
(2020) 03 CAL CK 0016

In the Calcutta High Court

Case No : Death Reference No.2 Of 2018, Criminal Appeal (CRA) No. 130 Of 2018

State Of West Bengal And Others

APPELLANT

Vs

Ustab Ali And Others

RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304B, 498A

Dowry Prohibition Act, 1961 — Section 3, 4

Code Of Criminal Procedure, 1973 — Section 313, 428

Citation : (2020) 03 CAL CK 0016

Hon'ble Judges : Joymalya Bagchi, J;Suvra Ghosh, J

Bench : Divison Bench

Advocate : Sourav Chatterjee, Surasri Baidya, Neguive Ahmed, Sanjay Bardhan

Final Decision : Disposed Of

Judgement

Joymalya Bagchi, J

The appeal and death reference are taken up for hearing analogously and are being disposed of by this common judgment and order.

By judgment and order dated 7.3.2018 and 8.3.2018 the learned Additional Sessions Judge, Kandi, Murshidabad in Sessions Case No.374/2015

corresponding to Sessions Trial Case No.29(09) 2015/G.R.1361/2015 convicted the appellant under section 302 of the Indian Penal Code (hereinafter

referred to as "I.P.C.") and sentenced him to death.

Prosecution case, as alleged against the appellant is to the effect about seven years ago the appellant married the deceased Nafija Bibi according to

Muslim rites and customs. Initially their conjugal life was happy. However, after the birth of three daughters, the appellant and his in-laws subjected

Nafija to physical and mental torture. It was further alleged appellant had developed illicit relation with another woman. On the night of 31.5.2015

when Nafija and her three children, namely, Amina Khatun (5 years), Marsida Khatun (3 years) and Tuhina Khatun (1 year) were sleeping in bed the

appellant poured kerosene oil on them and set them on fire. As per written complaint lodged by P.W.1, Golam Mostafa, father of Nafija, Kandi P.S.

Case No.529 of 2015 dated 31.5.2015 under sections 498A/304B/302/34 of I.P.C. and sections 3 and 4 of Dowry Prohibition Act was registered

against the appellant and one Akbar Ali. Appellant was arrested on 1.6.2015. On 6.6.2015 one blue coloured plastic jar smelling of kerosene and some

paddy straw were seized. Post-mortem report was collected and charge-sheet was filed against the appellant. Charges were framed under sections

498A/304B/302 of I.P.C. Appellant pleaded not guilty and claimed to be tried.

In the course of trial, prosecution examined eight witnesses and exhibited a number of documents.

It was the specific defence of the appellant that on the fateful night he had gone to the house of his cousin at Hijal Natun Gram to collect firewood

and was not present at his residence when the incident occurred. He, however, did not lead evidence to probabalise such alibi.

In conclusion of trial, the trial Judge by judgment and order dated 7.3.2018 and 8.3.2018 convicted the appellant under section 302 of I.P.C. and

holding the offence of murdering one's wife and three minor children fell within the category of 'rarest of rare' cases, sentenced the convict to death.

Hence, the present appeal and death reference.

Arguments at the Bar

Mr. Chatterjee, learned advocate appearing on the behalf of the appellant submitted that no one saw the appellant with the victims on the fateful day.

There is no direct evidence that the appellant had murdered his wife and children. Time of occurrence has not been proved beyond doubt. It is unclear

when the relations of Nafija came to the place of occurrence. While P.W.s 1 (father of the deceased Nafija Bibi), P.W. 2 (uncle of Nafija Bibi) and

P.W. 4 (brother of Nafija Bibi) saw the charred bodies in the room, P.W.5 (wife of P.W.4) claimed the bodies had already been removed from the

spot. None of the witnesses apart from investigating officer (P.W.7) stated they

detected smell of kerosene oil from bodies of the deceased persons or the seized articles. Autopsy surgeon (P.W.6) also did not note smell of kerosene during post mortem examination. FSL report of viscera of the deceased persons produced during trial do not show presence of intoxicant in the viscera. Plastic jar was belatedly seized and was not produced in court. Neither the wearing apparels of the deceased persons nor the jar had been sent for FSL examination and the trial court notwithstanding absence of scientific evidence relied on ipse dixit of investigating officer (P.W.7) to come to a finding that the seized articles as well as the jar smelt of kerosene. No cogent evidence with regard to illicit relation between the appellant and another woman is forthcoming. Hence, motive of crime is not proved beyond doubt. He relied on various authorities in support of his aforesaid propositions and prayed for acquittal of the appellant.

