

(2009) 06 GAU CK 0033
In the Gauhati High Court
Case No : Criminal Ref. (H) No. 8 (AP) of 2007

State of Arunachal Pradesh	Vs	APPELLANT
Ronda Basumatary		RESPONDENT

Date of Decision : 09-06-2009

Acts Referred:

Assam Frontier (Administration of Justice) Regulations, 1945 — Section 30
Constitution of India, 1950 — Article 14, 19, 21
Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313, 354(3), 360
Penal Code, 1860 (IPC) — Section 302, 34, 376, 448, 450

Citation : (2010) 4 GLR 193 : (2010) 1 GLT 679

Hon'ble Judges : P.K. Musahary, J; I.A. Ansari, J

Bench : Division Bench

Advocate : N. Lowang, for the Appellant; M. Pertin, for the Respondent

Judgement

P.K. Musahary, J.—This is a reference u/s 366 of Cr.PC, 1973, read with Section 30 of the Assam Frontier (Administration of Justice) Regulation, 1945, as amended vide Amendment Act of 2005, for confirmation of sentence of death passed by the Addl. Sessions Judge, Basar, West Siang District, Arunachal Pradesh, in respect of convict Ronda Basumatary who was convicted and sentenced to death u/s 302 vide judgment and order dated 31.8.2007 passed in BSR/SESS No. 250/2003.

2. We have heard Mr. N. Lowang, learned Public Prosecutor for the State of Arunachal Pradesh and Mr. M. Pertin, Learned Counsel appearing for the convict, as amicus curiae.

3. The prosecution tells its story as follows:

One Sri Tagon Darang of Rayang Village lodged a written FIR with the Officer in-Charge, Ruksin Police Station alleging that in the night of 7.8.2001, around 10.30 p.m., some unknown persons entered the hut of his labourers and killed his labours Lakhiram Narzary, his wife and his elder daughter. The information was received at 0900 hours and a crime being Ruksin PS. Case No. 28/2001 was

registered u/s 302, IPC. The Officer in-Charge of the said police station himself took over the charge of investigation who visited the place of occurrence, found the dead bodies of Lakhiram Narzary, his wife Navela Narzary and daughter Manjula Narzary, held the inquest on the dead bodies and sent the same for post mortem examination after taking photographs from different angles. He drew a rough sketch map of the place of occurrence and also recorded the statements of all available witnesses but found no clue of the culprits. However, during the course of investigation, he received some secret information from his engaged sources about the involvement of accused Sri Ronda Basumatary and Apollo Basumatary in the aforesaid murder case. Accordingly, he conducted the raid but the accused persons aforementioned managed to escape. In the meantime, the villagers were also alerted to apprehend the culprits and on 10.8.2001, the local public managed to catch Sri Apollo Basumatary and brought him to the Ruksin police station. On being interrogated, he confessed the commission of the crime along with Sri Ronda Basumatary. Thereafter, on 12.8.2001, Ronda Basumatary @ Romen Basumatary was nabbed from an agricultural field. During investigation, he also confessed the commission of crime and his confession led to recovery of the crime weapon (a knife) which was kept hidden in the Pineapple Garden at Milanpur village. The accused Sri Ronda Basumatary also disclosed the involvement of another accused Sri Amren Basumatary who was also arrested by the police and were forwarded to the court. While in custody, accused Ronda Basumatary attempted to commit suicide inside the latrine by cutting his neck with a beer bottle. The post mortem reports in respect of the deceased persons were obtained wherein it is mentioned that all the dead bodies bore penetrating wounds caused by a sharp weapon like dagger/knife on their persons. As per the said post mortem reports, the deceased Manjula Basumatary was raped before she was killed. A prima facie case having been established during investigation, the Investigating Officer laid the charge sheet against - (1) Sri Ronda Basumatary @ Romen Basumatary, (2) Apollo Basumatary, and (3) Sri Amren Basumatary, under Sections 302/376/448/34 of IPC. Charges were framed against the aforesaid accused persons under Sections 302/376/450/34 of IPC and the same having been read-over and explained to them, they pleaded not guilty and claimed to be tried.

4. In order to prove the charges against the accused persons, the prosecution examined as many as 10 witnesses including one child eye witness, son of the deceased parents. The accused Sri Ronda Basumatary and Sri Amren Basumatary examined themselves and one Sri Susanto Brahma in their defence. The accused Sri Apollo Basumatary, in the meantime, escaped from the judicial custody and has been absconding till date without facing trial. The learned trial court on consideration of the evidence on record, found the accused Sri Amren Basumatary not involved in commission of any of the offences levelled against him and accordingly, he was acquitted. On the other hand, on consideration of the evidence on record, the learned trial court found accused Ronda Basumatary guilty of all the charges under Sections 302/376/450/34 of IPC and accordingly,

convicted him of all the charges under Sections 302/376/450/34 of IPC, and awarded him sentence of:

1. Rigorous imprisonment for two years and nineteen days for his conviction u/s 450 of IPC with a fine of Rs. 1,000 and in default of the fine to undergo further rigorous imprisonment for three months. The convict has already been in the custody for a total period of six years and nineteen days and the period he had already undergone are set off against it.

