

(2012) 09 GAU CK 0102

In the Gauhati High Court

Case No : Criminal Ref. No's. 02 and 94 of 2005

State of Tripura and Another

APPELLANT

Vs

Ashok Debbarma @ Achak Debbarma and Another

RESPONDENT

Date of Decision : 05-09-2012

Acts Referred:

Arms Act, 1959 — Section 2(c), 2(e), 2(h)(ii), 2(i), 27(3)
Constitution of India, 1950 — Article 136, 14, 19, 19(2), 21
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 232, 235(2), 313
Evidence Act, 1872 — Section 138
Penal Code, 1860 (IPC) — Section 148, 149, 302, 307, 326

Citation : (2012) 5 GLT 209

Hon'ble Judges : Swapan Chandra Das, J; Iqbal Ahmed Ansari, J

Bench : Division Bench

Advocate : D. Sarkar, PP, Mr. Somik Deb, Mr. S. Lodh and Mr. A. Bhadra, for the Appellant; Somik Deb, S. Lodh, A. Bhadra and Mr. D. Sarkar, PP, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—The present death reference and criminal appeal have arisen out of the judgment and order of conviction and sentence, dated 07.11.2005 and 10.11.2005, respectively, passed by learned Addl. Sessions Judge (Court No. 2), West Tripura, Agartala, in Sessions Trial Case No. 169(WT/A) 1998, whereby the accused-appellant, Ashok Debbarma alias Achak Debbarma, and accused Gandhi Debbarma (since absconder) have been convicted of offences punishable under Sections 326, 436, 302 read with Section 34 IPC and Section 27(3) of Arms Act, 1959, read with Section 34 IPC and the present accused-appellant stands, inter alia, sentenced to death. The reference for confirmation of sentence of death has been made u/s 366(1) of Cr.P.C. and the appeal has been preferred by the accused against the judgment and order of conviction and sentence u/s 374 of Cr.P.C.

2. Human beings were at their worst-this is what this appeal discloses. The

present case may, rather, be viewed as a reminder to the mankind of the bitter truth, that human instincts can be even worse than that of beasts, for, beasts, unlike human beings, do not attack or kill mindlessly except in their self-defence or unless provoked to do so. History reveals that human beings 3/4 the only civilized species on the earth 3/4 are found to be contrary to their material achievements at their worst particularly when they behave as perpetrators of crimes, and the irony is that it is none but the human beings, who are the worst sufferers of their own blunder.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described as follows:

As many as 15 people, including children, teenagers and women, all belonging to a particular linguistic community, were killed brutally on one night, in a village called, Jarulbachai village, under Takarjala Police Station, in the State of Tripura. As many as 23 houses of the villagers were set on fire, which were completely gutted. Not less than 6 people sustained major injuries caused by bullets and narrowly escaped death. The belongings, which were inside the houses of the sufferers, could not be saved and were completely damaged and/or gutted in the fire. Such were the dastardly acts of the perpetrators of the genocide, which was committed on 11.02.1997 at about 11-00 p.m. When, after having taken their meals, the inhabitants of the Jarulbachai village, who were poor and illiterate, had fallen asleep, they were, suddenly, awakened, by the sound of cries and firing of bullets, to discover their houses ablaze and bullets being fired from sophisticated firearms. The whole village was engulfed in fire and the villagers were in panic. Many of them could not escape the shower of bullets and either died or grievously injured. Mother helplessly watched her child burnt alive in the fire, which had gutted her house, but could do nothing to save her beloved one. Husbands found their wives lying on the ground, ridden with bullets and screaming to death, but they were not able to even provide the least aid. Wives became widows in a flash of moment. Parents helplessly watched their children lying on the ground with bullet injuries, bleeding and crying in pain, and, ultimately, dying. On the very night of the occurrence, i.e., on 11.02.1997, at about 11-00 p.m., information was received, at Takarjala Police Station, West Tripura, from Jarulbachai D AR camp, that extremists had set on fire a number of houses at village Jarulbachai and that people had been shot dead and injured grievously. The information, so received, was entered into General Diary, at the Takarjala Police Station, in the form of Entry No. 292, dated 11.02.1997. The Officer-in-Charge (PW18), Takarjala Police Station, visited the DAR camp, cordoned off the area, and conducted search. Most of the houses of the village were found gutted by fire. On the very night of the occurrence, as many as 13 dead bodies were found lying at various places and three persons were found lying injured. A formal written information, as regards the occurrence, was received by the Investigating Officer, from one Gauranga Biswas (PW2), at the place of occurrence. Based on the written information, which was so received at the place of occurrence, Takarjala Police Station Case No. 12/97, u/s 148/ 149/

302 /326 /307 /436 IPC, read with Section 27(3) of the Arms Act, 1959, was registered. In course of time, more dead bodies were found and the number of the dead increased to fifteen. Similarly, the number of injured also increased to six. The dead bodies as well as the injured were carried to GB hospital, at about 4-00 p.m., on 12.02.1997. Inquests were held over the dead bodies and post-mortem examinations were also conducted thereon. While conducting investigation, the Investigating Officer (PW8) seized, vide seizure list (Ext. 11), two empty cartridges and some ashes from the place of occurrence. Looking at the serious nature of the case, the investigation was handed over to the Criminal Investigation Department (in short, "CID") and PW20 (a DSP in the CID) conducted further investigation.

4. On completion of investigation, charge-sheet was laid, under Sections 148 /149 /302/ 326 /307/ 436/ 34 IPC and Section 27(3) of the Arms Act, 1959, read with Section 34 IPC against 11 persons, namely, 1. Rabi Deb Barma, 2. Gandhi Deb Barma, 3. Mantu Deb Barma, 4. Sambhuram Deb Barma, 5. Budhrai Deb Barma Charge-sheet was filed also against some other accused, who were found absconding, namely, 1. Subha Deb Barma, 2. Sandhya Deb Barma, 3. Samprai Deb Barma, 4. Falgoon Deb Barma, 5. Bijoy Deb Barma, 6. Budhu Deb Barma, 7. Mangal Deb Barma, 8. Sankar Deb Barma, 9. Kaphur Deb Barma, 10. Sandhyaram Deb Barma alias Phang, and 11. Ashok Deb Barma alias Achak (i.e., the present appellant), showing the present appellant as an absconder.

5. Out of the 11 persons, named in the charge-sheet, charges were framed against five persons under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959, read with Section 34 IPC, these five persons being 1. Budhrai Deb Barma, 2. Mantu Deb Barma, and 3. Sambhuram Deb Barma, 4. Gandhi Deb Barma, and 5. Achak alias Ashok Deb Barma (i.e., the present accused-appellant). All these accused pleaded not guilty and claimed to be tried.

6. In support of their case, prosecution examined altogether 20 (twenty) witnesses. The two accused, namely, Gandhi Deb Barma and Ashok Deb Barma alias Achak were examined u/s 313 Cr.P.C. and, in their examinations aforementioned, they denied to have committed the offences alleged to have been committed by them, the case of these two accused being, in brief, thus: They were not members of the group of people, who had committed the offences aforementioned; rather, the relatives and family members of these two accused had given shelter to the helpless victims. As there was enmity between Bipul Biswas and the two accused, namely, Ashok Deb Barma alias Achak and Gandhi Deb Barma, with regard to grazing of cattle in the rubber plantation, the two accused aforementioned have been falsely implicated. However, for want of adequate evidence, three accused, namely 1. Budhrai Deb Barma, 2. Mantu Deb Barma, and 3. Sambhuram Deb Barma, were, vide order, dated 23.04.2005, acquitted u/s 232 Cr.P.C.; and only two accused, namely, Gandhi Deb Barma and Ashok Deb Barma alias Achak, were called upon, in terms of Section 232 Cr.P.C.,

to enter on their defence and, accordingly, the defence adduced evidence by examining two witnesses.

7. Learned Addl. Session Judge, West Tripura, Agartala, having found the two accused, namely, Ashok Deb Barma alias Achak and Gandhi Deb Barma, guilty of the offences under Sections 326, 436, 302 IPC and Section 27(3) of the Arms Act, 1959, read with Section 34 IPC, pronounced both the accused guilty of the offences aforementioned and convicted them accordingly, though, on the date of the judgment, i.e., 07.11.2005, the accused, namely, Gandhi Deb Barma, was absent. The judgment was, thus, pronounced by the learned Session Judge, in the absence of the said co-accused, in terms of Section 353(6) Cr.P.C.

8. Since the convict, namely, Gandhi Deb Barma, as indicated above, had absconded, the learned Addl. Session Judge, after hearing, on 10.11.2005, the prosecution as well as the defence, on the question of sentences to be passed against the present accused-appellant, sentenced him to death for his conviction u/s 302 IPC and also u/s 27(3) of the Arms Act, 1959. By the judgment and order aforementioned, Ashok Deb Barma alias Achak was also sentenced, for his conviction u/s 436, read with Section 34 IPC, to suffer rigorous imprisonment for life and pay fine of Rs. 10,000/- and, in default of payment of fine, suffer rigorous imprisonment for one year and, further, to suffer, for his conviction u/s 326 IPC read with Section 34 IPC, imprisonment for life and pay a fine of Rs. 5,000/- and, in default of payment of fine, suffer rigorous imprisonment for six months.

9. In terms of the provisions contained u/s 366(1) of the Cr.P.C., learned trial Court has referred to this Court the proceedings for confirmation of the death sentence awarded to Ashok Deb Barma alias Achak. The reference has been accordingly registered as Criminal Reference No. 02/ 2005.

10. Aggrieved by his conviction and the sentences, passed against him, accused Sri Ashok Deb Barma alias Achak, too, has preferred an appeal and the appeal has given rise to Criminal Appeal (J) 94/2005. Since the Appeal as well as the Criminal Reference have arisen out of the same judgment, we have heard both the Appeal as well as the Criminal Reference, together and the same are being disposed of by this common judgment and order.

11. We have heard Mr. Somik Deb, learned counsel, appearing on behalf of the accused-appellant, and Mr. D. Sarkar, learned Public Prosecutor, Tripura.

WHETHER PROVISO TO SECTION 27(3) OF THE ARMS ACT. 1959, IS CONSTITUTIONAL?

12. Before Proceeding further, it is pertinent to note that the accused-appellant had put to challenge, by way of a writ petition, made under Article 226 of the Constitution of India, the constitutionality of Section 27(3) of the Arms Act, 1959, the writ petition gave rise to WP(C)No. 74/2010. By its decision, in State of Punjab Vs. Dalbir Singh, reported in 2012 AIR SCW 1356, the Supreme Court

has held Section 27(3) of the Arms Act, 1959, as unconstitutional. Consequently, as we would proceed further, we would have to bear in mind the fact that Section 27(3) of the Arms Act, 1959, is unconstitutional and the accused-appellant could not have been sentenced to death by taking resort to, and relying upon, Section 27(3) of the Arms Act, 1959, and that the accused-appellant's writ petition, namely, WP(C) No. 74/2010, has been disposed of by order, dated 20.6.2012, passed by this Court in the light of the decision rendered in Dalbir Singh (supra).

