

(2010) 12 JH CK 0034

In the Jharkhand High Court

Case No : Death Reference No. 01 of 2009 and Criminal Appeal No. 956 of 2009

Vikash Sharma alias Gulla and Vishal Sharma alias Banti

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 235(2), 302, 307, 320, 324

Citation : (2010) 58 BLJR 1563 : (2011) 8 RCR(Criminal) 2848 : (2011) 1 JLJR 172

Hon'ble Judges : J.C.S. Rawat, J;D.K.Sinha, J

Bench : Division Bench

Judgement

J.C.S. Rawat, J.—This appeal is directed against the judgment and order of conviction and sentence dated 14th July, 2009 and 17th July, 2009 respectively, passed by the 1st Additional Sessions Judge, Bermo at Tenughat in Sessions Trial No. 184 of 2005 whereby the Appellants have been held guilty for commission of murder of Philip James Marandi, Jawanti Marandi and Sandeep Paul Marandi and accordingly convicted under Sections 302/34 of the Indian Penal Code, and both the Appellants have been awarded death sentence u/s 302/34 of the Indian Penal Code subject to confirmation of the order of conviction and sentence by the High Court. Further, the Appellants have also been held guilty for offences u/s 307/34 of the Indian Penal Code and accordingly sentenced to undergo rigorous imprisonment for ten years. The Appellants have preferred this appeal. The learned Addl. Sessions Judge has also made a reference to this Court for the confirmation of the Death Sentence. Both the appeals are arising out of the same judgment, hence both are being disposed of by this common judgment.

2. The prosecution case in a nutshell is that the informant Sanjay Peter Marandi alias Raja PW6 had a tea shop near his house. His friend Sushant Tudu PW5 came to his shop on 10.3.2005 at about 8.30 p.m. and asked him to accompany him to Jaridih Bazar. Meanwhile, Subhash Kumar Sao (PW3) also arrived there in the shop of the informant PW6. Sanjay Peter Marandi, the informant, requested

him to remain in the shop for a little while along with the boy who used to work in the shop. Thereafter, Sushant Tudu PW5 and the informant PW6 went to Jaridih bazar on a motor cycle of Sushant Tudu. After sometime, the informant PW6 reached at his shop and found that there were a number of persons who had surrounded his shop and he was told by them that the accused Appellants Bikash Sharma alias Gulla and Vishal Sharma alias Banti having sword and bhujali in their hands had come to his shop and assaulted Subhash Kumar Sao PW3 by the weapons they were holding in their hands, believing him that he is Sanjay Peter Marandi. It is also in the prosecution story that Subhash Sao PW3 ran away from the shop to his house to save his life and he lodged himself inside his house which was nearby the shop of the informant. The aforesaid accused Appellants proceeded towards the house of the informant with the intention to kill the family members of the informant. Meanwhile, the informant also returned from the market to his shop. On hearing the said information from the people gathered at the spot, the informant rushed immediately to his house and he saw that the mother of both the accused Appellants was standing near the gate of the boundary wall holding a danda in her hand and Rajesh Kumar, the brother of the aforesaid Appellants, was also present there holding danda in his hand and he exhorted the Appellants to kill all family members of the informant. The accused Appellants Vikash Sharma and Vishal Sharma assaulted the mother, father and brother of the informant. When he saw causing brutal assault on his family members, he raised alarms for saving them and both the accused Appellants rushed towards the informant to assault him with the weapons they were holding in their hands. The informant also fled away from the place of the occurrence on the apprehension that if he would remain there to save them, they will also kill him at the spot and he reached at the police station where he informed the Munshi (constable clerk of the Police Station) about the incident and the officer in charge of the Police Station who was on patrolling duty was informed on wireless and he reached at the spot immediately. When the police reached at the place of occurrence, his brother had already succumbed to the injuries and his parents were alive. They were taken to the hospital, but when they were going to the hospital, the mother of the informant also expired on the way. His father was admitted in the Dhori hospital where he died after four days. The police after reaching at the spot also recorded fardbeyan of the informant. The police prepared the inquest reports and also registered a case being Bermo PS Case No. 30 of 2005 and started investigation in accordance with law. The investigation culminated into the submission of the chargesheet against the accused Appellant by the police.

3. Learned Magistrate after taking cognizance, the case was committed to the court of sessions and the Appellants were charged by the learned Sessions Judge. The Appellants denied the charges and claimed trial.

4. The prosecution in support of his case, examined PW6 Sanjay Peter Marandi Informant; PW3 Subhash Sao, the injured; PW4 James Chaure, and Sushant Tudu PW5 who had claimed themselves to be eye witnesses of the occurrence.

PW1 Dr. Ajay Kumar Singh conducted autopsy on the dead bodies of the three deceased persons. PW2 Dr. Kumar Ajay Singh is the medical officer who had examined the injured Subhash Kumar Sao PW3. Both the doctors, P Ws 1 and 2, have proved the post mortem report and the injury report respectively. Sailesh Kumar Chauhan PW7 is the investigating officer of the case. PW8 Rama Shankar Singh is the Assistant Director, State Forensic Science Laboratory, Jharkhand, Ranchi. Satish Kumar Officer Incharge of the Police Station (PW9) prepared the inquest reports of all the deceased persons in the Hospital. The prosecution also produced certain documents in support of its case which is marked as Ext. 1 to Ext. 13 .