2. Rigorous imprisonment for 10(ten) years for his conviction u/s 376 of IPC with a fine of Rs. 3,000 (Rupees three thousand) only and in default of the fine whereof to undergo further rigorous imprisonment for six months. And the remaining four years period he had already undergone is also set off against this sentence, and

3. Death for his conviction u/s 302 of IPC and he be hanged by neck till he is dead on the confirmation of sentences by hon"ble Gauhati High Court.

5. Mr. N. Lowang, learned Public Prosecutor for the State of Arunachal Pradesh submits that the charges against convict Ronda Basumatary are well established and proved beyond all reasonable doubt and the learned trial court rightly convicted and sentenced the said convict of capital punishment which needs no interference and the same may be confirmed for execution of the death sentence in respect of convict Ronda Basumatary.

6. The conviction of accused Ronda Basumatary is founded on the evidence of a sole child eye witness, Master Jacob Narzary, who was about 10 years of age at the time of occurrence and 14, years of age at the time of making deposition before the learned trial court, on 19.10.2005. Before recording his evidence, the learned trial court examined the said child eye witness in general so as to satisfy whether he was fit to give evidence in the court. On such examination, the learned trial court was satisfied about the fitness of the child eye-witness to depose before the court and accordingly, he was examined by the prosecution and also cross-examined by the defence counsel. For the purpose of better appreciation of the evidence of PW5, we deem it proper to quote in its entirety, his deposition, as under:

ON OATH: On 6.8.2001, at about 11.30 p.m., I was sleeping with my father that time Ronda and Apollo entered the house by breaking opened the door. From amongst the two accused whom I recognized one Ronda Basumatary and Amren. I did not see Amren but the accused Ronda Basumatary is one among those persons. The another person involved name as Apollo is not seen in the court. Having entered the house Ronda tied my father and mother. After having tied my father and mother Ronda raped my sister it. Manjula and was followed by Apollo. After raping my sister Ronda stabbed my father with a dagger at the right side of the belly and caused death of my father. Thereafter, Ronda again stabbed with same dagger to my mother resulting death of my mother. Meanwhile Apollo stabbed my sister Manjula with a dagger resulting death of my sister. After killing

my father mother and sister Manjula they left the house and after they left the house I alongwith my 3(three) younger brothers fled away from my house and went to the house of one Mr. Ramesh who happened to be my Mama (maternal uncle). Having reached there I awake Ramesh. I then asked Ramesh to call people. I told my Mama that my mother and father had been killed. Accordingly he went out for calling the people around and the people then gathered and thereafter; went to my house and also went to the PS for making complaint. Then in the morning hours police came and saw the dead body. Thereafter the police broke opened the bamboo wall of the house for picking up the dead body from inside the house. Accordingly the police took out the (three) dead bodies and took away to Pasighat. I also accompanied with the dead body. The dead bodies were kept for a night there at police station. On the next day the dead bodies were sent back to Jonai where they were buried.

Private defence Counsel for Amren Basumatary is decline for cross-examination Cross by Government defence for the accused Ronda Basumatary My father myself and my mother were sleeping in one room while my sister was sleeping in another room; our house was a small house having two rooms. There was no electrification in our house. No light was burnt in our house on that night. My sister was raped in her room while I was sitting in my father's room in the bed. I saw my sister being raped by Ronda which was visible from my father's room where I was that time a lantern (sakhi) was alighted in the room of my sisters. My sister was raped by pulling up her mekhela by Ronda. After commission of rape my sister Ronda put off the (sakhi). It is not a fact that I did not see my sister being raped. I do not tell lies. When my father and mother protested against the accused such rape my sister Ronda tied my mother and father with a rope. My sister was killed by Apollo and I saw him stabbing my sister with a dagger with torch light. I saw Apollo stabbing my sister one only. I saw Ronda stabbing twice to my father. Apollo raped my sister before she was killed. I saw Apollo raping my sister with that torch light. At the time of raping my sister by Apollo Ronda was killing my father first and then my mother. And having killed so Ronda went out of the house. After raping my sister Apollo also killed my sister and went out of the room.

COURT QUESTION:

Q. If you were in your father's room how could you see your sister being raped in the other room?

Ans.: My sister slept at the front of the door of her room and the door wall made of bamboo through which the things happens inside could be visible from our room.