13. The fact that such dastardly acts, as described above, were committed in village Jarulbachai, under Takarjala Police Station, West Tripura, on the night of 11.02.1997, has not been in dispute at any stage of the trial. What is in dispute, in the present appeal, is the complicity of the accused-appellant, facing the trial, in the said ghastly occurrence.

14. It is not disputed that 15 persons were brutally and mercilessly killed and many others were injured in the massacre and the houses of innocent villagers, with all their household belongings and livestock, were, admittedly, burnt to ashes. Names of those killed and injured, according to the prosecution case, are:

PERSONS KILLED

1. Sachindra Sarkar, 55 years,
2. Archana Sarkar, 40 years,
3. Dipak Sarkar, 20 years,
4. Goutam Sarkar, 8 years,
5. Lasmi Sarkar, 10 years,
6. Prasenjit Sarkar, 2 years,
7. Saraswati Biswas, 32 years,
8. Tulsi Biswas, 8 years,
9. Narayan Das, 40 years,
10. Mithu Das, 10 years,
11. Bithu Das, 2 years,
12. Khelon Sarkar, 33 years,
13. Sujit Sarkar, 15 years,
14. Bipul Sarkar, 7 years,
15. Chotan Biswas, 10 years.

PERSONS INJURED

1. Dulal Sarkar, 25 years,

2. Sumitra Sarkar, 20 years,
3. Hemendra Sarkar, 42 years,
4. Ajit Biswas, 35 years.

15. Bearing in mind what is indicated above, we, first, come to the evidence of PW1 (Dulal Sarkar). According to the evidence of this witness, in the year 1996-97, on the night, preceding the day of Saraswati Puja, when he was asleep with his family members, some persons, armed with weapons, such as, fire arms, dao, lathi, etc., came and set fire to the roof of his homestead. It is in the evidence of PW1 that the miscreants opened fire and one of the bullets, so fired by the extremists, had hit his leg; but he, somehow, managed to escape and hid himself in the nearby bushes. It is also in the evidence of PW1 that his three year old son, whose name was Prasenjit Sarkar, was killed in the incident and that his hut was gutted by fire. PW 1 has deposed that, before coming to his house, the extremists had, in fact, set fire to as many as 23 houses and killed as many as 15 persons of their village. It is in the evidence of PW 1 that he could identify one person, but the said person was not present in the Court.

16. The defence did not cross-examine P W1 at all and his evidence, that he had been hit on his leg by bullet, remained unchallenged. We have, therefore, no reason to disbelieve the evidence given by PW1.

17. What surfaces from the undisputed evidence of PW1 is that on the night of the occurrence, as aforesaid, his house was attacked by some persons, armed with weapons, such as, dao, lathi, fire-arms, etc., they set fire to his house and, altogether 23 houses, in his village, had been burnt and as many as 15 people of his village were killed, which included his three-year old son, and that he (PW 1), too, sustained bullet injury on his leg.

18. Thus, the evidence of PW1 shows that those, who had set fire to his house, had, actually, set fire to as many as 23 houses in the said village and killed as many as 15 people.

19. Turning to the evidence of PW2 (Gouranga Biswas), a government servant, we notice that this witness has deposed that on the night of 11.02.1997, at about 11 -00 p.m., he heard sounds of shots being fired and saw flames emanating from east-south direction of his village, but he managed to hide, with his family members, in the nearby bushes. PW2 has also deposed that during the occurrence, he came across Ajit Biswas (PW13), who was in injured condition, and the said injured sought for his help saying that the extremists had attacked the area. PW2 has further deposed that he (PW2) rushed to the DAR camp and informed the personnel posted there about the incident of attack by extremists and, after sometime, when DAR personnel arrived at the place of occurrence, he, too, went there and found 20 houses gutted by fire and some dead bodies lying in burnt condition. It is in the evidence of PW2 that about 15 persons were killed in the extremist firing and that, as far as he remembered, three persons were

injured. This witness has named Ajit Biswas, Saraswati and Himadri Sarkar as persons, who had been injured. It is also in the evidence of PW2 that he lodged, with the police, an FIR, which is Exhibit 1.

20. In his cross-examination, PW2 has clarified that till the time of lodging of the FIR, none told him the names of the miscreants. PW2 has also clarified, in his cross-examination, that after the police force had arrived at the place of occurrence, some of the villagers came out of their respective places of hiding.

21. We may pause, at this stage, and refer to the evidence of PW18, who, as the Officer-in-Charge, Takarjala Police Station, had visited the place of occurrence and had, until before the CID assumed the charge of the investigation, conducted the investigation.

22. Coming to the evidence of P W18, we notice that he has deposed that on 11.2.1997, while he was functioning as the Officer-in-Charge of the said police station, he received, at the said police station, at about 11.10 pm, an information from Jarulbachai D AR Camp that an incident had taken place at Bangarbari, whereupon he rushed, with his staff, to the spot and, on arriving at the said Camp, he cordoned off the area and conducted a search. It is the evidence of PW18 that he found most of the houses of Bangarbari village gutted by fire, he came across 13 dead bodies and 3 persons lying injured, whereupon he sent the dead bodies and the injured to GB Hospital. It is also in the evidence of PW18 that at about 4 am, he received a complaint, lodged by one Gauranga Biswas (PW2), and he started the investigation and, during the course of investigation, he seized, from the place of occurrence, 2 (two) empty cartridges and some ashes by a seizure list, the seizure list being Ext. 11. The cartridges and ashes have been proved as Material Ext. 1 series.

23. We notice that according to evidence of P W18, he returned to the police station at 1.30 pm, and he, then, registered the said complaint, which had been handed over to him by PW2(Gauranga Biswas), as the First Information Report (FIR). In his cross-examination, PW18 has clarified that he arrived at the place of occurrence at 12.35 pm and that those, who were hiding inside the jungle, came out after the police arrived at the spot. In his evidence, PW18 has clarified that he registered the case against unknown extremists.

24. From the evidence discussed so far, what becomes clear is that PW13 (Ajit Biswas) was, admittedly, one of the persons, who got injured, in the said occurrence, by bullet and he was, admittedly, not examined by the police on the night of the occurrence. In such circumstances, the fact that the name of the accused-appellant, Ashok Deb Barma alias Achak, did not find mention in the First Information Report (FIR) can be of no serious consequence. What is also worth pointing out is that though GD Entry No. 292/97, dated 11.02.1997, has not been produced and proved in the Court, the fact of the matter remains that the police swung into action on the basis of the information received from the said Camp and, on reaching the place of occurrence, in consequence of the

information received from the said Camp, PW18 had cordoned off the area, conducted a search and he found most of the houses gutted by fire and he also found as many as 13 dead bodies and 3 persons lying injured, whereupon he sent the dead bodies and the injured to GB Hospital.

25. Thus, the police machinery had been set into motion on the basis of the information, which PW18 had received at his police station, and it was during the course of such investigation that Ext. 1 was received, at about 4 am, by PW18 from PW2.

26. Though Ext. 1 has been treated as the First Information Report (FIR), we must hasten to point out that when Ext. 1 had been, admittedly, received by PW18 after he had already commenced the investigation, the said written information (Ext. 1) could not have been treated as First Information Report (FIR). The said written information (Ext. 1) was, at best, a statement of PW2, made in writing, to the police during the course of investigation and shall be treated as PW2's statement recorded u/s 161 of the Code of Criminal Procedure, 1973, and the contents thereof can be used not as First Information Report (FIR), but for the purpose of contradicting PW2.

27. Information, regarding a cognizable offence, to a police officer, first in point of time, is regarded as FIR- It is not intended to be a very detailed document or encyclopedia of the prosecution's case. It may give only the substance of the allegations about the occurrence. Though FIR is not a substantive piece of evidence, it is nonetheless a valuable piece of evidence inasmuch as it discloses the version of the occurrence at the first available opportunity and can, therefore, be used not only for contradicting the informant, but also, in a given case, for lending support to the prosecution's case by way of corroboration. (See Kirender Sarkar and Others Vs. State of Assam, , and Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra,).

28. Keeping in view what have been pointed out above, when we come to the evidence of PW6 (Dr. J. K. Debaram), who was, on the relevant date, i.e. 12.02.1997, posted at GB. Hospital, as Medical Officer, we notice that he has deposed that he had examined two persons, namely, Hemendra Sarkar and Ajit Biswas (PW13), both of whom had sustained gun-shot injuries. Their injury reports have been proved by PW6 as Exhibit-7.

29. We may pause, at this stage, to point out that as per the evidence of PW2 (Gouranga Biswas), when he (PW2) was trying to hide, with his family members, in the nearby bushes, he came across Ajit Biswas (PW13), who was in injured condition, and that the said injured had sought for his (PW2's) help by saying that the extremists had attacked the area

30. We may, now, turn to the evidence of PW13 (Ajit Biswas), whose evidence, is that on 11.02.1997, at night, he was, at his home, with his wife, Saraswati, his three daughters, namely, Swapna, Tulshi and Suman and his son, Ratan, when miscreants set fire to his house. PW13 has deposed that his wife, Saraswati, who

was 30/32 years old, and his daughter, Tulshi, who was 5 VA years old, died in the said incident PW13 has also deposed that it was at about 11-00 p.m. that the miscreants had set fire to his house and that when he wanted to go out of his house, around 10/12 miscreants, with arms and "mashal" (i.e., torch) in their hands, opened fire at him and he sustained injury.

31. It is in the evidence of PW 13 that he saw the miscreants in the light of the "mashal" (i.e., torch) and that he was able to see the miscreants, but he did not know their names. This witness (PW13) has identified accused Gandhi (since absconder) and the present appellant, Achak, in the dock. It is also in the evidence of PW13 that he lost his senses thereafter and regained his senses at GB. Hospital.

32. Thus, there is nothing in the evidence of PW13 to show that he was in his senses, when the police arrived at the place of occurrence; rather, his evidence indicates that he was unconscious. In such circumstances, the fact that he did not disclose the name(s) of the assailants to the police, on the night of the occurrence, is of no material consequence.

33. What is extremely important to note is that while, on being cross-examined, P W20, a CID officer, who, too, investigated the case, has asserted that Ajit Biswas told him, during investigation, that he (Ajit Biswas) would be able to identify the miscreants.

