A.F.R. Judgment reserved on : 26.10.2018 Judgment delivered on : 09.01.2019

Reference No. 07 of 2017

In

Case :- CAPITAL CASE No. - 1900 of 2017

Appellant :- Gambhir Singh **Respondent :-** State Of U.P. **Counsel for Appellant :-** From Jail,Dharmendra Singh (AC), Brijesh Sahai **Counsel for Respondent :-** G.A.

Connected
With

Case :- GOVERNMENT APPEAL No. - 3574 of 2017

Appellant :- State Of U.P. **Respondent :-** Smt. Gayatri **Counsel for Appellant :-** G.A. **Counsel for Respondent :-** Hitesh Pachori,Hitesh Pachuri

Hon'ble Sudhir Agarwal,J. Hon'ble Om Prakash-VII,J.

(Delivered by Om Prakash-VII, J.) 1. Present reference under Section 366 Cr.P.C. and Capital Case under

Section 374(2) Cr.P.C. have arisen assailing judgment and order dated

20.03.2017 passed by Additional Sessions Judge, Court No. 10, Agra in

Session Trial No. 502 of 2012, whereby accused-appellant Gambhir Singh

has been convicted under Sections 302 read with 34 IPC and 404 IPC.

Considering the case to be rarest of rare, accused-appellant was awarded

death sentence under Section 302 read with 34 IPC with a fine of Rs.

50,000/- and in default of payment of fine, he has to undergo one year

additional imprisonment. Further under Section 404 IPC, he was

sentenced to undergo three years imprisonment with a fine of Rs. 10,000/-

and in case of default in payment of fine, he has to further undergo three

months additional imprisonment. It was further directed that all sentences

shall run
concurrently.

2. Vide impugned judgment and order dated 20.03.2017 passed by

Trial Court in Sessions Trial No.502 of 2012, accused Smt. Gayatri was

acquitted of charge under Sections 302 read with 34 IPC and 404 IPC.

Against her acquittal, an Appeal on behalf of the State, being Government

Appeal No.3574 of 2017, has been preferred, which is connected with this

Capital (Criminal)
Appeal.

3. Since both the connected cases arise out of same judgment and

order, it were heard together and are being disposed of by this common

judgment and
order.

4. Prosecution story, in brief, as unfolded in written report (Ex.Ka.1) is as follows :

Informant (P.W.1) Mahaveer son of Balveer Singh resident of Village Ardaya, Police Station Achhnera, District Agra moved written report (Ex.Ka.-1) dated 09.05.2012 at Police Station Achhnera mentioning therein that marriage of informant's sister Pushpa was solemnized 12 years back with Satyabhan son of Shiv Singh resident of Turkiya. Out of wedlock, three daughters namely, Aarti, Mahla and Gudia and one son Kanhaiya were born. Gambhir, younger brother of informant's brother-in-law, bore enmity with them due to partition of land. On 08.05.2012, Gambhir Singh was staying along with his friend Abhishek at the house of informant's sister. On 09.05.2012 at 6:30 in the morning, informant received information that his sister, brother-in-law, nephew and nieces i.e. whole family have been done to death. On information, informant and his family along with villagers reached village Turkiya and saw all dead

bodies lying there. On inquiry being made, it is revealed that yesterday

evening, Gambhir along with his friend Abhishek and sister Gayatri was

seen going from village Turkiya in bewildered condition. Informant

believed that Gambhir and his friend have murdered his sister Pushpa,

brother-in-law Satyabhan and their four children with some sharp edged

weapo
n.

5. On the basis of written report Ex.Ka.-1, chik first information report

(*hereinafter referred to as "F.I.R."*) No. 105 of 2012 (Case Crime No.329

of 2012) Ex.Ka.-18, was registered against accused Gambhir, Abhishek

and Smt. Gayatri under Section 302 IPC at Police Station Achhnera,

District Agra by P.W.11 Constable Sunil Kumar. He also made

entry in

General Diary, certified copy whereof is Ex.Ka.-19 on record.