7. Before appreciating the evidence, we have to note certain relevant facts. The members of the victim family and the accused persons including the present convict belong to the same community, namely Bodo/Kachari. The convict Ronda Basumatary is a resident of Rayanpur village under Jonai Police Station in the

District of Dhemaji, Assam, which is situated in the Assam-Arunachal border area. The place of occurrence, i.e., the house of deceased Lakhiram Narzary was situated at Rayang cultivation field under Ruksin Police Station in the East Siang District of Arunachal Pradesh. They lived in the same locality in the Assam-Arunachal border area. It is, therefore, not unlikely that the convict Ronda Basumatary happened to be a familiar/known person amongst the Bodo/Kachari people living in the said area. The child eye witness, Master Jacob Narzary (PW5), categorically and in clear terms stated that he saw accused Ronda and recognized him from amongst the accused persons and he was the person who tied his father Lakhiram Narzary, mother Navela Narzary and raped her sister Manjula Basumatary first and afterwards stabbed his father with a dagger at the right side of the belly causing death to his father. Furthermore, Ronda Basumatary was the person who stabbed his mother with the same dagger causing her to death. The child eye witness vividly narrated how the accused Ronda Basumatary stabbed his father twice after committing rape on his sister Manjula Basumatary.

8. The defence Counsel in the cross-examination tried to demolish the evidence of the child eye witness by way of bringing on record that there was no electrification in his house and there was no light in his house in the night when the occurrence took place. An endeavour was also made by the defence Counsel that whatever happened in the other room where his sister Manjula Basumatary was sleeping, was not visible from the room where the child witness was sleeping with his parents because there was no light in the house and that the child witness did not see his sister Manjula Basumatary being raped, but the child witness denied the same and reiterated that his sister was raped by the accused Ronda Basumatary by pulling up her mekhela and the occurrence was visible from his room. No suggestion was put to the child witness that he did not know the accused Ronda Basumatary since before and he could not recognize him at all. The evidence of having recognized the convict Ronda Basumatary by the child witness could not be demolished by the defence and the fact of having recognized the said convict by this witness, stands proved. So also, the presence of the convict Ronda Basumatary in the house of deceased Lakhiram Narzary and commission of alleged offences stands proved.

9. PW2, Sri Ramesh Wari, is the maternal uncle of the child witness (PW5). He deposed that the child witness, just after the occurrence, came to his house, awakened and informed him about the occurrence. PW2 then called some neighbours and went to the house of his nephew (PW5) and could see the dead bodies of the deceased persons lying inside the house. The PW2 then informed the owner of the house and agricultural field Sri Tagon Darang (PW1) about the occurrence. At around 9 a.m. of 7.8.2001, police arrived at the place of occurrence. The PW2 was then taken to the police station alongwith the dead bodies where his statements were recorded. This witness in his evidence did not make any statements to the effect that the child witness (PW5) while informing him about the occurrence, did not disclose the identity or the names of the

accused persons who entered the house and committed the offence.

10. Similarly, PW10, D. Tamuk, Investigating Officer, in his cross-examination by the defence counsel, deposed that he recorded the statements of the child witness but he (child witness) did not tell him (Investigating Officer) that his sister Manjula Basumatary was raped by the convict Ronda Basumatary. He further deposed that the child witness did not tell him who killed whom. According to this witness, the child witness did not disclose the names of any of the culprits.

11. From the evidence of PW2 (maternal uncle of child witness) and PW10 (Investigating Officer), it is found that the child witness did not tell the names of the accused persons before them and that for the first time, the child witness deposed before the court that he recognized the accused persons particularly the convict Ronda Basumatary who tied his parents by a rope, raped his sister Manjula Basumatary and thereafter, stabbed them to death.

12. The question that naturally arises is why the child eye witness did not tell the names of the accused persons to his maternal uncle (PW2) and the Investigating Officer (PW10). Had the child witness told or disclosed the names of the accused persons, it would have been easier for the Investigating Officer to apprehend the accused persons without looking for help from his secret sources or from the villagers. The conduct of the child witness in not disclosing the names of the accused persons whom he claimed to have recognized to his maternal uncle or to the Investigating Officer is quite unusual. Question then arises as to whether the child witness could be accepted as a natural or trustworthy witness and as to whether conviction could be ordered on the basis of evidence of this sole witness.

