

(2014) 05 PAT CK 0070

In the Patna High Court

Case No : Death Reference No. 14 of 2013 and Cr. Appeal (DB) Nos. 34 of 2014 and 1104 of 2013

The State of Bihar and Others

APPELLANT

Vs

Upendra Kumar Thakur and Others

RESPONDENT

Date of Decision : 07-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 164, 166, 313(1)(b), 366
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 120-B, 302, 34, 392, 394

Citation : (2015) 1 PLJR 25

Hon'ble Judges : S.P. Singh, J;I.A. Ansari, J

Bench : Division Bench

Advocate : Ashwini Kumar Sinha, Advocates for the Appellant; Neeraj Kumar, Amicus Curiae, Advocates for the Respondent

Judgement

S.P. Singh, J.—Under challenge, in the present appeals, is the judgment, dated 25.11.2013, passed, in Sessions Trial No. 1480 of 2011, by learned Additional Sessions Judge-II, Patna, and the order, dated 7.12.2013, whereby various sentences have been passed against the accused-appellants. By the impugned judgment, learned trial Court has convicted the accused-appellants under Sections 394, 411 and 302 read with Section 34 of the Indian Penal Code. Following their conviction under Section 302 read with Section 34 of the Indian Penal Code, both the accused-appellants have been sentenced to death and also pay fine of Rs. 10,000/- each and, in default of payment of fine, suffer simple imprisonment for three months. For their conviction under Section 394 read with Section 34 of the Indian Penal Code, both the accused-appellants have been sentenced to undergo imprisonment for life and pay fine of Rs. 1,000/- each and, in default of payment of fine, suffer simple imprisonment for three months. For their conviction under Section 411 read with Section 34 of the Indian Penal Code, both the accused-appellants have been sentenced to undergo rigorous imprisonment for three years. All the sentences have been directed to run

concurrently.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:-

(i) Aarti Gupta (since deceased) used to live with her husband, Sanjeev Gupta (PW-18), and two children, namely, Aashi @ Ritu, aged about 3 years, and Sanchit @ Golu, aged about 5 years, at Nala Road, Patna. Sanjeev Gupta (P.W.-18) had a furniture shop on the ground floor of a building and, in the same building, he used to live with his family on the 3rd floor.

(ii) Accused Upendra Kumar Thakur and accused Mukesh Mahto used to work, in the said furniture shop, as employees of Sanjeev Gupta (PW-18), and whenever Sanjeev Gupta was not at Patna, these employees used to open the shop by bringing a bunch of keys of the furniture shop from Aarti Gupta and, upon closing the shop, the bunch of keys used to be returned to Aarti Gupta. Accused Upendra Kumar Thakur was a Salesman at the furniture shop of Sanjeev Gupta; whereas accused Mukesh Mahto was a man, who used to polish furniture.

(iii) On 16.8.2010, at about 6:30-7:00 PM., when Ashok Kumar (PW-11) happened to pass by the shop of Sanjeev Gupta, he saw accused Upendra Kumar Thakur and accused Mukesh Mahto having alcohol in the furniture shop of Sanjeev Gupta. As Ashok Kumar (PW-11) happened to pass by, the two accused called Ashok Kumar to have drinks with them. After having with them alcohol, Ashok Kumar left the furniture shop. While, however, accused Upendra Kumar Thakur and accused Mukesh Mahto were drinking alcohol with Ashok Kumar (PW-11), they happened to be seen by Nagendra Singh (PW-3).

(iv) On 16.8.2010, at about 7:30 PM., as mentioned above, Nagendra Singh (PW-3) had seen accused, Upendra Kumar Thakur, and accused, Mukesh Mahto, drinking alcohol at the furniture shop of Sanjeev Gupta (PW-18), along with Ashok Kumar (PW-11), a resident of Gaighat. On seeing accused Upendra Kumar Thakur, accused, Mukesh Mahto and Ashok Kumar (PW-11) having alcohol together, Nagendra Singh (PW-3) admonished them and, then, accused Upendra Kumar Thakur and accused Mukesh Mahto told him that they were drinking alcohol only on that very day and that they would not drink there from the next day.

(v) On 16.8.2010, Sanjeev Gupta (PW-18) made several calls to Aarti Gupta (since deceased), but she did not pick up the phone. Worried and apprehensive, Sanjeev Gupta (PW-18), on 16.8.2010, at about 10:00 PM, rang up Nagendra Singh (PW-3) from Delhi that his wife Aarti Gupta (since deceased) had not been receiving/picking up phone and, therefore, to go to his (Sanjeev Gupta's) house and see what the matter was. As Nagendra Singh (PW-3) came out of his house to go to the house of Sanjeev Gupta (PW-18), he happened to meet Shankar Kumar (PW-4), Ajay Kumar (PW-2), Rahul Kumar (PW-5) and Kumar Sachin (PW-9) near the house of Sanjeev Gupta. Nagendra Singh (PW-3) informed them about the phone call of Sanjeev Gupta (PW-18) and, accompanied by all of them,