6. Investigation of the case commenced. During investigation,

Investigating Officer copied the chik and G.D. in case diary and recorded

the statement of informant and also proceeded to the place of occurrence

along with police personnel. He also deputed two Sub Inspectors to

prepare the inquest report. Inquest report of the dead body of Gudia as

Ex.Ka.-10, Satyabhan as Ex.Ka.-7, Kanhaiya as Ex.Ka.-6, Priyanka as

Ex.Ka.-8, Pushpa as Ex.Ka.-11 and Arti as Ex.Ka.-9 were prepared along

with relevant documents i.e. letter to C.M.O., letter to R.I., letter to

C.M.S., photo nash, form 13 etc.

7. Dead bodies were kept in sealed cloths preparing sample seals and

were dispatched through Constables for *postmortem*.

8. P.W. 8 Dr. Vinod Kumar conducted *post-mortem* on dead body of

Satyabhan on 09.05.2012 at 5:00 PM. On external examination,

Doctor

found him of average built body. *Rigor mortis* was passed of. Eyes and

mouth were half opened. P.W. 8 found following *ante mortem* injuries on

his
person:

> *"(i) Incised wound 17 x 2 cm. on the head and forehead in semi*
>
> *lunar shaped. Frontal bone*
> *cut.*
>
> *(ii) Incised wound 10 x 1 cm. on the upper part of front of neck.*
>
> *(iii) Oesophagus and trachea cut. Major veins cut and muscles*
>
> *also*
> *cut.*
>
> *(iv) Stab wound 2.5 x 1 cm. on the right side of lower part of*
>
> *chest.*
> "

9. On internal examination, membranes were found cut; trachea was

also found cut; both lungs were congested; both chambers of heart were

empty; stomach contained pasty food and mucus membrane was

congested; small intestine containing semi digested food particles was

congested and large intestine containing faecal matter was congested;

liver was congested and gall bladder was punctured; spleen and both

kidneys were congested; urinary bladder was empty. In the opinion of

Doctor about 3/4 day had passed since the death. Cause of death was due

to coma, shock and haemorrhage as a result of ante mortem injuries.

Postmortem report prepared by P.W.8 is
Ex.Ka.12.

10. At the time of *postmortem*, viscera of deceased Satyabhan was

preserved which is as
follows:

Jar A – Stomach and its
content.

Jar B – (i) Piece of liver and gall

bladder

(ii) One kidney

(iii) Whole spleen

(iv) Piece of small intestine

Jar C – Saturated Saline and preservative

11. P.W. 8 Dr. Vinod Kumar examined dead body of deceased

Kanhaiya on same day i.e. 09.05.2012 at 4:50 PM. According to him,

deceased was aged about 5 years. On external examination, Doctor found

him of average built body. Eyes and mouth were half opened. Following

ante mortem injuries were found on the body of deceased Kanhaiya by

P.W.8 : *(i) Incised wound 5 x 3 cm. x muscular deep, neck*

muscles and

trachea cut.

(ii) Abrasion 3 x 1 cm. left side of front of left shoulder.

(iii) Stab wound 2.5 x 1.5 cm. on the right side of upper part

of

abdome
n.

(iv) Stab wound 2.5 x 1 cm. in mid line of upper part of abdomen 7

cm. above the
umbilical.

(v) Contusion Traumatic swelling 5 x 4 cm. on the inner side of

right
knee.

12. On internal examination, deep cut was present in trachea; both

chambers of heart were empty; two stab wounds were found present in

abdomen; peritoneum cut at places; stomach was empty and paled; small

intestine contained semi digested food and was pale and large intestine

contained faecal matter and was pale; liver was pale and gall bladder was

full; spleen and both kidneys were congested; urinary bladder was empty.

In the opinion of Doctor about 3/4 day had passed since the death. Cause

of death was due to shock and haemorrhage as a result of ante mortem

injuries. Postmortem report prepared by Doctor is
Ex.Ka.13.

13. At the time of *postmortem*, viscera of deceased Kanhaiya was also

preserved which is as
follows:

Jar A – Stomach and its
content.

Jar B – (i) Piece of liver and gall
bladder

(ii) Whole
spleen

(iii) One
kidney

(iv) Piece of small
intestine

Jar C – Saturated solution of common salt used as preservative.

14. Dr. Vinod Kumar (P.W.8) conducted autopsy on body of deceased

Priya on 09.05.2012 at 5:20 PM. According to him, deceased was aged

about 5 years. On external examination, Doctor found her of average built

body. Rigor mortis was passed of. Eyes and mouth were closed.

