

(2019) 10 RAJ CK 0072

In the Rajasthan High Court

Case No : Criminal Death Reference No. 1 Of 2016, Criminal Appeal No. 966 Of 2016

State Of Rajasthan And Ors

APPELLANT

Vs

Shahabudeen And Ors

RESPONDENT

Date of Decision : 24-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302
Code Of Criminal Procedure, 1973 — Section 161, 164, 313
Evidence Act, 1872 — Section 3, 4, 25, 27
Arms Act, 1959 — Section 4, 25

Citation : (2019) 10 RAJ CK 0072

Hon'ble Judges : Sandeep Mehta, J; Vinit Kumar Mathur, J

Bench : Division Bench

Advocate : Mahesh Bora, Nishant Bora, Arpit Mehta, Farzand Ali, Anil Joshi

Final Decision : Partly Allowed

Judgement

Sandeep Mehta, J

1. The instant murder reference for confirmation of death sentence has been instituted before this court upon being forwarded by the learned Additional Sessions Judge, Pali, District Pali, who convicted and sentenced the accused Shahabuddin, Shakoor Khan, Kalu Khan, Usman Khan and Rahim Bux vide judgment dated 05.10.2016 passed in Sessions Case No.50/2015 (02/2010) as below :

Name of the accused

Offence for which convicted

Sentence awarded

Shahabuddeen Shakoor Khan Kalu Khan Usman Khan Rahim Bux

147 IPC

Rigorous imprisonment of one year along with a fine of Rs.1000/- and in default of payment of fine, additional simple imprisonment of 10 days

148 IPC

Rigorous imprisonment of one year alongwith a fine of Rs.1000/- and in default of payment of fine, additional simple imprisonment of 10 days

302/149 IPC

Death penalty alongwith a fine of Rs.20,000/- and in default of payment of fine, additional simple imprisonment of six months

Shahabuddin Usman Khan

4/25 of the Arms Act

Rigorous imprisonment of one year alongwith a fine of Rs.1000/- and in default of payment of fine, additional simple imprisonment of 10 days

All the sentences were ordered to run concurrently.

2. The accused have preferred the appeal No.966/2016 for assailing the impugned judgment, whereby they were convicted and sentenced as above.

3. Brief facts, relevant and essential for disposal of the reference as well as the appeal are noted hereinbelow. Smt. Samiya W/o Shareef Khan and Smt. Timiya W/o Babu Khan submitted a written report (Ex.P/34) to Mr. Binraj Singh, ASI, Police Station Sadar Pali, Camp Sarhad Bhangesar on 19.07.2009 at 6.36 p.m. alleging inter alia that on the same day at around 3 to 4 p.m., a villager named Ranjeet Bhat approached them and blurted out that while they were sitting idle at home, all had been killed. At around the same time, Samiya's son Iqbal came on a bicycle and told that Shakoor Khan, Usman, Rahim, Kalu Khan and Shahabuddin were assaulting his father (Shareef), elder uncle (Babu Khan), Lal Mohammad and Sabir. On hearing this news, the informant Samiya alongwith her Jethani Timiya rushed to their field in the Bhangesar Sarhad and saw the dead bodies of Shareef Khan and Babu Khan lying there. They were told that Lal Mohammad and Sabir Mohammad had been taken to the hospital for treatment. It was alleged in the report that the accused Shakoor and his companions were having country-made guns, swords and lathis, with which they had assaulted the family members of the informant. It was also alleged that Murlidhar, Ranjeet Bhat, Shakoor Khan and Sultan Khan were also present at the spot. Lal Mohammad and Sabir Mohammad also passed away at the hospital. It was further alleged that the accused had assaulted and killed the victims with country-made fire-arm, sword, lathis and acid etc. owing to a land dispute. On the basis of this written report, an FIR No.133/2009 (Ex.P/71) was registered at the Police Station Sadar, Pali for the offences under Sections 147, 148, 149 and 302 IPC.

4. Shri Binraj Singh posted as ASI at the Police Station Sadar had also reached the spot on receiving a telephonic information of the incident, which was entered

into Roznamcha Register (Ex.D/12). Samiya and Timiya, present at the scene of occurrence, submitted the written report (Ex.P/34) to him, Shri Binjraj Singh saw the dead bodies of Shareef Khan and Babu Khan lying at the place of occurrence. Shri Kailashchand, Circle Inspector, the then SHO, Police Station Industrial Area also got an information from the control room regarding the incident, on which he too reached the place of occurrence between 6.30-7.00 pm. Shri Kailashchand was directed to conduct the initial investigation in the matter. A country-made gun with ammunition, a bucket containing acid like substance and two water-cannons were seen lying at the place of incident. Footwear of the deceased were scattered here and there. Acid appeared to have been poured at the edge of the road near boundary of the field and nearby Babool bushes had been singed. A tractor was parked nearby the road. The injured were sent to the hospital in an ambulance with Binjraj Singh. Two persons standing at the spot, namely, Hari ram and Sadiq were deployed as motbirs for seizure made from the place of incident. Site was got inspected with the aid of Ranjeet Bhat and Murlidhar and the site inspection plan (Ex.P/18) was prepared by the SHO Shri Kailashchandra. Photographs of the scene of occurrence were got snapped through the photographer Rajesh. Various incriminating and other released articles lying at the place of occurrence were seized. The dead bodies were sent to the mortuary. The Investigating Officer reached the hospital, where he came to know that two injured had also passed away. Panchnamas of all the four dead bodies were prepared. The clothes worn by the deceased, which were stained with blood and marked with acid burns were seized.

5. A Medical Board was constituted at the Government Hospital, Pali on the next day, i.e. 20.07.2009. The four dead bodies were subjected to postmortem and then handed over to the family members for burial. The statements of Murlidhar, Ranjeet Bhat, Timiya, Samiya etc. were recorded under Section 161 CrPC. Statement of Ranjeet was got recorded under Section 164 CrPC as well. Ranjeet's clothes got blood-stained and acid marked when he was trying to save the victims and thus, they were also seized. During the intervening period, the ASI Binjraj Singh informed the Investigating Officer Kailashchand that the assailants Kalu Khan, Shahabuddin and Shakoor Khan reached the Bangad Hospital because they too had received acid burns in the incident. Kailashchand made inquiries and came to know that Kalu Khan was present at the Bangad Hospital, whereas Shahabuddin and Shakoor had been referred to a higher center. All three were brought to the police station and after interrogation, they were arrested on 20.07.2009. The clothes worn by these accused at the time of their arrest were also stained with blood and acid, which too were seized. The remaining two accused Rahim Bux and Usman Khan were arrested on 27.07.2009. All the accused gave informations to the Investigating Officer under Section 27 of the Evidence Act and got recovered the weapons of assault. For the sake of convenience, description of the informations given and the recoveries made at the instance of the accused are narrated in a tabular form below :

Recovery Exhibit

Information

Recovered Article

Motbir Witnesses

Ex.P/32

Ex. P. 122 On 21.07.2009 at 1:45 pm

Sword at the instance of Shahabuddin on 23.07.2009 at 2:15 pm

Babu Khan (P.W. 4) Kamruddin (P.W. 10)

Ex.P/28

Ex. P 124 On 21.07.2009 at 1:15 pm

Lathi, Hoti at the instance of Sakur Khan on 23.07.2009 at 12:00 am

Babu Khan (P.W. 4) Kamruddin (P.W. 10)

Ex.P/30

Ex. P 123 On 21.07.2009 at 1:30 pm

Kulhari at the instance of Kalu Khan on 23.07.2009 at 1:15 pm

Babu Khan (P.W. 4) Kamruddin (P.W. 10)

Ex.P/37

Ex. P 103 On 28.07.2009 at 9: 15 am

Lathi at the instance of Rahim Baksh on 28.07.2009 at 2:05 pm

Mithu Khan (P.W.12) Sohan Lal Kumawat (P.W. 11)

Ex.P/39

Ex. P 105 On 28.07.2009 at 8:15 am

Iron koont (mark AA) at the instance of Usman Khan on 28.07.2009 at 3:10 pm

Mithu Khan (P.W.12) Sohan Lal

6. From 23.07.2009 onwards, the further investigation was assigned to Shri Parasmal (P.W.34), the then SHO, Police Station Sadar, District Pali.

7. After making the recoveries aforesaid and completing investigation, the Investigating Officer proceeded to file a charge-sheet against the five accused appellants for the offences under Sections 147, 148, 302/149 IPC and Sections 3/25, 3/27 and 4/25 of the Arms Act concluding that the attack was perpetrated with the motive of usurping the agricultural land in question. Since the offences were Sessions triable, the case was committed to the Court of Sessions Judge, Pali, from where the same was transferred to the Court of Additional Sessions

Judge, Pali for trial.

8. Learned trial court framed charges against all the accused for the offences under Sections 147, 148, 302/149 IPC. In addition to that, charge was framed against accused Shahabuddin and Usman Khan for the offence under Section 4/25 of the Arms Act and against accused Kalu Khan for the offences under Sections 3/25 and 3/27 of the Arms Act. The accused denied the charges and claimed trial. The prosecution examined as many as 37 witnesses and exhibited 128 documents to prove its case.

9. When questioned under Section 313 CrPC and upon being confronted with the circumstances appearing against them in the prosecution evidence, the accused denied the same and claimed to have been falsely implicated. As many as 5 witnesses were examined and 12 documents were exhibited in defence. After hearing the arguments advanced by the defence and the prosecution and appreciating the material available on record, learned trial court proceeded to convict the accused in the manner stated above. The judgment was pronounced on 05.10.2016. The defence counsel was asked whether he was ready to advance the arguments on sentence, to which, he agreed. Thus, the arguments on sentences were heard on the same day. The learned trial court thereafter proceeded to sentence the appellants to capital punishment and other terms of imprisonment on separate counts vide order dated 06.10.2016, whereupon the instant confirmation reference and the appeal against conviction have been instituted in this court.

10. Mr. Nishant Bora, learned counsel representing the appellants, addressed the court on the merits of case. He vehemently and fervently urged that the entire prosecution case is false and fabricated. The allegations levelled in the FIR are contradicted by the attending circumstances available on record. The material prosecution witness Ranjeet Bhat (P.W.33) was declared hostile as he did not support the prosecution case. The witness Iqbal (P.W.18) is a cooked up witness. None of the other witnesses, who were going towards or coming from the place of incident, noticed presence of the boy and thus, manifestly, he has been created as an eye-witness just to ensure that at least one relative could be kept in back up as an eye-witness in case, the independent witnesses did not support the fictional prosecution story regarding participation of the accused in the incident. He further urged that the recoveries made by the Investigating Officer from the place of incident are apparently fabricated because the same were made from the boundary of the very field, where the incident happened. As per him, these weapons could not have escaped the notice of the Investigating Officer, when the site plan was being prepared because the entire area must have been combed. Thus, as per him, the recoveries are planted and deserved to be discarded. He further contended that the allegations set out in the FIR are false and fabricated. Shakoore Khan (P.W.13) and Murlidhar (P.W.16) gave evidence only against Kalu Khan. Thus, participation of the other accused in the incident is doubtful. Murlidhar (P.W.16) was the person, who gave telephonic

information to the police station, which was entered in the Roznamcha (Ex.D/12). As per Mr. Bora, the said information should have been treated to be the FIR. He further urged that Murlidhar, who was not declared hostile, did not state in his evidence that he saw any other witness present at the spot and thus, as per Mr. Bora, the presence of either Ranjeet Bhat or Iqbal at the scene of occurrence as an eye-witness of the incident is falsified. Ignorance shown by all other prosecution witnesses about the presence of Iqbal at the place of incident and the delay in recording of his statement under Section 161 CrPC clearly prove that he is a cooked up witness and hence, his evidence should be discarded. He further contended that the statement of Iqbal is falsified by the very circumstance that he claims to be present and to have seen the entire incident with his own eyes, whereas witnesses Murlidhar and Ranjeet Bhat, who too claim to have witnessed a part of the incident, never noticed presence of Iqbal despite the fact that the field in question is barren and clearly visible from all sides. Hence, as per him, Iqbal is a created witness and he was never present at the spot. He further urged that the recoveries made by the Investigating Officer from the two accused Usman Khan and Rahim Bux, who were arrested after seven days of the incident, are totally concocted because these accused were admittedly arrested from Gujarat and thus, it is impossible to believe that they would have preserved the weapons of offence so that the Investigating Officer could recover the same later. Regarding the medical evidence as deposited by Dr. Paras Khinchi (P.W.31) and Dr. Narpat Singh (P.W.32), the contention of Mr. Bora was that the doctors noticed acid burn injuries only on the faces of the four deceased and thus, as per him, the allegation of the prosecution witnesses that the water-cannons were indiscriminately used by the accused for spraying acid extensively on the victims is contradicted by the medical evidence because as per him, in case the acid had been indiscriminately sprayed by use of water-cannons, then burn injuries were bound to be noticed all over the bodies of the deceased persons. He further urged that the accused Shakoore Khan received a large number of injuries in this very incident. No explanation has been offered by the prosecution regarding these injuries. As per him, the star prosecution witness Iqbal (P.W.18) did not utter a word in his evidence that acid particularly was thrown by the accused persons on the faces of the victims by using water-cannons. He further contended that the star prosecution witness Ranjeet (P.W.33) did not corroborate the allegation of use of acid filled water-cannons in the incident. Mr. Bora further urged that the absence of the names of the accused in the Roznamcha entry (Ex.D/12) recorded on the basis of the telephonic information given by Murlidhar establishes the fact that the FIR is a post investigation document and thus, the same deserves to be discarded. He further contended that all the recoveries were made from places open and accessible to all and sundry and thus, the same deserve to be discarded. He further urged that the investigation was conducted in an absolutely casual, lackadaisical and biased manner. The Investigating Officer deliberately omitted to collect evidence regarding possession over the field where the incident took place. As per Mr. Bora, the field was owned by the accused, who had gone to

cultivate the same on the day of incident in an absolutely bonafide manner. The victims tried to interfere and caused obstruction and illegally restrained them, whereupon, a free fight ensued and in this free fight, the accused party also received injuries. As per Mr. Bora, it was a case of free fight and since the particular role played by each accused was not stated by any of the prosecution witnesses in their sworn testimony, the trial court was absolutely unjustified in applying Section 149 IPC so as to convict the accused vicariously under Section 302 IPC.

11. Without prejudice to the contention that the evidence of the eye-witnesses Ranjeet Bhat and Murlidhar is totally unreliable, Mr. Bora urged that even if the statements of these witnesses are taken to be correct on their face value, manifestly, only the presence of the accused Kalu Khan is stated by them and hence, he urged that the conviction of the accused, other than Kalu, is totally unjustified. Regarding the trial court's use of statements of the accused under Section 313 CrPC, Mr. Bora urged that if the statement can be divided in parts, then inculpatory part has to be omitted and only the exculpatory part can be read in evidence. He further urged that the prosecution has suppressed the genesis of the occurrence and hence, the entire case deserves to be discarded. As per him, injuries of the accused remained totally unexplained; the eye-witnesses were not present at the spot and the accused were in cultivatory possession over the field in question and in this backdrop, the trial court was absolutely unjustified in convicting the accused for the offences alleged. With these submissions, he implored the court to set aside the impugned judgment and acquit the accused of all charges.

12. On the aspect of confirmation of the death penalty awarded to the accused, Mr. Mahesh Bora, learned Senior Advocate, assisted by Mr. Nishant Bora and Mr. Arpit Mehta, appeared to argue the matter. He urged that the approach of the trial court on the aspect of sentencing was absolutely hasty, laconic and slipshod. As per Mr. Bora, the case does not fall within the category of rarest of the rare case so as to justify imposition of death penalty upon the accused. The accused were not provided appropriate opportunity of hearing or of leading evidence on the aspect of sentence. He relied upon the Supreme Court judgments in the cases of Govindaswami Vs. State of T.N. [1998 SCC (Cri) 1092], Deepak Rai Vs. State of Bihar [(2013) SCC 421], Himanshu @ Chintu Vs. State (NCT of Delhi) [(2011) 1 SCC (Cri) 593] and Narwinder Singh Vs. State of Punjab [(2011) 1 SCC (Cri) 601] in support of his contentions and urged that as per the law laid down by the Hon'ble Supreme Court, the State is required to prove and satisfy numerous mandatory criterion before the extreme penalty of death can be imposed on the accused. He contended that the criminal background of the accused has to be seen. The aggravating and mitigating circumstances have to be addressed, elaborated and weighed before imposing death sentence on the accused. As per him, the trial court failed to consider even a single of the mitigating circumstances and proceeded in an absolutely high-handed manner while relying upon impliedly over-ruled judgments of the Hon'ble Supreme Court

and unjustifiedly imposed the extreme death penalty on the accused.

13. He further urged that the High Court cannot fill the lacunae left by the prosecution before the trial court on the aspect of sentencing. The trial court did not consider and apply in correct perspective, the ratio of the Supreme Court judgment in the case of *Bachan Singh vs State Of Punjab* [(1980) 2 SCC 684] while awarding death sentence to the accused appellants. The trial court acted in a grossly hot and hasty manner because the arguments on sentence were heard on the very same day on which the judgment of conviction was pronounced. No report was called from the prison regarding the conduct of the accused. The incident is of the year 2009, whereas the judgment of conviction came to be delivered almost 7 years later. During this period, the accused had a significant window of reforming themselves and had actually been reformed. Without calling for the psychiatrist's report from jail regarding mental state of the accused, the learned trial Judge violated all the settled principles of sentencing, acted in a pre-determined manner and in hot haste showing that he was fixated for awarding the death sentence and nothing else. The accused do not have any criminal antecedents; the incident took place all of a sudden owing to a dispute of right to cultivate an agriculture field and as such, the accused cannot be said to have acted in an excessively cruel manner. He urged that most of the judgments referred to by the trial court while awarding death sentence to the accused and numerous other judgments were considered by the Hon'ble Supreme Court in the case of *Shankar Kisanrao Khade v. State of Maharashtra* [(2013) 5 SCC 546] and were explained or distinguished. He, thus, urged that the capital sentence awarded to the accused, which is based on over-ruled judgments of the Hon'ble Supreme Court can in no manner be approved and deserves to be commuted to life sentence. He, thus implored the court to turn down the reference and commute the death penalty imposed upon the accused by the trial court by accepting the appeal to the extent of the sentences awarded by the trial court.