he (PW-3) went to the 3rd floor of the building, where Sanjeev Gupta used to live with his family. When Nagendra Singh, accompanied by Shankar Kumar (PW-4), Ajay Kumar (PW-2), Rahul Kumar (PW-5) and Kumar Sachin (PW-9), entered into the house of Sanjeev Gupta, which had not been locked from inside, they were aghast to see Aarti Gupta lying dead, in a pool of blood, with a bunch of keys, which used to be given to her by Upendra Kumar Thakur, on closing the shop, lying nearby. When Nagendra Singh (PW-3), with his neighbours, went forward, they saw both the children of Aarti Gupta lying, in a pool of blood, with their necks cut off. They also found jewellery box and other articles lying scattered indicating thereby that person or persons, who had put to death Aarti Gupta and her children, had run away with jewellery and other valuables from the house. Having seen the ghastly occurrence, when Nagendra Singh (PW-3) was talking to others, who had come with him to the house of Sanjeev Gupta (PW-18), other neighbours, too, arrived there and police were informed.

(vi) Having been informed about the occurrence, police from Kadam Kuan Police Station arrived at the place of occurrence and recorded, on 16.8.2010, at about 10:20 PM, the statement of Nagendra Singh (PW-3) as regards the occurrence. This statement was treated as fardbayan. Treating the said fardbayan as First Information Report, Kadam Kuan Police Station Case No. 269 of 2010 was, on 16.8.2010, at about 11:50 PM, registered, under Sections 302/394/120-B Indian Penal Code, against accused Upendra Kumar Thakur and accused Mukesh Mahto.

(vii) During investigation, police held inquest over the said three dead bodies and inquest reports were accordingly prepared. The dead bodies were also subjected to post mortem examinations, which revealed that Aarti Gupta and her two children had been put to death by causing them injuries, which were homicidal in nature.

(viii) Police team also brought photographer and experts from the Forensic Science Laboratory, who took the photographs and also lifted fingerprints found on various articles.

(ix) Houses of accused Mukesh Matho and accused Upendra Kumar Thakur were raided by two different police teams, headed by S.I. Asrar Ahmad (PW-12) and S.I. Madhurendra Kumar (PW-13) respectively.

(x) The police team, headed by S.I. Asrar Ahmad (PW-12), arrived, on 17.8.2010, at about 4:15 A.M., at the house of accused Mukesh Mahto, and, on the basis of the statement, which accused Mukesh Mahto gave, his house was searched. During search, from the upper cap of ceiling fan, 8 (eight) pieces of silver coin of one rupee each and cash amount of Rs. 26,000/- of Rs. 500/- denomination and from beneath the almirah, a dagger, which measured 10 fingers in length, having wooden handle, but stained with blood, were recovered. The recovered articles, along with the dagger, were seized and a seizure list (Exhibit-4) was prepared. Later on, serological examination, carried out by forensic experts, revealed that the dagger, in question, had stains of human

blood.

(xi) The other police team, headed by S.I. Madhurendra Kumar (PW-13), went to the house of accused Upendra Kumar Thakur and, on arriving there, on 17.8.2010, at about 6:00 A.M., recorded the statement of accused Upendra Kumar Thakur. Based on the statement of accused Upendra Kumar Thakur, the police team found two pieces of gold chain, five pieces of gold jitia in pearl string, one piece of gold earring, one piece of gold fattish having Durgaji mark, one piece of small gold fattish having sitaram mark, one piece of silver snake having 1 1/2" length, one gold locket having betel shape, one piece of silver plate, five pieces of one rupee coin, one piece of five rupee coin, nineteen pieces of silver bichia, one pair of gold earring, five pieces of silver better nut, three pieces of small size silver bowls, one piece of silver sindoordan (i.e. containing meant for keeping vermilion by bride), five pieces of silver betel, one piece of silver coin of 100 rupee, four pieces of silver coins having marks of Lakshmi and Ganesh, one piece of silver coin having mark of Lakshmi, one piece of silver coin having mark of jai mata di, fifteen pieces of silver anklets, two pieces of small silver spoons, one pair of baby anklet, one piece of silver key-ring, one piece of silver jhunjhuna, one piece of silver Trishul, one piece of silver leaves having mark of om namah shivaya, two pieces of gold mangtika and one piece of gold necklace. The said materials seized by a seizure list (Exhibit-5).

(xii) Both the accused aforementioned were arrested and forwarded to the Court.

(xiii) The Forensic Science experts also found fingerprints of the two accused persons aforementioned on some of the articles, which were lying at the house of Sanjeev Gupta (PW-18).

(xiv) On completion of investigation, charge-sheet was laid, under Sections 394, 411 and 302 read with Section 34 of the Indian Penal Code, against both the accused persons, namely, Upendra Kumar Thakur and Mukesh Mahto.

3. During trial, charges, under Sections 394 and 302 read with Section 34 of the Indian Penal Code, were framed against the accused persons. Yet another charge, under Section 411 of the Indian Penal Code simpliciter, was framed against both the accused persons. To the charges so framed, both the accused persons pleaded not guilty.