34. Moreover, the evidence of PW13 that he had sustained bullet injury and that he was treated, at the said hospital, is supported by the evidence of PW6, who was a Medical Officer, at the relevant point of time, at the hospital. The fact, that PW13 had sustained injury, is also supported, as already indicated above, by the evidence of PW2 (Gouranga Biswas). PW13 has further deposed that he was a rickshaw-puller, that his statement was recorded at the hospital and that police officers met him on several occasions. PW13 has denied the suggestions, given by the defence, that the two accused, Gandhi and Achak, were not present along with persons, who were involved in the occurrence, and that he could not recognize the said two accused-persons.

35. Though the learned trial Judge has written, on the evidence of this witness (PW13), that he had identified accused Gandhi and the present appellant, Achak, what is pertinent to remember is that the evidence of this witness shows that this witness claims to have seen the two accused aforementioned and he has accordingly identified the two accused aforementioned in the dock. Except offering suggestions to this witness, nothing else was elicited by the defence to show that this witness's evidence, that accused Gandhi and the present appellant, Achak, were seen by him with those others, who had attacked the villagers, is untrue or false.

36. What is of immense importance to note in the evidence of PW13 is that as a result of the houses being set ablaze, the whole area was lighted and clearly visible. In such circumstances, it was quite possible for anyone to have seen the

persons, who were setting fire to the houses, or who were shooting from their firearms. The victims of such an occurrence may remember, for all the time to come, the face(s) of the person(s), who had injured or killed the members of their families.

37. The defence, it may be noted, has not disputed the evidence, given by this witness, that in the light of the burning houses, he saw Gandhi and the present appellant, Achak, along with those, who had attacked the villagers. It is not even suggested to P W13 that he had enmity with the present appellant. In such circumstances, PW13 had no motive to falsely implicate the present appellant. It is also not the case of the defence that this witness had not claimed before the police that he would be able to identify the miscreants, though he did not know their names. Thus, his assertions, that he had seen the said two accused, attacking their village, cannot be ignored or discarded; rather, his evidence must be believed unless can be shown, otherwise, by the defence.

38. It is also not the defence case, we must bear in mind, that this witness (PW13) might have committed an error in identifying the two accused. The simple case of the defence, while cross-examining the witness, is that the two accused were not associates of those, who had attacked the village, and that he (P W 13) could not identify the said two accused. But the crucial question, as to why this witness (PW13) could not have identified the two accused, has remained unexplained by the defence. Similarly, the fundamental question, as to why PW13 would be lying that he had seen the two accused, amongst others, who had attacked their village, has remained unexplained and/or unanswered. We, therefore, see no reason to discard the evidence of the PW13, to the effect that he had recognized the two accused at the place of the occurrence, and/or not to give credence, which his unshaken evidence, otherwise also, deserves.

IDENTIFICATION:

39. We may have a pause here to see the relevant law in respect of identification in a criminal trial. Identification of an accused, in a criminal trial, is a relevant fact to be proved by the prosecution to bring home the charge against a given accused. If an accused is known to the witnesses and is identified by name and face by the witnesses, there is no requirement of having a Test Identification Parade (in short, TIP) at the time of investigation. If it appears at the time of investigation that the offenders were not known to the witnesses involved in the occurrence and that the statements of the witnesses reveal that they will be able to identify the offenders if the witnesses see the offenders, then, in a case of this nature, it is the duty of the investigating officer to produce such suspects, in a TIP, before the witnesses concerned to establish that the investigation was proceeding in an appropriate direction as regards the identity of the persons involved as offenders.

40. It is fairly settled law that the primary object of holding TIP is to enable the witnesses to identify persons involved in the commission of offence(s) if the offenders were not personally known to the witnesses. This serves to satisfy the

investigating officer of the bona fide of the witnesses and help the investigating officer to collect further evidence in order to corroborate the testimony of the witness or witnesses concerned. The whole object behind holding a TIP is really to find out whether or not the suspect is the real offender. Where the witnesses themselves state, during investigation, that the accused persons were unknown to them and they would identify them, if confronted with, it may be necessary for the investigating agency to put up the suspect for identification by the witnesses in order to avoid the possibility of an innocent person being booked in and, at the same time, to strengthen the prosecution's case that the person, named by the witnesses, is the offender.

41. In *Kanta Prashad Vs. Delhi Administration*, , the Supreme Court has made it clear that failure to hold a TIP does not make the evidence of identification, at the trial, inadmissible. However, the weight to be attached to such identification would be for the court of fact to decide and that it is prudent to hold TIP with respect to witnesses, who did not know the accused before the occurrence. The relevant observations, made in *Kanta Prashad (supra)*, run as follows:

It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course.

42. Having taken into account the decisions in *Kanta Prashad (supra)*, *Harbajan Singh Vs. State of Jammu and Kashmir*, , *Jadunath Singh and Another Vs. The State of U.P.*, and some other authorities, the Supreme Court held, in *George and Others Vs. State of Kerala and Another*, , as follows:

It cannot be denied however that though not fatal, absence of the corroborative evidence of prior identification in a T.I. parade makes the substantive evidence of identification in Court after a long lapse of time a weak piece of evidence and no reliance can be placed upon it unless sufficiently and satisfactorily corroborated by the evidence.

43. From what have been observed, in *George (supra)*, it is clear that though absence of identification parade does not make the evidence of identification, at the trial, inadmissible, the court has the duty to ascertain as to how far the evidence of identification of the accused, at the trial, can be safely relied upon. In short, while the evidence of identification of an accused, at a trial, is admissible and substantive piece of evidence, it will depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused. The rule of prudence may urge a court, in a given case, that the court should look for some corroborative piece of evidence.

44. During the stage of investigation of a crime, the investigating agency is required to hold identification parade for the purposes of enabling the witness to identify the person alleged to have committed the offence, particularly, when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the Court regarding his involvement. Identification parade may also not be necessary in a case, where the accused persons are arrested at the spot. The evidence of identification of an accused person, for the first time, at the trial is, from its very nature, inherently of a weak character. The Supreme Court, in *Budhsen and Another Vs. State of U.P.*, held that the evidence of identification of an accused, at the trial, in order to carry conviction should, ordinarily, clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part, which the accused allegedly played in the crime, in question, with reasonable particularity. In such cases, test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused, who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration and in order to enable the Court to believe that the person brought before the Court was the real person involved in the commission of the crime. The identification parade, even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence, which is required to be followed in the cases, where the accused is not known to the witness or the complainant. (See *State of Himachal Pradesh Vs. Lekh Raj and Another*,).

45. In the case of *Malkhansingh and Others Vs. State of Madhya Pradesh*, the Supreme Court has clarified that the T.I.P. is not substantive piece of evidence and to hold the TIP is not even the rule of law, but a rule of prudence so that the identification of the accused inside the Courtroom, at the trial, can be safely relied upon. In *Malkhan Singh (supra)*, the Court, while observing that identification of an accused in a Court, should, as a rule of prudence, be preceded by a TIP, has, in no uncertain words, clarified that this rule of prudence is, however, subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can, without such TIP or other corroboration, safely rely. The Supreme Court has also clarified, in *Malkhan Singh (supra)*, that the identification parades belong to the stage of investigation and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade; the TIPs do not, points out the Supreme Court, in *Malkhan Singh (supra)*, constitute substantive evidence and these parades are essentially

governed by Section 162 of the Code of Criminal Procedure and, hence, failure to hold a test identification parade would not make inadmissible the evidence of identification in court, though the weight to be attached to such identification should be a matter for the courts of fact to determine. Asserted the Supreme Court, in Malkhan Singh (supra), that in appropriate cases, the Court may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad Vs. Delhi Administration, ; Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, -; Budhsen and Another Vs. State of U.P., and Rameshwar Singh Vs. State of Jammu and Kashmir, . (See also Dana Yadav @ Dahu and Others Vs. State of Bihar, , Umesh Kamat Vs. State of Bihar, , and Malkhansingh and Others Vs. State of Madhya Pradesh,).

46. What emerges from the above discussion is that the identification of an accused inside the Court-room, at a trial, is an admissible piece of evidence and because such identification of an accused is admissible in evidence, such evidence of identification is a substantive piece of evidence. It is, therefore, permissible to rely on such piece of evidence as a rule of law; but the rule of prudence demands that in the absence of a TIP having been held properly and in accordance with law, the conviction of an accused must not be based entirely on his being identified, at the trial, by a witness, who did not know the accused. There is, however, no legal impediment in convicting an accused on the basis of his identification at the trial provided that the court has good reasons to believe the evidence of identification at the trial, particularly, when there is other corroboration evidence on record, direct or circumstantial.

47. The Supreme Court, in Dana Yadav @ Dahu and Others Vs. State of Bihar, , examined the law, with regard to the identification of accused, and held, at paragraph 38, thus:

38. In view of the law analysed above, we conclude thus:-

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution, the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court, while dealing with such a prayer should consider without holding a mini inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily ensure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test

identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification parade held, the same ipso facto can not be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling the witnesses to identify either the properties which are subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general

rule there may be exceptions as enumerated above.

(Emphasis is added)

48. In the case of Nibaran Borah Vs. State of Assam, , taking into consideration the relevant decisions of the Supreme Court, this Court, at paragraph 18, held thus:

18. What emerges from the above discussion is that the identification of an accused inside the Court-room, at a trial, is an admissible piece of evidence and because such identification of an accused is admissible in evidence, such evidence of identification is a substantive piece of evidence. It is, therefore, permissible to rely on such piece of evidence as a rule of law; but the rule of prudence demands that in the absence of a TIP having been held properly and in accordance with law, the conviction of an accused must not be based entirely on his being Identified, at the trial, by a witness, who did not know the accused. There is, however, no legal impediment in convicting an accused on the basis of his identification at the trial provided that the court has good reasons to believe the evidence of identification at the trial, particularly, when there is other corroboration evidence on record, direct or circumstantial.

49. In the present case, the witnesses, "who are themselves victims, have identified the accused-appellant, in the open Court, during trial, which is a piece of substantive evidence and such identification, made by the eye witnesses, has not been shaken or controverted. The learned trial Court has made a detailed discussion of the relevant law of identification of accused persons at the trial. We find total justification in the findings, reached in this regard, by the learned Addl. Sessions Judge in respect of identification of the accused-appellant; and since the accused-appellant is known to the witnesses by name and face, holding of TIP of the accused-appellant was not at all called for. Furthermore, the accused-appellant had been absconding after the occurrence. The evidence of the investigating officer on the fact of abscondance of the accused-appellant has not been discredited or demolished. The abscondance of the accused-appellant, as a conduct, is, therefore, relevant and ought to be considered along with other evidence on record.