5. The Appellants after recording of the evidence of prosecution, were examined u/s 313 Code of Criminal Procedure and they denied all the averments made in the evidence against them and further stated that they have falsely been implicated in the case. The defence also examined three witnesses in support of their defence. They are Laxman Ram DW1, Ramdeo Ram DW2 and Darku Singh DW3. They have deposed that on the night of 10.3.2005 they had heard some noise and saw that some people had assembled in the chowk. They further deposed that the informant reached at the spot by a motor cycle and someone was also sitting on the motor cycle as a pillion rider. They went to his house and returned immediately after some time to the said chowk and told that his mother, father and brother were murdered by some unknown persons and he did not disclose names of the persons who had committed their murder. He went to the police station immediately on the motor cycle.

6. After going through the evidence and hearing the parties, the trial court convicted and sentenced the Appellants as indicated above.

7. It needs to be mentioned that there is no dispute that the deceased persons died at the spot at the time, place as indicated in the prosecution story. The prosecution has also examined PW1 Dr. A.K. Singh, who had conducted autopsy on the dead bodies of the deceased on 11.3.2005 at 8.45 a.m. at Regional hospital, Dhorri and he found the following external injuries on the dead body of the deceased Philips James Marandi :

(I) cut injuries 8"x1/2"x1/2" on right side face extending from right ear and running towards chin (ii) cut injury 2"x1/2"x1/4" on submental area of neck (iii) superficial cut injury 6" long skin deep of upper part left chest in horizontal direction from right side of neck towards right shoulder area (iv) cut injury 3"x1"x1/2" on right hand leading to fracture of lateral and metacarpals (v) cut injury 1"x 1/2"x1/4" on right side of hand between right thumb and index finger. All the mentioned injuries are likely to be inflicted by sharp cutting and heavy weapons like sword and bhujali. Nature of injuries was ante mortem. Cause of death was due to haemorrhage and shock due to above noted injuries. Time lapsed since death was 24 hours from the time of post mortem examination conducted on 11.3.2005 at 8.45 a.m.

PW1 conducted post mortem on the dead body of Sandeep Paul Marandi and found the following injuries :

(I) cut injury on left side of face three in number (a) 6"x1/2"x1/2" extending from left ear towards upper lip crossing over molar prominence (b) 5-1/2" x 1/2" below injury No. (a). (c) 5"x 1/2"x1/2" below injury No. (b). (ii) cut injury on right side of face size 6"x1/2"x 1/2"extending from right frontal area of scalp towards nose, bones exposed (iii) cut injury on left side of neck size 6"x1/2"x 1/2" . This injury also includes cutting of left carotid artery; (iv)cut injury on left side of palm leading to almost complete transaction of hand in a horizontal direction from one end to another except skin on dorsum of hand, size 4"x1"x1/2" (v) cut injury on posterior of elbow 2"x1/4"x1/4" (vi) cut injury on left interior axillary fold 1"x1/2"x1/4" (vii) cut injury on abdomen 3"x1/2"x 1/4" (viii) cut injury on left side of chest 2"x1/4"x1/4". All the above injuries are likely to be caused by sharp cutting and heavy weapon like sword and bhujali or khukhari. Nature of injuries are ante mortem. Cause of death according to the doctor was haemorrhage and shock due to above noted injuries. Time elapsed since death within 24 hours.

PW1 conducted post mortem on the dead body of Jaywanti Marandi and found the following injuries :

(I) cut injury on right wrist 2" long bones separated(cut through) (ii) cut injury on left side of face 4"x1"x1/4" (iii) cut injury on right side of face 2"x1/2"x1/4" extending from right side of nose to mola area (iv) cut injury extending from left mastoid region towards cheek 6"x1/2"x1/4" (v) cut injury on left side of neck 2"x1/2"x1/4" (vi) cut injury on left wrist Palmar aspect (ventral aspect) 2"x1/2"x1/4" (vii) cut injury on left rib cage area 2"x1/2"x1/4". All injuries are likely to be caused by sharp cutting heavy weapon. Nature of injury was ante mortem. Cause of death according to the medical officer was due to haemorrhage and shock due to above mentioned injuries. Time elapse since death within 24 hours. These injuries possible by sword or bhujali. Post mortem reports have been marked as Ext. 1,2 and 3 respectively.

PW1 Dr. A.K. Singh has opined that all the injuries sustained by the deceased are likely to be caused by sharp cutting and heavy weapons like sword and bhujali. He has further opined that the duration of death is within 24 hours at the time of the post mortem. He further opined that the injuries were ante mortem in nature and the death was caused due to shock and haemorrhage and due to ante mortem injuries.

PW2 Dr. Ajay Kumar Singh also examined the injuries of the PW3 Subhash Kumar Sao at about 10.50 p.m. on 10.3.2005 in the Regional hospital, Dhori, where he found the lacerated wound on forearm. Suspected compound fracture, fresh bleeding wound, age of wound within 24 hours. Mode of injury by hard and blunt as well as sharp object like sword.