14. Per contra, learned Public Prosecutor Mr. Anil Joshi argued the matter on merits; Mr. Vineet Jain, learned counsel for the complainant assisted him, whereas Mr. Farzand Ali, learned Additional Advocate General addressed the court on the aspect of sentence. The contention of the respective counsel appearing on behalf of the State and the complainant was that the prosecution has proved its case as against the accused appellants by leading cogent, clinching and convincing evidence. The defence has taken a totally contradictory stand for countering the prosecution case.

They urged that the field where the incident took place was a bone of contention between the parties. A litigation was going on in relation thereto. The competent Revenue court had granted a status quo order and thus, neither of the parties were supposed to make any attempt of cultivating or disturbing the status of the field. They urged that the accused consciously and intentionally decided to flout the court's order. They picked up dangerous weapons like gun, sword and acid; formed an unlawful assembly; intentionally went to the disputed field and tried to

make a show as if they were genuinely cultivating it, whereas, this entire exercise was a facade created in order to lure the members of the complainant party to the field and to eliminate them so as to put an end to their claim on the field. The victims fell into the trap laid by the assailants and went to the field unarmed and simply requested the accused not to cultivate the same. However, the accused, who were well-prepared in advance, attacked the unarmed and hapless members of the complainant party by the fire arm, swords and acid etc. and caused them extensive and multiple injuries, as a result whereof, two victims were killed at the spot, whereas, the other two died at the hospital. They urged that after the victims had been belabored and while they were lying on the ground in a seriously injured condition pleading for water, the accused acted in an extremely cruel and inhuman manner and forced acid down their mouths with the water-cannons, which caused extensive facial burns to all the victims and their internal organs were charred by the strong corrosive acid used by the accused. As per them, even the evidence of hostile witnesses can be used and relied upon to the extent, the admissible portion can be extracted therefrom and thus, the trial court was perfectly justified in extracting and relying upon the admissible portions from the evidence of the hostile eye-witness Ranjeet Bhat (P.W.33). They contended that the witness appears to have been won over by the defence and showed hesitation in supporting the prosecution case as deposed by him during investigation, but upon cross-examination conducted by the Public Prosecutor with reference to his previous statement recorded during investigation under Section 164 CrPC, the conscience of the witness was pricked and he admitted to have given the elaborated parts of his previous statements, which conclusively prove the guilt of the accused. They further contended that Murlidhar (P.W.16) also supported the prosecution case in material particulars and his evidence also leads to the only possible conclusion, i.e. the involvement of the accused in the crime. It was also contended that the child witness Iqbal (P.W.18), son of Shareef Mohammad, is a most natural and reliable eye-witness. His name finds place in the promptly lodged FIR as an eye-witness of the occurrence. The two illiterate and rustic lady first informants, who must definitely be in a state of shock due to the gruesome incident, could not have in any manner foreseen or conceived in advance that the witness Ranjeet Bhat (P.W.33) and Murlidhar (P.W.16) might be won over by the defence and thus, a family member should be introduced as an eye-witness in the report. They urged that the condition of the ladies at the time of lodging of the FIR after having seen the dead bodies of their husbands would have been extremely pitiable and it is impossible to believe that they could have created a fictional story naming Iqbal as an eye-witness in the FIR by a calculated design and hence, the presence of Iqbal at the scene of occurrence as an eye-witness cannot be disputed. It was their contention that merely because no other witness of the prosecution claims to have noticed presence of the boy from the way to the village till the field in question, the credibility of his evidence cannot be questioned. As per them, the witness confidently withstood prolonged cross-examination conducted by the defence counsel and firmly stuck to his version that he had seen a part of the

incident and that his testimony is wholly reliable and it conclusively implicates all the accused as the perpetrators of the crime.

15. They further contended that the doctors conducting postmortems of the four deceased noticed injuries by mechanical violence and acid burns on the dead bodies of the four victims and thus, the testimony of the eye-witnesses is thoroughly corroborated. In addition thereto, the superficial acid injuries noticed on the persons of the accused themselves, the recoveries effected from them also conclusively point towards their participation in the incident. They urged that the witnesses Sohan Lal Kumhar (P.W.11) and Mohammad Khan (P.W.20) saw the accused party on a tractor on the day of the incident and they were carrying a bucket with them. They were seen proceeding towards the field. As per the learned Public Prosecutor and complainant's counsel, this circumstance clearly indicates that the accused were moving towards the scene of occurrence with prominence after arming themselves with a pre-meditated design to kill the members of the complainant party. They urged that non-mentioning of the names of the accused in the Roznamcha entry Ex.P/12 is immaterial because a cryptic entry in the Roznamcha cannot assume the character of an FIR. They further submitted that the recoveries of the weapons, which were concealed by the accused in the bushes of the field in question, were effected at the instance of the accused in an absolutely genuine and reliable exercise during investigation. Two of the four accused, who had fled from the scene of occurrence, themselves received self-inflicted acid burns because they had indulged in rampant use of acid on the victims. People from the village started collecting at the field and thus, they took the easiest possible avenue of hiding the weapons in the bushes growing on the boundary of the field before escaping. The Investigating Officer acted in an absolutely bonafide manner because the Desi Katta and the water-cannons (Pichkaris), which were clearly visible lying at the scene of occurrence were recovered and seized when the site inspection plan (Ex.P/18) was prepared, whereas the concealed weapons were recovered on the basis of the informations supplied by the accused under Section 27 of the Evidence Act. They, thus, urged that the prosecution has proved its case as against the accused by leading clinching, convincing and cogent evidence. As per them, looking to the brutality and heinousness of the offensive acts attributed to the accused, the trial court was perfectly justified in imposing the extreme penalty of capital punishment upon the accused as they deserve nothing short of that. On these submissions, they implored the court to dismiss the appeal and answer the reference by affirming the death sentence awarded to the accused appellants by the trial court.

16. We have given our thoughtful consideration to the arguments advanced at bar and have minutely re-appreciated the evidence available on record. We now proceed to deal with the evidence of the prosecution witnesses as per serietim.

17. Sultan (P.W.1) deposed on oath that he knew Sabir Mohammad, Shareef Mohammad, Lal Mohammad and Lal Khan, who died on 19.07.2009 in a quarrel,

which took place in the field. The police prepared Panchnamas of the four dead bodies on 19.07.2009 at 09.30 p.m. The blood-stained and acid stained clothes present on the dead bodies were seized and sealed in his presence. He attested the Fard Surat Haal Lash of Sharif Mohammad, Babu Khan, Lal Mohammad and Sabir (Ex.P/1, Ex.P/2, Ex.P/3 and Ex.P/4 respectively). He also attested the seizure memos of the clothes of Lal Mohammad, Babu Khan, Shareef Mohammad and Sabir Mohammad (Ex.P/5, Ex.P/6, Ex.P/7 and Ex.P/8 respectively). The witness deposed that he attested the Panchnamas of dead bodies of Babu Khan, Shareef Mohammad, Lal Mohammad and Sabir Mohammad (Ex.P/9, Ex.P/10, Ex.P/11 and Ex.P/12 respectively). He also attested the seizure memo Ex.P/13 of the blood-stained and acid stained clothes of witness Ranjeet. Fard Supurdgi Lash of Shareef Mohammad, Lal Mohammad, Babu Khan and Sabir (Ex.P/14, Ex.P/15, Ex.P/16 and Ex.P/17 respectively) were also attested by this witness. He stated that he ran a cycle shop and knew Iqbal, son of Mohammad Shareef. He went to the place of the incident after the assault and saw the dead bodies of Babu and Shareef lying in the field. Lala and Sabir were lying there writhing in pain. He saw buckets of acid, two Pichkaris, Desi Katta, pellets and a sword lying at the spot and nearby a cultivator (plough) was also lying. He stated that the accused appellants had murdered the four victims.

In cross-examination, the witness stated that Ranjeet and Murli passed by from front of his shop shouting and went towards the house of Babu at about 04.00 p.m. He did not see the accused just before or after the incident. The place of the incident, which was located on the Pali Road, was at a distance of 2 - 2½ km from his shop.

The defence gave a suggestion to the witness in cross-examination that he was lying because his son Mohsin had been married to the daughter of Shareef. He explained that the marriage was solemnized after the incident. He also stated that Timiya and Samiya had also reached the place of the incident. Police and 108 Ambulance also came there in 15-20 minutes. Kalu Khan was also present at the place of the incident and was speaking to someone on phone, but he did not notice any injuries on his person. Kalu Khan was also sent to the hospital with the injured. The witness stated that he went to the place of incident on a bicycle and reached there at about 4 o'clock. On further cross-examination, the witness narrated that he saw two dead bodies, two injured persons, two Pichkaris and a Desi Katta lying at the scene of occurrence.

The evidence of this witness to a great extent is formal in nature. What can be concluded from the evidence of this witness is that he noticed the presence of Kalu Khan at the place of the incident, when he reached there.

18. Sadiq (P.W.2) is also an attesting witness of the site inspection plan (Ex.P/18) and the seizure memo (Ex.P/19) of the incriminating material from the place of the incident. His evidence is also more or less formal in nature.

19. Uttam Singh (P.W.3) was posted as a Head Constable at the Police Station

Sadar on 20.07.2009. He associated as an attesting witness to the arrest memos of the 3 accused, namely, Shakoor Khan, Shahabuddin and Kalu Khan (Ex.P/20, Ex.P/22 and Ex.P/24 respectively) and the seizure memos of the clothes worn by them (Ex.P/21, Ex.P/23 and Ex.P/25 respectively). He also attested the arrest memos of the accused Rahim Bux and Usman Khan (Ex.P/26 and Ex.P/27 respectively). Nothing significant was elicited in his cross-examination.

20. Babu Khan (P.W.4) was examined as an attesting witness of the recovery memo Ex.P/28, whereby the Investigating Officer recovered a stick and a Soti at the instance of Shakoor Khan; recovery memo Ex.P/30 of an axe at the instance of Kalu Khan, recovery memo Ex.P/32 of a sword at the instance of Shahabuddin. The defence cross-examined the witness suggesting that the deceased were his relatives, to which the witness stated that he was distantly related to them. The correct date of the seizures was 23.07.2009 and not 23.08.2009 as erroneously stated by him in the examination-in-chief. He further stated that there is only one route from the place of incident to the Village Indrokon Ki Dhani. The bus stand is situated at a distance of 1½ -2 km. from the place of incident. The place of incident and the place of seizure is one and the same. He did not go to the field in question before 23.07.2009. The sword, stick and the axe were recovered from the Baad near the road, which is located at a distance of 15 feet from the field. The road is thronged by people day in and day out. If anybody threw something from road, it could reach the Baad. Many villagers had gathered at the scene of occurrence on the day of the incident. The recovered weapons were sealed in different packets. Nothing significant was elicited in cross-examination of this witness, which can dilute the evidence given by him on oath about recoveries of the weapons effected at the instance of the accused.

21. The first informant Samiya (P.W.5) stated that she was at her house in the afternoon at about 4 o'clock. A quarrel took place wherein, her family members Usman Gani, Shareef Mohammad, Lal Mohammad and Sabir were killed by Shakoor Khan, Usman, Shahabuddin, Rahim Bux and Kalu. She identified the five accused and stated that they killed the deceased in the field. She received the information of the incident from Ranjeet Bhat. Her son Iqbal also came and told that the accused persons had assaulted the four victims. At that time, her Jethani Timiya was sitting besides her. She and Timiya rushed to the field. There they saw that her husband Shareef and Jeth Usman were lying dead, whereas her husband's nephews Lal Mohammad and Sabir were badly injured and were writhing in agony. Buckets, Pichkaris and a Desi Katta were lying in the field and were clearly visible. She started crying. The villagers gathered there. Lal Mohammad and Sabir were taken to the hospital. Later on, at about 6 o'clock, she received an information that they too had passed away. She gave report of the incident (Ex.P/34) to the police officer at the scene of occurrence after appending her thumb impression. In cross-examination, she stated that neither she nor her Jethani had gone to do famine work on the day of the incident. She did not know the Khasra no. or the measurement of the field in question which is

located nearby the main road. A litigation was pending between her husband and the accused regarding the field in question. She denied that the possession over the field was that of Shakoor Khan and claimed that it was of her family. The jamabandi of the field was in the name of her father in law Hakeem Khan. Ever since she was married, she saw her family members cultivating the entire field. The Dhoras etc. had been raised on the field by her father-in-law. On the day of the incident, her husband had gone to cultivate the field. She saw her husband, his two nephews and her brother-in-law Usman proceeding towards the field with her own eyes. They went to the field in a tractor, which was owned by Usman Gani. She could not state the distance between her house and Shakoor Khan's house. The report was written by Murli Maharaj at the field. Police officers, Ranjeet, Sultan, Shakoor and numerous other villagers were present there and Murli wrote the report as she had narrated. She appended her thumb impressions at three places on the report. She further stated that Iqbal met them on the way while they were going towards the field. Iqbal proceeded to home, whereas she went towards the field. Nothing significant was elicited in the cross-examination of the witness, which can discredit her testimony.

22. Timiya (P.W.6), being the sister-in-law of Samiya (P.W.5) gave evidence on the same lines as Samiya. Nothing significant was elicited in her cross-examination as well.

23. Since both these witnesses did not claim to be an eye-witness of the incident, their evidence is relevant only to the extent, they stated about lodging of the FIR; that Iqbal had gone to the place of incident and told them about the incident before the report (Ex.P/34) came to be lodged with the police.

24. Hari Ram (P.W.7) reached the place of incident after the assault. He attested the site inspection plan (Ex.P/18). In cross-examination, the witness admitted that there was a strife between the deceased and the accused party over the field in question. He stated that the field was of Babu Khan and he used to cultivate the same. In the very next breath, the witness stated that he did not see anyone cultivating the field. Shakoor Khan's tractor and cultivator were lying at the spot, but he was not having possession on the field. Thus, the evidence of this witness is also relevant only to the extent he attested the site inspection plan. No significant cross-examination was carried out from the witness on behalf of the defence on this aspect.

25. Jamal Khan (P.W.8) was the witness, who attested the seizure memo of the tractor (Ex.P/35), which was recovered at the instance of Shahabuddin. His evidence is formal in nature.

26. Mohammad Shareef (P.W.9) also attested the seizure memo of the tractor, which was seized at the instance of accused Shahabuddin.

27. Kamruddin (P.W.10) attested the seizure memos of the weapons viz. Lathi and soti (Ex.P/28), axe (Ex.P/30) and sword (Ex.P/32) recovered at the instance of Shakoor Khan, Kalu Khan and Shahabuddin respectively. We have gone

through the cross-examination conducted from the witness and find that he could not be shaken from the version, which he deposed in his examination-in-chief and has well and truly established the factum of recoveries of the weapons made at the instance of the accused persons.

28. Sohan Lal (P.W.11) stated that he knew the deceased as well as the accused. The four deceased were killed in an incident, which took place two years before his deposition. On the fateful day, he was standing at the bus stand of the village. In the morning at 9-10 o'clock, he saw the accused proceeding in a tractor, which was being driven by Rahim. Shakoor Khan and Kalu Khan were sitting on the tractor, whereas Shahabuddin and Usman Gani were standing on the cultivator. Kalu Khan was having a bucket. At about 4 o'clock, Ranjeet came around shouting that Babu Khan and Shakoor Khan had fought on the field, whereafter, the witness as well as the villagers rushed to the place of incident. He was associated as a motbir witness in the recovery of lathi at the instance of Rahim vide seizure memo (Ex.P/37) and Koont recovered at the instance of Usman Khan vide seizure memo (Ex.P/39). He also attested the seizure memos (Ex.P/41 and Ex.P/43) of the clothes of both these accused. He resiled from his police statement, whereafter, he was cross-examined by the Public Prosecutor and was declared hostile. On going through the entire deposition of this witness, we find that no significant question was put to the witness regarding his stand, wherein he claimed to have seen the accused persons proceeding on the tractor in the manner and time stated by him and rather he clarified to have seen the faces of the accused from close proximity. The most significant fact which is emerging apparent from the evidence of this witness is that on the morning of the incident, he saw the accused proceeding together on a tractor, while one of them, i.e. Kalu Khan, was holding a bucket in his hand.

29. Meethu Khan (P.W.12) stood as a Panch witness in the recovery memos Ex.P/37 to Ex.P/44. The evidence about recoveries shall be dealt with at the appropriate stage.

30. Shakoor Khan (P.W.13) stated that he knew the deceased as well as the accused. The incident took place on 19.07.2009. He was at the village. He accompanied Murlidhar and was proceeding towards the well of Budharam for procuring a tractor. In the afternoon at about 4 o'clock, they saw the tractor of Babu Khan standing on the road near Babu Khan's field. They heard someone crying out for water from inside the field, on which, both of them went in. They saw Babu and Shareef lying dead and Lal Mohd. and Sabir were lying there in injured condition. Lal Mohd. was crying out for water. Kalu was pouring something in his mouth with the water-cannon. They asked Kalu as to what he was doing. When some of the liquid spilt out and bubbles formed, the witness realized that it was acid. Kalu threatened Murli that he would meet the same fate. A little later, some more villagers including Ranjeet and Sadiq came there. Ranjeet told that the injured and the deceased had been beaten by lathis, Koont, Kawadiya and swords etc. Ranjeet brought Samiya and Timiya with him. Murli

called and informed the police. The SHO of the Police Station Sadar and Rohet came there. Ambulance was called, in which the injured were boarded and were sent to the hospital. One of the injured person expired on the way while he was being taken to hospital. The evidence of this witness is incriminating only against Kalu Khan and provides corroboration to the evidence of other witnesses. Nothing significant was elicited in the cross-examination of this witness.