50. Bearing in mind what have pointed out above, when we come to the testimony of PW3 (Narayan-Sarkar), we find that on the night of 11.02.1997, when he was at his home, he heard some sounds and he found that some houses were burning in his village and, later on, DRA personnel came, whereupon he went to the spot at about 1:00 am and found that about 25/30 houses had been gutted and about 15/16 persons had been killed by bullet. PW3 has also deposed that he came to know, on going to the place of occurrence, that the extremists had set fire to the houses and killed people. PW3 has further deposed that they took the injured to GB hospital, the police prepared the inquest reports of deceased Narayan Das and Bitu Das and that he signed, on the said inquest reports, as a witness.

51. What is, however, important to note, in the evidence of PW3, is that he claims that he could not identify anybody and none told him about the persons, who were involved in the attack. In his cross-examination, PW3 has deposed that he knows the accused persons as they are his neighbours and that they were not present at the time of the occurrence.

52. While considering the evidence of PW3, what is of great importance to note is that he had, admittedly, gone to the place of occurrence, at about 1 -00 p.m., on the night of occurrence, after the police force had already arrived there. His evidence, therefore, that none of the accused was present at the place of occurrence, at the time of occurrence, can be given no importance at all and the defence can, thus, derive no strength from his evidence, given to the effect that none of the accused was present at the place of occurrence and/or that none of the accused was involved in the said occurrence. What, however, the evidence of PW3 establishes is the fact that about 20/30 houses, as described by PW1, PW2, PW13 and PW18, had been gutted by fire and about 15/ 20 persons had been killed in the attack and that the injured were taken to the GB hospital.

53. Turning to the evidence of PW4 (Amrit Sarkar), we find that he has deposed that on 12.02.1997, police seized some empty barrel (cartridges) of bullet of A.K. 47 rifle and some ashes by way of seizure list, which is Exhibit 2. PW4 has deposed that some unidentified extremists had raided the area, set fire to the houses and killed persons by firing from their firearms.

54. The undisputed evidence of PW4 clearly shows that some empty cartridges of AK 47 rifle had been seized. His evidence, however, that the empty cartridges were of AK 47 rifles, can be given not much credence, because of the fact that he is a daily labourer and it is not discernible from his evidence as to whether he was conversant with arms and ammunitions and as to whether he was capable of identifying, by merely looking at an empty cartridge, that the empty cartridge was fired from AK 47 rifle or not. This witness too was, however, not cross-examined by the defence.

55. We, now, come to the evidence of PW5 (Ranjit Palit). His evidence is that on the day of occurrence, he was posted as ASI, at the West Tripura Police Station, and that he and two other officers of the rank of ASI, namely, Sajal Dey, and Rajkumar Singh, prepared, as directed by the DSP, Central, inquest reports on the dead bodies lying at IGM Hospital. This witness has also deposed that he prepared inquest reports of five unidentified dead bodies and that the inquest reports were prepared with reference to GBTOP GD. Entry No. 336, dated 12.2.1997. This witness too was left without being cross-examined by the defence. This witness's evidence does not help the defence much or weak prosecution's case.

56. Close on the heels of the evidence of PW6 (Dr. J. K. Debbarma), which we have already discussed above, PW7 (Dr. Pandav Chandra Pal) has deposed that on 12.2.1997, he was posted, as Medical Officer, at the GB. Hospital and, on that

that day, he examined one Sumitra Sarkar, who had sustained gun shot injury on her person, and that Sumitra Sarkar was discharged after 91 days. This witness was not cross-examined by the defence.

57. Coming to the evidence of PW8 (Dr. Samar Das), we notice that this witness has deposed to the effect that on 12.02.1997, he was posted, as Medical Officer, at the GB. Hospital, and that on that day, he examined injured Dulal Sarkar (PW1), who had sustained gunshot injury on his left knee and that Dulal Sarkar (PW1) was discharged on 08.03.1997. This witness, too, was not cross-examined by the defence.

58. From the evidence, given by PW6, PW7 and PW8, it becomes clear that PW6, PW7 and PW8 had, as Medical Officer, at GB. Hospital, examined Ajit Biswas (PW13), Sumitra Sarkar and Dulal Sarkar (PW1), who were found to have sustained gunshot injuries.

59. According to the evidence of PW9 (Pijush Kanti Das), on 12.02.1997, he, as Head of the Department of the Forensic Medicine, at the IGM Hospital, had conducted post-mortem examination on as many as 15 dead bodies, which were unknown to him, but all these 15 persons had died of bullet injuries. PW9 has deposed that the dead bodies were brought to him for postmortem examination by GBTOB GD. Entry No. 226, dated 12.02.1997. PW9 has proved Exhibit 6 serious as post-mortem reports prepared by him. The evidence of PW9 shows that he was the one, who had conducted post-mortem examination. It is in the evidence of PW9 that the dead bodies were brought to him by Constable Bani Kanta Sarkar. This witness, one may note, was not cross-examined by the defence.

60. Thus, the evidence of PW9 clearly establishes the fact that in connection with the occurrence of arson and murder, which took place in village Jarulbachai, Baganbari, P W9 had conducted post-mortem examination on as may as 15 dead bodies and, out of these dead bodies, many were of children and the remaining ones were of men and women, all them having died of bullet injuries.

61. Let us, now, turn to the evidence of PW10(Bipul Biswas). His evidence is that, on 11.02.1997, at about 10/10-30 p.m., while he was in the "Pathagar" (library) of his village, where a meeting, with regard to celebration of Saraswati Puja, was in progress, they, suddenly, heard hue and cry and, on coming out of the library, they found some people (whom this witness has described as miscreants) setting fire to the houses in their village with "mashal" (torch) and that some of these miscreants were shooting from their firearms. According to the evidence of PW10, the occurrence took place at a distance of about 15 meters from their library and that as a result of the houses having been set ablaze, the whole area was visible. It is in the evidence of PW10 that the miscreants were about 30/35 in number and that they were armed with firearms, "tukkle", "mashal" etc. PW10 has also deposed that amongst the miscreants, he could recognise Gandhi Debbarman (since absconder) and Achak

Debbarman (i.e., the accused-appellant). This witness has identified accused Gandhi and Achak Debbarman in the dock.

62. The clear and categorical assertion of PW10 is that accused Gandhi and accused Achak Debbarman (i.e., the present appellant) were firing from firearms, that his (PW10's) brother died of the injuries caused by bullets, which had been fired by the two accused, namely, Gandhi Debbarman (since absconder) and Achak Debbarman (i.e., the present appellant) and that in order to save his life, he (PW10) hid himself in the nearby jungle. PW10 has also deposed that as a result of the attack, 15 persons died and 23 houses were gutted in the fire on the night of 11.02.1997.

63. While being cross-examined by the defence, PW10 denied the defence's suggestion that he was not in the library at the time of the occurrence, that he had not come out of the library on hearing the sound of shooting and that he could not recognise Gandhi Debbarman (since absconder) and Achak Debbarman. In his cross-examination, defence suggested to this witness (PW 10) that he had hid himself in the jungle at the time of the incident and that he could not identify (i.e., recognize) any of the accused persons.

64. It, thus, became clear that the suggestions, offered by the defence to this witness, were wholly contradictory inasmuch as while, on the one hand, the defence suggested to this witness that he was not present in the library at the time of occurrence, the defence, on the other hand and in the same breath, suggested to this witness that he had not come out of the library on hearing sound of firing. Similarly, while the defence suggested to PW10 that he simply hid himself in the jungle at the time of occurrence and could not recognize the persons, whom he identified at the trial, they (defence) suggested, at the same time, that he (PW10) had not come out of the library on hearing sound of firing as if PW 10 had remained hiding inside the library and not in the bushes. The defence was, thus, shooting suggestions in the air and could, therefore, elicit nothing at all to show that this witness' evidence, given in his examination-in-chief, is untrue or false or that the evidence is such, which can be given no credence at all.

SUGGESTION:

65. The word, "suggestion", in common parlance, as found regularly in the procedure of the Court, means that a fact has been suggested to a witness either inviting his admission or denial on that fact during his cross-examination. Though scope of "suggestion" is not found in any statute, especially, in the law of evidence, yet it is a time honoured practice of courts that the lawyers or the party himself, while cross-examining a witness, either in the form of offering a denial to the facts deposed to by that witness or to place a new fact into the mouth of a witness to test whether he admits the same or not, suggests a fact or puts a suggestion of fact or facts to the witness. A mere suggestion, if not supported by any specific evidence, has no evidentiary value. We may gainfully

refer here to the observations made by a Division Bench of this Court in The State Vs. Md. Misir Ali and Others, , wherein it has been observed, at paragraph 9, as follows:

Mere suggestions not supported by any specific statements made by accused person and not supported by any defence evidence would have no evidentiary value. No importance could be attached to the above suggestions made during cross-examination of PWs. 1 and 3 in this case....

66. The Division Bench of Patna High Court, in Sita Ram Pandey and Others Vs. The State of Bihar, , has also expressed the similar view.

67. We may, however, pause here to point out that though the defence had the liberty to offer contradictory suggestions to the witness, produced by the prosecution, the fact remains that such suggestions made, at least, one thing clear that the suggestions could not show that what PW 10 had deposed was untrue or false.

68. In his cross-examination, PW 10 has also deposed that after the police had arrived at the place of occurrence, they came out of the jungle. In his further cross-examination, P W10 has deposed that he had stated before the police that he had seen accused Gandhi and accused Achak opening fire. It was, however, neither even suggested to this witness, by the defence, that he had not made any such statement to the police nor did the defence make any such attempt, when the Investigating Officers were being cross-examined by the defence, that this witness (P W10) had not stated before than the course of investigation that he had, amongst the miscreants, recognized accused Gandhi and Achak Debbarma (i.e., the present appellant). The assertion of PW10, that he had seen Gandhi and Achak firing from their firearms, has, thus, remained wholly unshaken. While, on being cross-examined, this witness (PW10) has also asserted that he had stated before the police that his brother died on being shot by bullets by accused Gandhi and Achak. This assertion, too, has remained unchallenged by the defence.

69. Thus, the defence could not succeed in showing that this witness' evidence is inconsistent with, or contradictory to, his previous statement made during the investigation of the case to the effect that he had seen accused Gandhi and accused Achak shooting bullets from their fire-arms.

70. Though it has been suggested to PW10 by the defence that Gandhi and Achak had not opened fire and that PW10's brother had not sustained bullet injuries at the hands of the accused, nothing at all was elicited by the defence, except offering such suggestions to this witness, to show that the evidence of PW10, given to the effect that the houses, in his village, having been set on fire, the flames, erupting from the burning houses, had made the whole area clearly visible and that he had seen the miscreants and even could recognize two of them, were untrue and ought not to be relied upon.

