SUPREME COURT OF INDIA

Deepak Rai

Vs.

State of Bihar

Crl.A.Nos.249-250 of 2011

(H. L. Dattu, Sudhansu Jyoti Mukhopadhaya and M. Y. Eqbal JJ.)

19.09.2013

JUDGMENT

H.L. DATTU, J:

1. These appeals are directed against the judgment and order passed by the High Court of Judicature at Patna in Death Reference No. 6 of 2009 and Criminal Appeal(DB) Nos. 989 of 2009 and 158 of 2010, dated 19.08.2010. By the impugned judgment and order, the High Court has confirmed the judgment of conviction, dated 17.09.2010 and order of sentence, dated 30.10.2009 passed by the Additional Sessions Judge cum FTC No. 2, Vaishali at Hazipur in Sessions Trial No. 195 and 571 of 2006, whereby the learned Sessions Judge has convicted the three accused-appellants for offence under Sections 120B, 148, 302 read with 149, 307 read with 149, 326, 429, 436 and 452 of Indian Penal Code, 1860 (for short 'the IPC') and sentenced them to death.

Facts:

2. The Prosecution case in a nutshell is: On the fateful night of 01.01.2006, the deceased informant (PW-7) was sleeping in the Varanda of his house and his wife alongwith the children, two daughters aged 12 and 10 years, respectively and three sons aged 8, 6 and 3 years, respectively were sleeping in the room inside the house. At around 01.00 A.M., he was awakened by the sound of footsteps of several people. In the dim light of a night bulb and further from their voices, he identified the persons who had come near his house armed with lethal weapons as appellant-accused persons and nine other villagers besides 10-11 unknown persons. Before the informant could escape, appellant- accused-Jagat Rai(A1) and Deepak Rai(A2)

caught hold of him and pushed him on the ground whereafter 3-4 unknown persons got over his body and gagged him. Then A1 instructed few others to surround the house from all sides and sprinkle kerosene over it, while the other accused persons locked the door of the room where the informant's wife was sleeping alongwith the children and set the house on fire trapping them inside. Thereafter, they sprinkled kerosene over the informant's body and held him to the ground while A1 set the informant's mouth on fire by lighting a matchstick. Upon rising of a blazing flash of fire, the accused persons fled away leaving the informant behind. While the informant also attempted to escape, A2 fired at him but the informant managed an escape and raised alarm. On hearing such noise, the informant's four brothers and other family members who resided in the adjoining houses woke up, reached the spot and witnessed the accused persons running away while the informant was on fire. Until then the fire in informant's house had reached its enormity, swallowing the informant's family and injuring the buffalo and calf on the property. The informant (PW-7) was rushed to the Primary Health Centre, Raghopur.

3. The fardbayan was recorded at 7:30 AM, on the basis of which an FIR was registered against the three appellant- accused and few others for the offence under Sections 147, 148, 149, 452, 342, 324, 326, 427, 436, 307 and 302 of the IPC at 9:00 AM on 01.01.2006. The motive of the occurrence was alleged to be the informant's refusal even after consistent threats by A1 to withdraw the FIR lodged by him for the theft of informant's buffalo against A1 and his family, in pursuance of which two members of his family were arrested. Upon investigation, the chargesheet was drawn against the aforesaid accused persons on 21.03.2006. The learned Judicial Magistrate, First Class, Hazipur, Vaishali bifurcated the case of the absconded accused persons-A1, A2 and 8 others and committed the case of Bacchababu Rai (A3) and 5 others for trial as Sessions Trial No. 195 of 2006, by order dated 06.05.2006. Upon arrest of the accused persons-A1, A2 and one other, their case was separated from other absconder-accused persons and committed to trial as Sessions Trial No. 571 of 2006, by order dated 15.12.2006.

4. While in Sessions Trial No. 195 of 2006, 17 witnesses were examined and 14 exhibits were produced, in Sessions Trial No.571 of 2006, 14 witnesses were examined and 11 exhibits were produced by the prosecution. Since both the cases arose out of the same FIR, they were consolidated by order dated 12.01.2008, whereafter their trial proceeded together. While A2 examined 8 witnesses, other two accused persons- Binay Rai and Ranjay Rai examined five and three witnesses, respectively in their defence.

5. Since the evidence of prosecution witnesses recorded in the two trials corroborates the prosecution case in material particulars, brevitatis causa and to avoid repetition we would only notice them once. The informant (PW-7) has identified the appellant-accused persons, supported the prosecution case in his evidence and testified in respect of the time and manner of occurrence of the fateful incident and the motive of the accused persons. PWs 1, 2, 3 and 4 are the brothers of PW-7 who resided adjacent to PW- 7's house. They have identified the accused persons and further corroborated the prosecution case in respect of time of occurrence and motive of the appellant-accused persons. PW-1 has stated that as soon as he heard PW-7's shrieks and noise from the blazing fire, he rushed outside his house and witnessed the accused persons fleeing away. He found PW-7 on fire and immediately covered him with a blanket to douse it; whereafter, he along with others attempted to set the fire off at PW-7's house but the fire having transformed into a conflagration it was too late to save the six deceased persons. PW-5 (wife of PW-2), PW-6 (mother of PW-7), PW-14 (wife of PW-1), PW-15 (sister of PW- 7) and PW-16 (wife of PW-4) have also supported the prosecution case in respect of PW-1's account of the incident, i.e., the fleeing away of the three appellant-accused persons along with others and the motive of the accused persons behind the incident. PW-8, the Doctor who conducted post mortem examination of the six deceased persons, has corroborated the prosecution case that the death occurred by 100% burn injuries. PW-10, the Doctor who treated PW-7, has testified in respect of the injuries suffered by PW-7. His evidence alongwith the post-mortem report corroborate the time and manner of the fateful incident. Further, PW-11 (the Investigating Officer) supported the prosecution case with regard to the time and place of the occurrence and the presence of charred dead bodies of the six deceased persons. The Trial Court discarded the testimonies of the defence witnesses at the outset and proceeded with the trial.

6. Upon meticulous consideration of the evidence on record and the submissions made by the parties, the learned Sessions Judge has observed that even though the witnesses examined by the prosecution are related to the victims, their testimonies when considered with due care and caution are corroborated by the evidence of informant (PW-7), the post mortem reports, evidence of the Doctors(PW-9 and 10) and the evidence of PW-11, the Investigating Officer and therefore, cannot be rejected on the prima facie ground of them being interested witnesses. The Trial Court has believed the aforesaid evidence corroborating the prosecution case in respect of A1, A2 and A3; however, doubted the presence of other accused persons since their names have neither been mentioned in the fardbayan nor has the evidence produced against them proved their offence beyond reasonable doubt. In light of the aforesaid observations, the Trial Court has reached the conclusion that

the three appellant-accused persons are guilty of the aforesaid offence and has convicted them accordingly while acquitting the others, by judgment dated 17.09.2009. Further, after affording an opportunity of hearing to the appellant-accused persons on the question of sentence, the Trial Court has sentenced them to death, by order dated 30.10.2009, relevant paragraphs of which are reproduced as under:

> "Heard both sides on the question of sentence on behalf of the held guilty accused Bachcha Babu Rai, Jagat Rai, Bipat Rai alias Deepak Rai, it has been submitted that before this, they have not been punished in any case of them Bipat Rai @ Deepak is a retired military personnel. Keeping in mind, their age has also first conviction, minimum of sentence may be inflicted.
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> On behalf of the prosecution it has been said that the guilty held persons Bachcha Babu Rai, Jagat Rai, Bipat Rai@ Deepak Rai have committed a heinous offence and their offence falls under the category of RARE OF RAREST. Their heinous crime has ruined the informant of this case, his wife and five children. So far Bipat Rai is concerned, he is a retired military personnel his conduct should be all the more decent. They are not of tender age nor old. They do not deserve any mercy and they deserve death sentence. In the light of the reasoning of both sides as also on an appreciation, it is manifest, that the occurrence is of night when the informant, his wife and five minor children and cattle all have been burnt to death. The informant also subsequently died in this way, the entire family is ruined. In the light of the guidelines as given by Hon'ble Supreme Court, this case falls under the heading of RARE OF RAREST cases. Because of this the guilty held accused persons Bachcha Babu Rai, Jagat Rai and Bipat Rai allias Deepak Rai are sentenced to death or offence u/s 302/ 149 IPC. …"

7. Aggrieved by the aforesaid judgment and order, the three appellant-accused persons filed appeals before the High Court which were heard alongwith the Death Reference No. 6 of 2009 and disposed of by a common judgment and order, dated 19.08.2010. The High Court has elaborately dealt with the evidence on record and extensively discussed the judgment and order of the Trial Court in order to ascertain the correctness or otherwise of the conviction and sentence awarded to the appellant-accused persons. The High Court has observed that since, the informant is the only witness who was present at the scene of crime, his testimony alone could substantiate upon the specific role of accused persons in the commission of the ghastly offence. In so far as the identification of the appellant-

accused persons, the High Court has observed that the informant in the fardbeyan specifically mentions their names and, infact, attributes specific roles to them in the commission of the offence, i.e., A1 commanding the house to be set on fire and lighting the matchstick to set the informant's mouth on fire and later, when the informant was attempting to escape, A2 firing at the informant. Further, that during the commission of the offence the accused persons were in close proximity to the informant and the presence of dim light of bulb in the night and the illumination by flames of burning house coupled with them being known to the informant establishes their identity in the evidence of informant, which is supplemented and strengthened by the evidence of PWs 1, 2, 3, 4, 5 and 6. The High Court has further observed that the prosecution case in respect of the time and place of occurrence and the factum of accused persons fleeing the spot of occurrence immediately after setting the house on fire causing death of six persons by burning them alive and injury to the informant has been well established by cogent, reliable and unimpeachable eye- witnesses and further corroborated by the testimonies of the Doctors, post-mortem report, medical report and the evidence of Investigating Officer. On the basis of the aforesaid, the High Court has concluded towards the guilt of the accused appellants and sentenced them as follows: "…since the occurrence is ghastly murder of wife and five children of the informant by closing in room for not withdrawing the case of theft of buffalo shocked the entire community bringing the case in the category of rare of rarest to attract the maximum punishment and hence the reference is answered in the affirmative and I do not find any merit in the two appeals and hence the appeals are dismissed……"

8. Aggrieved by the aforesaid conviction and sentence, the appellants are before us in these appeals. The appeals before us are limited to the question of sentence.

Submissions:

9. We have heard Dr. Sumant Bharadwaj learned counsel appearing for A2, Shri Ramesh Chandra Mishra, learned counsel appearing for A1 and A3 and Shri Nagendra Rai, learned senior counsel appearing for the respondent-State.

10. Dr. Bharadwaj would submit that the Courts below have erred in sentencing A2 as the reasons recorded by the Courts below do not conform to the statutory mandate prescribed under Section 354(3) of the Code of Criminal Procedure, 1973 (for short 'the Code'), which require the judgment to record "reasons" in case of sentence of life imprisonment and "special reasons" in case of death sentence. He would submit that the since no extraordinary reasons have been assigned by the Courts below to sentence the appellant to death instead of a less harsher sentence

and that this Court in appellate jurisdiction cannot go into the same for the first time while confirming the death sentence, the matter requires to be remanded to the Trial Court for fresh consideration on the question of sentence as per Section 354(3) of the Code. Further, he would place reliance upon the judgments of this Court in Ambaram v. State of M.P., (1976) 4 SCC 298, Balwant Singh v. State of Punjab, (1976) 1 SCC 425, Dagdu v. State of Maharashtra, (1977) 3 SCC 68, Muniappan v. State of T.N., (1981) 3 SCC 11 and Rajesh Kumar v. State, (2011) 13 SCC 706; wherein this Court has held that "special reasons" are essential for awarding death sentence under Section 354(3) of the Code and in absence of such reasons has commuted the sentence passed by the Courts below from death to life imprisonment and submit that since, in the instant case, no "special reasons" were recorded by the Courts below while sentencing the appellants, the sentence of the appellants ought to be commuted to life imprisonment.

11. Shri Mishra would assail the sentence awarded by the Trial Court and confirmed by the High Court and submit that in the instant case mitigating circumstances overwhelmingly outweigh the aggravating circumstances and therefore, ends of justice would only be achieved by commuting the sentence of the two appellant-accused persons, A1 and A3, from death to imprisonment for life. He would put forth the following factors in support of his submission:

> "Mitigating Circumstances:
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> 1. Appellants are not hard core criminals,
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> 2. They are not threat/ menace to the Society,
>
> 3. They have no criminal antecedent/ background,
>
> 4. They are not antisocial elements,
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> 5. Their conduct in Jail has been satisfactory,
>
> 6. The State has failed to prove that they are incapable of being reformed
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> 7. They have been in Jail for about seven years,
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> 8. Delay of seven years in execution of death sentence confirmed in death anticipating imminent death any moment,

9. Death sentence is exception and life-imprisonment is rule,

10. Global move to abolish death sentence. 138 nations have abolished death sentence while 59 countries including India have retained death sentence. (2009) 6 SCC 498. Relevant page- 544, paras 111-112,

11. Jagat Rai at the time of commission of offence was 48 years while Bachcha Babu Rai was 43 years, comparatively young,

12. Offence was committed when the appellant were under the influence of extreme of mental disturbance due to pendency of criminal case,

13. There is every probability that the appellants can be reformed and rehabilitated,

14. All the four main objectives which state intends to achieve namely deterrence, prevention, retribution and reformation can be achieved by keeping the appellants alive. Aggravating Circumstances:

1. It was a planned, cold-blooded brutal murder,

2. Entire family was wiped out.…"

12. A contrario Shri Rai would support the judgment and order passed by the Courts below convicting the appellants of the aforesaid offence and sentencing them to death. He would submit that the reasons recorded by the Courts below fall within the statutory requirements under Section 354(3) of the Code as well as the parameters laid down by this Court for recording "special reasons" while sentencing a convict to death. He would distinguish the cases cited by Shri Bharadwaj as cases wherein the sentence of the accused persons was commuted due to reasons besides absence of "special reasons" for sentencing the accused therein in the judgments and orders of the Courts below and further place reliance upon the decision of this Court in Gurdev Singh v. State of Punjab,(2003) 7 SCC 258 amongst others, wherein this Court has sentenced the accused persons therein who were responsible for causing the death of fifteen persons, besides causing grievous injuries to eight others to death after balancing the aggravating and mitigating circumstances.

13. We have given our anxious consideration to the materials on record in its entirety, the submissions made by the learned counsel for the parties and the judgments and orders of the Courts below.

Issues for consideration:

14. The questions which fall for our consideration and decision are first, whether the reasons assigned by the Courts below while sentencing the appellants are "special reasons" under Section 354(3) of the Code and second, whether the offence committed by the appellants fall into the category of "rarest of the rare" cases so as to warrant death sentence.

Cases cited by Shri Bharadwaj:

15. At the outset we would examine the decisions relied upon by Dr. Bharadwaj and examine whether at all should the sentence in the present case, for lack of special reasons being assigned by the Trial Courts as well as the High Courts, ought to be commuted to imprisonment for life.