31. Rustam Hussain (P.W.14) stated that on 19.07.2009 at about 2.30 p.m. in the afternoon, he was going from the Dhani of Jogis to the Dhani of Indrokas. At that time, Babu, Shareef, Lal Mohd. and Sabir came on a tractor and went inside the field. Rahim Bux was driving the tractor and Shakoore Khan, Shahabuddin, Kalu Khan and Usman were also present there. Babu Khan and his companions tried to stop the accused from tilling the field. Kalu and Usman Khan started unleashing some liquid from water-cannons at the victims, which he later on realized were filled with acid. The witness stated that he got frightened and went back to his house. He unloaded the goods at his house and then in the afternoon at about 4 o'clock, he approached Kalu Khan @ Nijamuddin and Shakoore Khan. He informed them of the afternoon's events. Thereafter all of them proceeded towards the field in question. There they saw the dead bodies of Babu Khan and Shareef lying under a Babool tree and Lal Mohd. and Sabir were lying in an injured condition. The 108 ambulance had already arrived. Shakoore, Murli Maharaj and other villagers had gathered at the scene of occurrence. The injured were sent to the Bangad Hospital in the 108 ambulance. A desi katta, two water-cannons and a bucket were lying in the field. Kalu was also present at the spot. In cross-examination, the witness stated that the accused were his relatives. On 19th July, he had gone to Pali and purchased some goods. He could not state the Khasra number of the field in question. On a suggestion given by the defence counsel, the witness admitted that the accused were tilling the field of the complainant party with the tractor from east to west. Two rounds of tilling had been completed. When the accused were tilling the field, Babu Khan, Shareef, Lal Mohd. and Sabir tried to stop them. The witness stated that he stayed there for two minutes and heated verbal altercation was going on between the parties. No sooner the incident started, he went away. The witness stated that what transpired before he reached the place of incident and after he left was known to Ranjeet, who told him of the same. To a suggestion given by the defence, the witness denied the portion 'A' to 'B' of his police statement, wherein, it is recorded that he and Shakoore were having some quarrel from before and thus, he did not stop at the place of incident and went away. The witness denied the defence suggestion that he saw a sword, a lathi and an axe lying at the place of incident. He admitted that a dispute was going on between the parties over the field in question for the last 4 to 5 years. He pertinently stated that the field towards the north was of Babu Khan and towards the south was of Shakoore Khan etc. Shakoore Khan was trying to take possession of the entire field with the aid of anti-social elements. He feigned ignorance of any order passed by the Revenue court regarding the field in question. No other significant fact was elicited in the

cross-examination of this witness. Thus, from his testimony, it is duly established that he saw all the accused as well as the deceased persons at the scene of occurrence. The accused were trying to till the field, whereas the deceased were trying to thwart them from doing so. Soon thereafter the witness went away. Since all four from the complainant side were murdered, what transpired at the scene of occurrence after Rustam Hussain went away, could be known either to the accused or to the eye-witness Ranjeet. Therefore, his testimony is relevant only upto this aspect.

32. Kamruddin (P.W.15) correctly identified the accused persons in the court as they belonged to the same village. He also claimed to be familiar with the deceased persons. He stated that on the day of the incident, he was standing at the dairy near the bus stand at about 4.00-4.15 p.m. At that time, Ranjeet came and stated that a fight was going on between the the complainant party and the accused party. He took the names of all the accused as well as the deceased persons. Ranjeet stated that he tried to intervene and prevent the quarrel, but could not succeed and thereafter, he had rushed back to the village. On hearing this, the witness, accompanied with Manaram and Malaram proceeded towards the field in question on the motorcycle of Manaram. They saw Babu and Shareef lying dead, whereas Lal Mohd. And Sabir were lying injured. Shakoore Mohd., Ward Panch and Murli Maharaj were standing there. Kalu Khan was also present at the field. A cultivator and bucket were lying there, in which dregs of acid were present. Two water-cannons and a pistol were also lying at the spot. Murli informed the police. The injured Sabir, Lal Mohd. and Kalu Khan were taken to the hospital. Thereafter, the witness proceed to his house.

In cross-examination, the witness re-affirmed the fact that it was Ranjeet who came to the village and told everyone of the incident and that thereafter the villagers reached there and saw the two deceased, two injured and the accused Kalu in the field in question with prominent signs of a large scale fight. The evidence of this witness is relevant to the extent that he corroborates the fact that Ranjeet came to the village and told everyone about the incident.

33. Murlidhar (P.W.16) is an eye-witness of a part of the incident. He stated in his evidence that he knew the four deceased as well as the accused persons. Four persons died in the incident and that the five accused persons were the perpetrators of the attack. He stated that on the fateful day at about 4 o'clock, he, alongwith Shakoore Khan and Kaju Khan, were proceeding to the field of Budharam for tilling the same by a tractor. On the way, they saw Babu Khan's tractor lying outside his field. They stopped there and saw Babu lying on the ground. Lal Mohd. and Sabir were crying for water. Kalu was pouring acid in the mouth of the victims by a water-cannon. The witness inquired from Kalu as to what he had done, on which, he threatened him as well. The witness immediately came out of the field and called the police. The villagers collected there. The police officers also came. The ambulance was summoned. The two injured victims and Kalu were sent to the hospital. Manaram, Kamruddin, Kalu,

Rasheed, Dau, Malaram, Ranjeet, Timiya, Samiya and Iqbal were present at the field. They requested him to write the report. He wrote the report Ex.P/34 on their instruction and signed the same. Kailash, CI, and other police officers, who were also present at the spot, inspected the site, prepared the site inspection plan (Ex.P/18), which the witness attested. Various incriminating pieces of evidence lying at the place of incident, viz. a desi katta, two water-cannons, pellets, chappals, a bucket having dregs of acid, blood-stained and control soil, were collected and were sealed in his presence. The burnt twigs and leaves of the Babool shrubs were also seized. A cultivator was seen lying at the spot. The witness attested the memos. He stated that Ranjeet and Iqbal told him that the five accused had committed the murders. The witness admitted that while proceeding from the village to the place of incident, he did not see anyone passing by. While on the way to the field from the village, he could not see if people were working in the nearby fields. He stated that when he reached at the spot, victims were lying down and thus, he stopped there.

He denied the defence suggestion that the tractor of Babu Khan was lying on the way into the field of Shakoor Khan. The witness was confronted with his police statement Ex.D/5 regarding the omission of the fact that Iqbal and Ranjeet told him about the incident, which he accepted. No other significant fact was elicited in the cross-examination of this witness.

34. Mangilal (P.W.17) did not support the prosecution story and was declared hostile. Thus, his evidence is of no significance whatsoever.

35. Iqbal (P.W.18), being the son of the deceased, is one of the most important prosecution witness. The witness stated that on 19.07.2009, in the afternoon at about 2 o'clock, he was at his house. His uncle Babu Khan and cousins Lal Mohd. and Sabir Mohd. brought a tractor to their house and asked his father Shareef Mohd. to accompany them. His father, uncle and cousins went to the field. On being told by his mother, he too followed them on his bicycle. On the way, the chain slipped off, on which, he stopped for a while. When he reached the field, which is located on the Pali Road, he saw that their tractor was lying outside the field and his father, uncle and cousins were lying prone in the field. They were being assaulted by Shakoor Khan, Shahabuddin, Usman, Rahim Bux and Kalu Khan by Koont, Kulhadi, sword, lathi and Belwa etc. All the victims were in consanguined condition and were crying out for water. Kalu was pouring something in their mouth from the bucket. When some liquid spilled, fumes started coming out. Rahim Bux and Shahabuddin looked up and saw the witness, on which he rushed back towards the village. After reaching the village, he told Sultan Khan, his mother and his aunt of this incident. Before he could narrate the complete facts to his mother and aunt, Ranjeet had already reached there and was telling them about the attack. The witness stated that his mother and his aunt went to the field, whereas he stayed back at home. The witness was extensively cross-examined. He stated that he was not sure of the time because he did not carry a watch on him. He could not elaborate about the size of the

field and stated that nothing had been sown in the field. His father stated that he was going to the field on the road to Pali. He followed a little behind. His police statement was recorded on 22.07.2009. At that time, his mother and aunt were present in the house. He could not say the name of the police officer, who recorded his statement and clarified that his signatures were not taken on his statement. On a pertinent question as to how he knew that the accused were at the field, the witness stated that he saw them going on a tractor while he was standing at the bus stand. The witness further stated that he did not take note of anyone crossing him while going towards the field in question. He also did not pay attention to the people sitting at the bus stand or at any other place while he was proceeding towards the field. The witness admitted that he could not specify the weapon held by each accused. He stated that while coming back, he was crying. He told Sultan of the incident on the way back. He admitted that a dispute was going on between his father and the accused owing to the possession on the field in question. He feigned ignorance regarding the litigation going on in relation thereto. He further stated that he told his father not to go to the field as the accused had already gone to that direction. The witness was cross-examined regarding the delay in recording of his statement under Section 161 Cr.P.C. He stated that the statement was recorded on 22.7.2009. He did not append his signatures on the statement. He did not tell the Police regarding the specific weapon held by each accused.

From an over all appreciation of the deposition of this witness, we are duly satisfied that he is a witness of sterling worth. His name is mentioned in the FIR as an eye-witness of the incident, which came to be lodged promptly just after the police had reached the place of incident. The two women first informants, whose four near and dear ones had been brutally assaulted by the accused could not be expected to be in such a composed state of mind so as to deliberate and introduce the name of a family member as an eye-witness in the incident by perceiving that the other eye-witnesses may not support the case at a later point of time. Thus, mention of the name of Iqbal in the FIR as an eye-witness of the incident and the tenor of his testimony is enough to satisfy us that he is a truthful witness of the incident and there is no reason to doubt his testimony. The truthfulness of this witness is fortified from the fact that he confidently withstood the lengthy cross-examination conducted by the defence. He did not try to over-implicate the accused or assign them any specific weapon other than alleging that Kalu was pouring some corrosive liquid on the victims. Thus, the contention of the defence counsel that the evidence of Iqbal should be discarded has no merit whatsoever and from his testimony, the involvement of the accused in the crime is duly established. His evidence cannot be discarded merely because no other witness of prosecution vouched for the presence of the boy on the way to the field or at the place of incident. A significant fact evident from the deposition of this witness is that the defence could not muster the courage to confront him with his previous statement recorded during investigation.

36. Kalu Khan (P.W.19) stated that he and Rustam were coming back from Pali

after buying some goods. Babu Khan's field is on the way. There he saw that Babu Khan, Shareef Mohd., Lal Mohd. and Sabir Khan being assaulted by Shakoor Khan and his four sons Shahabuddin, Usman Khan, Rahim Bux and Kalu Khan by sharp weapons and desi katta. The witness stated that he dropped off Rustam's goods and then he, Nizamuddin and Rustam went back to the place of incident. On an over all appreciation of the statement of this witness and keeping in view the testimony of Rustam Khan, we feel that the claim of the witness that he saw the accused assaulting the victims is exaggerated as Rustam himself clearly stated that no sooner the dispute started between the accused party and the victims, he left the place of incident. Apparently, Kalu Khan could not have waited there alone and thus, his evidence is relevant only to the extent he stated about the presence of the accused and the victims on the field in question, which by itself is a significant incriminating circumstance. The witness could not be shaken on this aspect of his testimony.

37. Mohammad Khan (P.W.20) stated that on the fateful day, he was standing near the dairy with Sohan Lal Kumhar (P.W.11) at about around 2.00 p.m. A tractor came from towards the village. Rahim Bux was driving the same. Shakoor Khan and Kalu Khan were sitting on the board. Kalu Khan was having a bucket. Usman and Shahabuddin were standing on the cultivator. They went towards the naadi. Two hours later, the witness came out of his house and went to the shop, where some people including Murli Maharaj, Kamruddin, Manaram and Shakoor Khan, Ward Panch. Five minutes later, Ranjeet Bhat came from towards the Naadi on his motorcycle and stated that Shakoor Khan and his four sons were beating Babu Khan, Sabir, Shareef and Lal Mohd. by lathis, sword, Koont, Kawadiya etc. Ranjeet further stated in the presence of the witness that he tried to intervene for saving the victims, but could not succeed. On this, the witness went to the field in question with Sohan. Babu's tractor was parked there. Dead bodies of Babu and Shareef were lying at the spot, whereas Lal Mohd. and Sabir were lying unconscious. Kalu was having a bucket with him, which they had seen earlier. A desi katta and two water-cannons were lying at the spot. Harji Choudhary, Murli Maharaj, Kamruddin, Manaram and at least 20 more people came at the spot. The police came there and took the injured to hospital.

Extensive cross-examination was conducted from the witness. On a perusal of his entire statement and upon a threadbare appreciation thereof, we are of the firm opinion that he is an absolutely truthful witness and his evidence is of sterling worth. His claim that he saw the five accused persons proceeding towards the field on their tractor and that Kalu Khan was having a bucket in his hands corroborates the entire sequence of events and the evidence of other witnesses on material aspects of the prosecution case. The criticism of the evidence of this witness made by the defence counsel on the premise that he did not state about the presence of weapons in the hands of the accused while they were proceeding towards the field or regarding the discrepancy of the time is absolutely trivial and does not dilute his testimony to any great extent. There are plenty of niches and cavities in a tractor, where weapons like lathis, swords etc. can easily be

concealed. Thus, from the evidence of this witness, it is duly established that the five accused were seen proceeding towards the field in question, while one of them was having a bucket.

38. Rasheed Qureshi (P.W.21) testified that he reached the place of incident after the victims had been beaten. He was told of the incident by Ranjeet, who took the names of five assailants in his presence. Thus, the evidence of this witness is not of much significance because he reached the place of incident after the fight had taken place.

39. The testimony of Sadiq Bihari (P.W.22) is similar to that to Rasheed Qureshi (P.W.21).

40. Om Prakash (P.W.23), stated that on 19.07.2009 he was posted as a Head Constable at the Police Station Sadar Pali. He gave evidence regarding deposition of the sealed packets of Malkhana articles of the case at hand by Kailashchand, CI and other police officers on various dates and forwarding thereof to the FSL in the self same condition. He also stated that he forwarded these articles to the FSL with Rajuram Constable. He testified that the articles were deposited and remained in a sealed condition right from the time of submission till they were handed over to Rajuram. No significant argument was raised by the defence counsel regarding the evidence of this witness.

41. Kishnaram (P.W.24) was posted as the Head Moharrir at the Police Station Sadar, Pali on 25.09.2009. He forwarded viscera of the deceased with Constable Rajuram, who deposited the same to the FSL, Jodhpur and submitted the receipt (Ex.P/58) on 25.09.2009.

42. Girdhari Lal (P.W.25) was posted at the FSL Branch of the SP Office, Pali. He received 12 sealed packets of the articles relating to the case at hand from Rajuram, Constable, on 25.09.2009 and prepared the forwarding letter and then returned the packets to Rajuram for onward transmission to the FSL.

43. Roop Singh Rajpurohit (P.W.26) was also posted at the SP Office, Pali. On 10.08.2009, he received various articles of the case at hand from Rajuram, prepared the forwarding letters and handed the articles back to Rajuram for being carried to the FSL on the same day. He received some more packets of the case from Rajesh Kumar, Constable, prepared the forwarding letter and handed over the same to Rajesh Kumar for onward transmission to the FSL. No significant cross-examination was made from this witness.

44. Rajesh Kumar (P.W.27) was posted as Constable at the Police Station Sadar Pali on 10.08.2009. He deposed that Om Prakash, Constable, handed over four packets of swabs and 12 jars to him in a sealed condition for onward transmission to the FSL, Jodhpur. The witness took them to the SP Office, Pali; got the forwarding letter prepared and went the FSL, Jodhpur, where the 12 jars were deposited on 11.08.2009, but the swab packets were returned to the witness, who took them back to Pali and deposited the same with Om Prakash at

the Police Station Sadar. On 12.08.2009, he was again provided 4 swab packets and 2 other packets for transmission to Jaipur FSL. The witness gave evidence regarding safe transmission of the packets to the FSL, Jaipur.

45. Rajuram (P.W.28) gave evidence to the effect that he was posted as a Constable at the Police Station Sadar, Pali on 19.07.2009. He went to the place of incident with the ASI Binjraj Singh and reached there at about 04.55 p.m. in the late afternoon. He saw two dead bodies and two injured persons lying there. The injured, alongwith the accused Kalu Khan were sent Bangad Hospital, Pali at 06.36 p.m. Binjraj Singh handed over the written report Ex.P/34 alongwith his note to him and sent him to the police station for registering the FIR. The Constable carried the report and handed it over to Omprakash, Head Constable, who registered the formal FIR Ex.P/71. On 10.08.2009, Omprakash, Head Constable handed over 28 sealed packets of this case to the witness with a road certificate and the attending documents. The witness took the packets to the SP Office, Pali, where Roop Singh, ASI prepared the forwarding letter and handed the packets to the witness in self-same condition for being carried to the FSL, Jodhpur. He was informed that two packets marked F and M would have to be deposited with the FSL, Jaipur. Accordingly, the witness deposited the same with Omprakash, Head Constable at the Police Station Kotwali, Pali. On 12.08.2009, 26 more packets of this case were provided to the witness for being carried to FSL, Jodhpur, which were duly deposited there on 13.08.2009. Acting under the directions of the Superintendent of Police, the witness went to the Sampurnanand College, Jodhpur on 23.09.2009 and collected 12 sealed jars of viscera of the deceased persons from there. He deposited the same with Kishnaram, Head Constable. On 24.09.2009, he took these jars to Bangad Hospital and sought some rectification. He collected the bottles from the doctor at the Bangad Hospital Pali and deposited the same with Kishnaram, Head Constable. On 25.09.2009, the witness took these jars in sealed condition and deposited the same at the FSL, Jodhpur. He proved the corresponding documents of transmitting and depositing of the samples. In cross-examination, the witness stated that no site plan, seizure memo etc. were prepared in his presence, nor was any photography or videography done while he was present at the spot. The evidence regarding transmission of the samples and articles as deposed by the witness is of sterling worth.

46. Narpat Singh (P.W.29) was posted as Patwari on 10.02.2005 at the Village Bhangesar. He gave evidence regarding revenue entries of the field in question. What is relevant to note from his evidence is that half of the field was entered in the revenue record in the name of Aladeen and Shakoor sons of Halfu Khan and the remaining half was entered in the name of Hakeem S/o Pratap, resident of Indroka Ki Dhani. After the death of Hakeem, the mutation entries were made in the name of his successors. In cross-examination, he was put questions regarding the pending revenue litigation between the parties, to which he feigned ignorance. He was also suggested that the possession over the land was of Shakoor, to which he offered denial.

47. Rameshchandra (P.W.30) took photographs of the place of the incident on the direction of the Kailashchandra, CI on 19.07.2009 by a digital camera. He proved the photographs Ex.P/79 to Ex.P/86. The defence questioned the witness regarding his knowledge about digital camera, which the witness explained to the best of his ability.

48. Dr. Paras Khichi (P.W.31) was posted as the Medical Officer at the Bangad Hospital, Pali on 20.07.2009. He was one of the members of the medical board, which conducted postmortem upon the bodies of Lal Mohammad S/o Babu Khan @ Usman Gani and Sabir S/o Usman Gani @ Babu Khan and issued the postmortem report Ex.P/87 and Ex.P/88 respectively. The doctor noted the following injuries on the body of Lal Mohammad :-

1. Incised wound 4 cm x ½ cm on the right and frontal area of the head.
2. Corrosive burn marks on eyebrows and eyelashes of right eye, cheeks and right side of forehead etc. and the skin had gone black.
3. Bluish red bruise 4 cm x 4 cm on the right elbow.
4. Bluish red bruise 6 cm x 4 cm on left forearm, which was totally broken.
5. All Metacarpal bones of right arm were broken. Swelling was noticed on the hand.
6. Bluish red bruise 6 cm x 4 cm on the left knee.
7. Bluish red bruise 5 cm x 4 cm just below left knee.
8. Left leg bones were broken and associated swelling and redishness were present.
9. Lacerated wound 2 cm x 1 cm below right knee.
10. Bluish red bruise below the right knee.