13. The evidence of PW10 (Investigating Officer) is that a brother of accused Apollo Basumatary was a member of BLTF (Bodo Liberation Tiger Force). Although, the Investigating Officer did not depose that this organization was active in terrorist and extremist activities particularly in certain plain districts of Assam, a judicial notice may be taken that the members of the BLTF belonged to an outlawed organization till Bodo Accord was signed between the BLTF and Union Government. The child witness being a member of the Bodo Community, is naturally aware about the violent activities carried-out by the said organization and that is why, at the time of reporting the occurrence to his maternal uncle (PW2), "he kept mum for 5 about minutes and was also trembling with fear and could not instantly disclose the names of the culprits." Only on repeated query by his maternal uncle, the child witness could tell about the horrifying incident yet he could not dare to disclose the names of the alleged perpetrators lest he may also be killed by them. This child witness had also to think about his 3 minor younger brothers with whom he rushed to the house of PW2 after the occurrence to save their lives. In such situation, we cannot expect that a minor boy after having seen the ghastly murder of his parents and elder sister, could gather courage to reveal the names of the accused persons before anybody. We should not lose sight of the fact that a brother of accused Sri Apollo Basumatary, is a

member of the outlawed organization and he managed to escape from the judicial custody and he is still at large without facing the trial. The convict Ronda Basumatary is also a desperate man who attempted to commit suicide while in custody as per the evidence of Investigating Officer (PW10). There was, therefore, compelling reasons for the child witness not to mention the names of the accused persons before anybody except before the court of law during trial and if he happened to mention the names of the accused persons earlier, then the child witness would have definitely been under intense pressure and threat from the perpetrators not to give evidence against them, Under such circumstances, the nondisclosure of the names of the accused persons before anybody including the maternal uncle (PW5) and Investigating Officer (PW10) during investigation cannot be faulted with nor could it adversely affect the prosecution case in any manner. This is because any statement made before the police and recorded u/s 161 Cr.PC, even while disclosing the name/identity of an accused, would have no evidentiary value in the eye of law except for helping the investigation in the right direction and in nabbing the culprits. The statements which carry evidentiary value for conviction or acquittal of an accused are those which are made before a Magistrate u/s 164 Cr.PC as in the court of law, during trial. We are, therefore, not prepared to accept any view that the evidence tendered by the child witness (PW5) before the trial court should be ignored or be paid no value simply because he failed to disclose the names of the alleged perpetrators before the police or before the near and dear ones during investigation.

14. We are interested only to see whether the child witness was capable of deposing correctly and truthfully before the court and whether his evidence could be the foundation for conviction of the accused persons. We have already found that PW5 was aged about 10 years at the time of occurrence as per his age recorded by the trial court and 14 years at the time of deposition. This child witness was alert and smart enough to go to his maternal uncle's house just after the perpetrators left the place of occurrence with his 3 minor younger brothers and asking him to inform the other villagers about the incident of rape and killing of his parents and elder sister. The said witness even accompanied with the dead bodies to Pasighat. The child witness was behaving and acting in a normal way although he was frightened to see the horrifying act of rape and murder. A child who had seen the killing, particularly of his own parents and sister, is usually expected to remember every detail of the incident and he would be in a position to narrate the same accurately as he felt secured in the court and could expect justice from the court. Nobody can import allegation that the child witness has been tutored or influenced to give false evidence against the accused persons. Why should a child depose falsely against anybody, after all, no case of enmity between his parents/sister and the accused persons have been found or brought on record. In our view, the evidence of the child witness is not only natural but also true to his heart. There may be some minor discrepancies in his evidence but the same bear no significance inasmuch as there is no

contradiction/infirmity in narrating the material facts, namely, entering of the accused persons including the convict in his house, tying his parents with rope, committing rape by the accused persons on his elder sister and thereafter, killing them one after another by a dagger.

15. A reference may be made to Dattu Ramrao Sakhare and Others Vs. State of Maharashtra, wherein conviction awarded by the trial court on the basis of a child witness was upheld by the Apex Court holding that if a child witness is found competent to depose to the facts and his evidence reliable, it could be a basis for conviction. In that case, the child witness was aged only 10 years and she was tested by the trial court and found that she was able to understand the nature of the questions and gave rationale answers to the questions put to her. However, it was held that the evidence of a child witness and credibility thereof, would depend upon the circumstances of each case and it was cautioned that the court should bear in mind while assessing the evidence of a child witness that he/she must be a reliable one and his/ her demeanour must be like any other competent witness and there is no likelihood of being tutored. It was also held that there is no rule or practice that in every case, the evidence of minor child witness should be corroborated for recording conviction. But as a rule of prudence, the court always finds it desirable to have the corroboration to such evidence if it is from other dependable evidence on record.

16. In yet another case of Panchhi and others Vs. State of UP, referring to the earlier case of Sakhare (supra), the Apex Court held that it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized and his/her evidence should be rejected, even if it is found reliable. However, it is held that the evidence of a child witness must be evaluated more carefully and with great circumspection because a child is susceptible to be swayed away by what others tell them and, thus, a child witness is an easy prey to tutoring.