4. In support of their case, prosecution examined altogether twenty two witnesses. The accused persons were, then, examined under Section 313(1)(b) Code of Criminal Procedure and, in their examinations aforementioned, the accused persons denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

5. Having found the accused persons guilty of the offences, which they stood charged with, learned trial Court convicted them accordingly and passed sentences against them as mentioned above.

6. For the reason that sentence of death has been passed against the accused persons aforementioned, learned trial Court, in terms of the provisions of Section 366 of the Code of Criminal Procedure, committed the proceedings of the case to this Court for confirmation of the sentence of death. At the same time, aggrieved by their conviction and the sentences passed against them, both the accused, as convicted persons, have preferred appeals.

7. The reference, under Section 366 of the Code of Criminal Procedure, made by the learned trial Court, has come to be registered as Death Reference No. 14 of 2013; whereas the appeal, preferred by the appellant, Mukesh Mahto, has come to be registered as Criminal Appeal (DB) No. 34 of 2014, and the appeal, preferred by the appellant, Upendra Kumar Thakur, has come to be registered as Criminal Appeal (DB) No. 1104 of 2013.

8. Because of the fact that the death reference and the appeals are wholly inextricable from each other, we have heard both, the reference as well as the appeals, together.

9. We have heard Mr. Rana Pratap Singh, learned Senior Counsel, for the accused-appellants, and Mr. Ashwini Kumar Sinha, learned Additional Public Prosecutors, appearing for the State.

10. Mr. Rana Pratap Singh, learned Senior Counsel, who led the arguments on behalf of the appellants, has submitted that there is no eye witness to the occurrence and the case is based on circumstantial evidence, which is of a weak nature inasmuch as the chain of circumstantial evidence has remained incomplete and cannot, therefore, warrant conviction of the appellants. He further submits that in any view of the matter, the learned trial Court committed an error of law in awarding death sentence inasmuch as the case would not fall within the category of rarest of rare cases.

11. There is no dispute as regard the fact that Arti Devi and her two children, namely, Aasi @ Ritu, aged about 3 years, and Sachin @ Golu, aged about 5 years, were killed by slitting their neck with the aid of sharp cutting weapon. It is Dr. Ramanand Chaudhary (P.W. 15), who had, on 17.8.2010 at 6.45 P.M., conducted post mortem examination on the dead body of Arti Gupta, aged 35 years. Similarly, he conducted post mortem on the dead body of Ritu, aged about 3 years, daughter of deceased Arti Gupta and Sanjeev Gupta (P.W. 18), and also on the dead body of their five year old son, Sachin @ Golu, on the same day.

12. The doctor (PW-15), who conducted post mortem examination on the dead bodies of Aarti Gupta, Ritu and Golu, has opined that the deaths were caused by sharp cutting pointed weapon like Chura and Chaku. It is also in the evidence of the doctor that the shock and haemorrhage, which resulted from the respective injuries sustained by the said three deceased, became the cause of death.

13. Though the appellants have not disputed the factum of murder of the said three persons, they do dispute that they are authors of the crime. They submit

that some one else has committed the murder, they do have been falsely implicated, in this case, on mere suspicion, though no incriminating articles was recovered or seized from their houses.

14. The case is, undoubtedly, based on circumstantial evidence and we will, now, proceed to examine whether the chain of circumstances, produced by the prosecution, is so complete as to lead to no hypothesis other than the hypothesis of guilt of the accused-appellants.

15. P.W. 3, Nagendra Singh, in his deposition, has reiterated the prosecution's case. He has stated, in his evidence, that the appellants, Upendra and Mukesh, were members of the staff at the Shop of Sanjeev Gupta, situated at Nala Road, which was run under the name and style of Bhog Furniture. He has also stated that his house is intervened by a lane from the house of Sanjeev Gupta (PW-18) and, in the absence of Sanjeev Gupta, the two accused used to hand over the keys of the shop to the wife of Sanjeev Gupta, namely, Arti Devi.

16. As regards the occurrence, PW-3 has deposed that on the fateful evening, i.e. 16.8.2010, at about 7.00-7.30 P.M., he had seen Upendra, Mukesh and Ashok taking wine in the shop of Sanjeev Gupta and when he raised objection, they stated that they would not take wine from the next day.

17. It is in the evidence of PW-3 that he had seen the accused locking the shop at about 8.30 P.M. It is also in the evidence of PW-3 that he saw Upendra carrying a small Silver Thali and Mukesh carrying blue colour bag and when he enquired from them as to where they were going, they said that they were required to catch the train. This witness (PW-3) has identified the two accused in the dock.

18. In his cross-examination, PW-3 has stated that police had not seized any article in his presence and that he had received telephone call on his mobile number 9334299338 from Delhi at about 10.00 P.M. Nothing has been elicited from P.W. 3 to show that his evidence is unreliable.

19. P.W. 1, Vinod Prasad Gupta, is the maternal uncle of Sanjeev Gupta (P.W. 18) and he is a witness to the recovery of bottle and two glasses alleged to have been used by the two appellants for taking wine in the evening of the day of the occurrence. The seizure list, prepared in this regard, has been marked as Exhibit-1.