On opening the body, 7th and 8th ribs were found broken on both sides of chest. 200 ml. Blood was collected in the chest cavity. The respiratory organs including larynx etc. were having oedema. Both the lungs were ruptured with lacerated wounds present in the middle lobe. The mouth and the upper part of respiratory wind pipe were burnt. The burn marks were also present on the lips, tongue and pharynx. All the injuries were antemortem in nature and the death occurred because of shock caused by the multiple injuries. The doctor collected swabs from the dead bodies for detecting presence of accident.

49. As per the postmortem report of Sabir, he was found having the following injuries :-

1. A bluish red bruise on the left knee with knee cap shattered into multiple pieces.
2. Right thigh was totally broken and swelling was present.

3. an abrasion with bleeding 3 cm x 3 cm on the right knee.
4. A bruise with associated swelling on the left elbow with olecranon process of ulna bone fractured.

On opening the skull, a lacerated wound measuring 4 cm x 1 cm was seen. The right parietal bone was shattered into pieces. Membranes as well as bones were congested.

On opening the chest, 7th and 8th ribs of the right side of the chest were fractured. 250 ml. Blood had collected in the thoracic cavity. The right lung was ruptured and congested with a lacerated wound 1.5 cm x ½ cm in the middle. The left lung was also ruptured and congested. The upper part of the wind pipe and the larynx were swollen. The mouth, pharynx, food pipe were blackened and the tongue, oral cavity, pallets and lips had turned blue and white. The remaining parts of the mouth were blackened.

The cause of death of Sabir was opined to be shock as a result of head injury and the associated injuries. Swabs were collected from his body as well and were provided to the SHO. Significant cross-examination was made from the doctor, but nothing material was elicited therein. Though the witness examined the accused persons and issued their injury reports (Ex.P/107 to Ex.P/112) but neither the prosecution nor the defence sought any opinion of the witness regarding these injury reports which were proved in the evidence of Dr.Parasmal (P.W.34).

50. Dr. Narpat Singh (P.W.32) was posted as the Medical Officer at the Bangad Hospital, Pali on 20.07.2009. He was a member of the medical board, which conducted postmortem upon the bodies of Babu Khan and Shareef Mohd. and issued the postmortem reports Ex.P/93 and Ex.P/94 respectively. While conducting the postmortem upon the body of Babu Khan, the board noticed the following injuries :-

1. Corrosive chemical burns with a lacerated wound 2 cm x 3 cm x 1 cm on the forehead. The face and nose were severely burnt by corrosive chemical. The board preserved swabs for chemical analysis.
2. Fractures of the right arm, left arm, right forearm and sternum (chest bone).
3. Incised wound 2 cm x 3 cm x 1 cm on the left parietal area of head.
4. Lacerated wound 2 cm x 2 cm x 1 cm on the pinna of left ear. The surface was burnt by corrosive chemical.
5. Lacerated wound 2 cm x 2 cm x 1 cm on the right leg with the margins burnt by corrosive chemical.
6. Lacerated wound 2 cm x 2 cm x 1 cm on the right leg. Upper part of the surface was burnt by corrosive chemical.
7. Lacerated wound 2 cm x 1 cm x 1 cm on the left leg with the surface burnt by

corrosive chemical. Swabs were preserved from all the injuries for analysis.

On opening the body, a laceration ad measuring 3 cm x 2 cm was seen inside the chest area. Blood was seen in the brain cavity and chest had a 3 cm x 2 cm bluish bruise. Internal organs were all congested. The board opined that the cause of death was head injury and multiple injuries, which were sufficient in the ordinary course of nature to cause death.

51. On conducting autopsy upon the body of Shareef, the board noticed the following injuries :-

1. Corrosive chemical burn injuries on forehead, nose, eyebrow, both cheeks and upper lip, trachea, larynx, eyebrows, eyelashes and mustache hair were also burnt by corrosive chemical. Corneas of the eyes were also totally burnt and destroyed by chemical burns. The gums and teeth were burnt and had turned brown and black. Tongue was ulcerated and swollen. The swabs of the injured portions were collected for chemical analysis.

2. Lacerated wound on the left leg shin area ad measuring 3 cm x 3 cm x 2 cm with the margins burnt.

3. Lacerated wound 3 cm x 3 cm x 2 cm on the right lower leg with margins burnt due to chemical. Swabs were collected from the injuries No.2 and 3 for checking the presence of gunpowder.

4. Cut wound 3 cm x 2 cm x 2 cm on the head and skull was fractured on right frontal parietal area.

5. Lacerated wound 3 cm x 2 cm x 2 cm on left elbow.

6. Fracture on the right humerus, left humerus, right forearm, right leg and lower area of left femur. All the injuries were antemortem in nature. The head and other internal organs were healthy, but congested. Larynx and trachea were having oedema. As per the board's opinion, the cause of death of Shareef was shock because of multiple injuries.

52. Significant and extensive cross-examination was conducted from the doctor, but nothing significant was elicited therein so as to doubt the veracity of his disposition.

53. The most significant and important witness of the prosecution is Ranjeet Bhat (P.W.33), who was named as a prime eye-witness in the FIR. During investigation, the witness supported the prosecution case to the hilt and implicated all the accused persons for assaulting the victims and for causing them numerous injuries by weapons, acid etc. However, at the trial, the witness appears to have been won over by the defence when his examination-in-chief was recorded. The substratum of the examination-in-chief of Ranjeet is translated in English language reproduced hereinbelow for the sake of ready reference in translated form.

He resided at the Village Indroka Ki Dhani from the time of his ancestors. He knows the accused by names and by face. They are sons of Shakoor Khan. He also knew Usman @ Babu Khan, Shareef Mohd. and Lal Mohd., who also used to reside in his village. Then he stated that he did not know Usman, but knew Babu Khan. Babu Khan, Shareef Mohd., Lal Mohd. and Sabir had expired. He knew the place named Dolanada, where his field is also located. These four persons died in their field. The brothers fought with each other owing to the dispute of the field and thus, they died. He saw them quarrelling, but did not see them being killed. The incident took place about 2 - 2½ years ago in the afternoon at about 02.30 to 03.00 p.m. He was proceeding from Dolanada to Indroka Ki Dhani for having tea. His grandson was also accompanying him on the motorcycle. A Pyau (Water hut) comes on the way, where the present appellants and the deceased were fighting. The witness identified Babu Khan, Shakoor Khan and Kalu Khan present in the court. He stated that the other four were the ones who died. Kalu Khan was sitting near the tractor. The witness tried to avert the fight, but when the fighting factions did not relent, he went to the village. Some people including Murli and Shakoor Khan were sitting at the dairy. He raised a hue and cry and then went to his home. He had tea. An hour later, he heard the cries. Iqbal came to him and asked him as to whether he had seen anyone fighting, on which, he told him the entire sequence of events. Sadiq came to fetch him, upon which he too went to the field. The entire village was collected there. No documents were prepared in his presence, but inquiry was made from him. The witness asserted that he appends his thumb impression or signatures without any fixed pattern. The witness admitted his signatures on the following documents :

Ex.P/13

Seizure memo of clothes of Ranjeet Bhat

Ex.P/18

Site inspection memo and site plan

Ex.P/19

Seizure memo of recoveries from the place of incident, viz. blood-stained soil and control soil, water-cannon, desi katta, plastic bucket, shoes, slippers, soil stained with acid and control soil, singed Babool branches and leaves, cultivator, pellets, cartridges

Ex.P/99

Order-sheet dated 04.08.2009 of the Court of Judicial Magistrate No.2, Pali, Rajasthan

Ex.P/100

Statement of Ranjeet Bhat under Section 164 CrPC

He stated that he signed all these documents with his own free will and volition.

However, he added on his own accord that these signatures were taken at the house of Shakoor Khan situated in the village.

The Malkhana articles were opened in his presence and he admitted his signatures on the articles 1, 2, 3 and 4. He admitted that he received a summon from the court for giving evidence.

He stated that he gave his Kurta to the police and had appended his signatures about 5 days later. At this point, the witness was declared hostile. In cross-examination, he was confronted by the learned Public Prosecutor with his previous statements recorded during investigation under Sections 164 and 161 CrPC (Ex.P/100 and Ex.P/103) and the following significant answers were elicited from him regarding the captioned portions of his previous statement (Ex.P/100) :

Portion of 164 CrPC statement

Version of the witness in the captioned portion

Regarding the portion, the witness stated in his cross-examination that :

C to D

दि. 19.07.2009 की बात है। मैं करीब 2:30 पी.एम. पर ढोला नाडा पर रजका के खेत की बाड़ कर रहा था।

the portion was correct as stated by him.

E to F

मैं अपने पोते जो 3 वर्ष का है जो मेरे साथ में था उसको लेकर घर चाय पीने के लिए जा रहा था।

the portion was correct.

G to H

काले पीपल की ढाणी के पास रास्ते पर प्रभुजी की प्याऊ पर पहुंचा तब बन्दूक की आवाज आयी।

he could not say whether he gave the said portion of the statement or whether it was correct or not.

I to J

मैं राजदूत मोटर साईकिल पर था। आवाज सुनकर आवाज की दिशा में मोटर साईकिल लेकर गया। करीब 2 खेत की दूरी पर रोड़ पर मैंने देखा कि शकूर खां, उस्मान, शहाबू खां, रहीम व कालू मारपीट कर रहे थे जो साबिर, शरीफ, बाबू व लाला को मार रहे थे।

the portion was not exactly correct. Then he stated that this portion was correct and he has no reason to state untruth.

K to L

मारपीट से ये चारों जमीन पर गिर गए। जमीन पर गिरे हुए के साथ ये लेग धड़ाधड़ मारपीट कर रहे थे।

this portion was deposed by him under the pressure of the police.

M to N

शकूर खां के हाथ में बेवला था, उस्मान के हाथ में कूट थी, शहाबू खां के हाथ में तलवार थी, रहीम के हाथ में काली बांस की बड़ी 4 फीट की लकड़ी थी, कालू के हाथ में देशी कट्टा व तेजाब की लाल पिचकारी थी जिससे ये लोग मारपीट कर रहे थे।

this portion had been given by him. He then stated that this portion was also given by him under the pressure of the police.

O to P

सभी शामिल ही मारपीट कर रहे थे। मैंने बीच बचाव करने की कोशिश की, ये लोग रुके नहीं मारते रहे। एक को छुड़ाता तो दूसरे को मारते।

this portion was deposed by him on saying of someone.

Q to R

बाबू और शरीफ वही खत्म हो गए थे। लाला और साबिर की जान बची हुई थी। बाबू और शरीफ, लाला व साबीर सभी कपड़े खून से भरे हुए थे। मैंने उन्हें बहुत रोका और कहा कि मैं तुम्हारे गांव का हूँ, मारपीट बन्द करो तो मेरे साथ कालू खां ने गाली गलोच शुरू कर दी और कहा कि तू यहाँ से भाग जा नहीं तो तेरा भी यही हाल कर देंगे।

this portion was deposed by him on the suggestion of the police and of the villagers.

S to T

मैं मोटर साईकिल कर भागा, गाँव में डेयरी के पास 5-10 व्यक्तियों को घटना सुनाई और कहा कि अपने गांव के लोग है उनके साथ मारपीट हो रही है, उन्हें बचा लो। उन व्यक्तियों में मालाराम, सदीक बैरी, राम महाराज, मानाराम चौधरी, कालूराम चौधरी और भी थे।

this portion is correct. He added that this portion was deposed by him on the suggestion of the villagers.

U to V

फिर मैं बाबू खां व शरीफ के घर गया, बाबू खां की पत्नी को सारी बात बताई, शरीफ की पत्नी को भी बताई।

this portion was not deposed by him.

W to X

गांव वाले करीब 40-50 लोग, बाबू खां की पत्नी, शरीफ की पत्नी, मैं सभी घटनास्थल पर पहुँचे।

this portion was not deposed by him.

Y to Z

कालू खां वहीं था, शकूर खां, शहाबू खां, उस्मान व रहीम वहां से भाग चुके थे। वहां पर एक तेजाब की भरी बाल्टी पड़ी थी।

this portion was not deposed by him.

A1 to B1

लाला व साबीर को घायल अवस्था में एम्बुलेन्स में ले जाकर पाली अस्पताल ले जा चुके थे।

this portion was not deposed by him.

C1 to D1

पुलिस वहीं खड़ी थी। पुलिस ने मेरे से पूछताछ की थी। मुलजिमान मेरे गांव के ही है इस कारण से इन्हें जानता हूँ।

he could not remember whether he deposed this portion. Then he stated that he had deposed the said portion.

E1 to F1

मारपीट का कारण खेत का कोई विवाद था। बाबू खां व शकूर खां मामा-बुआ के बेटे भाई है।

this portion is correct. He added that this portion was deposed by him on the saying of the villagers.

G1 to H1

उस्मान, शहाबुदीन, रहीम, कालू ये चारों शकूर के बेटे है।

this portion is correct and deposed by him.

I1 to J1

मरने वालों में बाबू, शरीफ सगो भाई थे, लाला व साबीर बाबू के बेटे थे। लाला व साबीर भी बाद में खत्म हो गये थे।

this portion was deposed by him on guidance/influence of someone.

K1 to L1

फिर कहा कि मौके पर टोटा (बन्दूक की गोली) भी पड़ी हुई थी, जो पुलिस वालों को मिली थी।

this portion was not deposed by him.

The witness was conveyed that the Magistrate read over the statement Ex.P/100 to him. He denied the said suggestion. He did not tell the Magistrate that he was deposing under the pressure of police or the villagers. Many people were present when the Magistrate recorded his statement, but he could not identify them. He was also confronted with his previous police statement Ex.P/103 recorded under Section 161 CrPC and he offered the following replies :-

Portion of the statement under Section 161 CrPC

Statement of the witness in the captioned portion

Regarding the portion, the witness stated in his crossexamination that :

A to B

आज दिन को करीब 2.30 बजे मैं मेरे खेत दोला नाडा पर स्थित रजके के खेत की बाड कर रहा था । बाड करने के बाद 2.45 पीएम पर खेत से मोरा साईकिल लेकर घर इन्द्रो की

He could not remember whether he had deposed the said portion.

C to D

जिस पर मोटर साईकिल तेज चलाकर आवाज की दिशा में आया तो मुख्य सडक के किनारे स्थित बाबू खा / उस्मानगनी व शकूर खां के विवादित खेत पर हल्ला सुनकर मैंने मोटरसाईकिल रोककर देखा ।

He could not remember whether he had deposed the said portion.

E to F

ते रोड़ के किनारे एक ट्रेक्टर खड़ा था ।

This portion is correct

G to H

खेत में घुसते ही देखा तो उस्मान गनी / बाबूखां, शाबिर मोहम्मदैध्व हकीम खां, लाल मोहम्मद व शाबिर चारों जने जमीन पर आस-पास पड़े थे ।

This portion is not correct

I to J

मौके पर शकूर खांध्व अल्फूखां एवं इसके लड़के शहाबुदीन, कालूखां, उस्मान व रहीम बक्श सभी जान से खत्म करने की नियम से धडाधड़ तलवर, कूटे, कुल्हाड़ी, बेवला, लठ व हो

This portion was deposed by him on the saying of the police

K to L

मैंने बीच बचाव कर इनको छुड़ाने का प्रयास किया लेकिन ये लोग नहीं माने । मारपीट के दौरान कालूखां के हाथ में कुल्हाड़ी थी जिससे वह उस्मान गनी / बाबूखां को मार रहा था ।

This portion was deposed by him on the suggestion of the police and the villagers

M to N

मैंने उसको छुड़ाया तो कुल्हाड़ी से शरीफ मोहम्मद को मारने लग गया । शरीफ मोहम्मद को छुड़या तो लाल मोहम्मद को मारने लग गया । लाल मोहम्मद को छुड़ाया तो शाकीर को मारने लग गया ।

He had deposed this portion on the suggestion of the police

O to P

शकूर खां के पास लाठी थी जिससे वह इन चारों को मार रहा था । लाठी से मारने से सभी के शरीर पर लगह

लगह चोटें लगी हुई व खून निकल रहा था ।

He stated that this portion was not deposed by him and then added that he had deposed the same on the suggestion of the police.

Q to R

शहाबुदीन के हाथ में तलवार थी जिससे वह इन चारों के साथ मारपीट कर रहा था । मारपीट कर रहा था । मारपीट करने से तलवार मुड़ गई थी ।

This portion was not deposed by him.

S to T

तलवार पर खून लगा हुआ था । मैंने छुड़ाने का प्रयास किया तो एक को छुड़ाने पर दूसरे को मारने लग गया ।

This portion was not deposed by him.

U to V

रहीम बक्श के पास बांस का लठ था जिससे धडाधड इनको मार रहा था । मैंने छुड़ाने का प्रयास किया तो वह भी नहीं माना ।

This portion was not deposed by him.

W to X

उस्मान के हाथ में कूट थी । जिससे वह भी सभी के साथ धडाधड मारपीट कर रहा था । जिससे भी मैंने छुड़ाने का प्रयास किया मगर नहीं माना ।

This portion was not deposed by him.

Y to Z

मेरे देखते देखते ही इन चारों को शकूरखां, शहाबुदीन, उस्तान व कालूखां ने मार-मार कर ढेर कर दिया ।

He could not remember whether he had deposed the said portion or not.

A1 to B1

मैंने शकूरखां से कहा कि यह क्या कर रहे हो। तो उसने कहा कि तुम गांव वाले 5 साल से जमीन का सल्टार नहीं करवा सके । अब हम ही इसका फेसला कर रहे हैं । तथा कालूखां ने उल्टा मेरे साथ गली गलोच की व कहा कि यहां से चला जा वरना तेरा भी यही हाल होगा ।

This portion was not deposed by him.

C1 to D1

रास्ते में मैंने जो फायर की आवाज सुनी थी वह आवाज यहां से आई थी । मौके पर एक देशी कट्टा पड़ा था । पास में दो पिचकारीयां पड़ी थी जिनके मुंह पर तेजाब लगा होने से मुंह जला हुआ था ।

This portion was not deposed by him.