71. It is also not the case of the defence that the two accused, namely, Gandhi Debbarman and Achak Debbarman were not known to PW10. Far from this, it was suggested to this witness by the defence that he had a dispute with accused Gandhi and Achak on the issue of damaging rubber plantation and that he had threatened them that he would teach them a lesson. It was also suggested to this witness (PW10) that he simply hid himself in the jungle at the time of the occurrence and that he could not recognize the accused. Both these suggestions, however, have been denied by PW10. PW10 has asserted that he had stated before the police that he had seen the incident from a distance of about 20 cubits. This assertion, too, has remained unscathed. None of the suggestions, which were so put to this witness, was, however, put to the Investigating Officer by the defence. Thus, the evidence of PW 10, as discussed above, has remained unshaken and his evidence convincingly proves the fact that the appellant, Achak, was seen by P W10 shooting from his firearm.

72. We, now, turn to the evidence of PW11 (Subhas Roy), a daily labourer. According to the evidence of this witness, on 11.02.1997, at about 10/10-30 p.m., he heard sounds of bullets being fired, he came out of his house and found nearby houses burning. It is in the evidence of PW11 that he saw, in the light of the flame, erupting from the burning houses, Gandhi Debbarman, Benoy Debbarman and Rabi Debbarman shooting from their firearms, which they were holding in their hands, and that Sachindra Sarkar and his son, namely, Dipak, aged about 20 years, were killed in the firing. This witness has further deposed that he had seen the occurrence from a distance of 20 cubits. It is in the evidence of PW 11 that he, thereafter, entered into his hut, took his wife and their infant baby to the nearby jungle and hid themselves there, but, he had come out, from the place of their hiding, to free his cattle, because his cattle had remained unguarded and that he found Mangal Debbarman, Falgoona Debbarman and Sandhya Debbarma setting fire to his house. It is also in the evidence of PW11 that the said accused, namely, Mangal Debbarman, Falgoona Debbarman and Sandhya Debbarma, saw him and he, immediately, rushed back to the jungle and hid himself. This witness identified accused Gandhi (since absconder) in the dock and asserted that he would be able to identify the other persons named by him.

73. PW11 has further deposed that the extremists had killed 15 persons, injured 5/6 persons and 23 houses were gutted in fire. This witness has not, admittedly, named the present appellant as one of the persons, whom he had seen at the place of occurrence. His evidence, therefore, neither helps the defence nor does it destroy the prosecution's case against the present appellant; rather, his evidence establishes the presence of accused Gandhi (since absconder) as one of the persons, who had been witnessed by PW11 shooting from firearm; whereas it is the case of even the present appellant that not only he (the appellant) but also Gandhi Debbarman had given shelter to the victims.

74. Thus, the unshaken evidence of PW11 reinforces the evidence on record,

which discloses complicity of the present appellant L as one of those persons, who had attacked the said village, set fire to the houses, injured and killed men, women and children.

75. So far as PW14 (Hemendra Sarkar) is concerned, he has deposed that on 11.02.1997, at about 11-00 p.m., he, on hearing gunshots being fired, woke up at his home, where he was sleeping with his wife, two sons and two daughters, and he found his hut burning. His further evidence is that he tried to run away with his family members to save their lives, but at that time, he sustained bullet injuries and his wife, who was 27 years old, and two sons died in the firing, his elder son was at the age of 17 years and his younger son was 8 years old, when they died. This witness has deposed that although he had seen the persons firing at his wife and two sons, he could not recognize them.

76. What, at least, the evidence PW14 clearly proves is the fact that though he could not recognize those, who had been shooting bullets and setting fire to houses, the fact remains that he, too, claims to have seen the persons, who had shot at his wife and two children. Hence, in the face of the uncontroverted evidence of even PW14, it may be held that one, who knew the assailants, could have, in the light of the burning houses, recognized the assailants.

77. Learned trial Court has recorded this witness' statement to the effect that he has become unable to speak properly after the incident. Learned trial Court has also observed that this witness' voice was feeble and that he was stammering.

78. As far as PW12 (Biswanath Saha) is concerned, his evidence is not very material in the present appeal inasmuch as he is a photographer in the Criminal Investigation Department, who had taken photographs of the burnt houses, etc., at the place of occurrence.

79. Lending support to the case of the prosecution, PW15 (Shyamendra Sarkar) has deposed that on 11.02.1997, at about 11 -00 p.m., he woke up at his home, where he was sleeping with his mother, wife, sons and daughters, and saw fire outside his house, he saw 10/11 miscreants coming towards his house and, hence, they shut the door, but the miscreants set fire to his kitchen and varandah and threw fire (torch) to his bedroom through the window.

80. PW15 has deposed that he could recognize Benoy Debbarman, Falgoon Debbarman and Rabi Debbarman, Benoy had a gun in his hands and the two others were carrying "mashal" (torch) and it was because of the light of the "mashal" that he could recognize them. PW 15 has further deposed that the miscreants had set fire to 23 houses in the village and 15 persons were killed and that Ajit Biswas, Hemendra Biswas and Dulal Sarkar had sustained injuries in the attack.

81. Thus, in the face of the above unshaken evidence of PW15, our impression gets reinforced that in the light of the burning houses, it was possible to clearly see those, who had attacked the village, and one could, therefore, identify the

assailant(s) if one knew the assailant(s) or if one was capable of remembering the face(s) of the assailant(s).

82. In his cross-examination, PW15 has deposed that he had seen the house of Ajit Biswas (PW13) burning and that it was after setting fire to Ajit's house that the miscreants came to his house. He has further deposed that the accused persons were known to him and that he had friendly relation with them. It is extremely sad to note that, according to PW 15, there was no celebration of "puja" in their village for the last 6/7 years (i.e. since after the gruesome occurrence, which is the subject-matter of this trial).

83. PW16 (Sajal Deb) is an ASI in the Tripura Police and he has deposed that on 12.02.1997, he held inquest over four dead bodies. This witness has proved the relevant inquest reports as Exhibit-A series and 10 series.

84. We may, now, turn to the evidence of PW17 (Sudhir Mandal). This witness, who had been tendered by the prosecution for cross-examination, has deposed that his house was gutted in the said incident and that while coming to set fire to his house, the miscreants had already set fire to other houses, too, and that all the inmates of his house fled away, he and the other inmates of his house hid themselves in the jungle, his wife took shelter in the house of Kama Debbarman and that accused Achak is the brother of Kama.

TENDERING OF WITNESS:

85. Let us, now, pause here to see whether tendering of witness by the prosecution for cross-examination is permissible or not.

86. Section 138 of the Evidence Act prescribes order of examination Of witnesses. It prescribes that a witness shall be first examined-in-chief and, then, if the adverse party, so desires, he may be cross-examined and, thereafter, if the party, calling the witness, so desires, he may be re-examined. There is no scope, u/s 138 of the Evidence Act, to start with cross-examination of a witness, who has not been examined-in-chief.

87. In Sukhwant Singh Vs. State of Punjab, , the Supreme Court has held that after amendment of Cr.P.C., tendering of witness for cross-examination is not permissible. Under the old Code, such tendering of witnesses was allowed, while the Committing Magistrate used to record the statements of the witnesses, which could be treated, at the discretion of the Sessions Judge, as substantive evidence at the trial. The Supreme Court held, in Sukhwant Singh (supra), as under:

Section 138, Evidence Act envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief.

(Emphasis is added)

88. In *Tej Parkash Vs. State of Haryana*, , the Supreme Court, relying on its previous decision, in *Sukhwant Singh (supra)*, observed and held, in paragraph 18, thus:

18. As far as Dr. O.P. Poddar is concerned, he was only tendered for cross-examination without his being examination-in-chief. Though, Dr. O.P. Poddar was not examined-in-chief, this procedure of tendering a witness for cross-examination is not warranted by law. This Court in *Sukhwant Singh Vs. State of Punjab*, held that permitting the prosecution to tender a witness for cross-examination only would be wrong and the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial. In the present case, however, non-examination of Dr. O.P. Poddar is not very material because the post-mortem report coupled with the testimonies of Dr. K.C. Jain P. W.-I. and Dr. J.L. Bhutani P.W.-9 was sufficient to enable the Courts to come to the conclusion about the cause of death

(Emphasis is added)

89. In view of the above, tendering of P W. 17 by the prosecution for cross-examination by the defence was wrong and not permitted by law. The prosecution ought not to resort to such a practice, which is not permitted by law, and the learned trial Court ought not to have allowed such tendering of the witness.

90. Be that as it may, PW17 has denied the defence's suggestion that the accused persons, including the present appellant, gave shelter to the members of his family and saved their lives. This denial shows that contrary to what the defence had suggested, the present appellant had not given shelter to any of the witnesses and this suggestion also shows that the present appellant was present at the place of occurrence at the time, when the occurrence had taken place, or else, the question of the present appellant giving shelter to any of the victims of the said gruesome occurrence could not have arisen.

91. Coming to the evidence of PW19 (Smti Sumitra Sarkar), we notice that her evidence is that on the night of 11.02.1997, at about 10-00 p.m., she was at her home, when a group of extremists set fire to her house. This witness has deposed that in the said attack, Dipak Sarkar (her brother-in-law), Raju Sarkar (her brother-in-law), Laxmi Sarkar (her sister-in-law), Archana Sarkar (her mother-in-law) and her father-in-law died. Her son, Prasenjit, who was two years old, also died in the attack. According to her evidence, her son, Prasenjit, died in the fire and the others succumbed to bullet injuries.

92. What is worth pointing out, in the evidence of this witness (P W19), is that she has deposed that she could identify one Rabi Deb Barma, one Samprai Deb Barma and two grandsons of one Santosh Deb Barma, at the place of occurrence, in the light of the flame erupting from the burning houses and the

mashal (i.e., torch), which were being carried by the attackers in their hands. She (PW19) has deposed that the persons, whom she had seen and recognized, were not present in the dock at the time of her examination and that she would be able to identify them if they were shown to her. It is noteworthy that these assertions of PW19 have remained unchallenged by the defence meaning thereby that at the time of the occurrence, the place of occurrence was clearly visible, because of the flames erupting from the burning houses and the mashals (i.e., torches), which the miscreants were carrying in their hands, and that one, who knew the assailants, could have, if we may reiterate, recognized them.

93. We, finally, come to the evidence of PW20 (Mukul Kumar Ghosh), i.e., the second Investigating Officer, who, on the CID assuming charge of the investigation of the case, conducted the investigation. This witness has deposed that he visited the place of occurrence and found the entire basti (i.e., hutment) almost gutted by fire, about 35 numbers of families were affected by fire, 15 persons had been killed and 4 others had been seriously injured. This witness has given the names of the persons, who had been killed in the said occurrence. This witness has also given the names of the injured persons.

94. It is in the evidence of the Investigating Officer (PW20) that he received 15 post-mortem reports from Dr. Pijush Kanti Das of IGM Hospital, where, according to Dr. Pijush Kanti Das (P W9), post-mortem, on the dead bodies, had been conducted.