16. In Ambaram case (supra), the appellant-accused was tried along with four others for murder of two persons. It was the appellant therein who shot one while his companions assaulted the other to death with sharp-edged weapons and a lathi. He was convicted under Section 302 of the IPC by the Trial Court and sentenced to death alone by the Trial Court as well as the High Court against which he had approached this Court by filing a special leave petition. It is pertinent to note that his appeal was limited to the question of sentence. This Court has noticed the change in the law introduced under Section 354(3) of the Code in 1973 which confers discretion on the Courts to inflict the death sentence or the sentence of life imprisonment each according to the circumstances and exigencies of each case but enjoins duty upon them to justify it by giving special reasons and reasons, respectively. This Court has observed as follows:

> "1. …The High Court has not given any special reasons why Ambaram has been singled out for the award of the extreme penalty. Nor do we find any such reason to treat him differently in the matter of sentence from his companions who have been awarded the lesser penalty. On this short ground we allow this appeal and commute Ambaram's death sentence to that of imprisonment for life." (emphasis supplied)

17. In Balwant Singh v. State of Punjab, (1976) 1 SCC 425 this Court has observed as follows:

> "4. …On the facts of this case, it is true that the appellant had a motive to commit the murder and he did it with an intention to kill the deceased. His conviction under Section 302 of the Penal Code was justified but the facts found were not such as to enable the Court to say that there were special reasons for passing the sentence of death in this case."
>
> (emphasis supplied)
>
> Thereafter, this Court has observed the error committed by the High Court in applying the principle of extenuating circumstances under the older Code even after the present Code coming into force in 1973 which requires the Court to assign special reasons while awarding death penalty and observed the follows:
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> "5. The High Court has referred to the two decisions of this Court namely in Mangal Singh v. State of U.P., (1975) 3 SCC 290 and in Perumal v. State of Kerala, (1975) 4 SCC 109 and has then said:
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> "There are no extenuating circumstances in this case and the death sentence awarded to Balwant Singh appellant by the Sessions Judge is confirmed ...."
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> As we have said above, even after noticing the provisions of Section 354(3) of the new Criminal Procedure Code the High Court committed an error in relying upon the two decisions of this Court in which the trials were held under the old Code. It wrongly relied upon the principle of absence of extenuating circumstances — a principle which was applicable after the amendment of the old Code from January 1, 1956 until the coming into force of the new Code from April 1, 1974. In our judgment there is no special reason nor any has been recorded by the High Court for confirming the death sentence in this case. We accordingly allow the appeal on the question of sentence and commute the death sentence imposed upon the appellant to one for imprisonment for life." (emphasis supplied)

18. In Muniappan v. State of T.N., (1981) 3 SCC 11, this Court has observed that not only has the Trial Court failed to provide adequate hearing to the accused under Section 235(2), but also it as well as the High Court have not assigned appropriate reasons while awarding and confirming the sentence of the accused,

respectively and thus, reached the conclusion that the sentence of death could not be imposed.

19. Further, in Dagdu case (supra) and Rajesh Kumar case (supra) this Court has considered the facts and circumstances of the case in its entirety while balancing the aggravating and mitigating circumstances to decide upon the adequacy of sentence awarded by the Courts below and upon reaching such satisfaction that the case did not fall into the category of "rarest of the rare" warranting "special reasons" for the award of death sentence has commuted the sentence of the accused.

20. Thus in the aforementioned cases, this Court has upon examination of both-the evidence on record and the reasoning of the Courts below while sentencing the accused reached an independent conclusion that the facts and circumstances of the case do not warrant imposition of sentence of death. Therefore, it is not the absence or adequacy of "special reasons" alone what weighed in the mind of this Court while commuting the sentence. The facts in toto and procedural impropriety, if any loomed large in exercising such discretion. Hence, the reliance placed on the aforementioned decisions is rejected.

Scope of Article 136 vis-à-vis examination of "special reasons"

21. Further, we are unable to accept the submission that in any case the failure on the part of the Court, which has convicted an accused and heard him on the question of sentence but failed to express the "special reasons" in so many words, must necessarily entail a remand to that Court for elaboration upon its conclusion in awarding the death sentence for the reason that while exercising appellate jurisdiction this Court cannot delve into such reasons.

22. Since the appellants are before us by way of an appeal by special leave, we would first examine the scope of jurisdiction of this Court under Article 136 of the Constitution of India vis-à-vis criminal appeals.

23. The appellate jurisdiction vested in this Court by virtue of Article 136 is not plain statutory but expansive and extraordinary. The Court exercises its discretion and grants leave to appeal in cases where it is satisfied that the same would circumvent a grave miscarriage of justice. Such jurisdiction is not fettered by rules of criminal procedure but guided by judicially evolved principles.

24. We are fortified by the decision of this Court in State of U.P. v. Dharmendra Singh, (1999) 8 SCC 325, where while examining the applicability of Section 377(3) of the Code to an appeal under Article 136 has observed as follows:

> "10. …A perusal of this section shows that this provision is applicable only when the matter is before the High Court and the same is not applicable to this Court when an appeal for enhancement of sentence is made under Article 136 of the Constitution. It is to be noted that an appeal to this Court in criminal matters is not provided under the Code except in cases covered by Section 379 of the Code. An appeal to this Court under Article 136 of the Constitution is not the same as a statutory appeal under the Code. This Court under Article 136 of the Constitution is not a regular court of appeal which an accused can approach as of right. It is an extraordinary jurisdiction which is exercisable only in exceptional cases when this Court is satisfied that it should interfere to prevent a grave or serious miscarriage of justice, as distinguished from mere error in appreciation of evidence. While exercising this jurisdiction, this Court is not bound by the rules of procedure as applicable to the courts below. This Court's jurisdiction under Article 136 of the Constitution is limited only by its own discretion (see Nihal Singh v. State of Punjab, AIR 1965 SC 26. In that view of the matter, we are of the opinion that Section 377(3) of the Code in terms does not apply to an appeal under Article 136 of the Constitution.
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> 11. This does not mean that this Court will be unmindful of the principles analogous to those found in the Code including those under Section 377(3) of the Code while moulding a procedure for the disposal of an appeal under Article 136 of the Constitution. Apart from the Supreme Court Rules applicable for the disposal of the criminal appeals in this Court, the Court also adopts such analogous principles found in the Code so as to make the procedure a "fair procedure" depending on the facts and circumstances of the case." (emphasis supplied)

25. More so, it is settled law that an appeal by special leave under Article 136 is a continuation of the original proceedings. In Moran M. Baselios Marthoma Mathews II v. State of Kerala, (2007) 6 SCC 0517, this Court categorically observed as follows:

> "13. We, therefore, are of the opinion that despite the fact that the appellants had insisted upon before the High Court for issuance of a writ or in the nature of mandamus upon the State or its officers for the purpose of grant of

police protection as this Court has exercised its appellate jurisdiction under Article 136 of the Constitution of India, it can and should go into that question as well viz. as to whether the writ petition itself could have been entertained or not, particularly, when the appeal is a continuation of the original proceedings."

26. Further, this Court in Netai Bag v. State of W.B., (2000) 8 SCC 262 while observing that the scope of an appeal under Articles 136 and 226 cannot be wider than the earlier proceedings, has noticed that the appeals under said provisions are continuation of the original proceedings.

27. Thus, jurisdiction of this Court in appeal under Article 136 though circumscribed to the scope of earlier proceedings is neither fettered by the rules of criminal procedure nor limited to mere confirmation or rejection of the appeal. This Court while considering the question of correctness or otherwise of the sentence awarded by the Courts below has exercised discretionary jurisdiction under Article 136 and hence can not only examine the reasons so assigned under Section 354(3) but also substantiate upon the same, if need so be.