E1 to F1

मौके पर ट्रैक्टर की कल्टी तथा पास में ट्रैक्टर खड़ा था ।

This portion was not deposed by him and added that the tractor was lying fallen in the ditch.

G1 to H1

इनके आस-पास ट्रैक्टर घुमाने के निशान बने हुए थे । इन लोगों ने मुझे यहां से जाने का कहा तो मैं अपनी मोटर साईकिल लेकर गांव में गया ।

This portion was not deposed by him.

I1 to J1

जहां बस स्टेण्ड पर खड़े मानाराम, कमरूद्दीन,, मालाराम व 10-15 अन्य आदमीयों को पूरी घटना की बात बतायी ।

This portion was not deposed by him and further added that he had raised a hue and cry at the dairy.

K1 to L1

यहां से उस्मानगनी / बाबूखां शरीफ मोहम्मद के घर पर जाकर इनकी औरतों से कहा कि "यहां क्या बैठी हो खेत पर तो सभी को मार डाल है । पीछे कोई पानी पिलाने वाला भी नहीं छोड़ा है ।"

This portion was not deposed by him.

M1 to N1

इस दरमियन शरीफ मोहम्मद का छोटा लड़का इकबाल भी घबराया हुआ घर पर आया व कहा कि "मम्मी खेत पर सभी को मार डाला है । रहीमबक्श व उस्मान मुझे पकड़ने के लिए मेरे पीछे दौड़े तब मैं वहां से जान बचाकर भागकर आया हूँ ।

This portion was not deposed by him.

O1 to P1

यह बात मेरे सामने बताया थी । तब मैं बाबूखां / उस्मान व शरीफ मोहम्मद की औरतों के साथ वापस मौके पर गया ।

This portion was not deposed by him.

Q1 to R1

जहां पर गांव के मुरली महाराज, शकूरखां वार्ड पंच, मालाराम सुल्तानखां एवं 10-15 अन्य व्यक्ति मौजूद थे ।

This portion was not deposed by him.

S1 to T1

मौके पर उस्मान गनी / बाबूखां, शरीफ मोहम्मद की मौत हो गई थी । तथा लाल मोहम्मद व शाबिर जो घायल थे जिनको अस्पताल ले गया थे ।

This portion was deposed by him and added that a white car had arrived.

U1 to V1

मैंने जब बीच बचाव कर छुड़ाने का प्रयास किया था। तब मेरे कमीज पर भी तेजाब व खून लग गया था।

This portion was not deposed by him and added that he had given his shirt when the police had asked him to do so.

W1 to X1

मैंने बाबूखां / उस्मानगनी व शरीफ मोहम्मद की लार्शें पास जाकर देखी तो इनकी लार्शें खून से लथपथ थी व हाथ पैर मिट्टी से सने हुए थे। मेरे सामने पुलिस वालों ने मौका मुआयना किया। मौके पर पड़ी पिचकारीयां देशी कट्टा तेजाब की बाल्टी, छर्रे, टोपीयां पुलिस ने हमें बताकर जब्त किये थे।

This portion was not deposed by him.

Y1 to Z1

शकूर खां, शहाबुद्दीन, कालूखां, उस्मान व रहीम बक्श सभी ने मिलकर एक राय होकर तलवार, लाठी, कुल्हाड़ी होठी व कूंट से उस्मान गनी/ बाबूखां, शाबिर, शरीफ मोहम्मद व लाल मोहम्मद के साथ जोर दार मारपीट की थी। जिससे उस्मान गनी व शरीफ मोहम्मद की मौके पर ही मृत्यु हो गई थी तथा लाल मोहम्मद व शाकिर की दौराने ईलाज अस्पताल में मृत्यु हो गयी थी। इनके लड़ाई का कारण जमीन का विवाद था।

This portion was not deposed by him and added that the Ex. P. 103 is a two and a half page document and he had only signed the same. He then admitted that his signatures were not appended on Ex. P. 103 and he never made such statement before the police.

He admitted that he never made a complaint to anyone that he was under pressure of the police or the villagers to give the statements before the Magistrate or before the police. He admitted that the police prepared the documents at the spot between 06.45 to 07.45 p.m. on the very day of the incident. He feigned ignorance regarding the presence of a bucket, water-cannons, desi katta etc. at the spot. The police told him that people had died, upon which, he signed the documents. His signatures were procured at the village. The police took his shirt and sealed the same in a white bag. He feigned ignorance regarding the portion E to F of his police statement Ex.P/103 and the signature G to H on the memo Ex.P/19. However, he admitted that the documents were prepared and then his signatures were taken. He could not say whether the police seized and sealed any article from the place of incident. He admitted his signatures on numerous documents prepared by the police and the slips appended on the sealed articles, which were opened in his presence during his evidence. He feigned ignorance as to how Lal Mohd., Usman, Babu Khan and Sabir died or that they died by injuries. He admitted to have seen blood coming out of the bodies of these persons. However, he denied that he had actually witnessed the assault made by the 5 accused upon the 4 deceased persons. He also denied the fact that he went to the place of incident on hearing the noise of a gunshot. He also denied the fact that his shirt got stained with blood and acid when he tried to save the victims. He admitted having reached the place of

incident firstly at 3 o'clock in the afternoon and then again at 04.30 - 05.00 p.m. At that time, police was present at the spot.

In further cross-examination, the witness stated that he was made to append his signatures on the articles Nos.1 to 5 at his house. He appended his signatures only on the documents and not on the articles. He did not sign any document on the day of the incident. He received the blood-stains because he helped in lifting the injured and the dead bodies on to the ambulance. He was just passing by the field of Shakoor Khan on the day of the incident. A drainage trench was dug in the field besides the road and boundary had also been raised. A tractor was lying tilted at the spot. The four victims were fighting with each other and Kalu Khan was trying to save them. Half of the field was tilled by Kalu Khan. He never saw the deceased persons cultivating the field. He did not see any accused other than Kalu present at the spot. He could not succeed in separating the victims, on which, he went to the dairy and raised a hue and cry and then he went to his house. In further cross-examination, he admitted that initially he was questioned on the day of the incident for about 1 to 1½ hours. Then, he was called to the police station and was made to sign some documents. Murli, Shakoor, Madhu Gehlot etc. and 8-10 people went along with him. The villagers told him that the victims had died and he should give the statement in a calculated manner so that the accused could be put behind the bars and he was warned that otherwise the tranquility of the village would be adversely affected. The police asked him as to how the four victims had died, on which, he told that only God knew how the incident happened. When he reached the place of incident, only four deceased and Kalu were fighting with each other. No one else was present there. Kalu was also lying down on the ground in an injured condition.

On perusal of the statement of this witness, it is apparent that he has been won over by the defence. Despite that, the witness admitted numerous portions of his police statement (Ex.P/103) and the statement under Section 164 CrPC recorded by the Magistrate (Ex.P/100), which we have extracted and elaborated above. From the extracted portions of the 164 CrPC statement (Ex.P/100), which the witness admitted to have given to the Magistrate, it is well-established that he saw the five appellants assaulting the deceased persons with his own eyes. He tried to intervene and he got blood-stains and acid burns on his shirt in this process. The endeavour of the witness in resiling from the story as narrated by him before the Magistrate, does not detract from the evidentiary worth of his statement. Admissible portions can be eschewed from his statement and can be relied upon to arrive at a correct conclusion. The deceased and the accused were closely related to each other. Neither was there any deep association nor did any enmity exist between Ranjeet Bhat and the parties to the incident, which could have impelled him to give false evidence against the accused during investigation. Manifestly, after the witness had given evidence against the accused during the course of investigation, either the accused party appears to have approached and won him over or it is quite possible that the witness might be fearing retribution if he deposed truthfully and thus, he turned hostile at the

trial. Nonetheless, it is a well-established preposition of law that the admissible and reliable portions, which support the prosecution can be extracted even from the statement of a hostile witness and can be used as evidence against the accused. In such a situation, all that would be required is that the court should be circumspect and should seek corroboration for these admissible portions extracted from the evidence of the hostile witness before placing implicit reliance thereupon. We are of the firm view that the admitted portions of the statement as deposed by the witness before the Magistrate (Ex.P/100) are materially corroborated by the attending circumstances and the evidence of the other witnesses, viz. Iqbal, Murli Maharaj, Timiya, Samiya and the Medical Officers Dr. Paras Khichi and Dr. Narpat Singh, which we have already discussed above. A fortiori, we have no hesitation in holding that from the evidence of Ranjeet Bhat (P.W.33), pertinent material is extractable inculcating the accused for the offences charged.

54. Parasmal (P.W.34) was posted as SHO at the Police Station Sadar, District Pali on 23.07.2009. The Investigation of the case was handed over to him on that day. He received the file from Kailashchandra, CI. During investigation, he arrested the accused Usman Gani and Rahim Bux on 27.07.2009 and upon the informations given by them under Section 27 of the Evidence Act, he recovered and seized the blood-stained clothes and the weapons of offence in the following manner

Name of the Accused

Memo of information under Section 27 of the Evidence Act

Recovered article

Recovery memo

Rahim Bux

Ex.P/103

Lathi

Ex.P/37

Ex.P/104

Blood-stained shirt

Ex.P/43

Usman Khan

Ex.P/105

Koont

Ex.P/39

Ex.P/106

Blood-stained shirt

Ex.P/41

The witness collected the injury reports of the accused Rahim Bux (Ex.P/107), Usman Khan (Ex.P/108), Shakoor Khan (Ex.P/109), Kalu Khan (Ex.P/110) and Shahabuddin (Ex.P/111). The witness also proved the proceedings pertaining to the recording of the statement of Ranjeet Bhat under Section 164 CrPC. He sought sanction for prosecuting the accused Kalu Khan under Section 3/25 of the Indian Arms Act. He gave evidence regarding depositing the samples of this case in the Malkhana of the police station and thereafter, having concluded the investigation, he proceeded to file a charge-sheet against the five accused appellants in the manner stated above.

In cross-examination, the witness admitted that he did not record the statements of the neighbors of the field in question explaining that the previous Investigating Officer might have done so. He admitted that the statements of the neighbors Budharam and Mangilal were not available in the file. He further admitted that the accused Rahim Bux was arrested by Uttam Singh and Prakash, Constables from Gujarat and was presented before him on 27.07.2009. In further cross-examination, the witness admitted that a land dispute was going on between the parties and the case was pending before the Revenue court.

55. Mutation of the land had been entered in favor of the deceased persons. He did not collect the documents pertaining to the revenue litigation. He did not seek the report of the Patwari regarding the possession on the field in question. In further cross-examination, the witness admitted that the fight took place because the accused tried to cultivate the field in question. He stated that the five accused indulged in the incident in an endeavour to oust the victims from the field in question. That the deceased were cultivating the field and the accused went there to restrain them. He denied the fact that the victims were prepared for a fight. He could not point out or specify the particular portion of the field, which was in possession of the parties to the incident.

56. Kailash Chandra (P.W.35) was the SHO, Police Station Industrial Area, Pali on the day of the incident. By the order of the Superintendent of Police, Pali, he went to the place of incident and reached there between 06.30 to 7.00 p.m. A crowd had gathered there. Binraj Singh, Incharge of the Police Station Sadar met him at the spot. The wives of the two deceased persons, namely, Timiya and Samiya, submitted the report, which was forwarded to the police station by Binraj Singh for registering the case. The witness noticed two dead bodies lying at the spot and a desi katta and a few cartridges were lying nearby. A bucket with acid like liquid was also lying there. Two water-cannons and the footwear of the deceased were seen strewn around at the place of incident. Acid had been poured near the edge of the field and Babool branches had been singed thereby. A tractor was parked near the road. The witness associated in the various steps

of investigation with Binjraj Singh and attested numerous documents. He conducted some part of investigation; recorded the statements of eye-witnesses Murli Maharaj, Ranjeet, Timiya and Samiya; got the bodies subjected to postmortem and received the postmortem reports. The dead bodies were thereafter handed over the family members for funeral. He recorded the statements of other witnesses also. The three accused, namely, Kalu Khan, Shahabuddin and Shakoor Khan were brought to the police station by Binjraj Singh and were presented before Shri Kailashchandra. They were arrested and their blood-stained clothes were seized. The Investigating Officer, recorded the informations given by the accused under Section 27 of the Evidence Act and got recovered the weapons of offence concealed amongst the thorny bush boundary (Baad) of the field in question. However, from a perusal of the examination-in-chief of the witness, it is apparent that while giving evidence regarding the informations provided by the accused leading to the recovery of the weapons, he did not elaborate in exact words or even in substratum as to what actually was stated by the accused while giving such informations and thus, the informations cannot be considered to have been proved properly as per law.

In cross-examination, the witness stated that as per the site plan (Ex.P/18), the part of the field was tilled by the accused, whereas the other part had been tilled by the complainants. The field was of the victims and the accused had gone there to take forcible possession thereof. From the evidence of this witness, we are duly satisfied that all the relevant steps taken during investigation and the documents prepared in this process have been proved properly except the informations recorded under Section 27 of the Evidence Act. However, the witness did not prove the informations recorded under Section 27 of the Evidence Act as per law and thus, the process of recovery of weapons is compromised.

57. Binjraj Singh (P.W.36) was posted as the Assistant Sub-Inspector at the Police Station Sadar, Pali on 19.07.2009. He received the telephonic information about the incident from a person named Murli. He registered the same in the Roznamcha and the relevant entry (Ex.D/12) was proved by the witness. After informing the Dy.S.P. Mr. Arun Machya, the witness alongwith police personnel proceeded to the place of incident and reached there at 04.55 p.m. Two persons had died and two more were lying in an injured condition. Another man named Kalu was present there. A large crowd had gathered at the spot. The witness summoned the 108 ambulance and sent the injured to the hospital. He informed his superior officers on telephone, upon which, the Additional S.P. and the Dy.S.P. reached there. Photographer Rajesh was also summoned. At 06.36 p.m., Timiya and Samiya submitted the report Ex.P/34 to the witness. The report was written by Murlidhar and was forwarded to the Police Station Sadar, Pali, where Head Constable Omprakash registered the FIR No.133/2009. The report was proved as Ex.P/71. Acting under the instructions of the S.P., Pali, investigation was handed over to Kailashchandra, C.I. The witness stated that he noticed acid marks at the spot. Two water-cannons, one green and another red, were also lying there. A

plastic bucket containing acid was also seen lying at the spot. A cultivator was also lying there. A tractor was parked near the road. A desi katta was also lying near the water-cannons. The witness was asked to identify Kalu and he did so correctly in the second attempt. No significant cross-examination was made from this witness.

58. Smt. Damyanti Purohit (P.W.37) was posted as Judicial Magistrate No.2, Pali on 27.07.2009. On requisition of the police, she summoned Ranjeet Bhat for recording his statement under Section 164 CrPC. He appeared before the Magistrate on 04.08.2009 at about 12 o'clock. The witness was made to sit in isolation in the chamber of the judicial officer so as to provide him time for contemplation. Thereafter, the statement Ex.P/100 was recorded by the learned Magistrate exactly as stated by Ranjeet. Significant cross-examination was made from the witness. However, we are duly satisfied that nothing significant was elicited, which can detract from the procedure adopted by the witness while recording the statement of Ranjeet under Section 164 CrPC (Ex.P/100) so as to question its evidentiary worth.

59. The defence exhibited the Revenue court's order (Ex.D/10), as per which, the parties had been bound to maintain status quo over the field in question. By going to the field in question on a tractor and trying to cultivate the same in spite of the status quo order, the accused not only flouted the court's order, but also took law into their own hands. The fact that the accused went to the field on a tractor, carrying a bucket filled with acid is duly established by the evidence of Mohd. Khan (P.W.20). The evidence of Murlidhar (P.W.16), Mohd. Iqbal (P.W.18) and Ranjeet Bhat (P.W.33) is clinching on the aspect that the accused brutally assaulted the four deceased persons by various weapons, viz. Koont, Kawadiya, sword, desi katta, gediya etc. The evidence of the eye-witnesses regarding the manner in which the incident took place and the assault was perpetrated is duly corroborated by the medical evidence as deposed by Dr. Paras Khinchi (P.W.31) and Dr. Narpal Singh (P.W.32). Other than recovery of weapons of offence, the two investigating officers have duly proved the various steps of investigation undertaken by them, during which the statements of witnesses were recorded, the recoveries of other incriminating material were effected. We have already discussed the evidence of witnesses while elaborating upon their testimony. We find that the evidence of the witnesses Ranjeet (P.W.33), Samiya (P.W.5) and Timiya (P.W.6), Iqbal (P.W.18) and Murlidhar (P.W.16) is trustworthy and reliable and conclusively establishes the guilt of the accused appellants for the gruesome murder of the four hapless victims.

60. The contention of the learned defence counsel that non-explanation of the injuries caused to the accused is a factor, which completely discredits the prosecution case, is taken up for consideration. Suffice it to say that as per the evidence of Murlidhar (P.W.16), Iqbal (P.W.18) and Ranjeet Bhat (P.W.33), the three witnesses saw the incident only in bits and pieces. Manifestly, these witnesses must have become frightened/terrified at the very inception and thus,

they would have fled away on seeing the brutal assault. After that, only five accused and the four victims were left behind at the field. The four victims were killed. The injury reports of the accused Rahim Bux (Ex.P/107), Usman Khan (Ex.P/108), Shakoor Khan (Ex.P/109), Kalu Khan (Ex.P/110) and Shahabuddin (Ex.P/111) which were proved by Dr.Parasmal (P.W.34), indicate that the accused were having a number of injuries including acid burns on their person. Presence of these injuries and the claim of the defence that they were received in same incident fortifies the fact that the accused participated in the incident. Since none from the prosecution side remained alive to tell the gruesome story and as the eye-witnesses got frightened and went away from the spot just after the incident began, obviously no one other than the accused could be expected to explain the injuries present on their person. On the contrary, by virtue of Section 106 of the Evidence Act, the burden would shift on to the accused to show as to how they received these injuries which include number of acid burns. It can be perceived that as acid was being sprayed around by the accused with the aid of water-cannons, possibility of some acid drops having landed on their bodies was imminent. Thus, the presence of the acid burns on the bodies and clothes of the accused, rather than giving them any plausible defence, corroborates the prosecution case regarding their involvement in the crime. Thus, the contention of Mr. Bora that the non-explanation of marks of acid on the bodies and clothes of the accused discredits the evidentiary worth of the prosecution witnesses is totally untenable. It may be noted that the accused did not take any such defence in their 313 CrPC statements that the injuries on their persons were not received during the incident. Mr. Bora also submitted that the genesis of the occurrence has not been disclosed by the prosecution and that the investigation was conducted in an unfair manner. In this regard, suffice it to say that as we have already concluded that the accused virtually designed the incident and the occurrence was definitely perpetrated by them. Thus, there is no need to satisfy ourselves regarding the genesis of occurrence. Regarding the allegation that the investigation was not conducted in a fair manner, it may be noted that trivial flaws in the investigation would not adversely affect the worth of the eye-witnesses, whose evidence, we have found to be worth credence and establishing the guilt of the accused beyond all manner of doubt. No other argument was advanced by Mr. Bora.