17. A classic case of upholding conviction and sentence awarded by the trial court on the basis of a solitary child eye witness (girl) of 4 years of age at the time of incident and 6 years of age at the time of deposition before the trial court and who was not even given oath could be found in Suryanarayana Vs. State of Karnataka, inasmuch as she could withstand the cross-examination of the defence Counsel and her testimony was found to be truthful and inspiring confidence. We consider it proper to quote paragraph 5 of the aforesaid judgment, below:

5. Admittedly, Bhavya (PW2), who at the time of occurrence was about four years of age, is the only solitary eye witness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as witnesses. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW2

cannot be discarded only on the ground of her being of tender age. The fact of PW2 being a child witness would require the court to scrutinize her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witnesses not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

18. Quite naturally, in the present case, there would be no other eye witness to the aforesaid incident as it took place at around 10.30 p.m., i.e., in night time when the villagers in such a remote and backward place are all fast asleep. The other minor younger brothers of the child witness (PW5) are also too small to give evidence before the court. It is futile, rather undesirable, to look for any corroborating oral evidence of any witness to the occurrence. But we can look for supporting evidence from the post mortem reports and the evidence of Medical Officers who conducted autopsies on the dead bodies.

19. First of all, let us have a look at the post mortem report on the dead body of the deceased Manjula Basumatary (Ext.-P/3). The details of injuries recorded by the Medical Officer are as under:

1. Edge of wound - edges of wounds were clear cut parallel and sharp angles of two extremities.
2. Kidney - penetrating wound of right kidney at the lower pole.
3. Liver - penetrating wound on the inferior surface of the left lobe.
4. Vaginal swab-shows presence of spermatozoa.

The said post mortem report is to be read with the evidence of PW9, Dr. T. Riso, who held the inquest of deceased Manjula Basumatary. According to him, the deceased was raped before she was killed. During the post mortem examination, he found that there was recent tear of hymen of the deceased and there was also presence of spermatozoa as per laboratory examination. He also deposed that the weapon of offence that caused the injuries was a sharp, pointed and one edge blunt.

20. In the post mortem report of deceased Lakhiram Narzary(Ext.-P/1), the details of injuries recorded by the Medical Officer, are as under:

1. Edge of wound - edge of the wound are clean cut parallel sharp angles at two extremities.
2. Kidney - penetrating wound of left kidney at the lower pole.
3. Liver - penetrating wound on the inferior surface of the left lobe.

The Dr. R. Tasung, PW7, who conducted the post mortem, opined that the death of the deceased Lakhiram Narzary was due to hemorrhagic shock following injury to the liver and left kidney and the weapon of offence used in causing the injuries, in his opinion, was a sharp weapon like dagger, knife, etc.

21. Ext-P/2 is the post mortem report in respect of deceased Navele Narzary, in which, the details of injuries recorded by the Medical Officer, are as follows:

1. Stab injury of 11/2 size at the level of 3rd intercostals space. There is pleural effusion with collapse of the right lung.
2. Stab injury on the back at the level of 10th and 11th rib near the vertebral column. The size of the stab injury is 11/2 x 1/4 X 1 deep.

PW8, Dr. Oishy Ering, who conducted the post mortem examination on the dead body of deceased Navele Narzary opined that the cause of death was due to haemorrhage and haemothorax with collapse of the right lung caused by stab injury. According to this witness, the weapon used to inflict the injuries was sharp weapon with one edge sharpened pointed.

22. From the post mortem reports and evidence of Medical Officers (PW7, PW8 and PW9), it is seen that all the deceased persons received almost identical injuries inflicted by a sharp one edge weapon, like dagger, knife, etc.

23. PW10 (Investigating Officer) clearly deposed that during the investigation, accused convict Ronda Basumatary made a disclosure statement about the crime weapon used, i.e., knife and it led to the discovery of the said weapon/knife. As per the seizure list (Ext.-P/4), the said seized knife was marked as Material Ext.-1. The length of the said knife was "without handle - 15 cm" and "with handle - 22.5 cm". The injuries received by the deceased persons on their persons fit in the size/length of the crime weapon, i.e., knife. The evidence of PW9 (Dr. T. Riso) that there was a recent tear of hymen of deceased Manjula Basumatary confirms that she was raped before she was stabbed to death. The child eye witness (PW5) also categorically stated that the accused persons used a dagger for stabbing the deceased persons to death.

24. The involvement of convict Ronda Basumatary in the offence, taking into consideration the materials available on the evidence on record, stands proved beyond all reasonable doubt. The conviction of convict Ronda Basumatary, therefore, does not, warrant interference from this Court and as such, we confirm the same.