Following *ante mortem* injury was found on the body of deceased :

> *(i) Incised wound 14 x 4 cm. on the front of neck. Muscles of neck,*
>
> *trachea, veins and oesophagus*
> *cut.*

15. On internal examination, cut was present in trachea; both chambers

of heart were empty; stomach contained pasty food and mucus membrane

was congested; semi-digested food was present in small intestine and

mucus membrane was pale; faecal matter was present in large intestine

and mucus membrane was pale; liver was pale and gall bladder was half

full; spleen was congested; urinary bladder was empty. In the opinion of

Doctor, about 3/4 day had passed since the death. Cause of death was due

to shock and haemorrhage as a result of ante mortem injuries. Postmortem

report prepared by Doctor is
Ex.Ka.14.

16. At the time of postmortem, viscera of deceased Priya was preserved

which is as
follows:

Jar A – Stomach and its
content.

Jar B – (i) Piece of liver and gall
bladder

(ii) One
kidney

(iii) Whole
spleen

(iv) Piece of small
intestine

Jar C – Saturated saline as
preservative.

17. On the very same day i.e. 09.05.2012 at 6:00 PM, *postmortem*

on

the body of deceased Pushpa was conducted by P.W.8 Dr. Vinod Kumar.

According to him, deceased was aged about 30 years. On external

examination, Doctor found her of average built body. Rigor mortis was

passed of. Eyes and mouth were closed. Cut was present in anus and there

was white discharge in vagina. Following *ante mortem* injuries were

found on the person of deceased
Pushpa :

(i) Incised wound 12 x 5 cm. on the front of neck. Muscles of neck,

veins, trachea and oesophagus
cut.

(ii) Incised wound 3 x 1 cm. on the right side of upper part of

abdome
n.

(iii) Incised wound 3 x 1.5 cm. on the left side of upper part of

abdome
n.

(iv) Incised wound 3.5 x 1 cm. on the left side of lower part of

ches

t.

(v) Incised wound 3 x 1 cm. on the front aspect of right index finger.

(vi) Incised wound 1.5 x 1 cm. on the front aspect of right middle

finger
.

(vii) Incised wound 3.5 x 2 cm. on the
anus.

18. On internal examination, cut was present in trachea; both chambers

of heart were empty; cut was present in peritoneum; stomach was empty

and congested and cut was present; semi-digested food was present in

small intestine and it was pale; faecal matter was present in large intestine

and cut was present; there was cut in liver and gall bladder was half full;

both kidneys and spleen were congested; urinary bladder was empty;

uterus was enlarged and fetus of 1.5 cm. x 1.5 cm. size was found present.

According to Doctor about 3/4 day had passed since the death. Cause of

death was due to shock and haemorrhage as a result of ante mortem

injuries. *Postmortem* report prepared by Doctor is Ex.Ka.15.

19. At the time of *postmortem*, viscera of deceased Pushpa was

preserved which is as follows:

Jar A – Stomach and its content.

Jar B – (i) Piece of liver and gall bladder

(ii) Whole spleen

(iii) Whole kidney

(iv) Piece of small intestine

Jar C – Saturated saline as preservative.

20. After taking vaginal swab, same was sent to Forensic Science

Laboratory (*hereinafter referred to as "F.S.L."*) for chemical and

spermatozoa
examination.

21. On 09.05.2012 at 5:30 PM, *postmortem* on the body of deceased

Arti was also conducted. According to Doctor, deceased was aged about 5

years. On external examination, Doctor found her of average built body.

Rigor mortis was passed of. Eyes and mouth were half opened. Cut of 2.5

cm. was present on anus. Following *ante mortem* injuries were found on

the person of deceased
Arti :

(i) Incised wound 17 x 3 cm. on the front of neck. Muscles of neck,

veins, trachea and oesophagus
cut.

(ii) Incised wound 5 x 3 cm. on the front of left
shoulder.

(iii) Stab wound 3 x 2 cm. x cavity deep on the upper part of

abdomen. Omentum coming out of the
wound.

(iv) Blood in vagina present. Vaginal swab taken and slide

prepare
d.

(v) Incised wound 2.5 x 1 cm. on the anus. Anal swab taken and

slide
prepared.