95. What is, now, of utmost importance to note, in the evidence of the Investigating Officer (PW20), is that he had forwarded, on 29.04.1997, one fired cartridge case to ballistic expert for his opinion and, on 19.05.1997, he received expert's opinion to the effect that it was 7.62 mm ammunition. It is in the evidence of PW20 that from his long 35 years of service experience, he can say that such bullets are used from automatic firearms like SLR. The report has been proved by this Officer as Exhibit 13. PW20 has further asserted that the firearm used was AK47 rifle. What is also of great importance to note, in the evidence of the Investigating Officer (PW20), is his clear and undisputed assertion that accused Ashok Deb Barma was also known, in the locality concerned, as Achak Deb Barma. It is the further assertion of this witness (P W20) that, amongst others, accused Ashok Beb Barma alias Achak (i.e., the present appellant) is one of the persons, who had remained absconder from the day of the occurrence.

96. The assertion of PW20 that the present appellant had absconded from the day of occurrence was never disputed by the defence. The evidence, so given by PW20, thus, belies the suggestion of the defence that the present appellant had given shelter to the victims, for, had he given shelter to the victims, he had no reason to abscond.

97. Moreover, from the undisputed evidence of the Investigating Officer (P W20), what becomes clear is that the cartridge, seized in the present case, was found to be of 7.62 mm ammunition and the bullets were fired from an automatic

firearm like SLR and, in the case at hand, the firearm used was AK47 rifle.

98. According to the evidence of DW1 (Anil Debbarma), there was an attack by the extremists at Baganbari and that his house is situated towards the north of the said village. As regards the occurrence, DW1 has deposed that at the time of occurrence, he was sleeping with his family members, he woke up on hearing sound of firing and, on coming out of the house, he saw the houses of the village burning and, out of fear, he and his family members took shelter in the house of Kama Debbarma, where he found a Bengali lady. It is also in the evidence of DW1 that he had seen Achak (I.e., the appellant) and Gandhi Debbarma (since absconder) in the house of Kama Debbarma.

99. In his cross-examination, even DW1 has admitted that all the houses of the Baganbari village were burnt and as many as 15 persons died of bullet injuries and that automatic firearms were used. In his evidence, DW1 has further deposed that before he had left his house to take shelter at the house of Kama Debbarma, he had taken some utensils and rice, etc., and that the house of accused Achak is adjacent to the house of Kama Debbarma.

100. DW1 has admitted that he had never stated before the police that he had seen Gandhi in the house of Kama. Thus, in his previous statement, DW1 had never stated before the police that he had seen accused Gandhi (since absconder) in the house of Kama Debbarma. This apart, as already indicated above, the evidence on record speaks loud and clear that the present appellant had been absconding since the day of the occurrence and the defence has not explained the reason of abscondance of the accused.

101. It is in the evidence of DW1 that he was requested by the accused persons to give evidence in the case.

102. What is, now, of utmost importance to note is that DW1 has very clearly deposed that he did not know if Gandhi and Achak had participated in the killing and arson and that he saw Gandhi Debbarma and Achak Debbarma at the house of Kama at the time of the occurrence. However, such deposition of DW1 is not sufficient, in the face of the clear and categorical assertion of PW10 that he (PW10) saw accused Gandhi and Achak firing from their firearms and that his (PW 10 "s) brother died of the injuries caused by their firing, to establish the fact that accused Gandhi and Achak had not participated in the killing and arson. Moreover, the deposition of DW1 gets belied by the clear and un-impeached evidence of PW11 that he saw, in the light of the flame, erupting from the burning houses, Gandhi Debbarmar, along with others, shooting from their firearms and that PW11 saw them from a distance of 20 cubits.

103. Coming to the evidence of DW2 (Kama Debbaram), who is brother of the accused-appellant, Achak, we note that according to the evidence of this witness, on the night of the occurrence, DW2 was at his home. His deposition is to the effect that on the night of the occurrence, some persons attacked Baganbari area, gutted houses and killed some men, one lady rushed to his house and took

shelter at his house, the lady being wife of Sudhir Mandal and that Rabindra, her son, was also with her at that time. DW2 has further deposed that he gave shelter and also rendered nursing and that DW1 (Anil Debbarma) too came to his (DW2) house and that Gandhi Debbarma (since absconder) was also present in his house. It is the further deposition of DW2 that the children of PW1 (Dulal Sarkar) took shelter at the house of Achak (i.e., the accused-appellant) and that at that time, Achak was in his house and that wife of Rabindra Mandal took shelter at the house of Achak. It is in the evidence of DW2 that at around 1-30 a.m., when the police arrived there, those persons, who had been hiding, came out and went to the police along with Gandhi Debbarma and Achak, but police did not examine them.

104. It is also in the evidence of DW2 that accused Achak had a rubber plantation, which he had been running with Gandhi, that one Babul had a quarrel with Achak and Gandhi in respect of grazing of cattles in the rubber plantation by Babul and that Babul told that if he (Babul) got a chance, he (Babul) would teach a good lesson, Babul being nephew of Ajit Biswas.

105. It is important to take note of the fact that even DW1 has admitted that the villagers had been killed by firearms. DW1 has also admitted that Ajit Biswas sustained bullet injury and that Hemendra and Sumitra Sarkar also sustained bullet injuries.

106. We may pause, at this stage, to point out that while the Investigating Officer was giving his evidence, the defence did not even whisper that the appellant had, accompanied by others, gone to the place of occurrence after the police had arrived there. "The assertion of PW20 that the accused was absconding since the time of occurrence has, as already pointed out above, remained undisputed by the defence.

107. To "abscond" means to go in a clandestine manner out of the jurisdiction of the court, or to conceal in order to avoid process of the Court, to hide, conceal, or absent oneself clandestinely with intent to avoid legal process. Abscondance may lend weight to the other evidence and help the prosecution in establishing the guilt of the accused; but by itself, abscondance is hardly any evidence of guilt

108. Once absconcion is established, the onus of proving that the accused did not abscond lies on him.

109. In the case at hand, evidence of the investigating officers (PWs. 18 and 20) show that they did search for the accused-appellant on numerous occasions, but found him absconding. The evidence, so given by the investigating officers, have not been controverted in cross-examination. The prosecution's case, therefore, has been reinforced by the evidence that the accused-appellant had absconded after the commission of the crime.

110. What emerges from the above discussion is that not only the presence, but also the active participation of the accused-appellant with his associates, on the

night of the occurrence in burning the houses of the villagers, injuring and killing them by opening fire-arms stand well-proved inasmuch as there was sufficient light at the place of occurrence and the visibility was clear enough to recognize, if one had known the miscreants, and the accused-appellant was, indeed, in the face of the evidence on record, recognized by the victims as pointed out above. This apart, following the occurrence, the accused-appellant, according to the evidence on record, absconded and his absconson lends support to the conclusion, which one can safely and confidently reach, that the accused-appellant was, as mentioned hereinbefore, had participated in the manner, as described hereinbefore, in the act of setting the dwelling houses into fire, causing grievous hurt to the innocent villagers and also killing as many as 15 persons, which include children, teenagers and women belonging to a particular linguistic community. The learned trial Court has, in our considered view, rightly held the accused-appellant guilty of the offences under Sections 326, 436 and 302 read with Section 34 IPC. Hence, conviction of the accused-appellant, under Sections 326, 436 and 302 read with Section 34 IPC, do not call for any interference in appeal.

111. We have already pointed out above that, in the case of Dalbir Singh (supra), the Supreme Court has already held Section 27(3) of the Arms Act, 1959, ultra vires the Constitution and, therefore, void. The conviction of the accused-appellant, u/s 27(3) of the Arms Act, 1959, cannot, therefore, be sustained.

112. Considering, however, the fact that the appellant has been proved to have used arm, the question, which pertinently arises, is: Whether the arm, which the accused-appellant had used, on the night of the occurrence, was a prohibited fire-arm?. This question, in turn, brings us to the moot question; and the question is: what is a prohibited fire-arm?

113. While answering the question posed above, it needs to be noted that Arms Act, 1959, speaks of three different weapons and prescribes accordingly different punishments for use of these three different types of weapons. The three weapons are: arms, firearms and prohibited fire-arms. While Section 2(c) defines arms and Section 2(e) defines fire-arms, Section 2(i) defines what a prohibited fire arm is. Prohibited fire-arms are also fire-arms within the meaning of Section 2(e); but prohibited fire-arms have been categorized as a special class, because of certain features in them as mentioned in Section 2(i). For instance, an AK-47 rifle is a self-loading rifle and once triggered, it continues to fire bullets until stopped manually or until the magazine is emptied; whereas a 303 rifle is not a self-loading rifle and, hence, may not be included in the definition of prohibited fire arms unless a notification is issued, in this regard, by the Central Government as provided by Section 2(h)(ii).

114. Coupled with the above, though the accused-appellant was seen, in the light of the evidence of PW10, firing bullets from an arm and the bullets, so fired by him, had killed PW10's brother, the fact remains that the evidence of PW10 does not indicate as to what kind of arm the accused-appellant had used nor is

there any evidence to show that the arm, which had been used by the accused-appellant, had no licence issued in favour of the accused-appellant, for, no evidence, in this direction, has been adduced by the prosecution. Though PW20, who investigated the case, has deposed that one cartridge, found at the place of occurrence, was forwarded to ballistic expert and the expert's opinion shows that the bullets were used in automatic firearms like SLR, the fact remains that there is no concrete evidence on record to show that the fire-arm, used by the assailants, on the night of the occurrence, was prohibited firearms.

115. Situated thus, it would be wholly unsafe, in our considered view, to hold that the accused-appellant had, on the night of the occurrence, used any fire-arm, and/or prohibited arm and/or prohibited ammunition without any licence. We do not find that, in the facts and attending circumstances of the present case, the accused-appellant could have been convicted for any offence under the Arms Act, 1959, because of lack of clear and cogent evidence adduced in this regard. The conviction of the accused-appellant is, therefore, impossible under any of the provisions of the Arms Act, 1959.

116. While, therefore, conviction of the accused-appellant, under Sections 326, 436 and 302 read with Section 34 IPC are hereby sustained, his conviction, u/s 27(3) of the Arms Act, 1959, is held to be ultra vires and void.