25. We are now left with the most important question as to whether the sentence

of capital punishment should be maintained and confirmed. For the purpose of deciding this question, it needs some spadework on certain important decisions of the Apex Court. The trial court is left with wide discretion either to award capital punishment or imprisonment for life and the capital punishment imposed after trial in accordance with the procedure established by law, has been held as not unconstitutional under Article 21 of the Constitution of India. In this respect, reference may be made to Jagmohan Singh Vs. The State of U.P., A Constitutional Bench in Bachan Singh Vs. State of Punjab, while declaring the procedure for awarding the death sentence u/s 354(3) of the Cr.PC, 1973 as constitutional and not violative of Articles 14, 19 and 21 of the Constitution of India observed that the death sentence shall not normally be awarded for the offence of murder and that it must be confined to the rarest of rare cases when the alternative option is foreclosed. In other words, the Constitutional Bench did not find death sentence valid in all cases except where the lesser sentence, by any account, would be wholly inadequate. In Bachan Singh's case (supra), some reference has been made to certain aggravating and mitigating circumstances, as was suggested by Dr. Chitale while the Indian Penal Code (Amendment) Bill, was passed in 1978 by the Rajya Sabha for awarding death sentence but the same were not accepted by the Apex Court to be followed by the courts. However, it was observed in paragraph 209, thus:

209. ...Nonetheless, it cannot be over-emphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive constructions by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be blood thirsty. Hanging of murderers have never been too good for them.... A real and abiding concern for the dignity of the 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 is unquestionably foreclosed.

26. Thereafter, a 3(three) Judge Bench of the Apex Court in Machhi Singh v. State of Punjab (1980) 3 SCC 470 took note of the aggravating and mitigating circumstances as was suggested in Bachan Singh's case (supra) and laid down certain guidelines which were incorporated in paragraph 38, as under:

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

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

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

having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

27. It is for the court to consider and decide what circumstances bring a particular case under the category of rarest of rare cases applying the aforesaid guidelines. In a subsequent case, *Shankar @ Gauri Shankar and Others Vs. State of Tamil Nadu*, it was observed that the choice as to which one of the punishment provided for murder is the proper one in a given case would depend upon a particular circumstances of that case and the court has to exercise its discretion judicially and on well recognized principles after balancing of the aggravating and mitigating circumstances of the crime. It was also observed that the court should see whether there is something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for death sentence. The sentence of death penalty should be reserved for the rarest of rare cases where the nature of the crime and the circumstances of the offender are so revealing that the criminal is a menace to the society and the sentence of imprisonment for life would be rather inadequate after considering both the aggravating and mitigating circumstances.

28. We are now to consider and apply the aforesaid guidelines for arriving at the conclusion as to whether the penalty of capital punishment would be the proper punishment to the convict Ronda Basumatary in the present case and whether to confirm the death sentence imposed upon the said convict by the learned trial court.

29. This is a case of triple murder committed by 3 young men followed by ravishment of a maiden girl by them, in turn, one after another. The victims belonged to a very poor family who have been earning their bread as daily agricultural labourer. Such a brutal case of rape and triple murder rarely takes place. A security guard named Dhananjay Chatterjee on being charged, tried and convicted, u/s 302 of IPC and sentenced to death by the trial court and the same being confirmed in reference by the High Court preferred an appeal before the Apex Court which was rejected confirming the death sentence. While justifying the death sentence, the Supreme Court, in its judgment as *Dhananjay Chatterjee alias Dhana Vs. State of W.B.*, observed that the offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked the judicial conscience and there are extenuating or mitigating circumstances whatsoever in the case. The Apex Court while confirming the death sentence kept in view that the appellant Dhananjay Chatterjee was a security guard and if the security guard commits such a heinous type of barbaric rape and murder of an innocent, helpless and

defenceless girl of 18 years, the fate of the society would be totally shaken.

30. In *Bishnu Prasad Sinha v. State of Assam* AIR 2007 SCW 569, one night watchman of a waiting room and a handyman of another bus who were charged with rape and murder of a minor girl who was sleeping with her family in the waiting room of a Travel Agency, were convicted u/s 302/376/34 of IPC by the trial court and sentenced to capital punishment. The conviction and sentence of the convicts was confirmed by the High Court. The Apex Court, in appeal, upheld the conviction but did not confirm the death sentence inasmuch as the appellants were convicted only on the basis of circumstantial evidence and there are authorities for the proposition that if the evidence is proved by the circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, appellant No. 1 in that case showed his remorse and repentance in his statement u/s 313 of Cr.PC and accepted his guilt. The appellants were, accordingly, awarded punishment of rigorous imprisonment for life by the Apex Court instead of extreme death penalty, in the said case.

31. The Apex Court also dealt with a case of rape and murder of a 4 year old girl by a man after abducting her from her house. After the rape and murder, her mangled body was dumped in the field where pulses and cotton were cultivated. The culprit was charged, tried and convicted and was awarded extreme death penalty. In appeal, the High Court acquitted the accused as it found that the conviction was based on circumstantial evidence and the charges were not proved beyond all reasonable doubt. Not being satisfied with the judgment of the High Court acquitting the accused, the State of Maharashtra preferred an appeal before the Apex Court. The case is *State of Maharashtra Vs. Suresh*, In the appeal, the Apex Court upheld the conviction but refrained from imposing the extreme penalty of death in spite of the fact that the case was perilously near the region of rarest of rare cases as envisaged by the Constitutional Bench in *Bachan Singh's* case (supra) for the same reason that the accused was convicted on the basis of circumstantial evidence.

