
(2009) 07 JH CK 0097
In the Jharkhand High Court

State of Jharkhand

APPELLANT

Vs

Mofil Khan, Mobarak Khan, Wakil Khan and Saddam Khan

 Mofil Khan, Mobarak Khan, Saddam Khan and Wakil
Khan Vs The State of Jharkhand

RESPONDENT

Date of Decision : 02-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 354
Penal Code, 1860 (IPC) — Section 120B, 164, 302, 34, 366

Citation : (2009) 07 JH CK 0097

Hon'ble Judges : R.R. Prasad, J; Amareshwar Sahay, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.R. Prasad, J.—Aforesaid four appellants were put on trial to face charges under Sections 302/449/380 read with Sections 34 and 120B of the Indian Penal Code on the allegation of committing murder of as many as eight persons, namely, Haneef Khan, Gufran Khan, Imran Khan, Danish Khan, Anish Khan, Maherban Khan, Yusuf Khan, Kasumanbibbi and also for committing theft of Pass-book, documents relating to land, cash etc. from the dwelling house of the informant. Learned trial court while acquitting other seven persons of all the charges did find the appellants guilty for the offence under Sections 302/449/34 of the Indian Penal Code and awarded death sentence to them and also sentenced each of them to pay fine of Rs. 500/-with default clause for the offence u/s 302/34 of the Indian Penal Code but seems to have been wrongly recorded as Section 302 of Indian Penal Code and further sentenced each of them to undergo rigorous imprisonment for ten years and also to pay fine of Rs. 500/-for the offence under Sections 449/34 of the Indian Penal Code though wrongly recorded as Section 449 of Indian Penal Code and in default to undergo simple imprisonment for one month.

2. The case of the prosecution is that on 6.6.2007 while one Haneef Khan (deceased), son of the informant, Gaffar Khan, P.W. 1, was offering Namaz at

about 8:30 p.m. in the mosque at Village Makandu along with others, these appellants, who are none else than the sons and grandsons of the informant, came over there with sword, tangi, bhujali and spade and assaulted Haneef Khan as a result of which, he died at the spot. Thereafter, Gufran Khan @ Pala and Imran Khan when after hearing cries of his father came out of the house, these appellants and others also assaulted them with the weapons which they were holding as a result of which, both of them died in front of their house. Thereupon, the appellants and others entered inside the house of the informant and committed murder of Kasuman Bibi, wife of deceased-Haneef Khan, and her four sons, namely, Anish Khan (aged about 5 years), Danish Khan (aged about 8 years), Yusuf Khan (a handicapped and aged about 18 years) and Maherban Khan (aged about 12 years). After committing murder of those persons, all the accused persons left the house after extending threat not to inform the police otherwise they will meet the same fate. They also took away certain documents relating to the land, Pass-book, jewellery etc.

3. The informant, Gaffar Khan, P.W. 1, who was at Lohardaga, when was informed by someone, he came to his village in the next morning at about 6:00 a.m. and saw the dead-body of Haneef Khan lying at the mosque, whereas the dead- bodies of his grand sons, namely, Gufran Khan @ Pala and Imran Khan, were lying in front of his house and the dead-bodies of his daughter-in-law, namely, Kasuman Bibi, and her four sons were lying inside the house and then he was informed by his wife-Jainub Khatoon, P.W. 2, about the manner in which accused persons committed the said offence. Meanwhile, Chowkidar of Village Makandu informed about the occurrence to the Officer In-charge of Kuru P.S. at about 6 O`clock on 7.6.2007 telephonically upon which Sanha was entered on the Station Diary and the Officer In-charge, Shambhu Nath Singh, P.W. 13, rushed to the place of occurrence and recorded the fard-beyan (Ext. 6) of the informant, Gaffar Khan, P.W. 1, upon which a case was registered and a formal FIR (Ext. 7) was drawn. Shambhu Nath Singh, P.W. 13, himself took up the investigation and held inquest on the dead-bodies of Haneef Khan, Gufran Khan, Imran Khan, Danish Khan, Anish Khan, Maherban Khan, Yusuf Khan, Kasumanbibi and prepared Inquest Reports which have been proved as Ext. 8 to 8/7 respectively and the dead-bodies were sent for post mortem examination. Meanwhile, the Investigating Officer inspected all the three places of occurrence where he found earth smeared with blood and also found plaster at the mosque smeared with blood, piece of plaster as well as earth smeared with blood were seized under Seizure List (Ext. 9 to 9/3). The Investigating Officer also found a plastic Mat smeared with blood at the mosque which was seized under Ext. 9/4. Next day, the Investigating Officer also seized a tangi (Ext. I) smeared with blood from the house of accused-Kariman Khan @ Kari Khan which was seized under Seizure List (Ext. 9/5). On receiving the dead-bodies, Dr. Arvind Kumar Arya, P.W. 8, held autopsy on the dead-bodies of all the deceased and found injuries on their persons which are being noted hereunder:

Haneef Khan:

(i) There was almost circular sharp cutting injury involving just above the tip of nose going on both sides posterior aspect of head showing fracture of concerned bone and laceration of brain matter with accumulation of blood and blood clot all around where found.

(ii) Sharp cut injury on left middle and ring finger with fracture of middle finger bone.

(iii) Stab injury on left side of chest lower side. Size c.m. x 1 c.m. muscle deep.

According to the doctor, all the injuries were caused by sharp cutting substance or weapon like sword, tangi and bhujali and the death of the deceased occurred on account of shock and hemorrhage due to injury on the vital organ like brain.

Gufran Khan:

(i) There is sharp cutting injury on the posterior side of head which extended to upper part of left ear. Size was 6" x 2.5" into bone deep with fracture of concerned bone and brain matter came out.

(ii) There was sharp cut injury on left cheek size 3" x 1/2" x bone deep with fracture of under lying bone maxilla.

(iii) There was sharp cut injury on lower chin size 4" x 1" x bone deep with fracture of under lying mandibular bone and tooth of that came out.

(iv) Multiple cut injury on left posterior side of fore arm which was muscle deep.

(v) Cut injury on right cheek size 2" x 1" x muscle deep.

According to the doctor, all the injuries were caused by sharp cutting weapon like Talwar, Chhura and bhujali and the death of the deceased occurred on account of shock and hemorrhage due to injury on the vital organ like brain.

Imran Khan:

(i) There was sharp cut injury size 6" x 1" x 1/2" x bone deep and the brain matter comes out and which extends over right side of the head towards posterior side of the head and there was sharp cut injury extending from base of nose to the right eye up to the right temporal area. Size 5" x 1" x bone deep with fracture of concerned bone.

According to the doctor, all the injuries were caused by sharp cutting weapons like Talwar, Chhura and bhujali and the death of the deceased occurred due to shock and hemorrhage as a result of injury on the vital organ like brain.

Kasuman Bibi:

(i) There was sharp cut injury on right side of forehead size 1.5" x 1/2" x bone deep.

(ii) There was sharp cut injury posterior side of head size 6" x 1.5" x bone deep

and brain matter comes out blood and blood clot present in hair face and neck.

According to the doctor, all the injuries were caused by sharp cutting weapons like Talwar, Chhura and bhujali and the death of the deceased occurred due to shock and hemorrhage as a result of injuries on the vital organ like brain.

Meharban Khan:

(i) There was sharp cut injury on the posterior side of the head, size 6" x 2" x bone deep with fracture of bone from where brain matter comes out. Blood and blood clot present over both the hands and upper part of cloths.

According to the doctor, all the injuries were caused by sharp cutting weapons like Talwar, bhujali and Kudal and the death of the deceased occurred due to shock and hemorrhage as a result of the injuries on the vital organ like brain.