20. P.W. 2, Ajay Kumar, another brother of Sanjeev Gupta, has deposed that at about 10.00 P.M., on 16.8.2010, he was at Nala Road, when P.W. 3 (Nagendra Singh) informed him that the latter had received a phone call from Sanjeev Gupta to enquire as to why his wife had not been picking up his phone call and, thereafter, he, along with P.W. 3 and others, went to the 3rd floor of the house of Sanjeev Gupta, where they found Aarti Gupta and her two children lying, in pool of blood, with injuries on their person.

21. It may be noted that P.W. 3 is an independent witness, who has seen the two

appellants going after locking the shop. He is a witness to the fardbeyan also and has put his signature on the fardbeyan as Exhibit-1/1.

22. P.W. 4, Sankar Kumar, is the cousin of Sanjeev Gupta and he is a witness to the seizure of clothes and liquor bottle from the Garbage dumb. He is also a witness to the recovery of cash, silver ornaments and blood drenched knife from beneath the almirah at the house of appellant, Mukesh, on 17.8.2010, at 4.15 A.M.

23. P.W. 5, Rahul Kumar, is the witness of inquest.

24. P.W. 6, Sanjay Kumar Gupta, is cousin of P.W. 18 and he is also a witness to the recovery of cash, silver coins, ornaments and blood-stained knife from the house of the appellant, Mukesh, situated at Musalahpur, Nayagajma, on 17.8.2010 at 3.45 A.M., raided by P.W. 12, Asrur Ahmad, investigating officer of the case.

25. P.W. 7, Sankar Kumar, brother-in-law of Sanjeev Gupta P.W. 18, and P.W. 8, Shashi Shekhar Kumar, brother of Sanjeev Gupta P.W. 18, are witnesses to the recovery of silver coins and gold ornaments from the house of the appellant, Upendra, situated, Village-Nadawa, which was raided by P.W. 13, Madhurendra Kumar, on 17.8.2010 at 6.30 A.M.

26. P.W. 9, Kumar Sachin, is brother-in-law of Sanjeev Gupta, who, too, received a phone call from the latter requesting him to enquire as to why his wife had not been picking up the phone. This witness (PW 9) has supported the prosecution's case as narrated by the informant inasmuch as he has stated that he, too, along with the informant and others, reached 3rd floor of the house of Sanjeev Gupta, where he found all the three persons aforementioned lying murdered by sharp cutting weapons.

27. P.W. 10, Dablu Kumar, and P.W. 11, Ashok Kumar, have proved their signatures on their statements, recorded under Section 164 of the Cr.P.C., their statements having been marked as Exhibits-2 and 2/1 respectively. The two witnesses have stated that the accused had confessed their guilt, on 17.8.2010, in full public view.

28. P.W. 12, Asrar Ahmad, is the investigating officer of the case. He has stated, in his examination-in-chief, that on 16.8.2010, he was posted, at Pirbahore Police Station, on the post of Police Inspector-cum-Officer-in-Charge and, on the direction of Senior Superintendent of Police, Patna, he went to Nala Road to assist the police of Kadam Kuan Police Station, where he found Senior Superintendent of Police, Sri Bachu Singh Meena, City Dy. S.P., Sheela Durani, Officer-in-Charge, Madhurendra Kumar (P.W. 13) and others were present. P.W. 12 has also stated that he went to the 3rd floor at Santoshi Kutir, which belongs to Sanjeev Gupta, and saw there one woman and two children lying murdered and while, the dead body of the mother was lying in the gallery, the dead bodies of her two children were lying on the bed. P.W. 12 has further stated that the

place of occurrence is Santoshi Kutir and, on the ground floor of the said building, is the furniture shop of Sanjeev Gupta, which is running under the name and style of Bhog Furniture, and the shop is located on the second floor also.

29. It is in the evidence of P.W. 12 that there was Iron grill at the staircase of the 3rd floor and that Key and lock, with bloodstains, were found lying at the stairs and that the dead body of the mother of the said two children was lying, in the gallery, drenched in blood, key of the shop was found near her dead body, both, the drawing room and the bedroom, are situated towards south of the gallery, but the bathroom, drawing and bedroom are situated towards south of this gallery.

30. It is also in the evidence of PW 12 that several empty boxes of ornaments, briefcase and clothes were found on the bed, Godrej Almirah was found open and the key of locker had spots of blood.

31. P.W. 12 has deposed that the statement of the informant, Nagendra Singh, was recorded, at the place of occurrence, by P.W. 13 (Madhurendra Kumar), Officer-in-Charge, Gandhi Maidan Police Station, and that the fardbeyan was scribed by Lalita Kumari (P.S.I.). This witness (PW-12) has proved the fardbeyan, which has been marked as Exhibit-3, and before his inspection, Forensic team had already collected the material samples from the place of occurrence.