On the other hand, Mr. Ahmed, learned Additional Public Prosecutor for the State argued that circumstances in the present case establish beyond

doubt the role of the appellant in committing the heinous murders of his wife and three helpless children in their sleep. The appellant gave a false

explanation regarding his alibi during trial. This is an additional link in the chain of incriminating circumstances pointing to his guilt. As his wife was

unable to bear a male child, the appellant developed illicit relation with another woman and in a preplanned manner committed the brutal murder of his

wife and three minor children while they were sleeping. The case falls within the category of 'rarest of rare' crimes justifying death penalty.

Evidence on Record

Prosecution has examined the following relations of the deceased Nafija Khatun:-

P.W.1 (father), P.W.2 (uncle), P.W.4 (brother) and P.W.5 (brother's wife). P.W.1, Golam Mostafa, deposed Nafija was married to appellant.

Initially the marriage was happy. After the birth of three daughters, appellant developed illicit relation with another woman. As Nafija objected to such

relationship, the appellant tortured her mentally and physically. On 31.5.2015 the appellant poured kerosene oil on Nafija and his three children,

namely, Amina Khatun, Marsida Khatun and Tuhina Khatun and set them on fire. He reached the spot and found the charred bodies of Nafija and her

three children. He lodged written complaint. He also signed on the inquest report and seizure list. In cross-examination, he stated he got news of the

incident at 6.00 a.m. and thereafter he came by bus to the place of occurrence. He found smoke emerging from the quilt. He admitted he could not

state the name and address of the woman with whom the appellant had developed illicit relation.

P.W.2, Motiur Rahaman and P.W.4, Nur Alam Sk. have corroborated the deposition of P.W.1. Further, P.W.2 stated, after birth of three daughters,

appellant tortured Nafija on demand of money and had developed illicit relation with another woman. In cross-examination, he stated at 9.00 a.m. he

came to the crime spot and noticed smoke coming from clothing of the deceased persons.

P.W.4 in cross-examination claimed that they left for the residence of the appellant around 8-8.30 a.m. and reached the residence of the accused one

and half hour later. He saw flame coming out from a portion of the quilt.

P.W.5, Arsina Bibi also corroborated the evidence of other witnesses. She, however, claimed, the bodies of the victims had been removed by police

when they arrived at the spot.

P.W.3, Tapas Kr. Biswas, Executive Magistrate, held magisterial inquest over the dead bodies and proved the inquest report (Exhibit-9).

P.W.6, Dr. Md. Rofiquel Hasan held post-mortem over the dead bodies of the deceased persons, Nafija Bibi, Amina Khatun, Marsida Khatun and

Tuhina Khatun. He proved the post-mortem reports (Exhibits-10, 11, 12 and 13). He opined death was due to neurogenic shock due to burn injuries

and ante-mortem in nature. In cross-examination, he stated it is not possible to suffer burn injuries of such nature as noted in the post-mortem reports

from a burning lamp. He did not find smell of kerosene on the bodies of the deceased prsons.

P.W.7, S.I. Rajat Das, is the investigating officer. He deposed, the then IC, Kandi police station directed him to investigate the case. S.I. Md.

Hasanuzzaman received complaint from P.W.1 against appellant and Akbar Ali. He filled up the formal part of FIR. During investigation, he went to

the place of occurrence and prepared sketch map. He recorded statements of witnesses. He conducted inquest over the dead bodies of the deceased

persons (Exhibits-3 to 6). He took steps for post-mortem of the bodies. He collected post-mortem reports. He seized burnt pillow, bed sheet having

smell of kerosene under seizure list (Exhibit-7). He produced burnt pillow and

chadar in court. He arrested the accused on 1.6.2015. He seized blue coloured plastic jar with smell of kerosene and some paddy on 6.6.2015 under seizure list (Exhibit-8). He filed charge-sheet against the appellant.