32. The conviction in the present case is not founded on circumstantial evidence rather it is founded on the basis of evidence of an eye witness and as such, the principles of law enunciated that the death sentence cannot be confirmed if the conviction is based on circumstantial evidence, would not be applicable to the present case. However, as per the ruling in *Bachan Singh's* case (supra) we have to draw the balance-sheet of aggravating and mitigating circumstances for coming to a balanced and just decision. The learned trial court recorded as many as 7 aggravating circumstances and 4 mitigating circumstances in the impugned judgment and order which are reproduced herein below for having a fresh look on them:

Aggravating Circumstances

1. The convict Ronda Basumatary has been found involved in enormous killing of three persons in concert with the absconding convict Apollo Basumatary.

2. The convict killed the three deceased in an extremely brutal, grotesque, diabolical, revolting or dastardly manner and those shocked and frightened the community at large.

3. The two deceased Lt. Manjula Basumatary of about 19 years and Navela Narzary of about 38 years were innocent and weak women of labour class and the third deceased Lt. Lakhiram Narzary was also an innocent and old aged person of the age of about 58 years of also a labour class who were killed by the convict Ronda Basumatary in concert with the absconding accused in an aggressive and dominating manner without any hesitation and fear of law of the country.

4. The convict with his absconding companion entered the house of the deceased at night by breaking opened the door with preparation for committing both gang rape and murder and, thereafter, acted in inhumanly, barbaric and beastly manner in committing gang rape and murder of the deceased persons. Such commissions of gang rape punishable for life u/s 376 of IPC along with the commission of another offence of triple murder including the offence of house trespass in order to the committing of the offences punishable of the death and life are highly condemnable and unexcusable.

5. The convict, having gang raped the victim deceased Manjula Basumatary before her own parents and, thereafter, killing them all together had thereby acted to an utterly dismay and indignation to all parents and community at large.

6. The convict also, having killed the parents and sister of a family, had thereby snatched the protection, love, and care of the parents and the elderly member of the family of the minor children/kids and has made them all doom of their future.

7. The convict, though sought for pardon, has not been clean breast to the court of the offences he had committed.

Mitigating Circumstances

1. The convict, though has not specifically proved his age in the court of law, has given his age about 27 years at the time of recording his statement u/s 313, Cr.PC on 12.3.2007. And if he was of about 27 years on 12.3.2007 he would have been of the age of 21 and 1/2 years on the date of incident on 6.8.2001. It appears on record in charge sheet that the accused at the time of filing of charge sheet was of the age of about 28 years from where it reveals that if he was of the age of 28 years on the date of filing charge sheet on 12.7.2002 he is now of the age of about 35 years. Such difference in age of the convict appearing on record give rise to a reasonable doubt about the age of the convict. In the face of those I have a reason to believe that the convict was a young person of the age in between 21-28 years at the time of commission of offence.

2. The convict at the time of commission of crime was illiterate and a poor person and the society under which he was brought and born up could have intrigued or influenced him for commission of such offence.

3. Admittedly there is an evidence on record that the convict once tried to commit suicide during his being under police custody. But the same in fact does not per se goes to show that he was repentant of what he had done to the deceased.

4. That his companion Apollo Basumatary with whom he perpetrated the crime in concert or acted in furtherance of the common intention of committing the offences of house lurking, rape and murder alleged against him has been absconding till date without trial by escape from judicial custody at Pasighat.

33. We agree with the learned trial court in respect of aggravating and mitigating circumstances found in this case but there are certain other circumstances which remained unnoticed or lost sight of. They are mainly:

1. The convict along with other co-accused carried only a dagger without any firearm, or deadly weapon with them.

2. The convict along with other co-accused proceeded to the house of the deceased Lakhiram Narzary with an eye on his daughter for quenching their sexual thirst without any plan or motive to kill any of the deceased but they took the extreme act of killing the deceased after committing rape when they thought that they had been recognized and they were worried about the consequence of being caught and punished.

3. The convict has no criminal antecedence and it has not been brought on record that he is a hard-core criminal or a habitual offender and he has been a menace to the society.

4. The convict left the child eye witness Jacob Narzary and his other 3 younger minor brothers unharmed, whom he could have also eliminated alongwith the other victims. This act shows some humanness in his heart, which is normally found absent in the case of hard-core criminals.