22. On internal examination, cut was present in trachea; both chambers

of heart were empty; cut was present in peritoneum; blood was present in

cavity; stomach contained pasty food and mucus membrane was

congested; semi-digested food was present in small intestine and it was

pale; faecal matter was present in large intestine containing paleness; liver

was contested and gall bladder was half full; spleen was congested and

urinary bladder was empty. According to Doctor about 3/4 day had passed

since the death. Cause of death was due to shock and haemorrhage as a

result of ante mortem injuries. Postmortem report prepared by P.W.8 is

Ex.Ka.1
6.

23. At the time of *postmortem*, viscera of deceased Arti was also

preserved which is as
follows:

Jar A – Stomach and its
content.

Jar B – (i) Piece of liver and gall
bladder

(ii) One
spleen

(iii) One
kidney

(iv) Piece of small
intestine

Jar C – Saturated saline as
preservative.

24. Dr. Vinod Kumar (P.W.8) also conducted autopsy on body of

deceased Gudia on 09.05.2012 at 5:40 PM. According to him, deceased

was aged about 3 years. On external examination, Doctor found her of

average built body. *Rigor mortis* was passed of. Eyes and mouth

were

closed. Cut was present on anus and bleeding present in vagina.

Following *ante mortem* injuries were found on the body of deceased :

(i) Incised wound 6 x 2 cm. on the upper part of neck. Muscles of

neck, veins and trachea
cut.

(ii) Stab wound 3 x 2 cm. on the upper part of abdomen.

(iii) Bleeding from vagina present. Vaginal swab taken and slide

preserve
d.

(iv) Incised wound 1.5 x 1 cm. on the anus.

25. On internal examination, cut was present in trachea; both chambers

of heart were empty; cut was present in membranes and in peritoneum;

stomach was empty and mucus membrane was congested; semi-digested

food was present in small intestine and it was pale; faecal matter was

present in large intestine containing paleness; gall bladder was half full;

spleen was congested and urinary bladder was empty. According to

Doctor about 3/4 day had passed since the death. Cause of death was due

to shock and haemorrhage as a result of *ante mortem* injuries. *Postmortem*

report prepared by P.W.8 is
Ex.Ka.17.

26. At the time of *postmortem*, viscera of deceased Gudia was

preserved which is as
follows:

Jar A – Stomach and its
content.

Jar B – (i) Piece of liver and gall
bladder

(ii) Whole
spleen

(iii) One
kidney

(iv) A piece of small intestine

Jar C – Saturated saline as preservative.

27. After taking vaginal swab, same was sent to F.S.L. for chemical and

spermatozoa examination.

28. During *postmortem* on all dead bodies, videography was also done.

Preserved viscera and video cassettes were also handed over to concerned

police officials.

29. P.W.12 Inspector Tasleem Ahmad, the Investigating Officer, on

information regarding presence of accused-persons, proceeded to Eidgah

Railway Station and arrested the accused-appellant Gambhir, co-accused

Abhishek (trial separated) and Smt. Gayatri (acquitted). Investigating

Officer also recovered pair of *kundal* - golden colour, two *bichhua* - white

colour, one metallic ring - white colour and two *ghungaroo* - white colour

from the possession of accused-appellant. It is also the case of prosecution

that one passbook of State Bank of India of deceased Satyabhan

numbered as 30722071514 and its cheque book having leaflets from serial

no.541296 to 7385 were said to be recovered from possession of co-

accused Smt. Gayatri. Identity card of deceased Satyabhan and Pushpa

and also Rs.200/- were recovered from possession of co-accused Smt.

Gayatri

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30. Since clothes and shoes worn by accused-appellant Gambhir and

co-accused Abhishek were blood stained, same were also taken into

custody by the police and keeping them in sealed cloths and also

preparing sample seal relevant details were mentioned in

Ex.Ka.-22, the

recovery memo mentioned
above.

31. It appears that on disclosure statement of accused, they were taken

to the place of occurrence. Weapons *kulhari* and *katari* said to have been

used in commission of crime were also recovered on pointing out of

accused-appellant Gambhir Singh (*kulhari*) and co-accused Abhishek

(*katari*) in presence of witnesses from the house of deceased persons in a

room where chaff was kept. Both weapons were found blood stained and

were taken into custody and keeping them in sealed cloths and preparing

sample seal, recovery memo Ex.Ka.-2 was prepared. Investigating Officer

has also taken blood stained and simple soil from the place of occurrence

and keeping it in sealed boxes and preparing sample seal, recovery memo

Ex.Ka.-3 was prepared. Similarly, one videocon TV was also taken into

possession and keeping the same in sealed cloth and also fulfilling

formalities, recovery memo Ex.Ka.-4 was prepared. Investigating Officer

has also taken in possession bread, pulse, three glasses and one steel bowl

and keeping it in sealed cloth and also preparing sample seal, recovery

memo Ex.Ka.-5 was
prepared.