The doctor (PW2) has further opined that the duration of injuries was within 24

hours at the time of examination of the injured. He further opined that the injuries would have been caused by hard or sharp cutting weapon like sword, etc. and the nature of injuries was grievous.

8. Now it is to be decided whether the Appellants killed the deceased persons on the date of the occurrence or not. According to the prosecution, the authors of the injuries on the persons of the deceased were the Appellants and the said injuries were caused by sword and Bhujali which the Appellants were holding in their hands at the time of assaulting the deceased persons. The Appellants have pleaded innocence and they have stated that they have been falsely implicated in the case.

9. The prosecution in support of its case examined the eye witnesses who have claimed that they had seen the occurrence.

10. There are two parts of the incident. The first part is that the Appellants holding arms, - sword and bhujali, - in their hands reached in the shop of the informant Sanjay Peter Marandi and inflicted injuries with their respective weapons mistakenly Subhash Sao PW3 for Sanjay Peter Marandi PW6 and caused grievous hurt upon him. For the said incident, the prosecution has adduced evidence of Subhash Kumar Sao PW3 and PW2 Dr. Ajay Kumar who examined the injuries of PW3 Subhash Kumar Sao after the incident. The 2nd part of the incident is that after Subhash Kumar PW3 was assaulted by the Appellants, he (PW3) fled away from the spot and went inside his house. The accused Appellants followed him and they also entered into the house of the informant PW6 where they killed the deceased persons who are the brother, mother and father of the informant (PW6). This second portion of the incident had been witnessed by PW4 James Chaure, PW5 Sushant Tuddu and PW6 Sanjay Peter Merandi.

11. We will discuss firstly the 2nd part of the incident in which it is said that the Appellants killed the deceased persons. The prosecution in support of its case examined Pws 4,5 and 6 as eye witnesses of the incident. PW4 James Chaure has stated that at about 9 p.m. on 10.3.2005 he was taking dinner inside his house and he heard some hue and cry out side the house and he immediately came out of his house and he saw the incident. PW5 Sushant Tudu has stated that he reached at the shop of the informant PW6 on a motor cycle and he was informed by the persons gathered in the shop that the informant had gone to bazaar keeping Subhash Sao PW3 and one boy in the shop to look after the shop. When the informant returned to his shop, he learnt that both the Appellants came to the shop of the informant and they had assaulted Subhash Kumar Sao, PW3 on mistaken identity assuming him to be the informant and he sustained injuries on his person. He further learnt that the accused Appellants thereafter went towards the house of the informant PW6 holding a sword and a bhujali in their respective hands. Immediately after hearing this, the witness got down from the motor cycle and went towards the place of the occurrence and he saw the incident. Both the Pws. 4 & 5 I.e. James Chaure and Sushant Tudu

witnessed the incident and they have stated that Rajesh Sharma was having a lathi in his hand who is stated to be the brother of the Appellant, near the door of the house of the informant PW6; the mother of the Appellants was also present there holding a lath in her hand. They further deposed that Appellant Vikas Sharma was armed with a sword and the Appellant Vishal Sharma was armed with a Bhujali and both of them inflicted injuries on the persons of the deceased. Appellant Vikas Sharma assaulted Filip Marandi by a sword and the latter fell down. Both the accused Appellants also inflicted deadly blows on Sandeep, brother of the informant PW6 with their respective weapons which they were holding in their hands and in consequence thereof, he also fell down. They also deposed that the mother of the deceased who was also present there was assaulted by both the applicants. Thus, both the witnesses (PW 4 and 5) have succinctly narrated the incident. Meanwhile, the informant PW6 Sanjay Peter Marandi reached at the spot and he cried for help but the accused Appellants ran towards him to assault him. He fled away from the spot. The Police reached at the spot after some time and it was found that Sandeep Peter Marandi PW6 was already at the spot and that the mother and the father of the informant PW6 were alive at that time and they were taken to the hospital. The mother of the informant died while she was being taken to hospital, whereas his father died in the Dhori hospital after four days.

12. PW6, Sanjay Marandi is the informant in this case and he also claims to be an eye witness of the incident. He has stated in his evidence that on 10.3.2005 at about 8.30 p.m. his friend Susant PW5 came to his house and asked him to accompany him to Jaridih bazar for purchase of some articles upon which the informant went with him to the bazar on his motor cycle. The informant (PW6) asked PW3 Subhash Sao as well as the boy to remain there in the shop to look after it. When they came at the shop from Jaridih bazar, they saw that some people have gathered near his shop and they informed him that Vikash Sharma alias Gulla and Vishal Sharma alias Bunti, both the accused Appellants, holding sword and bhujali respectively came to his shop and assaulted Subhash Sao PW3 on the mistaken identity that he was the informant. Subhash Sao PW3 sustained injuries on his person and he fled away from the spot. Thereafter, the gathering also informed that both the Appellants had proceeded towards his house to assault his family members also. The informant rushed to his house and on reaching there, he found that mother of the Appellants was standing at the door of his house with a danda in her hand and Rajesh Sharma, the brother of the Appellant Vikash alias Gulla was also standing inside the boundary wall and he was exhorting the Appellants to kill all the family members of the informant. The informant PW6 saw that the accused Appellant Vikash Sharma had a sword in his hand while the other Appellant Vishal Sharma was holding a bhujali and by their respective weapons they had been assaulting his mother, father and brother with the intention to kill them. When the Appellants saw the informant PW6 they did reach towards him with their respective weapons in their hands with the intention to kill him also. But he being extremely terrified and apprehending that

the accused Appellants would kill him also, he (the informant) rushed to the Police Station where the Munsif(Constable Clerk of the Police Station) met him and he stated him about the incident and immediately thereafter, the police reached at his house and with the help of the public, his mother and father were taken to hospital. The brother of the informant died at the spot; the mother died during the course of her being taken to hospital and the father succumbed to his injuries in Dhori hospital during his treatment. Thus, this witness, the informant PW6, has also vividly described the incident.

