non-judicial members with high experience in the criminal justice system. The Council is an independent body created to ensure transparency and consistency in sentencing and promoting independence of judiciary. The Council has set up sentencing guidelines for the Magistrate, Crown Court and the Court of Appeal. The guidelines were enforced on and from 6th April 2010.

Sentencing guidelines are available for most of the significant offences sentenced in the Magistrates' Court and for a wide range of offences in the Crown Court. On perusal of the Sentencing Policy, it is seen that in addition to providing a maximum period of sentence, clear guidelines are given to the Court regarding the application of the aggravating and mitigating circumstances. The guideline[6] also prescribes the measures to be adopted, by the Court, where the person accused of a

5 Information culled out from www.sentencingcouncil.org.uk

6 Example found in https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/using-the-mcsg/using-sentencing-council-guidelines/

crime assists the prosecution or when a guilty plea is entered. The Council also produces overarching guidelines on general sentencing issues and principles such as Sentencing children and young people. Where no offence-specific sentencing guideline exists, courts are expected to refer to the General guideline: overarching principles. Judges are also expected to refer to Court of Appeal judgments to look at how sentences have been reached for similar cases.

Sentencing Policy of The United States of America:

The Federal Sentencing Guidelines have been framed when the United States Federal Court System became effective in 1987. The rules are stated to be non-binding rules that set out a uniform sentencing policy for the defendants convicted in the United States Federal System. The guidelines are not mandatory because they may result in a sentence based on facts not proven beyond reasonable doubt to a jury, in violation of the sixth amendment[7]. The judges must consider them while determining a criminal defendant's sentence. When there is departure, the Judge must explain what factors warranted the increased or decreased sentence. When the Court of Appeal reviews a sentence imposed through propoer application of the guidelines, the Court may presume that the sentence imposed is reasonable[8]. The U.S. Sentencing Commission was created in 1984 to reduce sentence disparaties and to promote transparency and propotionality in sentencing. The statutory

7 United States v. Booker, 543 U.S. 20 (2005)
8 Rita v. United States, 127 S.C. 2456 (2007)

basis for framing of a Sentencing Policy is derived from the Sentencing and Reforms Act, 1984.

Indian Scenario:

So far, no sentencing policy has been framed in India. The Sentencing Policy also does not have any statutory backing. The Hon'ble Apex Court has from time to time expressed concerns regarding the lack of uniformity in imposing punishments. The Supreme Court has in Prem Sagar's case[9] lamented about the lack of uniformity in sentencing and the need to exercise discretion in a judicious manner in the following words:

> *"The Parliament, in providing for a hearing on sentence, as would appear from sub-section (2) of Section 235, sub-section (2) of Section 248, Section 325, as also Sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological backdrop of the accused being one of them.*
>
> *Although a wide discretion has been conferred upon the Court, the same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant.*
>
> *What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas, the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are*

9 State of Punjab v. Prem Sagar and Others (2008) 7 SCC 550

> *found to be different. Similar discrepancies have been noticed in regard to imposition of fine."*

In the above case, the Hon'ble Supreme Court referred to various instances, wherein it felt that the Courts must respond to the society's cry for justice against criminals. Justice demands that the Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime.[10] It was also felt that the Courts are required to mould the sentencing system to meet the challenges.[11]

In State of Karnataka v. Raju[12], it was observed by the Hon'ble Supreme Court that the extent to which the Judges had discretion under the statute remained a vexed question. In a case relating to s.304A IPC, it was felt that to reduce the rate of accidents, the trial courts must not deal with the accused leniently.[13]

With scattered guidelines in the form of precedents and without any framed policy of sentencing, the sentencing policy in India stands unregulated. It is also relevant here to note that the Indian Penal Code, 1860 only provides for a maximum sentence or in some cases, the minimum and the maximum sentence that may be imposed, leaving a sizable discretion to the presiding officer. The lack of uniform guidelines and definite period of sentence in the statute has definitely led to variety of punishments being imposed by the presiding officers of various courts. From the perspective of a common man, it is increasingly feared that

10 Dhananjoy Chatterjee v. State of West Bengal (1994) 2 SCC 220
11 Shailesh Jasvanthai and another v. State of Gujarat (2006) 2 SCC 359
12 2007 (11) SCALE 114
13 Dalbir Singh v. State of Haryana (2000) 5 SCC 82

even the outlook, upbringing and perspective of the deciding authority may have had an impact over the severity of the sentence imposed. The lack of standard policy and the dissimilitude in handling the propotionality of sentence has indicated a ring of caution time and again. The likelihood of an accused person losing his life by imposition of a death penalty as well as the likelihood of a hardcore offender, getting away with minimal sentence without adopting the guidelines/precedents set by the Hon'ble High Courts and the Apex Court cannot be ruled out. Therefore, there is an imminent need to give utmost attention and take all necessary safeguards at the time of deciding a sentence to be imposed on a person who is convicted of an offence.