32. In his examination-in-chief, PW-12 has deposed that he recorded the statement of Ajay Kumar (P.W. 2), Rahul (P.W. 5) and Kumar Sachin (P.W. 9) and while the inquest report of deceased Golu was prepared by Aman Kumar, the inquest report of Aarti Gupta was prepared by Ashok Kumar Thakur and that inquest report of Ritu was prepared by Madhurendra Kumar, the inquest report of Ritu was marked as Exhibit-4, inquest report of Golu was marked as Exhibit-4/1 and inquest report of Aarti Gupta was marked as Exhibit 4/2.

33. It is also in the evidence of PW-12 that he raided the house of accused Mukesh, situated at Naya Gawn Musallahpur Hat, searched the said house in presence of independent witnesses, namely, Sanjay Kumar Gupta (P.W. 6) and Shankar Kumar (P.W. 7), and that in course of search, one silver coin and Rs. 26,000/-, in cash, were recovered from the cap of fan. It is in the evidence of PW-12 that one piece of wooden log 10 fingers long, having spots of blood, was recovered from beneath the Almirah. It is in the evidence of P.W. 12 that he prepared a seizure list, which has been marked as Exhibit-4.

34. P.W. 13, Madhurendra Kumar, another investigating officer of the case, has stated that he was asked by his superior officer to assist Asrar Ahmad in the investigation, and, on 17.8.2010, he raided the house of accused Upendra Kumar, at Village-Nadawa, and seized ornaments from his house by a seizure list, which has been marked as Exhibit-2, and that P.W. 7 (Sanjay Kumar) and P.W. 8 (Shashi Shekhar Kumar) had singed, as witnesses, on the said seizure list.

35. P.W. 14, Om Prakash, who had participated in the Test Identification Parade of the looted articles, has identified one Gold chain and one silver coin, one side of the said coin having been inscribed Laxmi-Ganesh and, on the other side, Sachin and Sweta were inscribed. This witness has identified the chain as a chain, which he had seen Aarti wearing.

36. The Doctor (P.W. 15) found following ante mortem incised wounds on the body the deceased Aarti Gupta:-

"(i) Incised wound with clear cut margin size 2" x 1/2" x 1" x vertical bone deep on the right side of neck just below right ear;

Muscle, major blood vessels trachea and oesophagus and layer were cut;

(ii) Incised wound with clear cut margin transversely size 1" x 1 1/2" x 1/2" x bone deep on the front of the neck just 1" above the thyroid cartilage.

(iii) Incised wound with clear cut margin and transversely size 2" x 1/2" x 1/4" x mandibular bone deep on the lower jaw 1" above the midline chin.

(iv) Stab wound size 1" x 1/2" pelvic cavity deep on right iliac region contains about one litter fluid and blood clots.

(v) Penetrating wound size 1/4" x 1/6" x muscles deep on the right shoulder region 3" below the tip of the shoulder.

The time since death was 8 to 12 hours from the time of post mortem. The post mortem report was marked as Ex-hibit-7.

37. The doctor opined that death was caused by sharp cutting pointed weapon like Chura and Chaku. The time since death was 8 to 12 hours from the time of post mortem. The post mortem report was marked as Exhibit-7.

38. Similarly, P.W. 15 had conducted post mortem examination on the dead body of Ritu, aged about 3 years, daughter of Sanjeev Gupta, and found incised wound size 5" x 1/4" x cervical bone deep on front of the neck to right side neck 1/2" above the neck thyroid cartilage. The opinion of the Doctor (PW-15), Ritu's death was caused by sharp cutting weapon. The post mortem report was marked as Ex-hibit-7/1.

39. Similarly, the post mortem examination, conducted on the dead body of Golu, aged about 5 years, revealed following internal and external injuries over the dead body:-

"(i) Incised wound with clear cut margin and inversely size 2" x 1" x cervical bone deep on the left side of neck just midline of neck to 1" and 1/4" below the left year. His neck muscles were cut. There was infiltration of the blood and blood clots in and around the cut wound.

(ii) Incised wound with clear cut margin and inversely size 1"x 1/4" x muscles deep on the right side of the neck.

(iii) Multiple incised wound average size of each 1" x 1/4" x skin deep on low jaw."

40. In the opinion of the doctor (PW-15), the death resulted from haemorrhage and shock sustained by the neck injuries, which had been caused by sharp cutting weapon like Chhura and Chaku. The post mortem report is marked as Exhibit-7/2.

41. P.W. 16 Sanjay Kumar is a member of the raiding party to the house of accused Upendra Thakur.

42. P.W. 17, Maksud Ansari, is the Circle Officer, who had conducted the Test Identification Parade.

43. P.W. 18 is Sanjeev Kumar Gupta, husband of Aarti Devi and father of the said two deceased children. He identified the looted articles as well as ornaments of his wife. He has stated that he had gone to Delhi on 15.8.2010, while his wife and two children remained at his residence, situated at Nala Road, Patna. He has also stated that in the evening of 16.8.2010, he tried to contact his wife from basic telephone and mobile, which was not responded to, and he, then, requested his neighbour, Nagendra Singh (P.W. 13), his relative, Kumar Sachin, Rahul Kumar, Shankar Kumar and Ajay to go to his house and to enquire about the matter and after two hours, Nagendra Singh informed him about the occurrence and, on receiving the information, he came to Patna by morning flight and, on reaching his residence at around 8.30 A.M., he found the dead bodies of his wife and two children, which were kept in the gallery, and that neighbours and the people, who had gathered there, reported to him that two of his staff, namely, Upendra and Mukesh Mahto, had looted house hold articles and had also murdered his wife and children.