13. The prosecution also produced Subhash Kumar Sao PW3 who is said to be the injured witness, but not at the time of the incident, but he sustained injuries in the first incident as indicated above. He has also stated about the incident and he has claimed himself to be the eye witness during the examination in chief and he has also stated that the accused Appellants killed all the three deceased, who were the father, mother and brother of the informant.

14. The trial court after close scrutiny of the evidence of the PW3 has held that the PW3 has stated that he came to know about the murder of the father, mother and the brother of the informant when he returned from the hospital. The trial court has also held that from perusal of the para 15 of the cross examination, it appears that he cannot be an eye witness to the fact of the incident of killing of the father, mother and brother of the informant. It has also held that after he received injuries, he hurriedly took to his heels and straightway entered into his house and he came out when the accused Appellants had left the place and he himself went to the hospital and came to know about the ghastly and gruesome incident of murder when he returned from the hospital. We do not find any material, much less any cogent and credible material, to differ with the findings recorded by the trial court, inasmuch as it is natural as the witness had gone inside his house. He has stated in his cross examination that when he returned, he came to know that the deceased persons had been assaulted and died, and therefore he cannot be said to be the eye witness. The trial court has not committed any error or fault in appreciating the evidence of PW3 and we are in agreement with the findings of the trial court with regard to the fact that PW3 Subhash Kumar Sao was neither the eye witness to the second incident , nor to the fact of killing of father, mother and brother of the informant. He is an eye witness of the incident in which he sustained injuries which will be discussed later on.

15. Much stress has been laid down on the point that no independent witness i.e. the shopkeepers and other residents of the locality where the occurrence took place have been examined by the prosecution. The witnesses who have been produced before the Court are not reliable. PW4 who has stated the entire incident and he is the natural witness of the incident and he has no enmity with the accused Appellants. So far as PW5 Sushant Tudu is concerned, he cannot be said to be a partisan witness. There is no enmity with the deceased to implicate them falsely. While appreciating the evidence, it has to be seen what is the

quality of the evidence. It is the quality of the evidence and not the quantity which is required. If the evidence available on record is otherwise satisfactory in nature and can be said to be trustworthy, then the increase in the number of witnesses cannot be the requirement of the case. Moreover, it has become a fashion that public at large is reluctant to appear and depose before the court especially in criminal cases because of varied reasons. In the instant case, there is no evidence that other inhabitants of the vicinity were also in their respective houses. The prosecution has adduced two witnesses, first, of the same vicinity and he was taking his dinner. He immediately came out of the house and he also saw the incident. He is a natural witness and his credibility cannot be doubted. PW5 is also an eye witness of the incident and he is an independent witness. His evidence was consistent and nothing has been elicited from his cross examination which will render the evidence of the dependable witness unreliable. Thus, there is no need to corroborate the incident by other witness(es) of the locality. Much stress was laid down that there are contradictions in the testimony of the witnesses with regard to the manner of the incident. We have gone through the entire evidence and we do not find any such contradiction which disturbs the genesis of the incident. There is no dispute about the death of the deceased persons. Minor discrepancies always occur in the testimony of a truthful witness, due to lapse of memory, normal error of observation and due to mental disposition, such as shock and horror, at the time of the occurrence. Those are always there howsoever honest and truthful a witness may be. Thus, we do not find any such contradictions in the testimony of the eye witnesses, particularly PW4 Jams Chaure, PW5 Sushant Tudu and PW6 Sanjay Peter Merandi. PW4, 5, and 6 have been cross examined at length but nothing could be elicited from their evidence. During cross examination, attempts were made to show that Pws 6, 4 and 5 were not present at the spot, but of no avail to the defence.

16. Post mortem report of the deceased further corroborates the factum of injuries caused to the deceased by sword and bhujali; time of occurrence and the weapon used is further corroborated by the medical evidence.