32. It further appears that during investigation, slides prepared after

postmortem as well as articles and weapons recovered from the place of

occurrence including blood stained soil and clothes were sent by the

Investigating Officer for chemical examination to F.S.L. Viscera

preserved at the time of postmortem of dead bodies were also sent for

chemical
examination.

33. Record reveals that in slides of swab, no spermatozoa were found.

Poison was also not found in any of the viscera sent for chemical

examination. Blood was found on clothes and shoes taken from the body

of accused-persons, as is clear from Ex.Ka.-20. Blood was also found on

weapon *kulhari* and *katari*. Ex.Ka.-25 shows that on the weapon *kulhari*,

human blood was found on chemical examination, but the blood found on

katari could not be analyzed, as blood was disintegrated. Blood stains

were also found over the earth picked up from the place of occurrence,

which was also human blood. Ex.Ka.-24 is related to chemical

examination report of articles sent by the Investigating Officer taken

during investigation from the place of occurrence.

34. Investigating Officer, after fulfilling entire formalities and

completing the investigation, submitted charge-sheet against accused

Gambhir, Abhishek and Smt. Gayatri (Ex.Ka.-23).

35. Cognizance was taken by Magistrate concerned. Case, being

exclusively triable by the Sessions Court, was committed to the

Court of

Session
s.

36. Accused appeared. Prosecution opened its case describing all

evidence collected during investigation and proposed to be adduced

during trial. Trial Court also heard accused side and framed charge for

offence under Sections 302/34 and 404 IPC mentioning all details on

30.07.2013. Charges were read over to accused to which they denied and

pleading not guilty claimed their trial. It also appears that during trial, on

23.11.2016, missing details in the charge have also been added modifying

the charge already
framed.

37. It is also evident that an application was moved on behalf of

accused Abhishek for declaring him juvenile, on which Sessions Court

directed the Juvenile Justice Board to enquire his case. On 18.04.2013,

accused Abhishek was declared juvenile in conflict with law. On

10.07.2014, his case was sent to Juvenile Court and thus only against

accused Gambhir Singh and Smt. Gayatri Singh trial continued.

38. In order to prove its case, prosecution has examined 13 witnesses in

total. Out of them, P.W.1 Mahaveer is the informant, who reached on spot

in the morning after receiving information, P.W.2 Bahadur Singh and

P.W.3 Shiv Ram Singh, have also reached on spot from their village to the

place of occurrence in the morning of incident. They are witnesses of

circumstances and recovery. P.W.3 Shiv Ram Singh, P.W.4 Mahtab Singh

and P.W.5 Raju have also reached at the place of occurrence after

receiving information in their village and they are witnesses of inquest

proceedings. P.W.6 Dashrath and P.W.7 Kedar Singh are

witnesses of

circumstances. P.W.8 Dr. Vinod Kumar has conducted postmortem on

dead bodies of deceased persons along with the Panel of Doctors. P.W.9

S.I. Raj Bahadur and P.W.10 S.I. Sitaram Saroj have prepared inquest

reports and other relevant documents. P.W.11 Constable Sunil Kumar is

the chik writer, who has also prepared the G.D. P.W.12 Inspector Tasleem

Ahmad is the first Investigating Officer who is also witness of recovery of

weapons, clothes, ornaments etc. He has also prepared other relevant

documents as well as site plan and also recorded the statement of

witnesses. P.W.13 Inspector Rajeev Yadav is the second Investigating

Officer who has submitted charge-sheet after fulfilling entire formalities.