61. After discussing the entire evidence available on record, we feel that the evidence of the witnesses Shakoor (P.W.13) and Murali (P.W.16), is relevant only to the extent, they saw the four victims lying at the place of the incident and regarding the presence of the accused Kalu in the field. The evidence of Mohd. Khan (P.W.20) and Sohan Lal (P.W.11) establishes the fact that the accused were seen going towards the field in question after having prepared themselves for the assault. The admissible extracted portions from the evidence of the hostile eye-witness Ranjeet Bhat (P.W.33) and the entire evidence of the eye-witness Iqbal (P.W.18) clinchingly establishes the presence and active participation of the accused in the brutal assault. By the very fact that the accused calculatedly went

to the field in question openly announcing their presence to villagers at large in spite of the status quo order of the court, obviously their entire design was to lure the deceased into a trap. They succeeded in doing so. Admittedly, the victims/deceased were not having any weapons of any kind in their hands and thus, the argument that the case is of free fight is totally futile and worthless. As a consequence of the above discussion, we are of the firm view that the prosecution evidence is sufficient, foolproof, trustworthy and points to the only logical conclusion that the five accused herein brutally assaulted and killed the four deceased persons. From the evidence of the prosecution witnesses, it is clear that the accused went to the field in question as a body. They were carrying dangerous weapons and acid with them. The weapons were concealed on a tractor, on which the accused proceeded to the field. The accused made a show of trying to cultivate the field with their tractor. No sooner, the deceased persons appeared and tried to dissuade them, the accused got hold of their weapons and launched the brutal inhuman assault. The victims were felled down by use of various weapons, viz. Desi katta, Koont etc. The incident took place in extreme heat of July. Having been belabored in this fashion, the victims pleaded for water, but the barbaric acts of the accused persons crossed all limits when they splayed and poured acid down the throats of the hapless victims, who were writhing in throes of pain and were crying out for water. Hence it can be safely concluded beyond all manner of doubt that the accused persons, who were five in number, had formed an unlawful assembly with the sole objective of eliminating the deceased persons so as to put an end to the property dispute. As the concept of vicarious liability fully applies to the case, individual role of the particular accused need not be specified. Thus, the trial court was perfectly justified in convicting the accused persons for the offence under Section 302 IPC with the aid of Section 149 IPC. The attack was absolutely inhuman and barbaric. Thus, we have no hesitation in coming to a conclusion that the trial court was absolutely justified in convicting the accused for the offences charged by the impugned judgment, which does not suffer from any infirmity or error whatsoever on this aspect.

62. Hence, the conviction of the accused persons as recorded by the trial court vide judgment dated dated 05.10.2016 passed in Sessions Case No.50/2015 (02/2010) for the offences mentioned above is hereby affirmed.

63. Now coming to the aspect of sentencing. We are compelled to note that if at all a list was to be prepared of heinous crimes committed in the history of mankind, the incident at hand would definitely rate amongst the top hundred. However, while considering the aspect of confirming the capital sentence, the principles as enunciated by Hon'ble the Supreme Court from time to time have to be kept in mind. The trial court referred to the following Supreme Court decisions :

1. Kuruvi vs. State of Tamil Nadu : 1978 CriLJ 1421
2. Asharfi lal v. State of UP : AIR1987 SC 1721

3. Surja Ram v. State of Rajasthan : AIR 1997 SC 18
4. Govindasami v. State of Tamil Nadu : AIR 1998 SC 2889
5. Ram Deo Chauhan v. State of Assam : AIR 2000 SC 2679
6. Atbir v. Govt. of NCT of Delhi : AIR 2010 SC 3477
7. Javed Ahmed Abdul Hamid Pawala V. State of Maharashtra L AIR 1983 SC 594 (Overruled)
8. State of Himachal Pradesh v. Manohar Singh Thakur : AIR 1998 SC 2941
9. Subhash Ramkumar Bind & Ors. v. State of Maharashtra : AIR 2003 SC 269
10. Panchhi & ors. v. State of UP : AIR 1998 SC 2726
11. Om Prakash v. State of Haryana : AIR 1999 SC 1332
12. Manik Mukherjee v. State of Bihar (Patna HC) : 2000 CriLJ 3661
13. Shahid Khan v. State of Rajasthan : AIR 2016 SC 1178 and proceeded to award capital punishment to the accused by the impugned judgment.
64. As has been mentioned above, the trial court heard the defence on the question of sentence on the very day the judgment of conviction was pronounced and on the next day, i.e. on 06.10.2016. This endeavour of the trial court is contrary to the Supreme Court decision in the case of Mannan Vs. State of Bihar [AIR 2019 SC 2934], wherein it has been held as below :
79. Imposition of death sentence on the same day after pronouncement of the judgment and order of conviction may not, in itself, vitiate the sentence, provided the convict is given a meaningful and effective hearing on the question of sentence Under Section 235(2) Code of Criminal Procedure with opportunity to bring on record mitigating factors.
80. Preponement by the Trial Court of hearing Under Section 235(2) Code of Criminal Procedure at short notice, which is in effect, no notice, appears to have denied the Petitioner an effective hearing. The hearing Under Section 235(2) was reduced to a mere formality. The Court hastily proceeded to impose death sentence considering the dastardly nature of the crime for which the Petitioner had been convicted.
65. Various judgments relied upon by the trial court while awarding the extreme death penalty to the accused were discussed in the case of Shankar Kisanrao Khade Vs. State of Maharashtra [(2013) 5 SCC 546] wherein the entire concept of death penalty was thrashed out in detail. The Hon'ble Supreme Court evaluated numerous cases in which the capital punishment awarded to the accused was affirmed as well as those cases in which death penalty was commuted to life sentence. After conducting the entire exercise, the Hon'ble Supreme Court went on to hold as below :-

"25. In Bachan Singh and Machhi Singh cases, this Court laid down various principles for awarding sentence:

Aggravating circumstances - (Crime test)

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

Mitigating Circumstances: (Criminal test)

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme

provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

26. In *Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra* : (2009) 6 SCC 498, this Court held the nature, motive, and impact of crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation and some of the factors, the Court may take into consideration while dealing with such cases.

27. In *Sangeet's case* this Bench has held that there is no question of balancing the above mentioned circumstances to determine the question whether the case falls into the rarest of rare cases category because the consideration for both are distinct and unrelated. In other words the "balancing test" is not the correct test in deciding whether capital punishment be awarded or not.

28. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favoring the accused. If there is any circumstance favoring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favor the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances

favoring the accused, still we have to apply finally the Rarest of Rare Case test (R-R test). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.

29. We have to apply the above tests in the present case and decide whether the courts below were justified in awarding the death sentence.

Enormity of the Crime and execution thereof (Crime Test)

30. Victim was aged 11 years, on the date of the incident, a school going child totally innocent, defenseless and having moderate intellectual disability. Ex. P-4 was a certificate issued by the President of the Handicap Board General Hospital, Amravati which disclosed that the girl was physically handicapped and was having moderate mental retardation. Evidence of PW 10, PW 12 and PW13 also corroborates the fact that she was a minor girl with moderate intellectual disability, an aggravating circumstance which goes against the accused. Vulnerability of the victim with moderate intellectual disability is an aggravating circumstance. The accused was a fatherly figure aged 52 years.

31. Dr. Kewade-PW3, who conducted the post mortem, had deposed as well as stated in the report the ghastly manner in which the crime was executed. Rape was committed on more than one occasion and the manner in which rape as well as murder was executed had been elaborately discussed in the oral evidence as well as in report which we do not want to reiterate. The action of accused, in my view, not only was inhuman but barbaric. Ruthless crime of repeated actions of rape followed by murder of a young minor girl who was having moderate intellectual disability, shocks not only the judicial conscience, but the conscience of the society.

32. In my view, in this case the crime test has been satisfied fully against the accused.

Criminal Test

33. Let us now examine whether 'Criminal Test' has been satisfied. The accused was aged 52 years at the time of incident, a fatherly figure for the minor child. The accused is an able bodied person has seen the world and is the father of two children. The accused repeatedly raped the girl for few days, ultimately strangulated her to death. Intellectually challenged minor girls will not be safe in our society if the accused is not given adequate punishment. Considering the age

of the accused, a middle aged of 52 years, reformation or rehabilitation is practically ruled out. In the facts and circumstances of the case, in my view, criminal test has been fully satisfied against the accused and I do not find any mitigating factor favoring the accused. The only mitigating circumstance stated was that the accused is having two sons aged 26 and 27 years and are dependent on him, which in my view, is not a mitigating circumstance and the "criminal test" is fully satisfied against the accused. Both the crime test and criminal test are, therefore, independently satisfied against the accused.

34. Let us now apply the R-R Test. I have critically and minutely gone through the entire evidence and I am of the view that any other punishment other than life imprisonment would be completely inadequate and would not meet the ends of justice.

35. Remember, the victim was a minor girl aged 11 years, intellectually challenged and elders like the accused have an obligation and duty to take care of such children, but the accused has used her as a tool to satisfy his lust. Society abhors such crimes which shocks the conscience of the society and always attracts intense and extreme indignation of the community. R-R Test is fully satisfied against the accused, so also the Crime Test and the Criminal Test". Even though all the above mentioned tests have been satisfied in this case, I am of the view that the extreme sentence of Death penalty is not warranted since one of the factors which influenced the High Court to award death sentence was the previous track record of the accused.

Previous Criminal Record of the Accused

36. The Investigating Officer, during the course of hearing of the criminal appeal by the High Court, filed an affidavit dated 11.4.2008 stating that the accused was also figured as an accused in Crime No. 165/92 registered at Police Station Borgaon Manju, District Akola for the offence under Section 302 Indian Penal Code on the allegation that he caused murder of his wife Chanda by assaulting her with stick on 4.10.1993 and that Sessions Trial No. 52/07 was pending before the Sessions Court, Akola. Further, it was also stated that another Crime No. 80/06 was also registered against the accused at Chandur Bazar Police Station for an offence under Sections 457 and 380 Indian Penal Code. The High Court was of the view that the accused had not disclosed those facts before the Court and held as follows:

...However, fact remains that the accused has not disputed the pendency of these proceedings against him. Moreover, they cannot be said to be irrelevant for the purpose of deciding the appropriate sentence which deserves to be imposed on the Appellant. We, therefore, deem it appropriate to consider the pendency of these cases as a circumstance against the accused....

37. I find it difficult to endorse this view of the High Court. In my view, the mere pendency of criminal cases as such cannot be an aggravating factor to be taken note of while granting appropriate sentence. In *Gurmukh Singh v. State of*

Haryana : (2009) 15 SCC 635, this Court opined that criminal background and adverse history of the accused is a relevant factor. But, in my view, mere pendency of cases, as such, is not a relevant factor. This Court in Mohd. Farooq Abdul Gafur v. State of Maharashtra : (2010) 14 SCC 641 dealt with a similar contention and Justice S.B. Sinha, while supplementing the leading judgment, stated as follows:

178. In our opinion the trial court had wrongly rejected the fact that even though the accused had a criminal history, but there had been no criminal conviction against the said three accused. It had rejected the said argument on the ground that a conviction might not be possible in each and every criminal trial....

38. Therefore, the mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. High Court was, therefore, in error in holding that those are relevant factors to be considered in awarding appropriate sentence.

54. Considering the entire facts and circumstances of the case, I am inclined to convert death sentence awarded to the accused to rigorous imprisonment for life and that all the sentences awarded will run consecutively.

57. While entirely agreeing with my learned Brother Justice Radhakrishnan that the conviction of the Appellant must be upheld and that all sentences awarded to him must run consecutively, I feel it necessary to draw attention to the views expressed by this Court on awarding death penalty or converting it to imprisonment for life in cases concerning rape and murder.

Element of subjectivity:

58. In Swamy Shraddhananda (2) v. State of Karnataka : (2008) 13 SCC 767 this Court noted in paragraph 44 of the Report that the expression "the rarest of rare cases" in Bachan Singh v. State of Punjab : (1980) 2 SCC 684 indicates a relative category based on a comparison with other cases. In paragraph 45 of the Report, this Court considered the expression as requiring a comparison between (i) cases of murder with other cases of murder of the same or of a similar kind or even of a graver nature and (ii) the punishment awarded to the convicts in those cases. This Court also expressed the view that there is hardly any field available for comparison. In other words, this Court highlighted the difficulty in the practical application of the "rarest of rare" principle since there is a lack of empirical data for making the two-fold comparison.

59. The question therefore is: how does one determine that a case is rare as compared to another case? If such a comparison were possible, then on a relative basis could a particular case be described as rarer than an identified rare case? It is this inability to make a comparative evaluation and clarity on the issue due to a lack of information and any detailed study that the application of the rarest of rare principle becomes extremely delicate thereby making the awarding

of a death sentence subjective as mentioned in *Swamy Shraddananda* or judge-centric as mentioned in *Sangeet v. State of Haryana* : 2013 (2) SCC 452.

Corridor of uncertainty:

60. My learned Brother Justice Radhakrishnan has put in great efforts in analyzing a species of cases (of which I am sure there would be many more) in which the victim was raped and murdered. These cases fall in two categories, namely, those in which the death penalty has been confirmed by this Court and those in which it has been converted to life imprisonment. In my view, there is a third category consisting of cases (which cannot be overlooked in the overall context of a sentencing policy) in which this Court has, while awarding a sentence of imprisonment for life, arrived at what is described as a *via media* and in which a fixed term of imprisonment exceeding 14 or 20 years (with or without remissions) has been awarded instead of a death penalty, or in which the sentence awarded has been consecutive and not concurrent.

61. For the present purposes, I will first refer to those somewhat recent cases (say over the last about 15 years) where the death penalty was converted to imprisonment for life and cull out the main reasons for commuting it. However, it is necessary to enter two caveats: Firstly, the Constitution Bench in *Bachan Singh* has concluded in paragraph 164 of the Report that normally the punishment for murder is life imprisonment and a death penalty may be imposed only if there are special reasons for doing so. In other words, special reasons are required to be recorded not for awarding life imprisonment but for awarding death sentence. This is what the Constitution Bench held:

The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

62. It was further held in paragraph 209 of the Report that the normal rule is of awarding life sentence but death sentence may be awarded only if the alternative of life sentence is unquestionably foreclosed. The Constitution Bench held:

It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines 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 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.

63. Strictly speaking, therefore, this Court is not required to record reasons for commuting the death sentence to one of life imprisonment - it is only required to record reasons for either confirming the death sentence or awarding it.

64. Secondly, though a sentence awarded by this Court relates to a specific case, nevertheless an exercise needs to be undertaken to identify some jurisprudential principle for awarding the death penalty. It is in this context that the present exercise has been undertaken. It is possible that the cases discussed are not exhaustive of the "rape and murder" category and perhaps some may have been left out of the discussion but the general principles or guidelines would be discernible from this exercise of finding a way through the existing corridor of uncertainty in sentencing.

Cases where the death penalty has been converted to imprisonment for life:

65. *State of Tamil Nadu v. Suresh* : (1998) 2 SCC 372 was a case of the rape and murder of a pregnant housewife. This Court took the view that though the crime was dastardly and the victim was a young pregnant housewife, it would not be appropriate to award the death penalty since the High Court had not upheld the conviction and also due to the passage of time. This is what was observed:

The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A-2 and A-3, though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on those two accused.

66. *Nirmal Singh v. State of Haryana* : (1999) 3 SCC 670 was a case in which Dharampal had raped P and was convicted for the offence. Pending an appeal the convict was granted bail. While on bail, Dharampal along with Nirmal Singh murdered five members of P's family. Death penalty was awarded to Dharampal and Nirmal Singh by the Trial Court and confirmed by the High Court. This Court converted the death sentence in the case of Nirmal Singh to imprisonment for life since he had no criminal antecedents; there was no possibility of his committing criminal acts of violence; he would not continue being a threat to society; and he was not the main perpetrator of the crime. It was held:

There is nothing on record to suggest that Nirmal was having any past criminal antecedents or that there is a possibility that the accused would commit criminal acts of violence and would constitute a continuing threat to the society. The only aggravating circumstance is that he had come with his brother and had given 3 blows on deceased Krishna only after Dharampal chased Krishna and gave kulhari blows hitting on the neck while Krishna was running and on sustaining that blow, she fell down and then Dharampal gave two to three blows to Krishna and only thereafter Nirmal gave burchi blows on the said Krishna. It is no doubt true that the presence of Nirmal at the scene of the occurrence with a burchi in

his hand had emboldened Dharampal to take the drastic action of causing murder of 5 persons of Tale's family as a result of which Tale's family was totally wiped off. But because of the fact that Nirmal has not assaulted any other person and assaulted Krishna only after Dharampal had given her 3 or 4 blows, the case of Nirmal cannot be said to be the rarest of rare case attracting the extreme penalty of death. While, therefore, we uphold his conviction under Sections 302/34, we commute his sentence of death into imprisonment for life."

67. *Kumudi Lal v. State of Uttar Pradesh* : (1999) 4 SCC 108 was a case of rape and murder of a 14 year old. This Court was of the view that the applicability of the rarest of rare principle did not arise in this case apparently because the crime had no 'exceptional' feature. This Court noted as follows:

The circumstances indicate that probably she (the victim) was not unwilling initially to allow the Appellant to have some liberty with her. The Appellant not being able to resist his urge for sex went ahead in spite of her unwillingness for a sexual intercourse who offered some resistance and started raising shouts at that stage. In order to prevent her from raising shouts the Appellant tied the salwar around her neck which resulted in strangulation and her death. We, therefore, do not consider this to be a fit case in which the extreme penalty of death deserves to be imposed upon the Appellant.

68. *Akhtar v. State of Uttar Pradesh* : (1999) 6 SCC 60 was a case of rape and murder of a young girl. The sentence of death awarded to the accused was converted to one of life imprisonment since he took advantage of finding the victim alone in a lonely place and her murder was not premeditated. It was observed:

But in the case in hand on examining the evidence of the three witnesses it appears to us that the accused-Appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-Appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death.