17. So far as the first incident is concerned, the prosecution has adduced evidence of PW3 Subhash Kumar Sao. He has stated that on 10.3.2005 at about 8.30 p.m, he went to the shop of the informant PW6 where he found that Sushant Tudu PW5 was also present there and he wanted to accompany the informant to the market. The informant asked Subhash Kumar Sao PW3 to remain seated for a while in the shop along with the boy to look after the shop and he would return soon from the market. While he was sitting in the shop, both the Appellants Vikash alias Gulla and Vishal alias Banti reached there all of a sudden armed with sword and bhujali respectively in their hands. Accused Appellant Vikas Sharma immediately reached at the spot and assaulted him which he tried to ward off by left hand in course of which he received injuries on his hand and the other accused Appellant Vishal Sharma also assaulted him by bhujali which caused injuries on the fingers of his left hand. He ran away from

the place of occurrence. When he saw behind, he saw that the Appellants along with Rajesh and his mother were following him. The witness entered into his house which was nearby the house of the informant. The Appellants entered into the house of the informant. Thus, he has narrated the incident about the first incident in which he sustained injuries. We have already indicated the injuries in the preceding paragraphs which were found by PW2 Dr. . A.K. Singh on the person of the injured PW3. Thus, this witness is also consistent about the first incident and the injuries are corroborated by the medical evidence. The evidence of PW2 about causing injuries on his person is credible and cogent. The trial court has rightly believed his evidence regarding the first incident.

18. On conspectus of various relevant features of the case including the genesis, the nature of the incident, the nature of the weapons carried by the Appellants at the time of occurrence, it cannot be concluded from the prosecution evidence or from any probability arising from the materials on record that the Appellants have been falsely implicated in the case. We have gone through the entire evidence of the eye witnesses as well as the other witnesses. The trial court has found the evidence to be implicitly truthful and reliable, though their presence was attempted to be shown as doubtful. We do not find any reason to accept the plea advanced on behalf of the Appellants. Their presence at the place of the incident was explained and their evidence cannot be doubted as unreliable or tainted merely because one of the witnesses was related to the deceased. The prosecution evidence has supported the entire case in all material particulars and no infirmity could be pointed out in their evidence. After independent appreciation of the evidence on record, we do not find any fault with the findings recorded by the learned trial court with regard to the genesis of the incident. After going through the findings recorded by the trial court as well as the evidence/materials on record, we do not find any reason to differ with the findings of the trial Court regarding the incident. We find that the prosecution has been able to establish the case beyond all reasonable doubts. Thus, we do not find that the Appellants have been falsely implicated in the case. Learned Counsel for the Respondent had not laid much stress to set aside the conviction of the Appellants. He only insisted that death sentence awarded to the Appellants may be commuted into life imprisonment.

19. Now we have to see as to whether the case of the Appellants falls within the ambit of Section 307 of the Indian Penal Code. To constitute an offence u/s 307/ IPC, two ingredients of the offence must be present ; (I) The intention of or knowledge relating to commission of the murder and (ii) doing of an act towards it. For the purpose of Section 307 IPC what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. The Section clearly contemplates an act which is done with the intention of causing death, but the act fails to bring about the intended consequence on account of the intervening circumstances. The intention or knowledge of the accused must be such as necessary to constitute murder. In absence of intention or knowledge, which is necessary ingredient of Section 307

IPC, there can be no offence of an attempt to murder. The state of mind cannot be proved as a fact precisely by direct evidence; it can only be inferred from other factors. The intention to cause death can be gathered generally from the combination of a few or several of the following other circumstances :

1. nature of the weapon used ;
2. whether the weapon was carried by the accused or picked up from the spot;
3. whether the blow is aimed at vital part of the body;
4. the amount of force employed in causing the injury;
5. whether the act was in course of sudden fight or free of all fight;
6. whether the incident occurred by chance;
7. whether there was any premeditation;
8. whether there was any prior enmity or the injured was a stranger;
9. whether it was in heat of passion;
10. whether the accused dealt a single blow or several blows;
11. whether there were any intervening circumstances which prevented the causing of further injuries on the person of the injured;
12. whether he had sufficient time to cause further injuries upon him;

These are some factors, though not exhaustive, to consider the intention of an assailant/person while causing injuries.

20. In the case in hand, sword and bhujali was used which was carried by the accused in their hands and on mistaken identity they caused hurt to the injured PW3. The witness has not stated that the desired injuries of the Appellant were aimed at vital parts of the body of the injured PW3. The injured has sustained injuries on his wrist or little finger and he has not sustained any injury on vital parts. There was sufficient time to cause further injuries. The Appellants were two in number whereas the injured was only one. There was sufficient occasion to use force and to kill him. When two persons were there, he could not have fled away easily if the accused Appellants would have the intention to kill him. When he went inside the house, they did not enter his house to cause death of PW2; PW6 has nowhere stated that they caused injuries with the intention to kill him. PW2 has not indicated in his evidence that the injuries were fatal to his life. However, the Doctor (PW2) has stated the nature of the injuries were grievous. We do not understand how the injuries are grievous. There is no X-ray report, nor the injury had been kept under observation and no x-ray report in which it has been stated that there was some fracture on the person of the deceased. Grievous injuries have been enumerated u/s 320 of the Indian Penal Code and it does not fall within the ambit of such section and no evidence has been adduced

to prove that it is of grievous nature. Thus, we find that the injuries indicated in the evidence is simple injury. As such, no offence u/s 307 IPC is made out. The trial court has erred in holding that the accused Appellants are guilty u/s 307 of the Indian Penal Code of causing injuries to PW3 Subhash Sao with an intention to kill him. The injuries are merely simple and the Appellants are liable for the offences punishable u/s 324 read with Section 34 of the Indian Penal Code. There is credible and cogent evidence of the eye witness. No other points for consideration was raised on behalf of the Appellants.