44. P.W. 18 has deposed that accused Upendra Thakur and accused Mukesh were arrested and, in the Test Identification Parade, conducted on 14.9.2010, he identified the currency and ornaments. This witness has identified his signature on test identification parade chart (Exhibit-6). This witness has also identified the chain, which was used by his wife as well as photographs. P.W. 18 identified, in the test identification parade, two ornaments of his wife, which are already mentioned in the test identification parade chart. It is in the evidence of P.W. 18 (Sanjeev Gupta) that all his work, in his absence, were attended to, and managed by, his staff, Upendra Thakur and Mukesh, who used to open the shop and do the selling work. This witness has identified the appellants in the Court.

45. P.W. 19, Ravindra Kumar Sinha, is an employee of Forensic Science Laboratory. He has deposed to the effect that sealed exhibits, contained in a cartoon and forwarded by Chief Judicial Magistrate, Patna, were received on 25.8.2010, which was duly opened and the same was found to have five packets, made of cloth, which were marked Exhibits-A to E, and one paper packet, contained a knife, which was marked Exhibit-F.

46. P.W. 21, Shiv Kumar, has stated that total six samples, marked as Exhibits-A to F and kept in a cartoon, were received for forensic examination, which were found to be of blood group "B". The report has been marked Exhibit-13. Exhibit-6/F is the swab obtained from blood taken from the knife, which also pertained to blood group "B".

47. P.W. 20, Jayant Kumar Singh, has stated that he had taken photographs on the direction of Director, F.S.L., in presence of Lakhan Lal, finger impression expert, and A.S.I. Raj Kumar Jaiswal. The photographs have been marked as Exhibits-9 to 9/3. Photographs of palm of suspected accused Mukesh and Upendra were taken, which have been marked as Exhibits-10 to 10/4 and 11 to 11/4 respectively. In paragraph-3 of his examination-in-chief, this witness has stated that the right thumb impression of Upendra was marked as (sic - Exhibit?) X and the right thumb impression of Mukesh Mahto was marked as Exhibit-Y and both matched with the thumb impressions obtained from the place of occurrence by the fingerprint experts.

48. P.W. 22, Anand Kumar Singh, has stated that he was posted as Judicial Magistrate, 1st Class, Patna, and on 21.8.2010, he recorded the statements of Dabloo Kumar and Ashok Mahto under Section 164 of the Cr.P.C., which have been marked as Exhibits-9 and 9/1 respectively.

49. On the strength of materials produced on behalf of the prosecution, learned Additional Public Prosecutor submits that the charges, under Sections 302/34, 394/34 and 411 of the Indian Penal Code, have been brought home against the appellants. He submits that though there is no direct evidence of murder, there are chain of circumstances, which point to the guilt of the appellants and appellants alone.

50. In support of his submissions, learned Additional Public Prosecutor has pointed out the following circumstances:(i) On 16.8.2010, at around 7.00 to 7.30 P.M., the appellants were seen drinking alcohol at the shop of Sanjeev Kumar (P.W. 18), which was located on the ground floor of the building, where one woman and two children were mercilessly killed; (ii) The bottle and the glasses, which were used for taking of alcohol, had been recovered at the instance of the accused Mukesh; (iii) The informant and P.W. 1 had seen both, Upendra and Mukesh, going away with a silver plate and blue colour bag respectively at about 8.30 P.M. on the fateful evening; (iv) The looted articles, i.e. cash and the knife, used in the commission of crime, were recovered from the house of appellant, Mukesh Mahto; (v) The fingerprints obtained from the place of occurrence tallied with the fingerprints of the appellants" as per the report of finger-print expert; (vi) The samples of blood, which were obtained from the place of occurrence, tallied with the blood found on the knife recovered from the house of the appellant, Mukesh Mahto; (vii) The ornaments were duly identified by Sanjeev Gupta (P.W. 18), the husband of deceased Aarti Gupta, as well as P.W. 14, who identified the chain, which Aarti Gupta used to wear.

51. On the other hand, learned counsel for the appellants submits that no person had witnessed the killing of Aarti Gupta and her two children and it was on receipt of telephonic information from Sanjeev Gupta (P.W. 18), the husband of the deceased Aarti Gupta, that the informant (P.W. 3) and other witnesses, namely, P.W. 1, P.W. 5, P.W. 7 and P.W. 9 had gone to the house of Sanjeev Gupta (P.W. 9) to make enquiry as to why Aarti Gupta had not been picking the phone call of her husband. He also submits that the seizure from the houses of Upendra and Mukesh were made in utter violations of the provisions contained in Section 100 of the Cr.P.C. read with Section 166 of Cr.P.C. In support of his submissions, he has relied upon the decision reported in State of Haryana Vs. Ram Singh, . He next submits that T.I. Parade was held belatedly after 17 days and the bags, containing the seized items, did not have any seal nor was any identification mark put on the seized articles and that the owner of the house has not stated as to what items were looted.