69. In *State of Maharashtra v. Suresh* : (2000) 1 SCC 471 death penalty was not awarded to the accused since he had been acquitted by the High Court, even though the case was said to be "perilously near" to falling within the category of rarest of rare cases. The test of whether the lesser option was "unquestionably foreclosed" was adopted by this Court, which held:

We, therefore, set aside the impugned judgment and restore the conviction passed by the trial court.

Regarding sentence we would have concurred with the Sessions Court's view that

the extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases" envisaged by the Constitution Bench in *Bachan Singh v. State of Punjab*. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 Indian Penal Code, to imprisonment for life.

70. In *Mohd. Chaman v. State (NCT of Delhi)* : (2001) 2 SCC 28 the accused, a 30 year old man, had raped and killed a one and a half year old child. Despite concluding that the crime was serious and heinous and that the accused had a dirty and perverted mind, this Court converted the death penalty to one of imprisonment for life since he was not such a dangerous person who would endanger the community and because it was not a case where there was no alternative but to impose the death penalty. It was also held that a humanist approach should be taken in the matter of awarding punishment. It was held:

Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the Appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in *Bachan Singh, Machhi Singh* : (1983) 3 SCC 470) and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty. We find it difficult to hold that the Appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment.

71. *Raju v. State of Haryana* : (2001) 9 SCC 50 was a case in which this Court took into account three factors for converting the death sentence of the accused to imprisonment for life for the rape and murder of an eleven year old child. Firstly, the murder was committed without any premeditation (however, there is no mention about the rape being not premeditated); secondly, the absence of any criminal record of the accused; and thirdly, there being nothing to show that the accused could be a grave danger to society. This is what was said:

The evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two brick-blows which caused her death. There is nothing on record to indicate that the Appellant was having any criminal record nor can he be said to be a grave danger to the society at

large. In these circumstances, it would be difficult to hold that the case of the Appellant would be rarest of rare case justifying imposition of death penalty.

72. In *Bantu v. State of Madhya Pradesh* : (2001) 9 SCC 615 this Court converted the death sentence awarded to the accused to imprisonment for life. The accused was a 22 year old man who had raped and murdered a 6 year old child. It was acknowledged that the rape and murder was heinous, but this Court took into account that the accused had no previous criminal record and that he would not be a grave danger to society at large. On this basis, the death penalty was converted to life imprisonment. This is what was said:

In the present case, there is nothing on record to indicate that the Appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence.

73. In *State of Maharashtra v. Bharat Fakira Dhiwar* : (2002) 1 SCC 622 this Court converted the death sentence to imprisonment for life since the accused was acquitted by the High Court and imprisonment for life was not unquestionably foreclosed.

This is what this Court held:

Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench in *Bachan Singh v. State of Punjab*, However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 Indian Penal Code, to imprisonment for life.

74. In *Amit v. State of Maharashtra* : (2003) 8 SCC 93 the death penalty awarded to the accused for the rape and murder of an eleven year old child was converted to imprisonment for life for the reason that he was a young man of 20 years when the incident occurred; he had no prior record of any heinous crime; and there was no evidence that he would be a danger to society. This Court held:

The next question is of the sentence. Considering that the Appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death penalty is not awarded. Though the offence committed by the Appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases. We hope that the Appellant will learn a lesson and have an opportunity to

ponder over what he did during the period he undergoes the life sentence.

75. Surendra Pal Shivbalakpal v. State of Gujarat : (2005) 3 SCC 127 was a case in which the death penalty awarded to the accused who had raped a minor child, was converted to life imprisonment considering the fact that he was 36 years old and there was no evidence of the accused being involved in any other case and there was no material to show that he would be a menace to society. It was held:

The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which death penalty should be imposed on the Appellant. The Appellant was aged 36 years at the time of the occurrence and there is no evidence that the Appellant had been involved in any other criminal case previously and the Appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case.

76. In State of Maharashtra v. Mansingh : (2005) 3 SCC 131 the accused was acquitted by the High Court of the offence of rape and murder of the victim. In a brief order, this Court noted this fact as well as the fact that this was a case of circumstantial evidence and, therefore, the death sentence was converted to imprisonment for life to meet the ends of justice. It was observed:

Now the question which arises is as to whether the present case would come within the ambit of rarest of the rare case. In the facts and circumstances of the case, we are of the view that the trial court was not justified in imposing extreme penalty of death against the Respondent and ends of justice would be met in case the sentence of life imprisonment is awarded against the Respondent.

77. Rahul v. State of Maharashtra (2005) 10 SCC 322 was a case of the rape and murder of a four and a half year old child by the accused. The death sentence awarded to him was converted by this Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred; apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society. It was held:

We have considered all the relevant aspects of the case. It is true that the Appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the Appellant had been in custody since 27-11 -1999 we are not furnished with any report regarding the Appellant either by any probationary officer or by the jail authorities, The Appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the Appellant and other circumstances, we do not think that the penalty of death be imposed on him.

78. In *Amrit Singh v. State of Punjab* : (2006) 12 SCC 79 a 6 or 7 year old child was raped and murdered by a 31 year old. This Court took the view that though the rape may be brutal and the offence heinous, "it could have been a momentary lapse" on the part of the accused and was not premeditated. The victim died "as a consequence of and not because of any overt act" by the accused. Consequently, the case did not fall in the category of rarest of rare cases. It was held:

The opinion of the learned trial Judge as also the High Court that the Appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr Agarwal, however, that the Appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr. Reshamchand Singh, PW 1 did not state that injury on the neck could have contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the Appellant.

Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of the Appellant, seeing a lonely girl at a secluded place. He had no premeditation for commission of the offence. The offence may look heinous, but under no circumstances, can it be said to be a rarest of rare cases.

79. *Bishnu Prasad Sinha v. State of Assam* : (2007) 11 SCC 467 was a case concerning the rape and murder of a child aged about 7 or 8 years by two accused persons. The death penalty awarded to them was converted to life imprisonment since the conviction was based on circumstantial evidence and Appellant No. 1 had expressed remorse in his statement under Section 313 of the Code of Criminal Procedure and admitted his guilt. It appears that the second accused either did not admit his guilt or express any remorse. This Court held:

The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the Appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, Appellant No. 1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt.

80. *Santosh Kumar Singh v. State* : (2010) 9 SCC 747 was a case in which the

sentence of death was converted to life imprisonment by this Court since the accused had been acquitted by the Trial Court and the High Court had reversed the acquittal on circumstantial evidence. The accused was young man of 24 years when the incident occurred; he had got married in the meanwhile and had a daughter; his father had died a year after his conviction; his family faced a dismal future; and there was nothing to suggest that he was not capable of reform. It was held:

Furthermore, we see that the mitigating circumstances need to be taken into account, more particularly that the High Court has reversed a judgment of acquittal based on circumstantial evidence. The Appellant was a young man of 24 at the time of the incident and, after acquittal, had got married and was the father of a girl child. Undoubtedly also, the Appellant would have had time for reflection over the events of the last fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family. On the contrary, there is nothing to suggest that he would not be capable of reform.

There are extremely aggravating circumstances as well. In particular we notice the tendency of parents to be overindulgent to their progeny often resulting in the most horrendous of situations. These situations are exacerbated when an accused belongs to a category with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two. The reality that such a class does exist is for all to see and is evidenced by regular and alarming incidents such as the present one.

Nevertheless, to our mind, the balance sheet tilts marginally in favour of the Appellant, and the ends of justice would be met if the sentence awarded to him is commuted from death to life imprisonment under Section 302 of the Penal Code; the other part of the sentence being retained as it is.

82. Rameshbhai Chandubhai Rathod (2) v. State of Gujarat : (2011) 2 SCC 764 was an unusual case in as much as the two learned Judges hearing the case had differed on the sentence to be awarded. Accordingly the matter was referred to a larger Bench which noted that the accused was about 28 years of age and had raped and killed a child studying in a school in Class IV. The accused was awarded a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons. It was held as follows:

Both the Hon'ble Judges have relied extensively on Dhananjay Chatterjee case: (1994) 2 SCC 220, In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the Appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible

rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.

We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the Appellant....

83. Incidentally, Dhananjoy Chatterjee was also 27 years of age when he committed the offence of rape and murder, while Rameshbhai Chandubhai Rathod was 28 years of age when he committed the offence.

84. In *Haresh Mohandas Rajput v. State of Maharashtra* : (2011) 12 SCC 56 the Trial Court had awarded life sentence to the accused for the rape and murder of a 10 year old child but the High Court enhanced it to a sentence of death. Taking into account the view of the Trial Court, this Court converted the death sentence to one of life imprisonment. It was observed:

So far as the sentence part is concerned, in view of the law referred to hereinabove, we are of the considered opinion that the case does not fall within the "rarest of rare cases". The High Court was not justified in enhancing the punishment. Thus, in the facts and circumstances of the case, we set aside the punishment of death sentence awarded by the High Court and restore the sentence of life imprisonment awarded by the trial court. With this modification; the appeals stand disposed of.

85. In *Amit v. State of Uttar Pradesh* : (2012) 4 SCC 107 the death penalty awarded to the accused for the rape and murder of a 3 year old child was converted to imprisonment for life since the accused was a young man of 28 years when he committed the offence; he had no prior history of any heinous offence; there was nothing to suggest that he would repeat such a crime in future; and given a chance, he may reform. This Court sentenced him to life imprisonment subject to remissions or commutation. This Court held:

In the present case also, we find that when the Appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, we convert the death sentence awarded to the Appellant to imprisonment for life and direct that the life sentence of the Appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons.

Broad analysis:

86. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for

life. However, some of the factors that have had an influence in commutation include (1) the young age of the accused (Amit v. State of Maharashtra aged 20 years, Rahul aged 24 years, Santosh Kumar Singh aged 24 years, Rameshbhai Chandubhai Rathod (2) aged 28 years and Amit v. State of Uttar Pradesh aged 28 years); (2) the possibility of reforming and rehabilitating the accused (Santosh Kumar Singh and Amit v. State of Uttar Pradesh the accused, incidentally, were young when they committed the crime); (3) the accused had no prior criminal record (Nirmal Singh, Raju, Bantu, Amit v. State of Maharashtra, Surendra Pal Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh); (4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh, Mohd. Chaman, Raju, Bantu, Surendra Pat Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh), A few other reasons need to be mentioned such as the accused having been acquitted by one the Courts (State of Tamil Nadu v. Suresh, State of Maharashtra v. Suresh, Bharat Fakira Dhiwar, Mansingh and Santosh Kumar Singh); the crime was not premeditated (Kumudi Lal, Akhtar, Raju and Amrit Singh); the case was one of circumstantial evidence (Mansingh and Bishnu Prasad Sinha. In one case, commutation was ordered since there was apparently no 'exceptional' feature warranting a death penalty (Kumudi Lal) and in another case because the Trial Court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput).

Cases where the death penalty has been confirmed:

87. *Jumman Khan v. State of Uttar Pradesh* : (1991) 1 SCC 752 was a case in which the death penalty was confirmed by this Court for the rape and murder of a 6 year old child on the basis of the brutality of the crime and on circumstantial evidence. This Court quoted the order dismissing the special leave petition of the accused against his conviction, in which it was said;

Although the conviction of the Petitioner under Section 302 of the Indian Penal Code, 1860 rests on circumstantial evidence, the circumstantial evidence against the Petitioner leads to no other inference except that of his guilt and excludes every hypothesis of his innocence....

Failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the Appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders. The sentence of death is confirmed.

88. In *Dhananjay Chatterjee v. State of West Bengal* : (1994) 2 SCC 220 this

Court confirmed the death sentence of the 27 year old married accused taking into consideration the rising crime graph, particularly violent crime against women; society's cry for justice against criminals; and the fact that the rape and murder of an 18 year old was premeditated and committed in a brutal manner by a security guard against a young defenseless person to satisfy his lust and in retaliation for a complaint made by her against him. This is what this Court had to say:

In recent years, the rising crime rate -- particularly violent crime against women has made the criminal sentencing by the courts a subject of concern....

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenseless school-going girl of 18 years....

89. In *Laxman Naik v. State of Orissa* : (1994) 3 SCC 381 this Court was of the opinion that since the accused was the guardian of the helpless victim, his 7 year old niece, and since the crime was pre-planned, cold blooded, brutal and diabolical, the appropriate punishment would be a sentence of death. This Court held;

The hard facts of the present case are that the Appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the Appellant and while reposing such faith and confidence in the Appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the Appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the Appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the Appellant misusing her confidence to fulfil his lust. It appears that the Appellant had preplanned to commit the crime by resorting to

diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.

90. Kamta Tiwari v. State of Madhya Pradesh : (1996) 6 SCC 250 was a case where the accused was close to the family of the victim, a 7 year old child. In fact, she would address him as 'Uncle Tiwari'. He was, therefore, in the nature of a person of trust, while the victim was in a hapless condition and was brutally raped and murdered in a premeditated manner. This Court held:

Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances -- but found aggravating circumstances aplenty.... When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes.

91. Nirmal Singh v. State of Haryana : (1999) 3 SCC 670 has already been referred to above, One of the accused Dharampal, had been convicted for rape and had filed an appeal. Pending the appeal, he applied for and was granted bail. While on bail, he killed five members of the family who had given evidence against him in the case for which he was convicted of rape, thereby carrying out the threat he had earlier given. The crime was pre-planned and executed in a brutal manner. Confirming the death penalty awarded to him, this Court held;

... Coming to the question of sentence, however, we find that the High Court has not considered the individual role played by each of the Appellants. So far as accused Dharampal is concerned, it is he who had given the threat on the previous occasion that if anybody gives evidence in the rape case, the whole family will be wiped off, It is he who after being convicted in the said rape case preferred an appeal and obtained a bail from the High Court and has totally misutilised that privilege of bail by killing 5 persons who were all the members of the family of P whose deposition was responsible for his conviction in the rape case. It is he who has assaulted each of the 5 deceased persons by means of a kulhari and the nature of the injuries as found by the doctor would indicate that the act is an act of a depraved mind and is most brutal and heinous in nature. It is he who had consecrated the plan to put into action his earlier threat but he has taken the help of his brother Nirmal.

92. Jai Kumar v. State of Madhya Pradesh : (1999) 5 SCC 1 was a case in which the death penalty was confirmed since this Court accepted the view of the High Court that the accused was a "living danger" and incapable of rehabilitation. The

crime was that of an attempted rape of a 30 year old pregnant woman followed by her murder and the murder of her 8 year old child. This Court held that the crime was brutal and committed in a gruesome and depraved manner. The fact that the accused was a young man of 22 years was held not to be a relevant factor, given the nature of the crime. The judicial conscience of this Court was shocked by the facts of the case. It was held:

... We are unable to record our concurrence with the submissions of Mr Muralidhar that there are some mitigating circumstances and there is likelihood of the accused being reformed or rehabilitated. Incidentally, the High Court has described the accused as "a living danger" and we cannot agree more therewith in view of the gruesome act as noticed above.

The facts establish the depravity and criminality of the accused in no uncertain terms. No regard being had for the precious life of the young child also. The compassionate ground of the accused being 22 years of age cannot in the facts of the matter be termed to be at all relevant....

In the present case, the savage nature of the crime has shocked our judicial conscience. The murder was cold-blooded and brutal without any provocation. It certainly makes it a rarest of the rare cases in which there are no extenuating or mitigating circumstances.

93. In *Molai and Anr. v. State of M.P.* : (1999) 9 SCC 581 death penalty awarded to both the accused for the rape and murder of a 16 year old was confirmed. Molai was a guard in a Central Jail and Santosh was undergoing a sentence in that jail. The victim was the daughter of the Assistant Jailor. Taking into account the manner of commission of the offence and the fact that they took advantage of the victim being alone in a house, the death penalty was confirmed by this Court although the case was one of circumstantial evidence.

This Court held:

... It cannot be overlooked that N, a 16-year- old girl, was preparing for her Class 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangled her by using her undergarment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp-edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (Appellants) could not point any mitigating circumstance from the record of the case to justify the reduction of sentence of either of the accused.

94. *State of Uttar Pradesh v. Satish* : (2005) 3 SCC 114 is a remarkable case for the reason that the accused was acquitted by the High Court and yet the death penalty awarded by the Trial Court was upheld by this Court for the rape and

murder of a school going child. The case was also one of circumstantial evidence. The special reasons for awarding the death penalty were the diabolic and inhuman nature of the crime. It was held:

Considering the view expressed by this Court in Bachan Singh case and Machhi Singh case we have no hesitation in holding that the case at hand falls in the rarest of rare category and death sentence awarded by the trial court was appropriate. The acquittal of the Respondent-accused is clearly unsustainable and is set aside. In the ultimate result, the judgment of the High Court is set aside and that of the trial court is restored. The appeals are allowed.

95. Shivu and Anr. v. Registrar General, High Court of Karnataka : (2007) 4 SCC 713 was a case in which the special reasons for confirming the death penalty given to both the accused who were aged about 20 and 22 years old respectively were the heinous rape and murder of an 18 year old. It was noted that the accused had twice earlier attempted to commit rape but were not successful. Though no case was lodged against them, they were admonished by the village elders and the Panchayat and asked to mend their ways. It was held:

Considering the view expressed by this Court in Bachan Singh case and Machhi Singh case we have no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial court and confirmed by the High Court was appropriate."

96. In Bantu v. State of Uttar Pradesh : (2008) 11 SCC 113 the death sentence was confirmed for the special reason of the depraved and heinous act of rape and murder of a 5 year old child, which included the insertion of a wooden stick in her vagina to the extent of 33 cms. to masquerade the crime as an accident. This Court held:

The case at hand falls in the rarest of the rare category. The depraved acts of the accused call for only one sentence, that is, death sentence.

97. In Shivaji v. State of Maharashtra : (2008) 15 SCC 269 this Court categorically rejected the view that death sentence cannot be awarded in a case where the evidence is circumstantial. The death sentence was upheld also because of the depraved acts of the accused in raping and murdering a 9 year old child. This Court held:

The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play....

The case at hand falls in the rarest of the rare category. The circumstances

highlighted above establish the depraved acts of the accused, and they call for only one sentence, that is, death sentence.

98. In *Ankush Maruti Shinde v. State of Maharashtra* : (2009) 6 SCC 667 of the six accused, three were awarded life sentence by the High Court while for the remaining three, the death sentence was confirmed. The accused were found to have committed five murders and had raped a lady (who survived) and a child of 15 years of age (who died). This Court awarded the death penalty to all the six accused. This Court found the crime to be cruel and diabolic; the collective conscience of the community was shocked; the victims were of a tender age and defenseless; the victims had no animosity towards the accused and the attack against them was unprovoked. Considering these factors, this Court awarded the death penalty to all the accused and held:

The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1, 2 and 4; but held that in the case of others it was to be altered to life sentence.