28. With the aforesaid in view, let us now examine the issues before us.

Issue one: "Special reasons" under Section 354(3) of the Code

29. Under Section 367(5) of the Code of Criminal Procedure, 1898 (for short "old Code"), the normal sentence to be awarded to a person found guilty of murder was death and imprisonment for life was an exception. The Amending Act 26 of 1955 amended Section 367(5) of the old Code resulting in vesting of discretion with the Court to inflict the sentence of life imprisonment or death each according to the circumstances and exigencies of the case. The amended Section 367(5) of the old Code reads as follows: "367. (5) If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed."

30. The present Code which was legislated in 1973 brought a shift in the then existing penological trend by making imprisonment for life a rule and death sentence an exception. It makes it mandatory for the Court in cases of conviction for an offence punishable with imprisonment for life to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Court

awards the death penalty, “special reasons” for such sentence shall be stated in the judgment. It reads as follows:

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

31. For the first time, this shift in sentencing policy has been observed by Krishna Iyer J. (as he then was) in Ediga Anamma v. State of Andhra Pradesh, (1974) 4 SCC 443, as follows:

> “18. It cannot be emphasised too often that crime and punishment are functionally related to the society in which they occur, and Indian conditions and stages of progress must dominate the exercise of judicial discretion in this case.
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> …
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> 21. It is obvious that the disturbed conscience of the State on the vexed question of legal threat to life by way of death sentence has sought to express itself legislatively, the stream of tendency being towards cautious, partial abolition and a retreat from total retention.”
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> (Also Ambaram case (supra), Joseph v. State of Goa, (1977) 3 SCC 280, Triveniben v. State of Gujarat)

32. Further, this Court in Harnam v. State of U.P., (1976) 1 SCC 163 supplemented the aforesaid observations and noted as follows:

> “4. …The seminal trends in current sociological thinking and penal strategy, tampered as they are by humanistic attitude and deep concern for the worth of the human person, frown upon death penalty and regard it as cruel & savage punishment to be inflicted only in exceptional cases. It is against this background of legislative thinking which reflects the social mood and realities and the direction of the penal and procedural laws that we have to consider whether the tender age of an accused is a fetor contra-indicative of death penalty.”

33. In Allauddin Mian v. State of Bihar, (1989) 3 SCC 5 this Court has examined the purpose of inclusion of "special reasons" clause as follows:

> "9. … When the law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the "special reasons clause" in the above provision implies that the court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be… While rejecting the demand of the protagonist of the reformatory theory for the abolition of the death penalty the legislature in its wisdom thought that the "special reasons clause" should be a sufficient safeguard against arbitrary imposition of the extreme penalty. Where a sentence of severity is imposed, it is imperative that the judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the judge would not award the death sentence. It may be stated that if a judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence. In all such cases the law casts an obligation on the judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. …"

34. In Bachan Singh case (supra), while determining the constitutional validity of the death penalty, this Court has examined the sentencing procedure embodied in Section 354(3) of the Code. Following issue was framed by this Court in the aforesaid context:

> "15. (i)… (ii)…whether the sentencing procedure provided in Section 354(3) of the Code of Criminal Procedure, 1973 (2 of 1974) is unconstitutional on the ground that it invests the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Penal Code with death or, in the alternative, with imprisonment for life."

35. To answer the said issue, this Court referred to and considered Jagmohan Singh v. State of U.P.(which was decided under the old Code) and culled out several propositions from that decision. Keeping in view of the changed legislative policy, this Court agreed with all the observations in Jagmohan Singh case (supra) but for two- first, that the discretion in the matter of sentencing is to be exercised by the Judge after balancing all the aggravating and mitigating circumstances of the crime and second, that while choosing between the two alternative sentences provided in Section 302 of the IPC, i.e., sentence of death and life imprisonment, the court is principally concerned with the aggravating or mitigating circumstances connected with the particular crime under inquiry. This Court observed that whilst under the old Code, both the sentence of death was the rule and life imprisonment was an exception, Section 354(3) of the Code has reversed the sentencing policy with the legislative mandate that if a sentence of death is to be awarded, special reasons need to be recorded by the Courts. That is to say, the legislative policy now virtually obviated the necessity of balancing the aggravating and mitigating circumstances for the award of punishment in respect of an offence of murder. The Court observed as follows in context of departures from Jagmohan Singh case (supra):

> "164. (a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
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> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and

the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

36. In the aforesaid background this Court observed that special reasons, in the context of the said provision, obviously mean "exceptional reasons" founded on the exceptionally grave circumstances relating to the crime as well as the criminal. It being extremely difficult to catalogue such special reasons, they have to be construed in the facts of the case and relative weight has to be given to mitigating and aggravating factors. This Court observed that these two aspects are so intertwined that isolation of one from the other would defeat the mandate of law and held with hope that in view of the "broad illustrative guidelines" laid down therein, the Courts:

> "209. … will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception."
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> (Also: State of Maharashtra v. Goraksha Ambaji Adsul, (2011) 7 SCC 437; Sangeet v. State of Haryana, (2013) 2 SCC 452; Sandesh v. State of Maharashtra, (2013) 2 SCC 479)

37. In Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 this Court opined that the term "special reasons" as explained in the Bachan Singh case (supra) indicates a relative category based on comparison with other cases under Section 302 as under:

> "44. The matter can be looked at from another angle. In Bachan Singh it was held that the expression "special reasons" in the context of the provision of Section 354(3) obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. It was further said that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. In conclusion it was said that the death penalty ought not to be imposed save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Now, all these expressions "special reasons", "exceptional reasons", "founded on the exceptional grave circumstances", "extreme cases" and "the rarest of rare cases" unquestionably indicate a relative category based on comparison with other cases of murder. Machhi Singh, for

the purpose of practical application sought to translate this relative category into absolute terms by framing the five categories. (In doing so, it is held by some, Machhi Singh considerably enlarged the scope for imposing death penalty that was greatly restricted by Bachan Singh).”

38. The said five categories of rarest of the rare crimes delineated in Macchi Singh case (supra) are as follows:

> “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-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course of 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 terrorise 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-à-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." (emphasis supplied)

39. This Court has cautioned that though the aforesaid are extremely important factors could not be taken as inflexible, absolute or immutable, they must be perceived only as indicators which the Courts must bear in mind while deciding upon the sentence and assigning special reasons, if required.

40. The Constitutional Bench of this Court in Shashi Nayar v. Union, (1992) 1 SCC 96 has observed that the "special reasons clause" means reasons, specific to the fact of a particular case, which can be catalogued as justifying a severe punishment and unless, such reasons are not recorded death sentence must not be awarded. Under this provision, if the basis for awarding the higher sentence can be explained with reasonable accuracy, after examining the pros and cons of sentencing options achieving proportional balance with the severity of the crime committed only then should the higher punishment be awarded. This Court has noted that thus, Section 345(3) is a sufficient safeguard against the arbitrary imposition of the extreme penalty and unless the nature of crime and the circumstances of the offender reveal that the sentence to life imprisonment would be wholly inadequate, the Courts should ordinarily impose a lesser punishment.

41. This Court in Sandesh v. State of Maharashtra, (2013) 2 SCC 479 has discussed the aforesaid principles and observed as follows:

> "21……it is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354(3) CrPC for imposing death penalty but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion."