Danish Khan:

(i) There was sharp cut injury on right side of head, size 3" x 1/2"x bone deep with fracture of bone and brain matter comes out

(ii) There was sharp cut injury extending from right side of ear to right eye orbit such that right eye comes out. Size 5" x 2" x bone deep with fracture of bone and brain matter comes out. Blood and blood clot present on hair face and upper part of cloths. According to the doctor, all the injuries were caused by sharp cutting weapons and the death of the deceased occurred due to shock and hemorrhage on account of injuries on the vital organ like brain.

Anish Khan:

(i) There was a sharp cut on right eye or orbit such that eye ball comes out. Size 4" x 2" x bone deep with fracture of underlying bone and brain matter comes out.

(ii)

(iii) There was sharp cut injury on right cheek size 3" x 1" x bone deep fracture of right side of maxilla. There was sharp cut injury on left cheek extending left side of the head in front of left ear size 4" x 1" x

(iv) bone deep with fracture of bone. Blood and blood clot present on hair, T-shirt and upper limbs.

According to the doctor, all the injuries were caused by sharp cutting weapons like Talwar, Kudal and Bhujali and the death of the deceased occurred due to shock and hemorrhage caused by the injury on the vital organ like brain.

Yusuf Khan:

(i) There was sharp cut injury from right ear to lower part of right side of mandible size 4" x 1" x bone deep and bone fracture with brain matter comes out.

(ii) Sharp cut injury on left side of cheek, size 5" x 1" x bone deep. Fracture of

bone.

(iii) Sharp cut injury on left side of neck, size 4" x 1/2 " x skin deep. Blood and blood clot present in hair face and upper part of cloths.

According to the doctor, all the injuries were caused by sharp cutting weapons like Talwar, Kudal and Bhujali and the death of the deceased occurred due to shock and hemorrhage caused by the injury on the vital organ like brain.

The doctor has proved post mortem reports of the deceased, named above, as Ext. 3 to 3/7 respectively.

4. In course of investigation, the Investigating Officer also got the statements of Mahmood Khan, Islam Khan, Samir Khan, Safru Pawaria, Noor Mohammad, Jainub Khatoon, Moulana Khaleel Ahmad recorded u/s 164 Cr.P.C. which have been proved as Ext. 4 to 4/6.

5. After completion of the investigation, the Investigating Officer submitted charge-sheet against these appellants as well as against other seven accused persons under Sections 302/449/380 read with Sections 34 and 120B of the Indian Penal Code upon which cognizance of the offence was taken. On committal of the case, charges were framed to which these appellants and other accused persons pleaded not guilty and claimed to be tried.

6. In course of trial, the prosecution in order to prove the charges examined as many as 13 witnesses. Of them, P.W. 3, Safru Pawaria, P.W. 5, Khaleel Ahmad, P.W. 6, Islam Khan, are the eye witnesses to the occurrence which took place at the mosque. According to them, while they were offering Namaz at the mosque, the appellants came over there variously armed and committed murder of Haneef Khan. P.W. 7, Mohammad Khan @ Mahmood Khan, and P.W. 12, Samir Khan, claimed to have seen the appellants and other accused persons coming in front of the house of Haneef Khan and also saw appellants, Mobarak Khan and Mofil Khan, committing murder of Gufran Khan and Imran Khan, whereas P.W. 2, Jainub Khatoon, wife of the informant, is the eye witness to the occurrence which took place inside the house of Haneef Khan, where Kasuman Bibi and her four children were murdered. Gaffar Khan, the informant, P.W. 1, is the hearsay witness who came to know about the occurrence from his wife, P.W. 2. Learned trial court having placed his implicit reliance on the testimonies of the eye witnesses getting corroboration from the medical evidence and also by the objective findings of the Investigating Officer found the appellants guilty, whereas other accused persons were acquitted, as nothing was there to establish that they shared the common intention. Consequently, learned trial court, taking into consideration the aggravating circumstances like that of the brutality with which eight persons, including a child of five years and a handicapped boy of 18 years, were murdered, awarded death sentence to them. Accordingly, a reference in terms of Section 366 Cr.P.C. was made to this Court for confirmation of death sentence awarded.