The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenseless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged to the open field, gang-raped and done to death.

Above being the position, the appeals filed by the accused persons deserve dismissal, which we direct and the State's appeals deserve to be allowed. A-2, A-3 and A-5 are also awarded death sentence. In essence all the six accused persons deserve death sentence.

99. *B.A. Umesh v. Registrar General, High Court of Karnataka* : (2011) 3 SCC 85 was a case of the rape and murder of a lady, a mother of a 7 year old child. In the High Court, there was a difference of opinion on the sentence to be awarded - one of the learned judges confirmed the death penalty while the other learned judge was of the view that imprisonment for life should be awarded. The matter was referred to a third learned judge who agreed with the award of a death penalty. This Court confirmed the death penalty since the crime was unprovoked and committed in a depraved and merciless manner; the accused was alleged to have been earlier and subsequently involved in criminal activity; he was a menace to society and incapable of rehabilitation; the accused did not feel any remorse for what he had done. It was held:

On the question of sentence we are satisfied that the extreme depravity with

which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of the rarest of rare cases which merits the death penalty, as awarded by the trial court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in Bachan Singh case or in Machhi Singh case are present in the facts of the instant case. The Appellant even made up a story as to his presence in the house on seeing PW 2 Suresh, who had come there in the meantime, Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and assault her and in the process causing injuries to her.

As has been indicated by the courts below, the antecedents of the Appellant and his subsequent conduct indicates that he is a menace to the society and is incapable of rehabilitation. The offences committed by the Appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim. He did not feel any remorse in regard to his actions, inasmuch as, within two days of the incident he was caught by the local public while committing an offence of a similar type in the house of one Seeba.

100. Mohd. Mannan v. State of Bihar : (2011) 5 SCC 317 was a case which a 42 year old man had raped and killed a 7 year old child. This Court looked at the factors for awarding death sentence both in the negative as well as in the positive sense. It was held that the number of persons killed by the accused is not a decisive factor; nor is the mere brutality of the crime decisive. However if the brutality of the crime shocks the collective conscience of the community, one has to lean towards the death penalty. Additionally, it is to be seen if the accused is a menace to society and can be reformed or not. Applying these broad parameters, this Court held that the accused was a mature man of 43 years; that he held a position of trust in relation to the victim; that the crime was pre-planned; and that the crime was, pre-planned, unprovoked and gruesome against a defenseless child. It was held:

... The Appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and pre-planned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 ft of height and such a child was incapable of arousing lust in normal situation. The Appellant had won the trust of the child and she did not understand the desire of the Appellant which would be evident from the fact that while she was being taken away by the Appellant no protest was made and the innocent child was made prey of the Appellant's lust.

The post-mortem report shows various injuries on the face, nails and body of the

child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The Appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenseless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate is to inflict the death sentence which is natural and logical. We are of the opinion that the Appellant is a menace to the society and shall continue to be so and he cannot be reformed.

101. In *Rajendra Pralhadrao Wasnik v. State of Maharashtra* : (2012) 4 SCC 37 the accused, a 31 year old, had raped and murdered a 3 year old child. This Court considered the brutality of the crime and the conduct of the accused prior to, during and after the crime. Prior to the incident, the accused had worked under a false name and had gained the trust and confidence of the victim. The accused had, after committing a brutal crime, left the injured victim in the open field without any clothes, thereby exhibiting his unfortunate and abusive conduct. It was held:

This Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime. Prior thereto, the accused had been serving with PW 5 and PW 6 under a false name and took advantage of his familiarity with the family of the deceased. He committed the crime in the most brutal manner and, thereafter, he opted not to explain any circumstances and just took up the plea of false implication, which is unbelievable and unsustainable.

Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self.

Broad analysis:

102. The principal reasons for confirming the death penalty in the above cases include (1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (*Jumman Khan, Dhananjay Chatterjee, Laxman Naik, Kamta Tewari, Nirmal Singh, Jai Kumar, Satish, Bantu, Ankush Maruti Shinde, B.A. Umesh, Mohd. Mannan and Rajendra Pralhadrao Wasnik*); (2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (*Dhananjay Chatterjee, Jai Kumar, Ankush Maruti Shinde and Mohd. Mannan*); (3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (*Jai Kumar, B.A. Umesh and Mohd. Mannan*); (4)

the victims were defenseless (Dhananjay Chatterjee, Laxman Naik, Kamta Tewari, Ankush Maruti Shinde, Mohd. Mannan and Rajendra Pralhadrao Wasnik); (5) the crime was either unprovoked or that it was premeditated (Dhananjay Chatterjee, Laxman Naik, Kamta Tewari, Nirmal Singh, Jai Kumar, Ankush Maruti Shinde, B.A. Umesh and Mohd. Mannan) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu, B.A. Umesh and Rajendra Pralhadrao Wasnik).

103. However, what is more significant is that there are cases where the factors taken into consideration for commuting the death penalty were given a go-bye in cases where the death penalty was confirmed. The young age of the accused was not taken into consideration or held irrelevant in Dhananjay Chatterjee aged about 27 years, Jai Kumar aged about 22 years and Shivu and Anr. aged about 20 and 22 years while it was given importance in Amit v. State of Maharashtra, Rahul, Santosh Kumar Singh, Rameshbhai Chandubhai Rathod (2) and Amit v. State of Uttar Pradesh. The possibility of reformation or rehabilitation was ruled out, without any expert evidence, in Jai Kumar, B.A. Umesh and Mohd. Mannan in much the same manner, without any expert evidence, as the benefit thereof was given in Nirmal Singh, Mohd. Chaman, Raju, Bantu, Surendra Pal Shivbalakpal Rahul and Amit v. State of Uttar Pradesh . Acquittal or life sentence awarded by the High Court was considered not good enough reason to convert the death sentence in Satish, Ankush Maruti Shinde and B.A. Umesh but it was good enough in State of Tamil Nadu v. Suresh, State of Maharashtra v. Suresh, Bharat Fakira Dhiwar and Santosh Kumar Singh. Even though the crime was not premeditated, the death penalty was confirmed in Molai notwithstanding the view expressed in Akhtar, Raju and Amrit Singh. Circumstantial evidence was held not to be a 'mitigating' factor in Jumman Khan, Kamta Tewari, Molai and Shivaji but it was so held in Bishnu Prasad Sinha.

104. Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra : (2009) 6 SCC 498) and even in some of the cases referred to above. It is this individualized sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below.

Minimum fixed term sentences:

105. There have been several cases where life sentence has been awarded by this Court with a minimum fixed term of incarceration. Many of them have been discussed in Swamy Shraddananda and so it is not necessary to refer to them individually. Swamy Shraddananda refers to Alope Nath Dutta v. State of West Bengal : (2007) 12 SCC 230 which in turn refers to five different cases. I

propose to refer to them at this stage.

106. In *Subhash Chander v. Krishan Lal* : (2001) 4 SCC 458 it was held that the convict shall remain in prison "for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the rules made for the purposes of grant of commutation and remissions."

107. In *Shri Bhagwan v. State of Rajasthan* : (2001) 6 SCC 296, *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* : (2002) 2 SCC 35 and *Ram Anup Singh v. State of Bihar* : (2002) 6 SCC 686 the convict was directed to serve out at least 20 years of imprisonment.

108. In *Mohd. Munna v. Union of India* : (2005) 7 SCC 417 the convict had undergone 21 years of incarceration. This Court held that he was not entitled to release as a matter of course but was required to serve out his sentence till the remainder of his life subject to remissions by the appropriate authority or State Government.

109. *Swamy Shraddananda* also refers to *Jayawant Dattatraya Suryarao v. State of Maharashtra* : (2001) 10 SCC 109 in which it was directed that the convict "will not be entitled to any commutation or premature release under Section 433-A of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the Rules made for the purpose of commutation and remissions." Similarly, in *Nazir Khan v. State of Delhi* : (2003) 8 SCC 461 while sentencing the convicts to imprisonment for 20 years it was held that they would not be entitled to any remission from this period.

110. The death sentence to the convict in *Swamy Shraddananda* was converted to imprisonment for life with a further direction that he shall not be released till the rest of his life.

111. *Sebastian v. State of Kerala* : (2010) 1 SCC 58 was a case of a 24 year old extremely violent pedophile accused of raping a two-year old child and then murdering her. While commuting the death sentence, this Court held that he should remain in jail for the rest of his life in terms of *Swamy Shraddananda*. It was observed:

The evidence that the Appellant was a pedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Section 354 in the year 1998 and later for the offences punishable under Sections 363, 376, 379, 302 and 201 Indian Penal Code for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Section 302, and several other terms of imprisonment with respect to the other sections, though, an appeal in this connection was pending as on date. It is also extremely relevant that the Appellant had, in addition, been tried for the murders of several other children but had been acquitted on 28-7-2005 with the benefit of doubt. The

present incident happened three days later.

We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in Shraddananda case.

112. In *Ramnaresh v. State of Chhattisgarh* : (2012) 4 SCC 257 this Court converted the death sentence of the accused to imprisonment for life though the crime of rape and murder was heinous, since the accused persons were young at the time of commission of the offence (between 21 and 31 years of age); the possibility of the death of the victim being accidental; and the accused not being a social menace with possibility of reforming themselves. It was held, while modifying the sentence that the accused serve a term of imprisonment of 21 years:

While we cumulatively examine the various principles and apply them to the facts of the present case, it appears to us that the age of the accused, possibility of the death of the deceased occurring accidentally and the possibility of the accused reforming themselves, they cannot be termed as "social menace". It is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust, but it cannot be held with certainty that this case falls in the "rarest of rare" cases. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are unable to hold that any other sentence but death would be inadequate.

Accordingly, while commuting the sentence of death to that of life imprisonment (21 years), we partially allow their appeals only with regard to the quantum of sentence.

113. In *Neel Kumar v. State of Haryana* : (2012) 5 SCC 766 this Court modified the death penalty awarded to the accused for the rape and murder of his 4 year old daughter to one of 30 years imprisonment without remissions. It was held:

A three-Judge Bench of this Court in *Swamy Shraddananda (2) v. State of Karnataka*, considering the facts of the case, set aside the sentence of death penalty and awarded the life imprisonment but further explained that in order to serve the ends of justice, the Appellant therein would not be released from prison till the end of his life.

Similarly, in *Ramraj v. State of Chhattisgarh* : (2010) 1 SCC 573 this Court while setting aside the death sentence made a direction that the Appellant therein would serve minimum period of 20 years including remissions earned and would not be released on completion of 14 years' imprisonment.

Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The Appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for premature release.

114. In *Sandeep v. State of U.P.* : (2012) 6 SCC 107 the death sentence awarded

to the convict for the murder of his pregnant friend and pouring acid on her head was converted to sentence of life for a minimum period of 30 years without any remission before his case could be considered for premature release.

115. In *Brajendrasingh v. State of Madhya Pradesh* : (2012) 4 SCC 289 the accused had murdered his wife and three children since he suspected his wife's fidelity. The death penalty awarded to him was converted to imprisonment for life by this Court with a minimum imprisonment of 21 years. This is what was said by this Court:

Considering the above aspects, we are of the considered view that it is not a case which falls in the category of the "rarest of rare" cases where imposition of death sentence is imperative. It is also not a case where imposing any other sentence would not serve the ends of justice or would be entirely inadequate.

Once we draw the balance sheet of aggravating and mitigating circumstances and examine them in the light of the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that this is not a case where this Court ought to impose the extreme penalty of death upon the accused. Therefore, while partially accepting the appeals only with regard to quantum of sentence, we commute the death sentence awarded to the accused to one of life imprisonment (21 years).

116. In *State of Uttar Pradesh v. Sanjay Kumar* : (2012) 8 SCC 537 this Court converted the death penalty awarded to the accused for the rape and murder of an 18 year old into one of life imprisonment with a further direction that he would not be granted premature release under the guidelines framed for that purpose, that is, the Jail Manual or even under Section 433-A of the Code of Criminal Procedure It was said:

In view of the above, we reach the inescapable conclusion that the submissions advanced by the learned Counsel for the State are unfounded. The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non- consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of

justice cannot be perverted by executive or political pressure. of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A Code of Criminal Procedure.

117. In *Gurvail Singh v. State of Punjab* : (2013) 2 SCC 713 the death sentence was converted to imprisonment for life with the requirement that the convict spends a minimum of thirty years in jail without remission. It was held:

We are of the view, so far as this case is concerned, that the extreme sentence of capital punishment is not warranted. Due to the fact that the Appellants are instrumental for the death of four persons and nature of injuries they have inflicted, in front of PW 1, whose son, daughter-in-law and two grandchildren were murdered, we are of the view that the Appellants deserve no sympathy. Considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the Appellants was not warranted but while awarding life imprisonment to the Appellants, we hold that they must serve a minimum of thirty years in jail without remission. The sentence awarded by the trial court and confirmed by the High Court is modified as above. Under such circumstances, we modify the sentence from death to life imprisonment. Applying the principle laid down by this Court in *Sandeep* we are of the view that the minimum sentence of thirty years would be an adequate punishment, so far as the facts of this case are concerned."

Consecutive sentence cases:

118. *Ravindra Trimbak Chouthmal v. State of Maharashtra* : (1996) 4 SCC 148 is perhaps among the earliest cases where consecutive sentences were awarded. This was not a case of rape and murder but one of causing a dowry death of his pregnant wife, It was held that it was not the "rarest of rare" cases "because dowry death has ceased to belong to that species of killing." The death sentence was, therefore, not upheld. Since the accused had attempted to cause disappearance of the evidence by severing the head and cutting the body into nine pieces, this Court directed that he should undergo the sentence for that crime after serving out his life sentence. It was held:

We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the "rarest of the rare" type. This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we

entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the Appellant before us. We, therefore, commute the sentence of death to one of RI for life imprisonment.

But then, it is a fit case, according to us, where, for the offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder -- the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body. To these sentences, we do not, however, desire to add those awarded for offences under Sections 316 and 498-A/34, as killing of the child in the womb was not separately intended, and Section 498-A offence ceases to be of significance and importance in view of the murder of Vijaya.

The result is that the appeal stands allowed to the extent that the sentence of death is converted to one of imprisonment for life. But then, the sentence of seven years' RI for the offence under Sections 201/34 Indian Penal Code would start running after the life imprisonment has run its course as per law.

Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what this decision mandates is that if the convict is to be earlier released by the competent authority for any reason, in accordance with procedure established by law, then the second sentence will commence immediately thereafter.

119. Ronny v. State of Maharashtra : (1998) 3 SCC 625 is also among the earliest cases in the recent past where consecutive sentences were awarded. The three accused, aged about 35 years (two of them) and 25/27 years had committed three murders and a gang rape. This Court converted the death sentence of all three to imprisonment for life since it was not possible to identify whose case would fall in the category of "rarest of rare" cases. However, after awarding a sentence of life imprisonment, this Court directed that they would all undergo punishment for the offence punishable under Section 376(2)(g) of the Indian Penal Code consecutively, after serving the sentences for other offences. It was held:

Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way; having regard to the nature of offences and circumstances in which they were committed, it is not possible for the Court to predict that the Appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years' old, A-2 is 35 years' old and A-3 is 25 (sic 27) years' old. The Appellants cannot be said to be

too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the "rarest of the rare" cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment. Accordingly, we modify the sentence awarded by the courts below under Section 302 read with Section 34 from death to life imprisonment. The sentences for the offences for which the Appellants are convicted, except under Section 376(2)(g) Indian Penal Code, shall run concurrently; they shall serve sentence under Section 376(2)(g) Indian Penal Code consecutively, after serving sentence for the other offences.

120. In *Sandesh v. State of Maharashtra* : (2013) 2 SCC 479 this Court converted the death penalty awarded to the accused to imprisonment for life, inter alia, for the rape of a pregnant lady, attempted murder and the murder of her mother in law to imprisonment for life with a further direction that all the sentences were to run consecutively.

121. In *Sanaullah Khan v. State of Bihar* the death sentence awarded to the accused for the murder of three persons was converted by this Court to imprisonment for life for each of the three murders and further the sentences were directed to run consecutively.

122. These decisions clearly suggest that this Court has been seriously reconsidering, though not in a systemic manner, awarding life sentence as an alternative to death penalty by applying (though not necessarily mentioning) the "unquestionably foreclosed" formula laid down in *Bachan Singh*."

66. Manifestly, thus, following the criterion expounded by the Supreme Court in *Shankar Kisanrao Khade's* case is imperative while considering the reference for confirmation of death penalty. As per the above judgment, reports regarding the conduct of the accused have to be called for from the prison and the Social Welfare Department.

Mitigating and aggravating circumstances have to be evaluated and only then, can the court proceed to award the extreme death penalty to the accused, if the aggravating circumstances outweigh the mitigating circumstances. In absence of such an exercise being conducted, a death penalty cannot be awarded even if the offence falls within the rarest of rare category. True it is that we could have undertaken this exercise even at this stage, but by now much water has flown inasmuch as more than 10 years have passed by since the crime was committed. Thus, we feel that indulging in an exercise of evaluating the mitigating and aggravating circumstances at this extremely delayed stage is not called for. Hence, we have to say albeit with a heavy heart that the death penalty imposed upon the accused by the trial court cannot be confirmed. Nonetheless, we feel that the perpetrators of such a ghastly offence cannot be permitted to be set at

liberty by adverting to the provisions of the parole or by shortening of the life sentence at any point of time during their natural life span.

67. Hence, we commute the death penalty awarded to the accused by the trial court vide its sentencing order dated 06.10.2016 and sentence them to undergo life imprisonment. The sentence of life imprisonment awarded to the accused persons shall enure till the remainder of their natural life without possibility of remission, parole, premature release or access to open air prison.

68. The reference for confirmation of death sentence is answered in negative. The appeal preferred by the accused to assail the impugned judgment is partly allowed. Their conviction as recorded by the trial court for the various offences mentioned above is affirmed. For the offence under Section 302/149 IPC, the death sentence awarded to the accused appellants is commuted to life imprisonment, which shall enure till their entire life span without possibility of parole or premature release. The sentence of fine is maintained. The victims' families shall be granted maximum possible compensation under the Rajasthan Victim Compensation Scheme at the rates prevailing today. The District Legal Services Authority, Pali shall ensure compliance of this direction forthwith. The record be returned to the trial court.