42. The aforesaid would reflect that under this provision the legislature casts a statutory duty on the Court to state reasons for choice of the sterner sentence to be awarded in exceptional cases as against the rule of life imprisonment and by necessary implication, a legal obligation to explain them as distinguished from the expression "reasons" follows. The legislative mandate of assigning "special reasons" assures that the imposition of the capital punishment is well considered by the Court and that only upon categorization of the case as "rarest of rare", thus leaving no room for imposition of a less harsh sentence, should the Court sentence the accused person to death.

43. Incontrovertibly, the judicial approach towards sentencing has to be cautious, circumspect and careful. The Courts at all stages- trial and appellate must therefore peruse and analyze the facts of the case in hand and reach an independent conclusion which must be appropriately and cogently justified in the "reasons" or "special reasons" recorded by them for imposition of life imprisonment or death penalty. The length of the discussion would not be a touchstone for determining correctness of a decision. The test would be that reasons must be lucid and satisfy the appellate Court that the Court below has considered the case in toto and thereafter, upon balancing all the mitigating and aggravating factors, recorded the sentence.

44. We must now briefly advert to the sentencing procedure prescribed by law. Under Section 235(2) of the Code, the Court on convicting an accused must unquestionably afford an opportunity to the accused to present his case on the question of sentence and under Section 354(3) record the extraordinary circumstances which warrant imposition of death sentence keeping in view the entire facts of the case and the submissions of the accused. In doing so if, for any reason, it omits to do so or does not assign elaborate reasons and the accused

makes a grievance of it before the higher court, it would be open to that Court to remedy the same by elaborating upon the said reasons. Even when the reasons recorded by the Courts below do not conform to the statutory mandate or the judicially evolved principles, this Court, should reach the conclusion that harsher sentence of death requires to be imposed, could supplement them so as to justify the imposition of such sentence instead of remanding the matter to Courts below for re- consideration on the question of sentence. Further, should this Court opine to the contrary that the facts and circumstances of the case do not require imposition of capital punishment and the ends of justice would be achieved by a less harsh sentence, it could accordingly commute the sentence awarded by the Courts below. This Court in Dagdu case (supra) has observed that remand is an exception, not the rule, and therefore ought to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases.

45. Herein, it is not the case of the appellants that the opportunity to be heard on the question of sentence separately as provisioned for under Section 235(2) of the Code was not provided by the Courts below. Further, the Trial Court has recorded and discussed the submissions made by the appellants and the prosecution on the said question and thereafter, rejected the possibility of awarding a punishment less harsh than the death penalty. However, the High Court while confirming the sentence has recorded reasons though encapsulated. The High Court has noticed the motive of the appellants being non withdrawal of the case by the informant and the ghastly manner of commission of crime whereby six innocent persons as young as 3 year old were charred to death and concluded that the incident shocks the conscience of the entire society and thus deserves nothing lesser but death penalty.

46. There being no impropriety by the Courts below in compliance with the procedure prescribed under law for sentencing the appellants, only the question of adequacy and correctness of the special reasons assigned for awarding sentence of death requires to be considered by us. In our considered opinion, as noticed above, it is only upon examination of the facts and circumstances of the case could the adequacy of the special reasons recorded by the Courts below be determined by us. Therefore, we would now consider the second issue to determine whether at all the case falls in the category of rarest of the rare offences.

Issue two: Does this case fall into the category of rarest of the rare cases?

47. We are mindful of the principles laid down by this Court in Bachan Singh v. State, (1980) 2 SCC 684 and affirmed in Macchi Singh v. State of Punjab, (1983) 3

SCC 470 to be observed on the sentencing policy in determining the rarest of the rare crimes. In Bachan Singh case (supra) this Court has held as follows:

> "While considering the question of sentence to be imposed for the offence of murder u/s 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

48. In Machhi Singh case (supra), this Court has awarded death sentence to the accused who had methodically in a preplanned manner murdered seventeen persons of a village including men, women and children. Therein, this Court has besides outlining the five broad categories of rarest of rare cases held that in order to apply the guidelines of Bachan Singh case (supra) the following questions ought to be answered:

> "39. "(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?"
>
> This Court has held that if the answer to the above is in affirmative, then death sentence is warranted. This Court has further observed that the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are few of the many factors which normally weigh in the mind of the Court while awarding death sentence in a case terming it as the "rarest of the rare" cases. While applying the test of rarest of the rare case, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes which shake the collective conscience of the society.

49. This Court in Rajesh Kumar v. State, (2011) 13 SCC 706 has noticed the observations and principles evolved in Bachan Singh case (supra) resonating through the international sentiments on death penalty, as follows:

"83. The ratio in Bachan Singh has received approval by the international legal community and has been very favourably referred to by David Pannick in Judicial Review of the Death Penalty: Duckworth (see pp. 104-05). Roger Hood and Carolyn Hoyle in their treatise on The Death Penalty, 4th Edn. (Oxford) have also very much appreciated the Bachan Singh ratio (see p. 285). The concept of "rarest of rare" which has been evolved in Bachan Singh by this Court is also the internationally accepted standard in cases of death penalty.

84. Reference in this connection may also be made to the right based approach in exercising discretion in death penalty as suggested by Edward Fitzgerald, the British Barrister. [Edward Fitzgerald: The Mitigating Exercise in Capital Cases in Death Penalty Conference (3-5 June), Barbados: Conference Papers and Recommendations.] It has been suggested therein that right approach towards exercising discretion in capital cases is to start from a strong presumption against the death penalty. It is argued that "the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases" and Fitzgerald argues:

"Such a restrictive approach can be summarised as follows: The normal sentence should be life imprisonment. The death sentence should only be imposed instead of the life sentence in the 'rarest of rare' cases where the crime or crimes are of exceptional heinousness and the individual has no significant mitigation and is considered beyond reformation." (Quoted in The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p. 285.)

85. Opposing mandatory death sentence, the United Nations in its interim report to the General Assembly in 2000 advanced the following opinion:

"The proper application of human rights law—especially of its provision that 'no one shall be arbitrarily deprived of his life' and that 'no one shall be subjected to … cruel, inhuman or degrading … punishment'—requires weighing factors that will not be taken into account in the process of determining whether a defendant is guilty of committing a 'most serious crime'. As a result, these factors can only be taken into account in the context of individualised sentencing by the judiciary in death penalty cases …. The conclusion, in theory as well as in practice, was that respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualised sentencing that accounts for all of the relevant factors…. It is clear, therefore, that in death penalty

cases, individualised sentencing by the judiciary is required to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life."

(The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p.281.)

50. In Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257, this Court has reflected upon the aforesaid decisions and culled out the principles as follows:

"76. The aforesaid judgments, primarily dissect these principles into two different compartments—one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

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

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

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

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

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

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.
(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

51. This Court has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscience of the community, would it be appropriate to award death sentence. Since such circumstances cannot be laid down as a straight jacket formula but must be ascertained from case to case, the legislature has left it open for the Courts to examine the facts of the case and appropriately decide upon the sentence proportional to the gravity of the offence.

52. We would now notice the decisions of this Court to reflect upon the various circumstances which have acted as mitigating and aggravating factors in given facts to result in commutation of sentence or confirmation of death penalty; so as to examine the sentencing policy in the backdrop of balance-sheet of such factors in the case at hand.

Cases where death sentence is confirmed:

53. In Dagdu v. State of Maharashtra, (1977) 3 SCC 68, this Court has observed as follows:

"83. Having considered the matter in all its aspects — penal, juristic and sociogical — and having given our most anxious consideration to the problem, we are of the opinion that Accused 3, 9, 10 and 11 deserve the extreme penalty of law and that there is no justification for interfering with the sentence of death imposed upon them.