Meanwhile, the appellants also preferred an Appeal against the judgment of conviction and order of death sentence and, therefore, both the cases were heard together.

7. Learned Counsel appearing for the appellants submits that though three of the witnesses, namely, P.W. 3, Safru Pawaria, P.W. 5, Khaleel Ahmad, and P.W. 6, Islam Khan, have claimed to have seen the appellants committing murder of Haneef Khan but they never informed anyone either to the villagers or to the Police Station or to the Chowkidar and as such, the conduct of these witnesses never inspire confidence to be believed particularly when the prosecution is silent about the source of light at the mosque which could have facilitated identification of the culprits. It was also submitted that other witnesses such as P.Ws. 7 and 13 who claimed to have identified the accused persons in front of the house of Haneef Khan who, according to them, committed murder of Gufran Khan and Imran Khan but their claims of identification get falsified, as no source of light was there inasmuch as it was a dark night, still the trial court accepted their versions though their testimonies are unworthy of its credence. Similar is the case with P.W. 2 who has claimed to have identified the appellants and others who committed murder of five persons inside the house but she herself has stated that she kept herself confined in a room out of fear and in that view of the matter and also keeping in view that there was no source of light, she cannot be believed to have identified the appellants. Lastly, it was submitted that the trial court while awarding death sentence to the appellants never considered the mitigating circumstances appearing in this case, rather the trial court being influenced by the fact that number of persons including minors have been done to death assumed it to be a case of "rarest of rare cases" though it was never the case of extreme culpability and cruelty and as such, the facts and circumstances never warrant infliction of death sentence. Therefore, the order awarding death sentence is fit to be set aside.

8. Learned Counsel appearing for the State in support of judgment did submit that the prosecution, by leading clinching evidence of the eye witnesses to the occurrence took place at all the three places, has been able to establish the charges and as such, the trial court has rightly recorded the judgment of conviction and order of death sentence against the appellants.

Learned Counsel further submit that the appellants without any provocation committed murder of Haneef Khan while he was offering Namaz and then came in front of his house where they did find Gufran Khan and Imran Khan who were done to death brutally and then the appellants by entering into the house committed murder of Kasuman Babi and her four children, including a minor and a handicapped, and in that circumstance, there was no alternative but to impose death sentence after considering both the aggravating as well as the mitigating circumstances and, therefore, the trial court has rightly awarded death sentence to the appellants.

9. Having heard learned Counsel appearing for the parties and on perusal of the

record, we do find that this is the case where the accused persons have committed offence of murder in a series whereby eight persons of a family, including a minor as well as a handicapped, were exterminated. In the said series of the acts, first occurrence took place inside the mosque situated at Village-Makandu, whereby deceased-Haneef Khan was done to death and then Gufran Khan and Imran Khan, sons of Haneef Khan, were done to death in front of the house of Haneef Khan and lastly five persons, wife and four children of Haneef Khan, were done to death inside the house of Haneef Khan. Three witnesses, P.W. 3, Safru Pawaria, P.W. 5, Khaleel Ahmad, and P.W. 6, Islam Khan, are the persons who claimed to have seen the appellants committing murder of Haneef Khan inside the mosque. According to them, while the deceased-Haneef Khan was offering Namaz along with aforesaid three persons, all the appellants, namely, Mofil Khan, Mobarak Khan, Saddam Khan and Wakil Khan armed with sword, bhujali, tangi and spade respectively came over there all on a sudden and started assaulting the deceased indiscriminately as a result of which, Haneef Khan died at the spot. It would be worthwhile to note here that according to P.W. 3, it were Mofil Khan and Mobarak Khan who first entered the mosque and started assaulting Haneef Khan with the weapons which they were holding and then two other appellants, namely, Saddam Khan and Wakil Khan, came and they also joined them in assaulting the deceased, whereas other two witnesses P.Ws. 4 and 6 have testified that all four appellants came simultaneously but this minor contradiction does not have any adverse bearing over the case of the prosecution that all the accused persons entered into the mosque and assaulted the deceased. Further, it appears that P.W. 5 has testified that before offering Namaz he had put on the light but such statement had not been made by the witness before the police. Still this omission would have hardly any impact on the case of the prosecution, as it would be quite natural for the persons offering Namaz to offer Namaz in the illumination of some light, as it is beyond comprehension that one would offer Namaz in the darkness. Moreover, the fact that Namaz is being offered in the light at night has been accepted by D.W. 1. Moreover, the testimonies of all the eye witnesses get corroboration from the medical evidence, as it would appear from the evidence of the doctor, P.W. 8 that three injuries inflicted upon the deceased-Haneef Khan were caused by sharp cutting weapons. Further the Investigating Officer in course of inspection of the place of occurrence did notice a Mat (Ext. II) at the mosque which was smeared with blood which has been seized by him under Ext. 9/4. Moreover, plaster of the floor where the occurrence took place was also found to be smeared with blood. Therefore, the witnesses, referred to above, are fully trustworthy and there appears to be no reason whatsoever to discard their testimonies.