Examination under section 313 Cr.P.C.

During examination under section 313 Cr.P.C. the appellant stated that he was not at his residence on the fateful night. In the evening he had gone to the house of his cousin at Hijal Natun Gram to bring fuel. He could not return home as he did not get a tractor. He further stated, a kerosene oil lamp used to burn at night at his residence.

Circumstances relied on by the Prosecution

From analysis of evidence on record, it appears, the case is based on circumstantial evidence. Prosecution has relied on following circumstances to establish the guilt of the appellant:-

(a) Appellant was married to deceased Nafija. From the wedlock three girl children, namely, Amina Khatun (5 years), Marsida Khatun (3 years) and Tuhina Khatun (1 year) were born.

(b) After birth of three daughters appellant started torture on Nafija as he developed illicit relation with another woman.

(c) On the night of 31.5.2015 the appellant poured kerosene oil on them and set them on fire.

(d) Appellant was not found in his residence in the morning when relations of Nafija came to the spot.

(e) On the next day, i.e. 1.6.2015 appellant was arrested from the village.

(f) Post-mortem doctor stated that the victims died due to neurogenic shock due to severe burns, ante-mortem in nature.

(g) Appellant gave false explanation that he was not at his residence on the fateful night and had gone to his cousin's house at Hijal Natun Gram

to fetch fuel. He further stated, a kerosene oil lamp used to burn in their room at night hinting at accidental fire. Post-mortem doctor in cross-

examination wholly ruled out such possibility.

Analysis of the circumstances vis-à-vis evidence on record

In Sharad Birdhichand Sarda vs. State of Maharashtra 1984 SCC (Cri) 48,7 para 153 , the Court while analyzing the law on circumstantial evidence

reiterated five golden principles as â??panchsheel of the proof of a case based on

circumstantial evidence:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned must or should be and not may be

established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be

explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the

innocence of the accused and must show that in all human probability the act must have been done by the accused.

It is my endeavour to see whether the aforesaid principles have been fully satisfied in the present case or not. Fact that the appellant married the

deceased Nafija and three daughters were born from the wedlock has not been challenged. It is also undisputed that the family resided together in the

house where the incident occurred. Evidence of post-mortem doctor establishes beyond doubt that Nafija and her three daughters died due to

neurogenic shock arising out of severe burn injuries which were ante-mortem in nature. Possibility of accidental death as hinted on behalf of the

defence from a burning kerosene lamp was ruled out. It is argued, there is no indication with regard to the time of occurrence in the charge framed in

this case. None of the witnesses, that is, P.W.s 1, 2, 4 and 5 who claimed the incident took place at night had witnessed it. Post-mortem doctor,

P.W.6, held post-mortem examination on 31.5.2015 at 3.50 p.m. He opined the death occurred within 24 hours of post-mortem examination. Reaching

the place of occurrence around 9/10 a.m., P.W.s 1, 2 and 4 found smoke coming out from the quilt and wearing apparels of the deceased. In this

backdrop, it may be concluded that the victims were charred to death in the wee hours of 31.5.2015 and the witnesses found smoke smouldering from

the quilt and wearing apparels when they reached the place of occurrence in the

morning. These facts were fully established during trial and the appellant was wholly aware of them. Accordingly, he was in no way prejudiced due to lack of particularization of time in the charge.