5. Committing gang rape or committing rape of women or maiden girls in front of parents and killing in today's modern turbulent society/ civilization are prevalent rather found increasing in recent times and under such circumstances, the present case cannot be brought to the footings of rarest of rare cases. It may be a case perilously near the region of rarest of rare cases and in such cases, it cannot be said that death penalty is the only answer without any alternative penalty like rigorous imprisonment for life.

6. The convict was comparatively at his prime youth and he being an illiterate person could not resist his sexual urge that made him commit gang rape along with other accused persons and ultimately, committed the murder on fear of being identified and consequent severe punishment.

34. Admittedly, as per the evidence of PW10 (Investigating Officer), convict Ronda Basumatary attempted to commit suicide while he was in police custody. The said convict must have done such attempt out of repentance for the extreme

wrong act done by him. Generally, a person having a criminal mindset does not have the tendency of showing repentance or punishing himself by way of attempting to commit suicide for the offence committed by him. Although he expressed no remorse during examination u/s 313 of Cr.PC, he stated that he was badly beaten up/tortured by the police in custody and he was suffering from malaria at the time when the police arrested him. The convict being an illiterate labourer without any previous criminal record and who attempted to commit suicide due to repentance of his wrong act, cannot be considered as a person not possessing basic humanness or lacking the psyche or the mindset which cannot be amenable for any reformation. Such convict should, in our considered view, be given a chance for reformation under the scheme of reformatory punishment. In *Sushil Murmu Vs. State of Jharkhand*, it is held that under the Criminal Procedure Code, normally punishment for murder is imprisonment for life and death penalty is an exception. A just balance has to be struck between the aggravating and mitigating circumstances before option is exercised. In the aforesaid judgment, the Apex Court had taken the note of historical developments since 1955 in sentencing system. It has been observed that in the context of Section 360, the special reasons contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedent of the offender and the circumstances in which the offence was committed. This is some indication by the Legislature that reformation and rehabilitation of the offenders and not mere deterrence are now, among the foremost objects of the administration of criminal justice in our country. It has not been shown to us from any material on record or otherwise that there is no scope for reformation or rehabilitation of this illiterate tribal labourer or it has been foreclosed being unamenable to such reform. It has also not been shown that the convict Ronda Basumatary has become a threat or liability to the society/community at large and he would repeat committing the offence after serving the full term of sentence of life imprisonment.

35. There is yet another aspect which escaped consideration by the learned trial court while awarding the death penalty. Admittedly, there were 3 accused persons including the present convict in committing the heinous crime of gang rape and murder of the deceased persons. Among them, one accused (Amren Basumatary) has been acquitted for want of evidence against him, he being not identified by the child eye witness. The other accused Sri Apollo Basumatary escaped from the judicial custody and absconded till date. The said absconding accused could not be brought to justice. Who was the third accused whom the child eye witness could not identify and whom the police failed to apprehend ? Our minds are perturbed by putting the question to ourselves as to whether it would be justified and fair enough to take the life of the convict Ronda Basumatary alone by way of confirming and allowing to execute the death sentence, Our judicial conscience would hardly allow us to sustain the death penalty against this convict alone while allowing the other 2 accused persons to

move at large. The administration of criminal justice would be failing if the other co-accused persons are not brought to justice and awarded similar punishment. In our view, a great injustice and prejudice would be caused to this convict if the penalty of death sentence is sustained and executed, at this stage, as against the convict alone. We hold this view for another compelling reason, because this child eye witness (PW5), as quoted earlier, clearly deposed that it was the absconder accused Apollo Basumatary, who actually stabbed deceased Manjula Basumatary with a dagger resulting into her death. Taking into consideration the evidence of child eye witness (PW5), this convict Ronda Basumatary is not the killer of deceased Manjula Basumatary.

36. What is further to note is that the Supreme Court has recently changed the age old purport of punishment of life imprisonment by pronouncing a decision in *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka* AIR 2008 SC 5110 wherein it has been mandated that "life imprisonment" must mean imprisonment for rest of life and in cases of substitution of death penalty, life imprisonment has to go beyond any remission and to be carried out as directed by the court.

37. Considering the matter in its entirety, in the light of the principle of law enunciated in various decisions in respect of capital punishment and sentencing system based on changing approach to changing criminality in the modern society and also the present strong trend against the death penalty, we fail to persuade ourselves to sustain or confirm the death sentence awarded against the present convict Sri Ronda Basumatary as imposed by the learned trial court vide impugned judgment and order dated 31.8.2007 passed in BSR/SESS No. 250/2003.

38. In the result, conviction of the present convict Sri Ronda Basumatary as recorded by the learned trial court in BSR/SESS No. 250/2003 stands upheld while the sentence of death penalty in respect of aforesaid convict shall stand reduced to imprisonment for life as an alternative punishment to death penalty, which, we consider, would meet the ends of justice befittingly.

39. The criminal reference is answered accordingly.

40. Send down the LC Rs to the court below forthwith.