117. Turning to the question of the sentence or confirmation of the capital punishment, imposed on an accused, what may be pointed out is that the march of human civilization has, undoubtedly, reduced the number of crimes in respect of which death penalty is, now, awarded. In the 18th century, there were about two hundred offences for which death penalty was the rule. Now, death penalty has altogether been abolished in the European Union. In the United States of America too, only limited number of offences are punishable by death. So also, in India, there are only a handful of offences under the Indian Penal Code, which call for capital punishment. In this context, one may, perhaps, safely say that the scenario in India, especially, the post Independence era, has not been facile. In the year 1949, Rajya Sabha mooted a proposal to altogether repeal death sentence. However, in the backdrop of the events of the partition of India, the then Home Minister made a forceful argument for retention of the capital punishment and, ultimately, the proposal was withdrawn. In the year 1962, a resolution was moved and passed by the Lok Sabha referring to the Law Commission of India, for its views, the desirability or otherwise of the retention of sentence of death. In their 35th report, rendered in the year 1967, the Law Commission of India emphasized the risk of abolition of capital punishment by stating, inter alia, thus:

...experience of other countries could not be conclusive for India. Need for deterrent control provided by capital punishment is greater here in various classes of society. There is greater danger in India of increase in violent crimes if capital punishment is abandoned, particularly, in respect of professional criminals.

The 35th report of the Law commission, thus, favoured retention of death sentence, particularly, in respect of professional criminals. Approach to the criteria for imposition of death sentence noticeably changed with the coming into force of the Code of Criminal Procedure, 1973, on 1st of April, 1974. What was the position of law with regard to death sentence, before the Code of Criminal Procedure, 1973, came into force, can be summarized by referring to some decisive judicial pronouncements in this regard.

118. In *Paras Ram Vs. State of Punjab* [SLP (Crl) Nos. 698 and 678 of 1953, decided on October 9, 1973], the facts were that Paras Ram, who was a fanatic devotee of the Devi, used to hold satsangs at which bhajans were sung in praise of the goddess. Paras Ram ceremonially beheaded his four year old boy at the crescendo of the morning bhajan. He was tried, convicted and sentenced to death for the murder. On his death sentence being confirmed by the High Court, Paras Ram filed a petition for grant of special leave to appeal to the Supreme Court under Article 136 of the Constitution. It was contended, inter alia, on behalf of Paras Ram, that the very monstrosity of the crime provided proof of his insanity sufficient to exculpate the offender u/s 84 IPC and this ought to have been considered as a mitigating circumstance, while imposing on him the sentence of death. V.R. Krishna Iyer, J., speaking for the Bench, refused to grant special leave and summarily dismissed the petition with these observations:

The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butchery of one's own beloved son was perpetrated, aided by other "pious" criminals, to propitiate some blood thirsty diety. Secular India, speaking through the court must administer shock therapy to such anti-social "piety", when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condition punishment on dangerous deviants.

119. In *Jagmohan Singh Vs. The State of U.P.*, , too, the Supreme Court expressed the view that for certain types of murders, death penalty alone can be considered adequate deterrent inasmuch as the Court observed as under:

A large number of murders is, undoubtedly, of the common type. But some at least are diabolical in conception and cruel in execution. In some others, where the victim is a person of high standing in the country, society is liable to be rocked to its very foundation. Such murders cannot be simply wished away by finding "alibis" in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval of the society.

120. Responding to the question whether life imprisonment was an adequate substitute for death penalty, the Court in Jagmohan (supra) noted:

In the context of our Criminal Law, which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of punishment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.

121. In Ediga Anamma Vs. State of Andhra Pradesh, , V.R. Krishna Iyer, J., speaking for the Bench, observed:

...deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime". It was further observed, in Ediga Anamma (supra), that "...horrendous features of the crime and the hapless and helpless state of the victim steel the heart of law for the sterner sentence.

122. Before introduction of the Code of criminal Procedure, 1973, the judicial scenario, in this country, thus, as we have already indicated above, reflected the necessity of retention of death penalty in some cases of murder for its deterrent effects and dis-favoured abolition of death penalty altogether. We have already taken note of a few prominent cases in this regard.

123. We may, now, pause here to point out that the Criminal Procedure Code, 1973, engrafted the hitherto latent legislative intent by providing, in Sub-Section (3) of Section 354, thus:

(3) When the conviction is for an offence punishable with death, or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

124. What follows from a bare reading of the provisions of Section 354(3) Cr.P.C. is that the law-makers have introduced "legislative limit" to the imposition of death penalty inasmuch as it has, now, been made mandatory for the courts to assign "special reasons" if a court has to award capital punishment.

125. What constitute "special reasons" for awarding of death penalty have, however, been a subject of divergent views, the prominent ones being the cases of Shiv Mohan Singh Vs. The State (Delhi Administration), , Bishnu Deo Shaw Vs. State of West Bengal, , and Rajendra Prasad Vs. State of Uttar Pradesh, .

126. In Shiv Mohan Singh Vs. The State (Delhi Administration), , too, V. R. Krishna Iyer, J, speaking for the court, reiterated, by referring to the earlier judgment in Ediga Anamma's case (supra), the necessity of retention of death penalty for its deterrent effects in these words:

In Ediga Anamma Vs. State of Andhra Pradesh, , this Court, while noticing the social and personal circumstances possessing an extenuating impact, has equally clearly highlighted that in India under present conditions deterrence through death penalty may not be a time-barred punishment in some frightful area of

barbarous murder.

127. Even in *Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi*, , V. R. Krishna Iyer, J, speaking for a 3 Judges Bench of the Supreme Court, reiterated that deterrence was one of the vital considerations of punishment.

128. In the realm of death penalty in India, a visible change, somewhat suddenly, took place with the pronouncements of the decisions in *Bishnu Deo Shaw (supra)* and *Rajendra Prasad (supra)*.

129. In *Bishnu Deo Shaw (supra)*, the Supreme Court held that reformation and rehabilitation of the offender and not mere deterrence are, now, among the foremost objects of the administration of criminal justice. The Court observed to the effect that especial reasons must have a nexus with the personality of the offender as revealed by his age, character, antecedents and tractability of the offender to reform. In *Rajendra Prasad (supra)*, Krishna Iyer, J, held that especial reasons, necessary for imposition of death sentence, must relate not to the crime as such, but to the criminal. In other words, the Supreme Court, in the two cases cited hereinbefore, took the view that especial reasons have to be reform-oriented. In the backdrop of the fact that the Code of criminal Procedure, 1973, had been introduced with the intention of reforming the criminal justice system and aimed at rehabilitating the criminals rather than destroying or eliminating them, the Court took the view that especial reasons....f cannot be any reason; rather, a court, before awarding death penalty, must conclude that the convict is irredeemable. Noticing this shift in the position of law, which *Rejendra prasad (supra)* sought to reflect, the Constitution Bench, in *Bachan Singh Vs. State of Punjab*, observed as under:

In *Rajendra Prasad Vs. State of Uttar Pradesh*, , however, the majority (of 2:1) has completely reversed the view that had been taken in *Ediga Anamma Vs. State of Andhra Pradesh*, regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3), "murder most foul" is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal, "special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal.

130. From the above observations made in *Bachan Singh (supra)*, it is clear that the constitution Bench took note of the fact that according to the decision in *Rajendra prasad (supra)*, since after the enactment of Section 354(3), "murder most foul" was no longer the test for imposing death penalty nor were the shocking nature of the crime or the number of murders committed essential criteria for imposition of death penalty and that the focus had, now, completely shifted from the crime to the criminal and "special reasons", necessary for imposing death penalty, shall relate "not to the crime as such, but to the criminal". Disagreeing with the views, so expressed in *Rajendra Prasad (supra)*, the Constitution Bench, in *Bachan Singh (supra)*, observed, in paragraph 201, as

under:

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

131. There was yet another shift in the position of law, with regard to the imposition of death sentence, which Rajendra Prasad (supra) reflected. The shift being that death sentence was constitutionally permissible only if the security of the State and society, public order and the interest of the general public were threatened by the murder, which took place. Reacting to the law, so laid down in Rajendra Prasad (supra), the Supreme Court, in Bachan Singh (supra), observed, in paragraph 204, as under:

204. In Rajendra Prasad Vs. State of Uttar Pradesh, , the majority said: "it is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and Society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)". Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty or murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302, Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its "ethos"; nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302, penal Code, fully apply to the case of Section 354 (3), Code of Criminal Procedure, also. The same criticism applies to the view taken in Bishnu Deo Shaw Vs. State of West Bengal, which follows the dictum in Rajendra Prasad Vs. State of Uttar Pradesh, .

132. Thus, Bachan Singh Vs. State of Punjab, , overruled the decisions in Bishnu

Deo shaw (supra) and Rajendra Prasad (supra) and categorically held that the law, as it stands, does not mandate that "special reasons" must be reform oriented only or that the death penalty can be imposed only when the security of the State or of the society is threatened or the public order and the interest of the general public are in jeopardy. The Court held that any reason, which is just and adequate in the facts and circumstances of a given case, shall qualify as a "special reason". In short, one cannot, according to what the Court observed in Bachan Singh (supra), restrict imposition of death penalty only to cases, where the security of the State and the society, public order and the interest of the general public are threatened and/or that the "special reason" for imposition of death penalty "must relate not to the crime as such, but to the criminal"; rather, the "special reasons" must pay, according to what Bachan Singh (supra) lays down, due regard both to the crime as well as criminal and what is the relative weight to be given to the aggravating and mitigating factors would really depend on the facts and circumstances of a given case, for, many a times, the crime as well as the criminal may be intertwined and it may not be possible for the court to separate the "crime" from the "criminal" or the "criminal" from the "crime".

133. What, thus, follows from the above discussion is that "special reasons", which section 354(3) mandates the courts to record, before imposing the death penalty, are the aggravating as well as mitigating circumstances, which led to the commission of the crime and/or under which the crime was committed. Determination of these two conflicting factors, amongst others, taking into account both the crime as well as the criminal, is, thus, mandatory before reaching a decision as to whether death penalty can be imposed or not. In fact, in many cases, these two factors are closely interwoven and may have to be studied together in order to come to a finding as to whether death penalty is warranted or not. The court must, while scrutinizing the crime and the criminal, prepare a balance sheet of the aggravating as well as mitigating circumstances in respect of the crime. While computing the aggravating and mitigating circumstances, the court shall have to look into the nature of the offence, the manner of its execution, the nature of planning, heinousness or otherwise of the crime, the impact of the crime on the society and the society's reactions thereto. The court must also pay due regard to the circumstances of the offender including his personality, as a whole, which would obviously include his age, character, antecedent, the situation in which the crime was committed, and, above all, the probability of his being reformed and rehabilitated. To put it a little differently, the criminal can be treated as a sick person and may be divided into two groups. The first group relates to those, who suffer from curable diseases and the society must make endeavour to cure, reform and rehabilitate such sick persons. The second group relates to those sick persons, who suffer from incurable disease and are immune to treatment. They are not only immune to treatment, but their very existence may be a grave danger to the community at large.