52. The appellants have argued that the informant (P.W. 18) and other witnesses, namely, P.W. 2, P.W. 4, P.W. 5, and P.W. 9, went to the house of deceased at about 10.00 P.M. on receipt of telephone calls from Sanjeev Gupta (P.W. 18), husband of the deceased from Delhi, but no call records have been produced to substantiate the same.

53. We have given our anxious consideration to the submissions made on behalf of the appellants as well as the State-respondent. In our view, the absence of telephone call records will, in no way affect, the prosecution's case. The appellants have not disputed the factum of murder of Aarti Gupta and her two children. The police had recorded, on the very night of the occurrence, the statements of as many as five witnesses including the informant, at the place of occurrence, who uniformly stated that on receiving telephone message from Sanjeev Gupta (P.W. 18), they had gone to the place of occurrence, where they saw Aarti Gupta and her two children murdered in Sanjeev Gupta's house situated on the 3rd floor of the said building. The police also came soon thereafter and found all the four persons present there. Thus, in the light of the evidence of P.W. 12 and P.W. 13, who are the investigating officers of the case, the presence of the witnesses aforementioned cannot be disputed. P.W. 13, without delay, recorded the statement of P.W. 3, the informant of the case, at 10.40 P.M. It is not the prosecution's case of the appellants that these witnesses had not gone to the house of the deceased, at about 10.00 P.M., on the fateful evening.

54. The appellants next submitted that the seizure was not conducted as per the law and the witnesses, who are witnesses to the recovery of looted articles, are not local witnesses; rather, interested witnesses.

55. It would appear from the evidence of P.W. 13 that before making a search, the raiding party, at the onset, subjected themselves to search. Furthermore, in reply to a Court question, P.W. 12 has stated that the local witnesses, even after repeated requests, did not come forward to be witnesses to the seizure. It is true

that Section 100 Cr.P.C. requires that the officer or the person, who is about to make a seizure, shall call upon two or more independent and respectable persons from the neighbourhood of the place, which is required to be searched, but when the neighbours do not wish to be associated with the search, there is no impediment in associating, as a witness to the search, a person, who may not live in the neighbourhood, moreso, when the witnesses to the search and seizure have not been shown to be interested in falsely implicating any of the appellants.

56. In the instant case, we find that there was no failure, on the part of police officer, in making the search inasmuch as P.W. 12, the investigating officer, who conducted the search, has clearly deposed that he did request the local persons to come for the search, but none was ready to witness the search. It is, thus, clear that P.W. 2 had to depend on outsider as witnesses; more so, when the search could not have been abandoned.

57. Thus, there was no deliberate intent not to adhere to the provisions of Section 100 Cr.P.C. Furthermore, the appellants have not been able to point out any bias against the seizure witnesses as to why they would falsely implicate the appellants in the case. The contention of the appellants that the seizure was made at some other place is a mere suggestion without any material basis and is accordingly rejected.

58. The appellants next contended that the bags from which the recovered articles were allegedly produced had not been sealed. In this regard, it is relevant to point out that appellant, Mukesh Mahto, has not disputed that money was recovered from the cap of the fan. He merely asserted that the money recovered was not stolen money, but was his own. He also does not dispute that the bloodstained knife was not recovered from beneath the Almirah.

59. Similarly, the raiding party, consisting of P.W. 13, which proceeded to search the house of the other co-accused, namely, Upendra Thakur, informed the local police, before making a raid, that a raid would be conducted at the house of Upendra Kumar Thakur, and looted articles (32 in numbers) were recovered and seized. A lot of people had assembled outside the house at the time of search and seizure. The raid was conducted early in the morning of 17.8.2010. The looted articles were identified by P.W. 18 (Sanjeev Gupta), the husband of the deceased. The test identification parade was conducted by the Circle Officer at the order of the Court. P.W. 14, too, identified two items, namely, one being Golden chain, because he had seen the deceased wearing them in past. He (P.W. 14) has also identified the silver coin on which Laxmi Jee and Ganesh Jee are inscribed on the one side and the picture of Sachin and Sweta on the other side.

60. Learned counsel for the appellants argue that as the articles, which were put on test identification parade, had not been kept in sealed bag, the identification was sham and may be treated bereft of credence. Furthermore, the test identification parade ought not to have been held at a police station.

61. In our view, merely because the test identification parade was conducted at

the police station, the identification, made by the witnesses, cannot be brushed aside; More so, when there is no allegation that items were shown to the witnesses prior to their participation in the test identification parade and that the conducting officer, namely. Circle Officer, Patna, (P.W. 14) acted unfairly. Thus, it is difficult to accept the submissions of the learned counsel for the appellants that the test identification parade, which had been conducted, was not fair.