84. Accused 3 put an end to four innocent lives, three small girls ten years of age and a woman in her thirties. Accused 9, 10 and 11 committed the murders of Haribai, her nine-year old daughter and her infant child. The victims had given no cause for the atrocities perpetrated on them. They were killed as a child kills flies. And the brutality accompanying the manner of killing defies an adequate description. The luring of small girls, the gagging, the cutting of their private parts, the ruthless defiling in order to prevent identification of the victims and the mysterious motive for the murders call for but one sentence. Nothing short of the death sentence can atone for such callous and calculated transgression of law. Morbid pity can have no place in the assessment of murders which, in many respects, will remain unparalled

in the annals of crime. Accordingly, we confirm the death sentence imposed on Accused 3, 9, 10 and 11."

54. In Sunder Singh v. State of Uttaranchal, (2010) 10 SCC 611 the accused had gone to the place of occurrence well prepared carrying jerry cans containing petrol, sword, pistol with two bullets, which showed his premeditation and cold-blooded mind. In the incident five persons lost their lives while the sole surviving lady survived with 70% burn injuries. The murder was committed in a cruel, grotesque and diabolical manner, and closing of the door of the house was the most foul act by which the accused actually intended to burn all the persons inside the room and precisely that happened. Hence the Court did not find any sentence less harsh than the death sentence.

55. In M.A. Antony v. State of Kerala, (2009) 6 SCC 220 all six members of a family were murdered at their residence at night. The motive was money, and the absence of the accused from his own residence during the corresponding period and recovery of clothes under Section 27 of the Evidence Act, 1872, fingerprints on the doorsteps of the house matching with those of the accused, and recovery of scalp hair of the accused from place of occurrence were damning circumstantial evidence. Having regard to the chain of circumstances and the diabolical manner of commission of crime the death sentence was upheld.

56. In Jagdish v. State of M.P., (2009) 9 SCC 495 the assailant murdered his wife and five children (aged 1 to 16 years) in his own house. The murders were particularly horrifying as the assailant was in a dominant position and a position of trust as the head of the family. The assailant betraying the trust and abusing his position murdered his wife and minor children (youngest being the only son just 1 year old). This Court held that the balance sheet of the aggravating and mitigating circumstances was heavily weighed against the assailant making it the rarest of rare cases. Consequently the award of death sentence was just.

57. In Prajeet Kumar Singh v. State of Bihar, (2008) 4 SCC 434 the accused was a paying guest for a continuous period of four years in lieu of a sum of Rs.500 for food and meals. He brutally executed three innocent defenceless children aged 8, 15 and 16, attempted to murder the father (informant) and mother who survived the attack with multiple injuries. There was no provocation or reason for committing this ghastly act at a time when the children were sleeping. There were several incised wounds (muscle- deep or bone-deep) caused to the deceased. Considering the brutality, diabolic, inhuman nature and enormity of the crime (multiple murders and attacks), this Court held that the mindset of the accused could not be said to be

amenable to any reformation. Therefore, it came under the rarest of the rare category where not awarding a death sentence would have resulted in failure of justice.

58. In Ram Singh v. Sonia, (2007) 3 SCC 1 the wife in collusion with her husband murdered not only her stepbrother and his whole family including three tiny tots of 45 days, 2½ years and 4 years, but also her own father, mother and sister so as to deprive her father from giving property to her stepbrother and his family. The murders were committed in a cruel, pre-planned and diabolic manner while the victims were sleeping, without any provocation from the victim's side. It was held that the accused persons did not possess any basic humanity and completely lacked the psyche or mindset amenable to any reformation. It was a revolting and dastardly act, and hence the case fell within the category of the rarest of rare cases and thus death sentence was justified.

59. In Holiram Bordoloi v. State of Assam, (2005) 3 SCC 793 the accused persons were armed with lathis, and various other weapons. They came to the house of the victim and started pelting stones on the bamboo wall of the said house. Thereafter, they closed the house from the outside and set the house on fire. When the son, daughter and the wife of the victim somehow managed to come out of the house, the accused persons caught hold of them and threw them into the fire again. Thereafter the elder brother who was staying in another house at some distance from the house of the victim was caught and dragged to the courtyard of the accused where the accused cut him into pieces. It was held that there was absence of any strong motive and the victims did not provoke or contribute to the incident. The accused was the leader of the gang, and the offence was committed in the most barbaric manner to deter others from challenging the supremacy of the accused in the village. It was held that no mitigating circumstances to refrain from imposing death penalty were found.

60. In Karan Singh v. State of U.P., (2005) 6 SCC 342 the two appellants chased the deceased persons and butchered them with axes and other weapons in a very dastardly manner. After killing three adults, the appellants entered their house and killed two children who in no way were involved with the alleged property dispute with the appellants. It was held that the sole intention here was to exterminate the entire family. Thus, it was the rarest of the rare case.

61. In Gurmeet Singh v. State of U.P., (2005) 12 SCC 107 appellant G, along with his friend L killed thirteen members of his family including small kids for a flimsy

reason (objection of family of G to the visits and stay of L at their house) while they were asleep. The award of death sentence was held proper.

62. In State of Rajasthan v. Kheraj Ram, (2003) 8 SCC 224 the accused deliberately planned and executed his two innocent children, wife and brother-in-law when they were sleeping at night. There was no remorse for such a gruesome act which was indicated by the calmness with which he was smoking "chilam" after the commission of the act. As it was preplanned and after the entire chain of events and circumstances were comprehended, the inevitable conclusion, was that the accused acted in the most cruel and inhuman manner and the murder was committed in an extremely brutal, grotesque, diabolical, revolting and dastardly manner.

63. In Om Prakash v. State of Uttaranchal, (2003) 1 SCC 648 the accused, a domestic servant killed three innocent members and attempted to kill the fourth member of the family of his employer in order to take revenge for the decision to dispense with his service and to commit robbery. The death sentence was upheld.

64. In Gurdev Singh v. State of Punjab, (2003) 7 SCC 258 the appellants, having known that on the next day a marriage was to take place in the house of the complainant and there would be lots of relatives present in her house, came there on the evening when a feast was going on and started firing on the innocent persons. Thirteen persons were killed on the spot and eight others were seriously injured. The appellants thereafter went to another place and killed the father and brother of PW 15. Out of the thirteen persons, one of them was a seven-year-old child, three others had ages ranging between 15 and 17 years. The death sentence was held justified.

65. In Praveen Kumar v. State of Karnataka, (2003) 12 SCC 199 the accused was accommodated by one of the victims (who was his aunt) despite her large family, and she gave him an opportunity to make an honest living as a tailor. The accused committed the preplanned, cold-blooded murders of the relatives and well-wishers (including one young child) while they were sleeping. After the commission of the crime the accused absconded from judicial custody for nearly four years, which eliminated the possibility of any remorse or rehabilitation. Held, the extreme penalty of death was justified.

66. In Suresh v. State of U.P., (2005) 6 SCC 130 the brutal murder of one of the accused's brother and his family members including minor children at night when they were fast asleep with axe and chopper by cutting their skulls and necks for a

piece of land was considered to be a grotesque and diabolical act, where any other punishment than the death penalty was unjustified.

67. In Ranjeet Singh v. State of Rajasthan, (1988) 1 SCC 633 the entire family was murdered when they were fast asleep and this Court observed as under:

> "13. With regard to the sentence of death, there cannot be two opinions. The manner in which the entire family was eliminated indicates that the offence was deliberate and diabolical. It was predetermined and cold-blooded. It was absolutely devilish and dastardly."