10. Going further in the matter, it appears that P.W. 7, Mohammad Khan @ Mahmood Khan, P.W. 12, Samir Khan and P.W. 2, Jainub Khatoon, have claimed to have seen the appellants committing murder of Gufran Khan and Imran Khan in front of the house of Haneef Khan. According to P.W. 7, he came out of his home on hearing Halla and saw Mofil Khan assaulting Gufran Khan with a

sword, whereas Mobarak Khan was assaulting Imran Khan with Bhujali and in the meantime, one co-accused flashed torchlight towards him upon which Mofil Khan threatened him to run away from there otherwise he would also be done to death and then he fled away and in the next morning, he found both the dead-bodies at that place. More or less, similar is the evidence of P.W. 12 who has testified that while he was going to mosque, he was prevented by co-accused from going inside the mosque and then when he raised alarm, Gufran Khan and Imran Khan came out of their house and then Mofil Khan and Mobarak Khan cut them with sword and bhujali and seeing this he also fled away from there out of fear. Subsequently, he found dead-bodies over there. The testimonies of these two witnesses substantially get corroboration from the testimony of P.W. 2 that Gufran Khan and Imran Khan were done to death in front of the house of Haneef Khan by appellants Mofil Khan and Mobarak Khan. However, she has testified that apart from aforesaid two appellants, other appellants were also involved in committing murder. Thus, there appears to be slight variation in the matter of involvement of the persons who committed murder of Gufran Khan and Imran Khan which may have same bearing on the other aspect of the case but the fact remains that the witnesses are consistent on the point that the appellants Mofil Khan and Mobarak Khan cut the aforesaid two persons. Moreover, the testimonies of those get corroboration not only from the medical evidence but also by the objective finding of the Investigating Officer who did find blood spilled over the ground at that place of occurrence.

11. Coming to last act of the appellants in the same series, whereby the appellants committed murder of Kasuman Bibi and her four children inside the house of Haneef Khan. We do find that P.W. 2, Jainub Khatoon, who is none other than the mother of two appellants, namely, Mofil Khan and Mobarak Khan, and grand mother of appellants, Saddam Khan and Wakil Khan, has testified that the appellants and other accused persons after committing murder of Haneef Khan at mosque came in front of his house where they committed murder of Gufran Khan and Imran Khan and then entered into the house where they committed murder of Kasuman Babi and her four children. This piece of evidence was sought to be assailed on behalf of the defence on the plea that she would not be in a position to identify the accused persons, as admittedly, it was dark night. It is true that the prosecution does not come forward to say about any source of light but we cannot lose sight of the fact that the appellants are none other than the sons and grand sons of the witness-Jainub Khatoon and moreover, the appellants were giving warning in loud voice to other persons not to come to rescue to the persons who were killed. Under these situations, it never appears to be unnatural on the part of the witness to be in position to identify the appellants.