It is a known fact that in the Code of Criminal Procedure 1973, s.235(2)[14] provides for a hearing on sentence. The provision reads as follows:

> *"s.235(1): After hearing arguments and points of law (if any) the Judge shall give a judgment in the case.*
>
> *(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of s.360[15], hear the accused on the question of sentence and then pass sentence on him according to law."*

Therefore, s.235(2) mandates a hearing on sentence, before sentencing the person convicted. More often than not, such a hearing on sentence is a mere ritual/formality. In many cases, without knowing the implication of the question posed by the presiding officer, the convicted

14 The provision was introduced by the Code of Criminal Procedure, 1973

15 S. 360 of the Code of Criminal Procedure, 1973 enables the Court to release the convict on probation of good conuct or admonition.

person pleads not guilty of the offence. Such a plea cannot be mechanically recorded since, it would have no bearing on the question of adeqaucy or propotionality of sentence. In such cases, it is the duty of the Court to draw the attention of the convicted person to the consequences of his plea and to ascertain the details necessary to be considered at the time of sentencing. The Court ought not to hestitate to get assistance from the defence counsel in this regard and ought to pose questions that may be of relevant consideration at this stage. There may be some instances where the defence come well prepared with a statement on behalf of the accused showing mitigating factors to favour a reduced sentence. In those instances, the Public Prosecutor should be requested to assist the court. In short, the seriousness of a hearing on sentence has to be made to be imbibed in the minds of all the stake holders concerned.

It is pertinent here to note that in Shivaprasad v. State of Kerala[16], the legendary Krishna Iyer J observed as follows:

> *"Criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty...It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the court to help it for a correct judgment in the proper personalized punitive treatment suited to the offender and the crime."*

The scope of hearing provided under s.235(2) of the Code of Criminal Procedure 1973 came up for discussion in the case of Santa Singh v.

16 1969 KLJ 862

State of Punjab,[17] wherein the Division Bench of the Hon'ble Supreme Court, Justice P. N. Bhagawati, speaking for the bench observed as follows:

> *"Modern penology as pointed out by this court[18] regards crime and criminal as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalize the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant, if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined. The material may be placed before the Court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, an opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing such material on record. The hearing on question of sentencing would be rendered devoid of all meaning and content and it would become an idle formality if it were merely confined to oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to the various factors bearing on the question of sentence, and if necessary, to lead evidecne for the purpose of placing such material before the Court... Of course, care would have to be taken by the Court to see that this hearing on question of sentence is not abused and turned into an instrument for unduly protracting the trial/proceeding. The claim of due and proper hearing would have to be harmonized with the requirement of expeditious disposal of the proceedings."*

In the above case, the Supreme Court went on to hold that the general public have to be educated about the new trends of penology and

17 1976 AIR 2386, 1977 SCR (1) 229
18 Ediga Ananma v. State of Andhra Pradesh AIR 1974 SC799

sentencing procedures. The tool must be used for reforming, rehabilitating criminals, smoothening out the uneven texture of the social fabric, not as a weapon, fashioned by law, for protecting and perpetrating the hegemony of one class over the other.

The modern approach of the Courts towards sentencing attempts a balancing act between the heinousness of the crime and the rights of the victim to be rehabilitated on one hand and the age of the accused, the circumstances under which the crime is committed and repentive state of mind of the accused on the other hand. Broad guidelines in this regard have been issued by the Apex Court in certain cases. Apart from these, there are cases, where the adequate and proportional sentencing has been considered by various High Courts of the Country as well as the Supreme Court in connection with the peculiar facts of each case. The said principles can be applied in factually similar cases by the District Judiciary. A few examples of such guidelines are mentioned herein below:

(i) Bachan Singh vs State Of Punjab[19], the Supreme Court, which upholding the constitutional validity of s.302 of the Indian Penal Code, providing an alternative death sentence, observed as follows:

> *"It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted*

19 AIR 1980 SC 898

> *of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."*

In this case, there is also reference to the aggravating circumstances and the mitigating circumstances, which a court can look into at the time of determining the sentence. Though the circumstances were not considered exhaustive, it definitely gives an indication about the circumstances to be looked into by a trial court.

(ii) Machhi Singh And Others vs State Of Punjab[20]: In this case, the Supreme Court, relying upon the principles laid down in Bachan Singh's case, went on to observe that in order to fit a particular set of facts into the category of 'rarest of the rare' case, the following question may be posed:

> *"In order to apply these guidelines inter-alia the following questions may be asked and answered:*
>
> *(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*
>
> *(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"*

20 1983 SCR (3) 413

(iii) Gurmukh Singh vs State Of Haryana[21], it was laid down by the Hon'ble Supreme Court that the following aspects could be considered while awarding punishment to the convicted person.