21. Next question which needs our consideration is whether the death sentence awarded to the Appellants is sustainable in accordance with law and the guidelines laid down by the Hon'ble Apex Court. Learned Counsel appearing on behalf of the Appellants contended that the life imprisonment is the rule and the death sentence is an exception. There is no reason to deviate from this rule. In support of his contentions, he also relied upon the decisions of the apex court rendered in the case of Bachan Singh Vs. State of Punjab, and the case of Machhi Singh and Others Vs. State of Punjab, . Learned Counsel appearing on behalf of the Appellants in course of his arguments further contended that the trial court has committed a serious error in law while awarding the death sentence to the Appellants. There are several mitigating circumstances. Therefore, it would be just and appropriate to award life imprisonment to the Appellants. Learned Counsel appearing on behalf of the Appellants further pointed out the mitigating circumstance i.e. the deceased persons were assaulted by the Appellants with sword and bhujali and the incident took place for a short period. Cruelty and brutality is in-built in every murder; in a case of murder, death sentence cannot be awarded where there is an exceptional brutality in committing the offence; the Appellant Vishal Sharma was 27 years of age at the time of recording of his statement u/s 313 Cr. P.C. in the year 2008 and thus he was about 24 years of age when the occurrence took place; Appellant Vikash Sharma was 29 years of age when his statement u/s 313 Code of Criminal Procedure was recorded in the year 2008; thus, when he committed the crime, he was about 26 years of age; thus, the age of the Appellants has to be considered as a mitigating circumstance. Learned Counsel contended that they have an opportunity to reform themselves in their future life, if their death sentence is commuted to life imprisonment. It was further pointed out that there is no criminal history of the Appellants and they are not menace to the society. Learned Counsel appearing on behalf of the informant as well as the State while supporting the death sentence of the Appellants contended that the circumstances as projected by the defence could not be considered as a mitigating circumstance to commute the death sentence to life imprisonment in the facts and circumstances of the case. He further pointed out that when the informant was not present in the shop, the Appellants committed murder of his mother, father and brother. There was no provocation from the side of the deceased; that the manner in which three persons were done to death was most brutal, heinous, and ghastly in total disregard of human dignity and the modus operandi was well thought-of in

advance.

22. We have heard the learned Counsel for the Appellants and the Respondents and have gone through the materials on record including the judgment of the trial court, which has convicted the Appellants and awarded death sentence, as indicated above.

23. In a criminal trial where the prosecution seeks to make out a case for imposition of death sentence, the prosecution has undoubtedly to discharge a very heavy and onerous burden. The prosecution must discharge this burden by demonstrating the existence of aggravating circumstances and the consequential absence of mitigating circumstances. In discharging such burden, the prosecution has not only to prove its case beyond all reasonable doubts, but it has also to prove as to how the crime was committed and the aggravating circumstances which leads to an inference that the case falls within the category of the rarest of the rare case and warrants death penalty. In discharging the said burden, the prosecution has to discharge this burden either to prove this fact by the evidence and the accused has the right to rebuttal of the said evidence at the time of passing of the sentence. The accused should also be given a chance separately apart from the statement recorded u/s 313 of the Cr. P.C. that he can demonstrate the mitigating circumstances which were in his favour at the time of the commission of the offence or thereafter, so that both the evidence of aggravating and mitigating circumstances can be weighed in the balance.

24. In the case of Bachan Singh Vs. State of Punjab, while upholding the validity of the death sentence, it has been held that the provisions of the Cr. P.C (235 (2) provides for a bifurcated trial and it gives a right of proving the sentence by hearing and to bring on record the material evidence which may not be relevant or connected with a particular crime, but may have a bearing on the choice of the sentence. It is just like a regular hearing of another trial. In the case of Bachan Singh (supra) the Hon"ble Apex Court has held as under :

163. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence u/s 302 of the Penal Code, the court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence.

The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of

sentence for various offences, including one u/s 302 of the Penal Code, the court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.

25. Furthermore, in the aforesaid case of Bachan Singh (supra) , the Hon"ble apex court has held that it cannot be overemphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the court in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the State, show that in the past, courts have inflicted the extreme penalty with extreme infrequency - a factor which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. The persons convicted of murder, life imprisonment is the rule and death sentence is an exception. A real and abiding concern for the dignity of human life postulates resistance to taking 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.

26. The Hon"ble Apex Court in the case of Jagmohan Singh v. State of U.P. (1973 (1} SCC 20) while upholding the validity of the death sentence held that the application of the principles have now to be guided by the paramount legislative power discernible from Section 354(3) and 235(2) namely (i) the extreme penalty can be inflicted only in gravest cases of extreme culpability; (ii) in making choice of sentence in addition to the circumstances of the offence due regard must be paid to the circumstances of the offenders also.

27. In the case of Machhi Singh and Others Vs. State of Punjab, , the Hon"ble Apex Court again had an occasion to examine when the death penalty should be awarded. The apex court examined the principles laid down in Bachan Singh's case in detail and observed as under :

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a doubt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-

preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance :

I. Manner of commission of murder

33. 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. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) 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. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "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.