62. Besides what have been pointed out above, the scientific investigation, as revealed from the evidence of P.W. 19, P.W. 20 and P.W. 21, establish beyond doubt the involvement of appellants in the commission of crime. P.W. 20 and P.W. 21 are fingerprint and forensic experts respectively. P.W. 20 states that the sample of palm of each of the appellants was taken on five different pages, marked as Exhibits-10 to 10/4 and 11 to 11/4. The right thumb impression of Upendra, which is marked as X, matched with the finger impression obtained from the spot. Similarly, the right thumb impression of Mukesh Mahto, which is marked as Y, matched with the finger impression obtained from the spot. Further more, it would appear from the testimony of P.W. 21 (Shiv Kumar) that the blood obtained from the person of the deceased and the blood obtained from the knife seized from the house of the appellant, Mukesh Mahto, contained human blood and belonged to Blood Group-"B". The forensic report clearly establishes that the accused-appellants did enter the house of the deceased on the fateful evening and participated in the crime of murder.

63. Learned Additional Public Prosecutor has submitted that the evidence on record reveals how the appellants executed their plan to commit robbery and murder of Aarti Gupta, in absence of her husband, in order to make quick money. The appellants, being employees of the husband of the deceased, Aarti Gupta, had known about the movements of their employers. They knew that P.W. 18 (husband of the deceased) had gone to Delhi and, in order to commit robbery, they committed murder of the deceased and also her children so that no witness remains alive. However, realizing the legal position and the extent to which confessional statement made before the police would be admissible, the learned Additional Public Prosecutor rightly not relied upon the confessional statement save and except on that part of the confession, which led to the recovery of the looted articles, being admissible under Section 27 of the Evidence Act.

64. The materials, produced on record, prove establish that the accused-appellants had entered into the house of their employer, Sanjeev Gupta, with knife in order to commit robbery fully knowing that their employer was not in the town. These facts go to establish the appellants' intent to commit robbery and murder and, in furtherance of their common intention, they did commit robbery as well as murder of Aarti Gupta and her two children.

65. Thus, the impugned judgment of conviction under Section 302 read with Section 34 of the Indian Penal Code is affirmed. However, in the facts and attending circumstances of the present case, we alter the conviction of the accused-appellants from one under Section 394 of the Indian Penal Code to

Section 392 of the Indian Penal Code. Even if no specific charge under Section 392 of the Indian Penal Code was framed, the substance of the charge under Section 394 of the Indian Penal Code and questions put, under Section 313(1)(b) of the Cr.P.C., substantially covered the accusations with respect to robbery as well and, as such, no prejudice has been caused to the appellant in respect of their defence and consequent conversion of conviction from Section 394 of the Indian Penal Code to one under Section 392 of the Indian Penal Code. We also uphold their conviction under Section 411 of the Indian Penal Code inasmuch as the appellants, having looted the properties, dishonestly retained the same in their respective houses.

66. Now that the offence of commission of murder stands proved against the appellants, the other issue would be as to what punishment ought to be meted out to the appellants. The learned trial Court has awarded the sentence of death, which needs to be examined in the light of guidelines laid down by the Hon''ble Apex Court with respect to awarding of capital punishment. The Hon''ble Supreme Court, right from the case of Machhi Singh and Others Vs. State of Punjab, , upto Md. Manan vs. State of Bihar, reported in 2011 (3) Supreme 409, have made it abundantly clear that the capital punishment is to be awarded in the rarest of rare cases.

67. While considering the matter relating to award of capital punishment, this Court, in Death Reference No. 11 of 2013 (State of Bihar vs. Hemlal Sah), disposed of on 11.2.2014, reiterated the guidelines with respect to award of capital punishment and observed as follows:-

"a balance sheet of aggravating and mitigating circumstances has to be drawn up and, in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option to impose death penalty is exercised. In order to 34 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?"

68. In the present case, we find that the common intention of the accused-appellants was to commit robbery and, in order to execute the commission of robbery, they planned and committed murder of Aarti Devi and her two children as well. The prosecution has not pointed out any criminal antecedent of the appellants. Even P.W. 18, who is the employer of the two employees, has not alleged any past act of misconduct against them.

69. Thus, it would be difficult to put the present case in the category of rarest of rare cases warranting their capital punishment. Consequently, the sentences of

death, passed against the appellants, are hereby altered to imprisonment for life and pay fine of Rs. 10,000/- (Ten thousand) each, and to suffer, in default of payment of fine, suffer (sic) rigorous imprisonment for a period of six months.

70. So far as conviction of the appellants under Section 411 read with Section 34 of the Indian Penal Code and the sentence passed by the learned trial Court is concerned, the same does not, to our mind, warrant any interference, alteration or modification.

71. Following their conviction under Section 392 of the Indian Penal Code, both the appellants are hereby sentenced to suffer rigorous imprisonment for a period of two years and fine of Rs. 3,000/- (Three thousand) each, and, in default of payment of fine, suffer rigorous imprisonment for a period of three months.

72. With the above modifications in impugned judgment of conviction and order of sentences, Cr. Appeal (DB) Nos. 1104 of 2013 and 34 of 2014 shall stand disposed of. The Death Reference Case No. 14 of 2013 is accordingly answered in negative.

I.A. Ansari, J.

I agree.