> *"24. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:*
>
> *a) Motive or previous enmity;*
>
> *b) Whether the incident had taken place on the spur of the moment;*
>
> *c) The intention/knowledge of the accused while inflicting the blow or injury;*
>
> *d) Whether the death ensued instantaneously or the victim died after several days;*
>
> *e) The gravity, dimension and nature of injury;*
>
> *f) The age and general health condition of the accused;*
>
> *g) Whether the injury was caused without pre-meditation in a sudden fight;*
>
> *h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;*
>
> *i) The criminal background and adverse history of the accused;*
>
> *j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;*
>
> *k) Number of other criminal cases pending against the accused;*
>
> *l) Incident occurred within the family members or close relations;*

21 (2009) 15 SCC 635

> *m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?*
>
> *These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused."*

A broad guideline was given to the trial courts regarding the circumstances, which have to be considered before imposition of sentence.

(iv) In Rajendra Prahladrao Wasnik vs The State Of Maharashtra[22], it was observed by the Supreme Court that the trial court has to give sufficient opportunity to the prosecution and the defence to produce materials to ensure proper sentencing. It was observed as follows:

> *"We may generally mention, in conclusion, that there is really no reason for the Trial Judge to be in haste in awarding a sentence in a case where he might be considering death penalty on the ground that any other alternative option is unquestionably foreclosed. The convict would in any case remain in custody for a fairly long time since the minimum punishment awarded would be imprisonment for life. Therefore, a Trial Judge can take his time and sentence the convict after giving*

22 2018 SCC OnLine SC 2799

> *adequate opportunity for the prosecution as well as for the defence to produce material as postulated in Bachan Singh so that the possibility of awarding life sentence is open to the Trial Judge as against the death sentence. It must be appreciated that a sentence of death should be awarded only in the rarest of rare cases, only if an alternative option is unquestionably foreclosed and only after full consideration of all factors keeping in mind that a sentence of death is irrevocable and irretrievable upon execution. It should always be remembered that while the crime is important, the criminal is equally important insofar as the sentencing process is concerned."*

(v) In the case of State Of M.P vs Mehtaab[23], the Supreme Court has emphasized the importance of the need to consider the victim and the society while imposing sentence and also to ensure that there is a provision made for rehabilitation of the victim. It observed as follows:

> *"It is the duty of the Court to award just sentence to a convict against whom charge is proved. While every mitigating or 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 to the victim and the society. It is also the duty of the court to duly consider the aspect of rehabilitating the victim."*

(vi) With regard to the adequacy of sentence, the Supreme Court has in the case of Shailesh Jasvantbhai & Anr vs State Of Gujarat & Ors[24] observed as follows:

> *"The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross*

23 https://indiankanoon.org/doc/100230239/
24 2006 (2) SCC 359

cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the 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.

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, 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 etc.[25]

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment

25 Also see Sevaka Perumal etc. v. State of Tamil Nadu (1991 (3) SCC 471)

> *ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread."*

(vi) Alister Anthony Pareira vs State Of Maharashtra[26], is a case wherein the Supreme Court reiterated the importance of imposing adequate sentence, considering not only the rights of the criminal but also the rights of the victim of the crime and the society at large. In this matter, the Supreme Court made the following observations regarding the principles involved in sentencing.

> *"70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.*
>
> *71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social*

26 (2012) 2 SCC 648

interest and consciousness of the society for award of appropriate sentence."

The above judgements are samples of the broad guidelines given by the Apex Court from time to time regarding sentencing in criminal cases. It is seen that all the decisions give a broad outline as to how a Judge should go about the task of sentencing. Ultimately, when it comes to the application of these principles in practice, one would only go by the facts of each case.

The goals of having sentencing guidelines[27] is to (i) have rational and consistent sentencing standards; (ii) proportionality in sentence; (iii) Uniformity in sentencing; and (iv) ensuring public safety. As is mentioned herein, what is framed is only in the form of guidelines and only weighs persuasively with the Judge. In the United States of America, the Judge has the option of awarding, what is known as a departure sentence. A departure sentence, is a sentence that deviates from the sentencing guidelines. The Judge has to give her reasons for doing so, which is subject to challenge in the appellate forum. Therefore, merely by forming sentencing guidelines, the discretion is not taken away. Further, a standard set of guidelines always helps the Judge to act with a sense of reassurance and satisfaction of having fulfilled all the requirements before sentencing a convict. It also ensures transparency and predictability in our system.

27 https://sentencing.umn.edu/content/what-are-sentencing-guidelines – authored by Richard S. Frase and Kelly Lyn Mitchell

The Malimath Committee (2003) and the Committee on Draft National policy on Criminal Justice, 2008 (also known as the Madhava Menon Committee) have already mooted the idea of framing of a sentencing policy in India. However, the same has not been framed till date. Though, there are sufficient guidelines available in the form of precedents, a standard policy, would also be of much help for the development of the Criminal Justice System, introduce predictability in the system and would in turn boost the confidence of the general public in the Court System.