12. It would also be appropriate to note here that this witness in her cross-examination has admitted that her house and the house of Haneef Khan is the same which has been divided by the common wall, but this witness in her evidence has asserted that she was living in the house of Haneef Khan and this assertion of P.W. 2-Jainub Khatoon gets corroboration from the testimony of P.W.

12 who has testified that P.W. 2 was living on the Varanda of the house of Haneef Khan.

13. Further, we do find that P.W. 2 when saw the accused persons entering into the house, she locked herself in a room and when the accused persons went away, she saw the dead-bodies which, according to her, were lying in three rooms though the Investigating Officer did find all the five dead-bodies only in two rooms but this variation never goes to the root of the prosecution case and as such, it has got hardly any adverse impact over the case of the prosecution. Moreover, the testimony of this witness also gets corroboration from the testimony of P.W. 7 who has testified that when he came in front of the house of Haneef Khan, he was threatened by the accused and then he left the place out of fear and came to his house. After a while, he saw the appellants as well as other accused persons entering into the house of Haneef Khan and in the morning when he came to the house of Haneef Khan, he found the dead-bodies of five persons. Thus, none of these two witnesses appears to have seen the accused persons assaulting the deceased, but in the facts and circumstances, no other conclusion can be drawn than the fact that it was the appellants who committed murder of Kasuman Bibi, as other accused persons, who were put to trial, were never found to have been sharing common intention. Moreover, the testimonies of these witnesses gets corroboration from the medical evidence, as the doctor has found sharp cut injuries on the person of the deceased, whereas the accused persons were seen entering into the house with sharp cutting weapons and that apart, the Investigating Officer has also found earth smeared with blood at the place of occurrence.

14. Regard being had to the facts and circumstances, we do find and hold that the trial court was absolutely justified in holding the appellants guilty for committing murder of all the deceased.

Once guilt has been established in such a case, where number of persons have been exterminated, the court is bound to fall in punitive dilemma and in the words of Hon''ble Justice Krishna Iyer, as expressed in a case reported in Ediga Anamma Vs. State of Andhra Pradesh, , this dilemma reaches its peak when the magnitude of the crime is enormous, viewed from the angle of number of casualties inflicted by the offenders. We are also no exception to it. However, before determining the sentence to be awarded, we need to observe certain guidelines laid down by the Hon''ble Supreme Court in such a situation. In the case of Anshad and Others Vs. State of Karnataka, , it has been observed by the Hon''ble Supreme Court that the Courts are expected to exhibit sensitiveness in the matter of award of sentence particularly, the sentence of death because life one lost cannot be brought back. It has been further observed that this Court has in cases more than one emphasized that for determining the proper sentence in a case like this while the court should take into account the aggravating circumstances it should not overlook or ignore the mitigating circumstances. Further their Lordships in the case of Sheikh Ishaque and Others Vs. State of

Bihar, has observed that the manner in which the crime was committed, the weapons used and the brutality or the lack of it are some of the considerations which must be present to the mind of the court. The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) Cr.P.C. Death sentence, being an exception to the general rule, should be awarded in the "rarest of the rare cases" for "special reasons" to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. It has further observed that the number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of "rarest of the rare cases". Again the same view has been expressed by the Hon'ble Supreme Court in the case of Gyasuddin Khan @ Md. Gyasuddin Khan Vs. The State of Bihar, , wherein it has been observed that the nature of the crime, the circumstances of the criminal and the impact of the crime on the community are broadly the considerations that ought to be kept in view by a Court called upon to choose between the death sentence and the life imprisonment. At the same time, the circumstances in which the death sentence can be imposed cannot be placed in pigeon holes.

The aggravating and mitigating circumstances have been enumerated in the famous case of Bachan Singh Vs. State of Punjab, . While enumerating the aggravating and also the mitigating circumstances, their Lordships have observed as follows:

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

Subsequently, in the case of Machhi Singh and Others Vs. State of Punjab, , this Court after referring to the guidelines adverted to in Bachan Singh's case applied the following working test to reach the conclusion whether a particular case warrants death sentence :

(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?