Whether the deaths were homicidal, suicidal or accidental? Manner and circumstances in which the charred bodies of the victims were found in the

bed leave no doubt in my mind that they had suffered homicidal death. Faint plea of accidental fire from a burning kerosene lamp had been ruled out

by the post-mortem doctor. P.W.s 1, 2 and 4 came to the spot around 9.00 a.m. and found smoke coming out from the bodies and clothing of the

deceased persons. I do not give much credence to the deposition of P.W.5, wife of P.W.4, who claimed the charred bodies had been removed at the

time when she arrived at the spot. P.W.5 is a lady and it is possible in order to save her from the trauma of watching the horrible sight of charred

bodies she was made to understand that the bodies had been taken away by police. Evidence on record establish beyond doubt that the victims had

severe burn injuries while they were sleeping in bed. Charred bodies were found lying together in the bed and smoke was coming out from the

beddings, wearing apparels etc. Bodies had deep and extensive burn injuries. These circumstances clearly indicate that the victims were set ablaze in

their sleep. If they were awake when they suffered burn injuries, they would have definitely run helter skelter in pain and tried to save themselves.

This rules out any possibility of suicidal death. In fact no case of suicidal burning has ever been suggested by the defence. Accordingly, I hold that the

victims were set ablaze in their sleep and suffered homicidal death. This brings us to the most vital question who committed the murder of Nafija and

her three daughters?

Prosecution evidence shows that Nafija and her daughters used to reside with the appellant in the house. Evidence has also come on record after the

birth of three girls, the appellant had developed illicit relation with another woman and as Nafija protested she was subjected to mental and physical

torture. Bodies of Nafija and her three children were found in the bed with severe burn injuries on the morning of 31.5.2015. P.W.s 1, 2 and 4 found

smoke emanating from the beddings and wearing apparels. These circumstances for reasons recorded hereinbefore clearly establish the homicidal

death of the victims due to burn injuries. No evidence of any outsider breaking

into the room where the incident occurred is forthcoming. No broken door or window was found at the place of occurrence. These circumstances leave no doubt that Nafija and her daughters were set on fire by a person who ordinarily resided with them, that is, the appellant. After setting them on fire the appellant had run away and was not found in the house on the morning of 31.5.2015. On the next day, he was arrested. These circumstances unerringly point to the guilt of the appellant. False plea of alibi raised by the appellant during trial provide an additional link to the aforesaid chain of circumstances pointing to his guilt. Appellant claimed, he had gone to the residence of his cousin at Hijal Natun Gram to bring fuel. He did not examine any witness to probabilise such alibi. On the other hand, there is evidence that the appellant used to reside with his wife and three children in the house. It has been argued neighbours have not been examined to show that the appellant was present in the house on the fateful night. As it is normal human conduct that a couple would be together at night, non-examination of neighbours is not fatal to the prosecution case. Under such circumstances, it was incumbent on the appellant to probabilise his alibi that he had been away from his residence at night as contended by him during his examination under section 313 Cr.P.C. I am not unmindful of the fact that prosecution must stand on its own leg and not rely on the weakness of the defence. However, when the circumstances of the case give rise to an irresistible inference that the appellant ordinarily resided with his wife and children in the house, it was incumbent on him to probabilise his absence from the residence on the fateful night when his wife and children suffered homicidal death. In the backdrop of the aforesaid facts, one may safely conclude the false plea of alibi taken by the appellant is an additional incriminating fact, which establishes his guilt beyond doubt.

Authorities relied upon by the appellant are inappropriate. In *State of Rajasthan vs. Ramanand* (2017) 5 SCC 695, the Apex Court upheld acquittal of the accused as there was no reliable evidence that the accused was guilty of murder of his wife. In fact, he had lodged complaint at the earliest opportunity regarding her death. On the other hand, in the present case, the appellant was not found at his house in the morning and raised a false plea of alibi which he failed to probabilise during trial.

In *State of Gujarat vs. Sonbai* 1991 Supp (2) SCC 120, possibility of presence of

a third person at the place of occurrence could not be ruled out.

Hence, conviction of stepmother for killing her two stepsons was set aside. In the instant case, no evidence is forthcoming that any outsider had

broken into the room where the wife and daughters of the appellant were set on fire. Hence, the aforesaid case is, therefore, of little assistance to the appellant.