68. In Ramdeo Chauhan v. State of Assam, (2000) 7 SCC 455 the accused committed a preplanned, cold-blooded brutal murder of four inmates of a house including two helpless women and a child aged 2½ years during their sleep with a motive to commit theft. The accused also attacked with a spade another inmate of the house, an old woman, and a neighbour when they entered the house. The Court held that the young age (22 years) of the accused at the time of committing the crime was not a mitigating circumstance, and death penalty was a just and proper punishment.

69. In Narayan Chetanram Chaudhary v. State of Maharashtra, (2000) 8 SCC 457 there was a preplanned, calculated, cold- blooded murder of five women, including one pregnant woman and two children aged 1½ years and 2½ years, all inmates of a house, in order to wipe out all evidence of robbery and theft committed by two accused in the house at a time when male members of the house were out. It was held that the young age (20-22 years) of the accused persons cannot serve as a mitigating circumstance.

70. In Surja Ram v. State of Rajasthan, (1996) 6 SCC 271 the appellant murdered his brother, his two minor sons and an aged aunt by cutting their neck with a kassi while they were all sleeping. He also attempted to murder his brother's wife and daughter but they survived with serious injuries. The dispute between them only related to putting a barbed fence on a portion of their residential complex. The death sentence was held to be justified.

71. In Ravji v. State of Rajasthan, (1996) 2 SCC 175 the accused in a cool and calculated manner wanted to kill his wife and three minor children while they were asleep. When his mother intervened he injured her with an axe with an intention to kill her. He then silently went to the neighbour's house and attempted to kill his neighbour's wife who was also asleep. When his neighbour intervened he killed

him too and fled from the place of occurrence and tried to hide himself. The accused had a solemn duty to protect his family members and maintain them but he betrayed the trust reposed in him in a very cruel and calculated manner without any provocation whatsoever. Hence the death penalty had to be upheld.

72. In Sudam v. State of Maharashtra, (2011) 7 SCC 125 this Court held that where an accused was found guilty of committing murder of four children and a woman with whom he was living with as husband and wife, the death penalty was justified and observed:

> "22. The manner in which the crime has been committed clearly shows it to be premeditated and well planned. It seems that all the four children and the woman were brought near the pond in a planned manner, strangulated to death and the dead bodies of the children thrown in the pond to conceal the crime. He not only killed Anita but crushed her head to avoid identification. Killing four children, tying the dead bodies in bundles of two each and throwing them in the pond would not have been possible, had the appellant not meticulously planned the murders. It shows that the crime has been committed in a beastly, extremely brutal, barbaric and grotesque manner. It has resulted in intense and extreme indignation of the community and shocked the collective conscience of the society.
>
> 23. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment, in our opinion, shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant. We are of the opinion that the case in hand falls in the category of the rarest of rare cases and the trial court did not err in awarding the death sentence and the High Court confirming the same."

73. In Atbir v. Govt. (NCT of Delhi), (2010) 9 SCC 1, this Court confirmed the death sentence given to the appellant who had committed multiple murders of members of his family, who were none other than stepmother, brother and sister in order to inherit the entire property of his father. The appellant, in consultation with his mother planned to eliminate the entire family of his stepmother, and with this intention went to her house, closed the doors and mercilessly inflicted 37 knife injuries on the vital parts of the victims' bodies.

74. In Ajitsingh Harnamsingh Gujral v. State of Maharashtra, (2011) 14 SCC 401 the appellant was convicted for burning wife and three grown up children. While

awarding the sentence of death this Court considered the following circumstances which weighed in favor of the capital punishment:

> "91. In our opinion, a person like the appellant who instead of doing his duty of protecting his family kills them in such a cruel and barbaric manner cannot be reformed or rehabilitated. The balance sheet is heavily against him and accordingly we uphold the death sentence awarded to him.
>
> 92. In the present case the accused did not act on any spur of the moment provocation. It is no doubt that a quarrel occurred between him and his wife at midnight, but the fact that he had brought a large quantity of petrol to his residential apartment shows that he had pre-planned the diabolical and gruesome murder in a dastardly manner."
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> Cases where death sentence is commuted:

75. Mohd. Chaman v. State (NCT of Delhi), (2001) 2 SCC 28 was a case where the convict had raped a one-and-a-half year old child who died as a result of the unfortunate incident. This Court found that the crime committed was serious and heinous and the criminal had a dirty and perverted mind and had no control over his carnal desires. Nevertheless, this Court found it difficult to hold that the criminal was such a dangerous person that to spare his life would endanger the community. This Court reduced the sentence to imprisonment for life since the case was one in which a "humanist approach" should be taken in the matter of awarding punishment.

76. Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775 was a case in which three convicts had killed two persons and grievously injured two others, leaving them for dead. A third victim later succumbed to his injuries. While noticing that the crime was in the nature of, what is nowadays referred to as "honour killing", this Court reduced the death sentence awarded to two of the criminals to imprisonment for life with a direction that they should not be released until they complete 25 years of actual imprisonment. The third criminal was sentenced to undergo 20 years of actual imprisonment. That these criminals were young persons who did not have criminal antecedents weighed in reducing their death sentence.

77. Sebastian v. State of Kerala, (2010) 1 SCC 58 was a case in which the criminal had raped and murdered a two-year-old child. He was found to be a paedophile with "extremely violent propensities". Earlier, in 1998, he was convicted of an

offence under Section 354 IPC, that is, assault or use of criminal force on a woman with intent to outrage her modesty, an offence carrying a maximum sentence of two years' imprisonment with fine. Subsequently, he was convicted for a more serious offence under Sections 302, 363 and 376 IPC but an appeal was pending against his conviction. The convict also appears to have been tried for the murder of several other children but was acquitted in 2005 with the benefit of doubt, the last event having taken place three days after he had committed the rape and murder of the two-year-old child. Notwithstanding the nature of the offence as well as his "extremely violent propensities", the sentence of death awarded to him was reduced to imprisonment for the rest of his life.

78. In Rajesh Kumar case (supra) the appellant had murdered two children. One of them was four-and-a-half year old and the criminal had slit his throat with a piece of glass which he obtained from breaking the dressing table. The other child was an infant of eight months who was killed by holding his legs and hitting him on the floor. Despite the brutality of the crime, the death sentence awarded to this convict was reduced to that of life imprisonment. It was held that he was not a continuing threat to the society and that the State had not produced any evidence to show that he was incapable of reform and rehabilitation.

79. Amit v. State of U.P., (2012) 4 SCC 107 was a case in which a three-year-old child was subjected to rape, an unnatural offence and murder. The convict was also found guilty of causing the disappearance of evidence. The sentence of death awarded to him was reduced to imprisonment for life subject to remissions. It was held that there was nothing to suggest that he would repeat the offence and that the possibilities of his reform over a period of years could not be ruled out since there was no evidence of any earlier offence committed by him.