134. While considering the question of death sentence, what a court has to

understand is as to whether there is any judicial limitation to the imposition of death penalty and, if so, what is the extent of such limitation? One may refer, in this regard, to the decision of the Constitution Bench, in *Bachan Singh (supra)*, wherein the Constitution Bench observed that the court would not venture to formulate rigid standards as regard the cases, which demand capital punishment. The Supreme Court further clarified, in *Bachchan Singh (supra)*, that it is neither practicable nor desirable that the criteria of applying discretion by the Courts, to sentence a guilty person to death, be laid down exhaustively and in rigid standards-However, the broad criteria, guiding the Courts in respect of imposition of death penalty, were given shape in *Bachan Singh (supra)* by making it clear that the extreme penalty of death can be inflicted only in gravest cases of extreme culpability.

135. Thus, the rule limiting the death penalty to "the murder most foul" is, now, christened "in the rarest of rare cases". In other words, the Supreme Court made it clear, in *Bachan Singh (supra)*, that awarding of sentence of life imprisonment is the general rule now and that only special facts and circumstance of a given case may warrant the awarding of capital punishment. It was held, in *Bachan Singh (supra)*, that normal rule is that the offender shall be sentenced to imprisonment for life, but the court may, when the circumstances of a given case so justify, depart from this normal rule and impose capital punishment. The court, however, must justify the imposition of the harshest punishment of death by assigning "special reasons". It may not be out of place to reiterate here that "special reasons" cannot remain confined to either crime or criminal; rather, the "special reasons" may relate to the crime or to the criminal and, in many cases, the "special reasons" may relate to the "crime" as well as the "criminal". However, what was made clear and authoritatively pronounced, in *Bachan Singh (supra)*, is that the death penalty cannot be imposed except "in the rarest of rare cases", when alternative option is "unquestionably foreclosed" inasmuch as the Supreme Court, in *Bachan Singh (supra)*, observed thus:

a real and abiding concern for the dignity of human 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.

136. In *Bachan Singh Vs. State of Punjab*, , the guidelines, emerging from *Bachan Singh's* case (*supra*), have been culled out as follows:

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
- (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances

of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances,

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

137. In order to apply the guidelines aforementioned, following questions, observed the Supreme Court, in *Machhi Singh* (supra), may be asked and answered: (a) Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

138. Further pointed out the Supreme court, in *Machhi Singh's* case (supra), that in rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the upholders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The Supreme Court, however, clarified, in *Machhi Singh* (supra), that the community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e. g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-?-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-?-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community. If upon taking an overall global view of all the circumstances in the light of the

aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

139. In the light of the decisions in Bachan Singh (supra) and Machhi Singh (supra), what can be safely concluded is that in every case, in which the question of imposition of death penalty arises, a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be maintained between the aggravating and the mitigating circumstances before the option to impose death penalty is exercised. In order to apply these guidelines, the following questions may, inter alia, be asked and answered, namely, (a) is there something uncommon about the crime, which renders the sentence of imprisonment for the life inadequate and calls for a death sentence ? and (b) are the circumstances of the crime such that there is no alternative, but to impose death sentence even after according maximum weightage to the mitigating circumstances, which speak in favour of the offender ?

140. The Supreme Court, thus, in Machhi Singh (supra), crystallized the principle of "rarest of rare cases" by limiting it to the gravest of grave murder and held that the extreme penalty of death should be imposed only in extreme cases. If the trial court finds that the nature of the offence is heinous, the plan and design are diabolical, the execution is most brutal and there is little prospect of the offender reforming himself, the court may impose death sentence. The Supreme Court, in Machhi Singh (supra), emphasised that death penalty must be imposed only when the life imprisonment appears to be altogether an inadequate punishment having regard to the relevant circumstances of the crime and provided, and only provided, that the option to sentence the convict to imprisonment for life cannot be consciously exercised having regard to the nature of the crime, the relevant circumstances in which the crime was committed, prospect of the offender to reformation and rehabilitation. Where collective conscious of the community is so shocked that it will expect the upholders of judicial power centre to inflict death penalty, the court must respond by awarding the extreme penalty of death provided, of course, that all other judicially settled relevant factors justify imposition of such a penalty.

141. Let us, now, see whether in the facts and circumstances of the present case, the accused-appellant deserves to be awarded the extreme penalty of death.

142. A Division Bench of this Court, in Sri Mithu Kalita alias Mitu Kalita Vs. State of Assam, , while dealing with a death reference and a connected appeal, preferred by the convict, considered the law, where a sentence of death is appropriate. One of us (Ansari, J), taking into consideration the law laid down by the Supreme Court, in Bachan Singh Vs. State of Punjab, , Machhi Singh and Others Vs. State of Punjab, , Raja Ram Yadav and others Vs. State of Bihar, , while speaking for the Bench, observed, at paragraphs 64 to 67, thus:

64. While considering the question of death sentence, what a court has to understand is as to whether there is any judicial limitation to the imposition of death penalty and, if so, what is the extent of such limitation? The answer to this momentous question is not very far to seek. Made it clear, the Constitution Bench, in Bachan Singh(supra), that the Court would not venture to formulate rigid standards" as regard the cases, which demand capital punishment. Further clarified the Supreme Court, in Bachchan Singh (supra), that it is neither practicable nor desirable that the criteria of applying discretion by the courts to sentence a guilty person to death be laid down exhaustively and in rigid standards. However, the broad criteria guiding the courts in respect of imposition of death penalty were given shape in Bachan Singh (supra) by making it clear that the extreme penalty of death can be inflicted only in gravest cases of extreme culpability. Thus, the rule limiting the death penalty to "the murder most foul" is, now, christened "in the rarest of rare cases". In other words, the Supreme Court made it clear in Bachan Singh (supra) that awarding of sentence of life imprisonment is the general rule now and that only special facts and circumstance of a given case may warrant the awarding of capital punishment. It was held in Bachan Singh (supra) that normal rule is that the offender shall be sentenced to imprisonment for life, but the court may, when the circumstances of a given case so justify, depart from this normal rule and impose capital punishment. The court, however, must justify the imposition of the harshest punishment of death by assigning "special reasons". It may not be out of place to reiterate here that "special reasons" cannot remain confined to either crime or criminal; rather, the "special reasons" may relate to the crime or to the criminal and, in many cases, the "special reasons" may relate to the "crime" as well as the "criminal". However, what was made clear and authoritatively pronounced in Bachan Singh (supra) is that the death penalty cannot be imposed except "in the rarest of rare cases", when alternative option is "unquestionably foreclosed" inasmuch as the Supreme Court in Bachan Singh (supra) observed thus. "A real and abiding concern for the dignity of human 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 alternatively option is unquestionably foreclosed.

65. In Bachan Singh Vs. State of Punjab, , the guidelines, emerging from Bachan Singh"s case (supra), have been culled out as follows:

- (i) The extreme penalty of death need not be inflicted except to gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
- (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be and altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of

imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

66. In order to apply the guidelines aforementioned, following questions, observed the Supreme Court, in Machhi Singh (supra), may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

67. Further pointed out the Supreme Court in Machhi Singh's case (supra) that in rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the upholders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The Supreme Court, however, clarified, in Machhi Singh (supra), that the community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness, e.g. murder by hired assassin for money or reward, or cold blooded murder for gains of a person vis-?-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc, is committed not for personal reasons but in circumstances which arouse social wrath, or in a cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality are committed.

(5) When the victim of murder in an innocent child, or a helpless woman or old or infirm person or a person vis-?-vis whom the murder is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.

143. In the backdrop of the law with regard to the imposition of death penalty, as discussed above, let us, now, cull out the aggravating and mitigating circumstances appearing against the present accused-appellant so as to determine if the present one is a case, which can be described as one of the "rarest of rare cases", wherein death penalty can be imposed and whether the learned trial Court's finding that the case deserves awarding of penalty of death was in tune with law.

AGGRAVATING CIRCUMSTANCES:

(i) A small village, called Bangarbari, Jarulbachai, located in an interior area, under Takarjala P.S., was inhabited by poor people belonging to a particular linguistic group.

(ii) On 11.02.1997, all the inhabitants were sleeping in their respective huts after taking their meals.

(iii) Miscreants, armed with fire arms and "masha" in hands, started setting fire to the houses and the inmates of the houses, frightened, petrified, startled and wondering as to what had been happening, started coming out by raising alarm.

(iv) Taking full advantage of the panic-ridden condition of the inhabitants of Bangarbari, the miscreants indiscriminately spread bullets on the unarmed innocent villagers causing death of as many as 15 persons on the spot including women and minor children. Even children, aged below 10 years, did not escape the bullets of the miscreants.

(v) Many persons were grievously injured including Dulal Sarkar, Sumitra Sarkar, Hemendra Sarkar and Ajit Biswas.

(vi) Almost whole of the household belongings and livestock of the poor villagers were burnt to ashes.

(vii) The witnesses could identify the accused by name and face as one of the miscreants, who had set fire to their houses and killed the inhabitants by firing bullets from the arms, which he (accused-appellant) and his associates were carrying. (viii) After the incident, the accused appellant absconded and he was apprehended, later on, by police.

MITIGATING CIRCUMSTANCES:

144. Brother of the accused appellant gave shelter to some of the victims of mass massacre. We do not, we are constrained to observe, find any other mitigating circumstance in favour of the accused-appellant.

145. The evidence on record shows the cruel and diabolic manner in which innocent persons, belonging to a particular linguistic community, were, as described above, killed indiscriminately and their houses and belongings were burnt to ashes.

146. The perpetrators of the crime, including the present appellant, acted in most cruel and inhuman manner and murders were committed in extremely brutal, grotesque and dastardly manner, which is revolting and ought to be taken to have vigorously shaken the collective conscience of the society. The victims, all innocent, were helpless when they were put to death or grievously injured or when their houses and belongings were burnt to ashes. The case at hand, therefore, squarely falls in the category of "rarest of rare cases", where death penalty could be the only adequate sentence.

147. In the facts and attending circumstances of the present case, ends of justice demanded death sentence and the learned trial Court has, in our considered and firm view, rightly awarded death sentence as punishment to the accused.

148. The learned trial Court found the appellant Ashok @ Achak Debbarma guilty of committing offences punishable under Sections 326, 436, 302 read with Section 34 IPC as well as u/s 27(3) of the Arms Act, 1959. As the Supreme Court has declared, in Dalbir Singh (supra), Section 27(3) of the Arms Act, 1959, as void and unconstitutional, punishment, u/s 27(3) of the Arms Act, 1959, cannot be sustained. However, the death sentence, u/s 302 IPC, read with Section 34 IPC must be sustained in addition to the sentences passed for offences u/s 326 and 436 read with Section 34 IPC, which the accused-appellant stands convicted of.

149. In the result and for the reasons discussed above, we confirm the sentence of death imposed on the appellant, Sri Ashok Debbarma alias Achak Debbarma, by the learned trial Court and dismiss his appeal. The death reference as well as the criminal appeal shall accordingly stand disposed of. Send back the L.C. records along with a copy of this judgment and order.