In *Reena Hazarika vs. State of Assam* (2019) 13 SCC 289, one of the witnesses, that is P.W.1 had claimed that the deceased told him that he

suffered head injury due to fall. In view of the contradictory evidence with regard to the circumstances leading to the injury on the victim,

accused/wife was acquitted. Manner and circumstances in which the charred bodies of the deceased persons were found in the bed room leaves no

doubt that they had suffered homicidal death while they were sleeping at night. In the backdrop of the aforesaid facts and false plea of alibi taken by

the appellant, I am of the opinion, the present case is distinguishable from the cited one.

Accordingly, I have no hesitation to hold that the prosecution has been able to prove the guilt of the appellant beyond doubt and his conviction is

accordingly upheld.

Death sentence – whether justified

Trial Judge was of the opinion in view of the heinousness and gravity of offence, brutality of attack, number of persons murdered, their age,

vulnerability and gender and the fact the appellant was in a position of trust to the victims, the instant case fell within the “rarest of rare”

category justifying imposition of the maximum sentence of death.

From the time of *Bachan Singh vs. State of Punjab* (1980) 2 SCC 684 till date penology in death sentencing is pivoted on the premise

whether the case fell within “rarest of rare” category or not. In order to arrive at such conclusion, the court is required to make a balance-sheet

of aggravating and mitigating circumstances and come to the following conclusion:-

“(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?â?? See Machhi Singh Vs. State of Punjab, (1983) 3 SCC 470, para 39.

The court must give due weightage to the â??crime testâ??, that is, aggravating circumstances relating to the crime as well as â??criminal testâ??,

that is, mitigating circumstances relating to the offender and come to a conclusion that the possibility of rehabilitation of the offender is wholly

foreclosed before imposing the irreversible sentence of death.

In the present case the aggravating and the mitigating circumstances may be enumerated as follows:-

Aggravating Circumstances:-

- (a) All the victims were female and three of them were minor children.
- (b) Appellant being the husband and father of the victims betrayed their trust and committed the crime.
- (c) Victims were vulnerable and defenceless as they were sleeping at the time when the incident occurred.
- (d) Appellant had acted with premeditation and the offence was a diabolical one.
- (e) Motive of the crime is a deplorable one. He was unhappy with his wife since she had given birth to three daughters and had developed an illicit relation with another woman.

Mitigating Circumstances:-

- (a) Appellant was a young person aged about 26 years at the time of occurrence.
- (b) He does not have any criminal antecedent.
- (c) Report has been received from Berhampore Central Correctional Home, Murshidabad, where the appellant has been kept for the last two years and it appears from the said report that he is always found to be â??well-disciplinedâ?? and â??well-behavedâ??.

Trial judge was swayed to impose the sentence of death, inter alia, holding that the appellant committed a heinous and diabolical crime by burning

vulnerable and defenceless victims who were dependent on him in their sleep. Such crime, according to the judge, shocked the collective conscience

of the community which â??necessitated awarding death penaltyâ??.

In Gudda @ Dwarikendra vs. State of Madhya Pradesh (2013) 16 SCC 59,6 paras 27 & 28, the Apex Court, inter alia, held neither the â??number of

deathâ?? nor â??brutality of crimeâ?? are sole criteria to come to the finding the

case falls within the 'rarest of rare' category:-

This Court has consistently held that the number of deaths or the factum of the whole family being wiped off cannot be the sole

criteria for determining whether the case falls in the category of 'the rarest of the rare'. (See *Aqeel Ahmad v. State of U.P.*, *Ram*

Pal v. State of U.P.)

Further, we cannot lose sight of the fact that brutality also cannot be the only criterion for determining whether a case falls under the

'rarest of the rare' category. In *Panchhi v. State of U.P.*, this Court has reiterated the said principle and thereby justified the

commutation of sentence from death to life imprisonment.

The aforesaid case involved the murder of three persons including a five year old child and a pregnant lady and according to the Court, the appellant

was a person in a position of trust to the victims.