IV. Magnitude of crime

36. 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.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

28. In the case of Bachan Singh (supra), the Hon'ble Apex Court has also laid down in para 206 of the judgment the following mitigating circumstances as Suggested by Dr. Chitale :

Mitigating circumstances.-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances :

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

29. These are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child", that is, "a person who at the date of murder was less than 16 years of age", cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same Criminal Procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

30. In the case of Machhi Singh (supra) it has been held that the test for determination of the rarest of rare cases of category of crime inviting death sentence, these includes broad criteria in view of the guidelines indicated in Bachan Singh Case, which will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case :

1. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability,
2. Before opting for the death penalty the circumstances of the offenders also required to be taken into consideration with the the circumstances of the crime;
3. Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be altogether inadequate punishment having regard to the relevant circumstances of the case, 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.
4. 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 is exercised.

31. The Supreme Court in the background of these factors indicated in Bachan Singh case (reported in Bachan Singh Vs. State of Punjab, formulated the following propositions for application to the facts of each case for determination of the question:

- (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. In other words death sentence must be imposed only when the 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 of 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 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 is exercised.

In order to apply these guidelines inter alia the following questions 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?

56. The principle laid down in Bachan Singh case and the formulations made in Machhi Singh case (reported in Machhi Singh and Others Vs. State of Punjab, as noted earlier have been applied by the Supreme Court in different cases depending on the facts and circumstances thereof. In the case of Nirmal Singh v. State of Haryana 1999 (3) SCC 650, the Supreme Court while confirming the death sentence imposed on accused Dharam Pal, commuted such sentence to life imprisonment of the coaccused taking note of the facts that the accused had no criminal antecedents, no possibility of continued threat to society, he was only accompanying his brother co-accused and gave three blows to one deceased only after his brother had given 2-3 blows to the deceased. No assault was carried out by him on other victims who were killed by his brother. The Supreme Court in the above case held that the case is not of "rarest of rare" nature and hence commuted death sentence to life imprisonment. (to be checked here under)

57. It has been held in Anshad and Others Vs. State of Karnataka, :

The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) Code of Criminal Procedure Death sentence, being an exception to the general rule, should be awarded in the " rarest of the rare cases" for "special reasons" to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. The number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of "rarest of the rare cases". The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedents of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon case to case.

58. After elaborate discussion of the law laid down earlier by the Supreme Court in Mohd. Chaman v. State (NCT Delhi) 2001 2 SCC 28 held that :

Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the Appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, Macchi Singh and other

decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty.

32. From the pronouncements made in the case of Bachan Singh, (supra) while dealing with the mitigating circumstances, the age of the accused has to be taken into consideration while awarding the sentence and the second thing which has to be considered is the probability that the accused would not commit the crime/ violence as would constitute a continuing threat to the society. It has to be seen whether if he remains alive, his presence in the society would be a menace to the society. There is also a mitigating circumstance that the court has to see the probability that the accused can be reformed and rehabilitated and the State shall prove that the accused does not satisfy the above conditions.

33. There is another aspect of the matter. The conviction of the Appellants was recorded on 14.7.2009 and thereafter on 17.7.2009, death sentence was recorded by the trial court for the reasons that three persons were brutally killed by assaulting them with sword and bhujali. The case of the convicts was brutal and barbaric and shocking to judicial conscience and the informant PW6 was saved as he had run away from the place of occurrence. Learned Counsel for the Appellants tried to emphasize that the expectation of the society is of adequacy of the sentence to the nature of the crime. But at the same time, we cannot be oblivious of the person who is alleged to have committed the crime and his right to get the sentence must be within structured sentencing power.

34. In the case of Bachan Singh (supra) it was emphasized that before imposing death sentence, the abiding concern must be shown to the dignity of the human lives by the court while awarding the death sentence. Before choosing upon for death sentence, the court must by its judicial conscience to eschew its tendency of retributive ruthlessness. While delivering the judgment in Bachan Singh's case (supra) the Hon'ble judges of the apex court have observed that the judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion, not being representative of the people. It is for the public as matter of judicial restraint to leave the function of assessing public opinion to the legislators. The court cannot go on the sentiments of outrage about the nature of the crime committed and whether the Appellants who committed the crime are really a threat or menace to the society or not, or whether there is any possibility of reforms or rehabilitation of the Appellants while sentencing the Appellants.

35. Learned Counsel cited the cases of Shobhit Chamar and Another Vs. State of Bihar, ; Shiv Ram and Another Vs. State of U.P., ; Prajeet Kumar Singh Vs. State of Bihar, ; State of U.P. v. Sattan @ Satyendra JT 2009 (4) 437 and the case of Sunil Baban Pingale Vs. State of Maharashtra, . The rulings cited by the learned Counsel of the complainant are mainly based on the judgments in the case of Bachan Singh (supra) and Machhi Singh (supra). We have discussed in detail the principles laid down in those judgments. Each case has to be adjudged from its

own facts and circumstances. The rulings which have been cited by the learned Counsel are not applicable in the facts and circumstances of the present case.

36. In the case of Panchhi and others Vs. State of UP, the court has observed as under :

16. When the Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in Bachan Singh v. State of Punjab this Court took particular care to say that death sentence shall not normally be awarded for the offence of murder and that it must be confined to the rarest of rare cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid freaks wherein the lesser sentence would be, by any account, wholly inadequate. In Machhi Singh v. State of Punjab⁶ a three-Judge Bench of this Court while following the ratio in Bachan Singh case⁵ laid down certain guidelines among which the following is relevant in the present case: (SCC p. 489, para 38).