15. Keeping in view all these guidelines, we would be turning our attention to the relevant facts and circumstances having a bearing on the question of sentence and to test as to whether learned trial court was justified in awarding death sentence. Learned trial court keeping in view the guidelines laid down in the case of Machhi Singh (supra) did find the aggravating circumstances as that of extermination of the entire family of deceased-Haneef Khan executed in most gruesome, brutal and merciless manner without any provocation and at the same time did take notice the age of two appellants Saddam Khan and Wakil Khan as that of 19 and 21 years respectively and absence of criminal antecedents as the mitigating circumstance but perhaps keeping in view the aggravating circumstance overweighing mitigating circumstances, the trial court thought it proper to award death sentence to the appellants but while coming to such conclusion, the trial court overlooked certain mitigating circumstances which would certainly have bearing in the matter of infliction of sentence. Some of the mitigating circumstances appearing against the appellants particularly Saddam Khan and Wakil Khan are that, according to P.Ws. 7 and 12, they have not committed any overt act in commission of murder of Gufran Khan and Imran Khan and that there has been no evidence at all that they in fact inflicted injuries on the persons who were found dead inside the house. So far first occurrence is concerned, where deceased-Haneef Khan was done to death inside the mosque, it is evident from the evidence of P.W. 3 that it was appellant Mofil Khan and Mobarak Khan who first entered into the mosque and then inflicted the injuries indiscriminately by sword and bhujali to Haneef Khan and subsequently, these two appellants having tangi and spade came and started assaulting the deceased, but the doctor did find only three injuries on the persons of deceased-Haneef Khan. Therefore, when it is not sure whether they inflicted injuries, though they were certainly sharing common intention to commit murder and that they are of young age, it would not be appropriate to inflict death sentence to them. The trial court certainly seems to have overlooked the important mitigating circumstance and, therefore, committed illegality in awarding death sentence to them.

16. Therefore, we set aside the death sentence imposed upon appellants Wakil Khan and Saddam Khan and instead of that they are sentenced for imprisonment of life for the offence u/s 302/34 of Indian Penal Code. However, in the facts and circumstances of the case, we do not find it proper to pass separate sentence for the offence u/s 449/34 of Indian Penal Code. However, keeping in view the act committed by other two appellants namely, Mofil Khan and Mobarak Khan, whereby they not only committed murder dastardly of their brother at the place of worship but again committed murder of Gufran Khan and Imran Khan, sons of deceased-Haneef Khan, and then committed murder of Kasuman Bibi, wife of Haneef Khan, and her four children i.e. the entire family of Haneef Khan though

nothing specific is there that they inflicted fatal injuries to Kasuman Bibi and her four children still it can be said in the totality of the circumstances that the culpability of these two appellants assumes the proportion of extreme depravity which can be said to be something uncommon about the crime and under these circumstances, there was no other alternative for the trial court but to impose death sentence u/s 302/34 of Indian Penal Code, which in our view is absolutely proper and appropriate. Therefore, death sentence imposed upon them u/s 302/34 of Indian Penal Code is hereby confirmed. So far sentence imposed for the offence u/s 449/34 of Indian Penal Code is concerned, we do not find any justification in imposing separate sentence for the offence u/s 449/34 of Indian Penal Code.

17. Thus, the death sentence imposed upon the appellant Nos. 3 and 4, namely, Wakil Khan and Saddam Khan, is commuted to imprisonment for life whereas death sentence imposed upon the appellant Nos. 1 and 2, namely, Mofil Khan and Mobarak Khan, is hereby confirmed.

18. In the result, appeal stands dismissed with modification in sentence as indicated above so far appellants Wakil Khan and Saddam Khan are concerned, whereas appeal stands dismissed as against appellants Mofil Khan and Mobarak Khan. Accordingly, Reference is answered.