In *State of Maharashtra vs. Goraksha Ambaji Adsul* (2011) 7 SCC 437, three members of a family were murdered in the course of a family feud over

ancestral property. The Apex Court declined to come to a conclusion that the convict had committed a crime which fell in the 'rarest of rare'

category justifying death penalty. It may not be out of place to note that in the said case the convict had acted with premeditation by offering sweets

containing sedatives to the victims in order to put them to sleep and thereafter strangled them.

Similarly, in *Amar Singh Yadav vs. State of Uttar Pradesh* (2014) 13 SCC 443 , the appellant, a police constable, had murdered his wife and two out

of four children by setting on fire a Maruti van which was occupied by the victims. In the aforesaid case, the Apex Court while noting the most cruel

and inhuman manner in which the crime was committed converted the sentence of death to one of life without remission for thirty years as there was

'no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would

constitute a continuing threat to the society.'

These authorities clearly establish that neither the number of victims nor the brutality of the crime are the sole determining factors for imposition of

death penalty. No doubt, they are relevant considerations. However, each case has to be assessed on its own factual matrix to come to a conclusion

whether a balance of aggravating and mitigating factors eliminate all possibility of reformation and rehabilitation of the convict and render death

sentence as the only alternative. I have analysed the circumstances in the present case from that perspective. For the reasons recorded hereinbefore,

I am convinced that the circumstances establish the guilt of the appellant beyond doubt. However, it is one thing to assess the circumstances to

ascertain guilt of an accused, it is entirely different to analyse the said circumstances for the purpose of sentencing. In Santosh Kumar Satishbhushan

Bariyar Vs. State of Maharashtra (2009) 6 SCC 498, para 57, quality of evidence adduced was considered to be a relevant factor in the matter of

sentencing. The Court held that:-

“Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence.”

Judging the circumstances of the case from that perspective I note that there are certain investigational lapses and/or deficiencies which though does

not affect the conclusiveness of guilt may leave a residual doubt in the mind of the court with regard to culpability of the appellant. Lapses in

investigation which may leave residual doubt in the mind of the court are as follows:-

(a) No forensic test was held to prove presence of kerosene oil in the seized beddings and other articles.

(b) No one apart from investigating officer (P.W.7) deposed there was smell of kerosene in the seized articles.

(c) No smell of kerosene was found by post-mortem doctor on the bodies of the deceased persons.

(d) Plastic jar was belatedly seized and was neither sent for forensic examination nor produced in court.

(e) Identity of the lady with whom the appellant allegedly had an illicit relation had not been established.

Principle of residual doubt as a mitigating circumstance has been recently incorporated in Indian jurisprudence in the last decade. In Ashok Debbarma

vs. State of Tripura (2014) 4 SCC 747, the Apex Court quoting American authorities held, the prosecution case must transcend beyond reasonable

doubt to absolute certainty to qualify as one where death sentence may be awarded.

Similar view has been taken in *Sudam @ Rahul Kaniram Jadhav vs. State of Maharashtra* (2019) 9 SCC 38,8 wherein the convict had murdered his

wife and four children and was initially awarded death sentence. In review, the Apex Court adopting the aforesaid doctrine of residual doubt

commuted death sentence to one of life imprisonment without any right to remission.

Principle of residual doubt was again applied by the Apex Court to convert sentence of death to one of life imprisonment in *Ravishankar @ Baba*

Vishwakarma vs. State of Madhya Pradesh (2019) 9 SCC 689, where a minor was raped and murdered.

The Law Commission of India Law Commission of India, *The Death Penalty*, (Report no. 262 , August 2015), para 7.1.6 while noting the vagaries of

the criminal justice system involving lack of resources, outmoded techniques of investigation, ineffective prosecution and poor legal aid recommended

the abolition of death penalty for all crimes except terrorism related cases. It noted as follows:-

“Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country

is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some

of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic

impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also operate

disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an

adversarial criminal justice system.”