(iv) 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 is exercised.

20. We have extracted the above reasons of the two courts only to point out that it is the savagery or brutal manner in which the killers perpetrated the acts on the victims including one little child which had persuaded the two courts to choose death sentence for the four persons. No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in Bachan Singh case⁵. In a way, every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder.

37. Thus, the Court has also held that brutality of the murder must be seen along with all mitigating factors in order to come to the conclusion whether the case falls within the ambit of the rarest of the rare cases.

38. In the case of Mulla and Another Vs. State of Uttar Pradesh, , there were three persons irrigating their fields from tube wells. 8 miscreants reached at the spot and they caught hold of four persons who were irrigating their fields and inquired about the property and demanded ransom of Rs. 3000/- each and threatened them otherwise would be killed. At the very moment, four persons who were returning homes after irrigating their fields also reached there and they were also stopped by the miscreants demanding Rs. 10,000/- each from them also. When all the persons expressed their inability, they assaulted two persons by the butt of the gun and took all the persons towards a jungle. They

released three persons directing them to bring money otherwise they would be killed. The persons who were released reached at the village and they narrated the incident in the village and they took all the other five abducted persons along with them. In the morning dead bodies of five persons were found near the tubewell and the Appellants were found guilty for commission of murder of those persons. Death sentence was recorded against the Appellants and the apex court while assessing all the facts and circumstances of the case and taking into account all the aggravating and mitigating circumstances confirming the conviction, commuted the death sentence into life imprisonment.

39. Hon"ble Apex Court in the case of Gurmukh Singh v. State of Haryana 2009 (15) SCC 625 has laid down certain guidelines which have to be taken into consideration before awarding appropriate sentence to the accused Appellants and the Apex Court has held that the said factors are not exhaustive and are merely illustrative. The Hon"ble Apex Court has held as under in para 12 of this Judgment :

There are significant features of the case which are required to be taken into consideration in awarding the appropriate sentence to the accused;

1. Admittedly, the incident happened on the spur of the moment;
2. It is clear from the evidence on record that the Appellant was not using that path every day;
3. The Appellant gave a single lathi blow on the head of the deceased which proved fatal;
4. The other accused did not indulge in overt act therefore, except the Appellant, the other co-accused, namely, Niranjana Singh, Harbhaan Singh and Manjit Singh have been acquitted by the trial court;
5. The incident took place on 8.1.1997 and the deceased remained hospitalized and ultimately died on 14.1.1997;
6. The trial court observed that there was no previous enmity between the parties;

Therefore, it is abundantly clear that there was no prearranged plan or that the incident had taken place in furtherance of the common intention of the accused persons. When all these facts and circumstances are taken into consideration in proper perspective, then it becomes difficult to maintain the conviction of the Appellant u/s 302 IPC.

40. Learned trial court, in the instant case, has assigned one of the reasons for awarding death sentence that there were three persons who were brutally murdered.

41. In the case of Tika Ram v. State of Madhya Pradesh reported in 2007 (15) SCC 760, where seven persons of a family were shot dead and some persons

sustained injuries on their persons. After analyzing the evidence on record, in this case, the trial court has awarded maximum punishment of death sentence whereas the High Court commuted the sentence of death into life imprisonment and the Hon''ble apex court was in agreement with the findings of the High Court that the incident in question cannot be termed as rarest of the rare case requiring maximum punishment of death.

42. In the case of Bachhitar Singh and Another Vs. State of Punjab, families of Sukhwant Singh and Bhupindra Singh were murdered and the trial court awarded death sentence which was confirmed by the High Court and the Apex Court commuted the death sentence into life imprisonment.

43 In the case in hand, the Appellant Vishal Sharma @ Banti was 24 years of age at the time of the occurrence and Appellant Vikash Sharma @ Gulla was 26 years of age at the time of the occurrence. They were youth and still they are young. There is no criminal history or any criminal antecedents of the Appellants and there is no evidence on record that they are menace to the society. Murder of the deceased persons were committed by Bhujali and Sword within a short span of time. The State has not demonstrated to the effect that punishment of life imprisonment is not sufficient and the doors have closed for life imprisonment to the Appellants and the only punishment is punishment of death sentence. Thus, this case does not fall within the category of the rarest of the rare case. Hence, the death sentence is commuted to life imprisonment. The accused Appellants are also liable to be convicted u/s 324/34 of the Indian Penal Code instead of Section 307/34 of the Indian Penal Code.

44. Keeping in view the facts and circumstances of the case as elaborately discussed hereinabove as also the law laid down by the Hon''ble Apex Court, we do not find reasons to interfere with the order of conviction passed by the trial court. However, the order of death sentence of the Appellants is commuted to life imprisonment. They are further sentenced to one year rigorous imprisonment under Sections 324/34 of the Indian Penal Code. Both the sentences shall run concurrently.

45. For the reasons aforesaid, we confirm the conviction and commute the death sentence into life imprisonment. Both the appeals and the Reference made by the Sessions Judge are hereby disposed of accordingly.