80. In the present circumstances, we would place reliance upon the observations of this Court inState of U.P. v. Dharmendra Singh, (1999) 8 SCC 325. In this case, 6 accused persons were charged with offence under Section 302 read with 149 of the IPC for murdering 5 persons: an old man of 75 years, a woman aged 32 years, two boys aged 12 years and a girl aged 15 years, at night when they were asleep by inflicting multiple injuries to wreak vengeance. The Trial Court while convicting them had awarded life sentence in regard to 4 accused persons and after assigning reasons awarded death sentence to the 2 others. In appeal the High Court upheld the conviction of all accused persons and while confirming life sentence on the 4 accused persons came to the conclusion that the sentence of death was not called for in respect to 2 accused persons who were languishing in the death cell for 3 years and consequently reduced the sentence to that of imprisonment of life. In

appeal, this Court in context of the argument that since individual overt acts that have not been established, even if the conviction is to be upheld, capital punishment should not be granted, has observed as follows:

> "15. We have carefully perused the evidence adduced in this case, to the limited extent of examining whether the case in hand is a case which could be termed as rarest of the rare cases so as to invoke the extreme penalty of death. The learned Sessions Judge while assigning special reasons for awarding the capital punishment came to the conclusion that the crime in question was a dastardly crime involving the death of 5 innocent human beings for the purpose of achieving the sadistic goals of Dharmendra and Narendra, the respondents herein, to avenge their respective grouse against the complainant and his niece Reeta by eliminating 5 members of the family. Learned Sessions Judge distinguished the case of the 4 other accused with that of these respondents based on the motive and on the ground that these respondents were the principal perpetrators of the crime. It is seen that the High Court has concurred with this reasoning of the Sessions Judge. However, the High Court on the ground that the accused have languished in the death cell for 3 years, altered the sentence to life imprisonment.
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> 23. It is possible in a given set of facts that the court might think even in a case where death sentence can be awarded, the same need not be awarded because of the peculiar facts of that case like the possibility of one or more of the accused being responsible for offences less culpable than the other accused. In such circumstances, in the absence of their being no material available, to bifurcate the case of each accused person, the court might think it prudent not to award the extreme penalty of death. But then such a decision would rest on the availability of evidence in a particular case. We do not think that a straitjacket formula for awarding death sentence can be evolved which is applicable to all cases. The facts of each case will have their own implication on the question of awarding sentence. In Ronny case (1998) 3 SCC 625, this Court on facts found extenuating factors to curb the sentence which is clear from the following extract from the said judgment: (SCC p. 654, para 47) "From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls

within the 'rarest of the rare' cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment."

81. Further in Dharmendra Singh case (supra) this Court while rejecting the mitigating circumstance of expectation of survival due to reversal of sentence by the High Court, observed:

"25…In a judicial system like ours where there is a hierarchy of courts, the possibility of reversal of judgments is inevitable, therefore, expectations of an accused cannot be a mitigating factor to interfere in an appeal for enhancement of sentence if the same is otherwise called for in law.

26. Taking into consideration the brutality of the attack, the number of persons murdered, the age and infirmity of the victims, their vulnerability and the diabolic motive, acts of perversion on the person of Reeta, cumulatively we find the sentence awarded by the trial court was just and proper. "

Mitigating and Aggravating Circumstances in the present case:

82. Having noticed the decisions of this Court on the said aspect, we would revert to the factual position in this case. Herein, the time, place, manner of and the motive behind commission of the crime speak volumes of the pre- mediated and callous nature of the offence. The ruthlessness of the appellants is reflected through brutal murders of the young, innocent children and wife of the informant by burning them alive to avenge their cause in the dark of the night; the cause being non-withdrawal of an FIR filed by the informant for theft of his buffalo against the appellant-A1. Further, from the record we gather that only family members of the informant have come forward to depose as the entire village must have been shocked with the ghastly murders of the deceased persons and in such circumstances would not have come forward to testify against the appellants who already had translated the threats given to the informant in village panchayat into a shocking reality. While our experience reminds us that civilized people generally unsuccinctly when the crime is committed infact in their presence, withdraw themselves both from the victim and the vigilante unless inevitable and consider that crime like civil disputes must restrict itself to the two parties, it also evidences for the threat the incident had instilled amongst the villagers that none in such close knit unit besides the sanguine relatives had come forth to testify against the accused.

83. The mitigating circumstances elaborated upon by Shri Mishra in respect of comparatively young age of the appellants holds no ground, their army background and their custodial behavior fail to outweigh the aggravating factors in the present case. The argument that the appellants are not "antisocial elements" fails into inception in the light of the effect of the occurrence reflected through the abstinence of the villagers from deposing against them at the trial.

84. However, in the present case, while taking an overall view, no overt act in the commission of crime could be attributed to A3. The role played by A3 during commission of the crime as established was to hold the barrels of kerosene along with one other. While determining the gravity of the offence committed by the appellants it must be noticed that it is only A1 who had threatened the informant of burning his house in case the FIR against his family and him were not withdrawn. Further, A1 during the occurrence not only scripted and instructed the rest of the unlawful assembly but also lighted the matchstick to burn the house as well informant's body. A2, pushed the informant to the ground and later fired at him.

85. Further, in respect of the mitigating factors of lack of criminal antecedents or probabilities of the appellants to be menace to the society, we would re-iterate the observations of this Court inGurdev Singh v. State of Punjab, (2003) 7 SCC 258 that it is indeed true that the underlying principle of our sentencing jurisprudence is reformation and there is nothing in evidence to show that the appellants have been a threat or menace to the society at large besides the FIR regarding the theft of buffalo. It is also true that we cannot say that they would be a further menace to the society or not as we live as creatures saddled with an imperfect ability to predict the future. Nevertheless, the law prescribes for future, based upon its knowledge of the past and is being forced to deal with tomorrow's problems with yesterday's tools.

86. However, in the peculiar facts of this case, the possibility of A3 being less culpable than the other accused cannot be answered in affirmative. Therefore, in our considered view, we do not deem it proper to sentence A3 to death in light of there being no overt act attributable to him and sentence to imprisonment till the end of his life would appropriately serve as punishment proportional to the degree of offence committed by him.

87. In respect of A1 and A2, we are of the considered view that the instant case falls into such category of rarest of the rare cases where culpability has assumed the proportion of extreme depravity and the appellant-accused are perfect example of a blood thirsty, scheming and hardened criminals who slayed seven innocent

lives to quench their thirst for revenge and such revenge evolving out of a fellow citizens refusal to abstain from resorting to machinery of law to protect his rights. The entire incident is extremely revolting and shocks the collective conscience of the community. The acts of murder committed by the appellants are so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances.

88. We now proceed to examine such special reasons which negate the possibility of any sentence but for death penalty. Herein, A1 and A2 have committed a cold blooded murder in a pre-ordained fashion without any provocation whatsoever. The motive behind the gruesome act was to avenge the act of informant in approaching the machinery of law enforcement inspite of threats by the appellants. The victims were five innocent children and wife of the informant who were sleeping unalarmed when the appellants came and locked them inside their house while it was set ablaze. Further, wrath of A1 and A2 is reflected in their act of first gagging the informant, thereafter attempting to burn him alive and later, when he tried to escape, firing at him thereby leaving no stone unturned in translating their threats into reality. As a result of the aforesaid incident, having witnessed the threats of burning given by the A1 to the informant tuned into reality, none but the family of the deceased-informant came forth to depose against the appellant-accused persons during the trial. The crime, enormous in proportion having wiped off the whole family, is committed so brutally that it pricks and shocks not only the judicial conscience but even the collective conscience of the society. It demands just punishment from the Court and the Court is bound to respond within legal parameters. The demand for justice and the award of punishment have to be in consonance with the legislative command and the discretion vested in the Courts.

89. On the question of striking a delicate balance between the proportionality of crime to the sentencing policy, Lord Denning has observed as follows on the very purpose of imposition of a punishment:

> "…the punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformative or preventive and nothing else... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not."

90. In light of the aforesaid, having regard to the gravity of the offence committed, we are of the considered opinion that with regard to A1 and A2 this case falls into the category of rarest of the rare cases and is not a case where imprisonment for life is an adequate sentence and thus, constrained to reach the inescapable conclusion that death sentence imposed on A1 and A2 be confirmed.

91. Therefore, the sentence of death imposed on A1 and A2 is confirmed and the sentence awarded to A3 is commuted to life imprisonment till the rest of his life.

92. The order of stay on the execution of the capital punishment of A1 and A2 is vacated.

93. The appeals are disposed of in the aforesaid terms.