The aforesaid observation of the Law Commission relating to outmoded investigational techniques and ineffective prosecution justifies the invocation

of doctrine of residual doubt in our jurisprudence. When tools for unraveling truth are themselves blunt or ineffective, one must come to an absolute

certainty with regard to guilt of an offender bereft of any shadow of lingering doubt arising out of sublime or unexplored factors before the court may

proceed to pronounce a sentence of death.

Present case is a glaring example of investigational and prosecutorial lapses. No

forensic test to detect the presence of kerosene oil either on the beddings or on the wearing apparels of the deceased persons was undertaken. Seized jar smelling of kerosene was also not sent for FSL examination.

Neighbours of the appellant were not examined in court. These circumstances leave a lingering doubt whether the guilt of the appellant has been

established with absolute certainty although one may have no doubt that the evidence on record is sufficient to uphold the conviction.

Trial Judge has relied on various authorities which are factually distinguishable.

In *Ranjeet Singh vs. State of Rajasthan* (1988) 1 SCC 633, the appellant was convicted of murdering eight persons. Prosecution case was essentially

based on the evidence of approver which was corroborated by other witnesses. Some of the prosecution witnesses heard cries of the victims and also

witnessed part of the incident. In the present case, there is no eye-witness to the incident. That apart, issue of residual doubt as evolved and applied in

the last decade had not been addressed in the aforesaid report. Subsequent evolution of law, particularly in the matter of identifying mitigating

circumstances in death penology must prevail over earlier authorities when such principle had neither been recognised nor applied. It is settled law an

authority is not a proposition for an issue which was neither raised nor argued. [See *Rajput Ruda Meha and Others vs. State of Gujarat* (1980) 1 SCC

677/AIR 1980 SC 1707, para 6]

In *State of Rajasthan vs. Kheraj Ram* (2003) 8 SCC 224, the accused was convicted of murder of his wife as he suspected her fidelity. He had made

an extrajudicial confession which was believed by the Court. Other circumstances also established his guilt. The Apex Court stated that the appellant

acted in a pre-planned manner and had executed the murder. He had no remorse and was seen smoking *chilam* calmly. Accordingly, the

Court imposed death sentence. In the present case, no evidence is forthcoming that the appellant had committed the crime in a pre-planned manner.

Prosecution has not led evidence relating to appellant procuring kerosene oil to commit the crime. No forensic report with regard to presence of

kerosene in the seized jar has been produced in court. In the face of the aforesaid facts, I am of the view that the instant case does not portray similar

state of facts to justify imposition of death sentence.

In *Ajitsingh Harnamsingh Gujral vs. State of Maharashtra* (2011) 14 SCC 401,

convict was sentenced to death for burning his wife and three grown up children. Evidence had come on record in the said case that there was quarrel between the couple on the night of the incident and on his leading statement the bucket used for throwing petrol was recovered. Under such circumstances, death sentence was imposed. Facts in the present case are not exactly the same as in the reported decision. Due to investigational and/or prosecutorial lapses, absolute certainty with regard to the guilt of the appellant cannot be said to have been established. Imposition of death sentence may, therefore be not advisable.

Furthermore, in *Viran Gyanlal Rajput vs. State of Maharashtra* (2019) 2 SCC 311, the Apex Court considering good conduct of a young convict during incarceration commuted his death sentence. Ratio of the aforesaid case applies with full force to the facts of this case.

Upon weighing the aforesaid factors, I am of the opinion the prosecution has failed to establish that the possibility of reformation and rehabilitation of

the convict is wholly ruled out. Under such circumstances and in the light of lingering residual doubt vis a vis guilt of the appellant, it may not be

prudent to confirm the death sentence imposed upon him. Accordingly, death sentence imposed upon the appellant is set aside. He is sentenced to

imprisonment for life without remission for a period of thirty years and to pay a fine of Rs.10,000/- (rupees ten thousand only) in default to suffer

rigorous imprisonment for one year more.

Death Reference No.2 of 2018 and Criminal Appeal No.130 of 2018 are thus, disposed of.

The period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him

in terms of section 428 of the Code of Criminal Procedure.

A copy of the judgment along with L.C.R. be sent down to the trial Court at once for necessary action.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

I agree.