39. In documentary evidence, prosecution has proved Ex.Ka.-1 written

report, Ex.Ka.-2, 3, 4 & 5 recovery memos, Ex.Ka.-6 to 11 inquest

reports, Ex.Ka.-12 to 17 postmortem reports and papers relating to inquest

reports as Ex.Ka.-12Ka/1 to Ex.Ka.-17/7, Ex.Ka.-18 chik F.I.R., Ex.Ka.-

19 copy of G.D. Entry, Ex.Ka.-20 & 21 site plan, Ex.Ka.-22 recovery

memo, Ex.Ka.-23 charge-sheet and material exhibits 1 to 10.

40. On closure of prosecution evidence, statement of accused-appellant

Gambhir Singh as well as statement of co-accused Smt. Gayatri were

recorded under Section 313 Cr.P.C. in which accused-appellant has denied

the facts mentioned in written report and has stated that P.W.1 and P.W.2

have made false statement. Attention of accused was also drawn by Trial

Court towards the question put under Section 313 Cr.P.C. regarding the

statement of prosecution witnesses and exhibits proved by those witnesses

and then accused-appellant has specifically stated that witnesses have

made false statement. Nothing was stated by him regarding inquest

reports and other police papers. Trial Court has also drawn attention of

accused-appellant towards statements of P.W.5, P.W.6 and P.W.7, on

which he stated that these witnesses have also made false statement.

Nothing was stated by him in regard to postmortem conducted by P.W.8

on dead body of deceased persons. He also stated that P.W.9, P.W.10 and

P.W.11 have also made false statements and have wrongly proved the

police papers. When attention of accused was drawn by the Trial Court

towards statement of P.W.11, accused specifically stated that P.W.11 has

wrongly registered the chik F.I.R. Ignorance was shown regarding the

statement of P.W.12 Inspector Tasleem Ahmad, the Investigating Officer,

who prepared site plan and made recovery of weapons on pointing out of

accused as well as recovery of clothes of accused. He also specifically

stated that charge-sheet was submitted on the basis of false facts. In his

additional statement recorded on 01.03.2017, chemical examination

reports submitted by F.S.L. as Ex.Ka.-24, 25, 26, 27 and 28 were said to

be false, but he denied to adduce any evidence in his defence. Similar is

the statement of co-accused Smt. Gayatri
(acquitted).

41. Trial Court after hearing parties and appreciating the evidence was

of the view that prosecution was able to bring home the guilt of accused-

appellant for offence under Sections 302/34, 404 IPC beyond reasonable

doubt and convicted him for the aforesaid offence. Finding the present

case in the category of “rarest of rare” cases, Trial Court has also imposed

death penalty for offence under Section 302 IPC to accused-appellant

Gambhir Singh. Hence, present reference was submitted by the Trial

Court and Appeal has been preferred by accused-appellant. It is also

evident that the Trial Court vide impugned judgment and order itself has

acquitted Smt. Gayatri from all charges, therefore, Government Appeal

has been filed by
State.

42. We have heard Sri Brijesh Sahai, Advocate (amicus curiae) for

appellant assisted by Sri Dharmendra Singh, Advocate (amicus curiae)

and Sri Bhavya Sahai, Advocate and Sri Syed Ali Murtaza, learned AGA

for State in Capital Case No. 1900 of 2017 (Reference No. 07 of 2017) as

well as Sri Syed Ali Murtaza, learned A.G.A. and Sri Hitesh Pachori,

Advocate in connected Government Appeal No.3574 of 2017.

43. Learned Amicus Curiae appearing for appellant assailed the

judgment and contended that prosecution was not able to prove its case

beyond reasonable doubt. It is purely a case of circumstantial evidence.

None of witnesses examined in the matter had seen accused-persons at

any point of time at the place of occurrence or along with deceased. F.I.R.

lodged in this case was not in existence at the time mentioned therein. It is

an ante-timed document. At this stage, learned Amicus Curiae referred to

chik F.I.R. as well as statements of P.W.1 and P.W.11 and argued that it

appears improbable and unbelievable that within 30 minutes informant

reached at police station concerned after preparing written report. Thus, it

was argued that F.I.R. was lodged in the matter with an afterthought in

consultation with the police. He also referred to statement of P.W.2 and

specifically emphasized that police had already reached the place of

occurrence before reaching of witnesses. This fact also supports the

contention raised on behalf of appellant on point of F.I.R. It was further

argued that mandatory provisions provided under Section 313 Cr.P.C.

have not been followed. All incriminating materials relied upon by the

Trial Court in impugned judgment and order have not been put before

accused-appellant in detail as required under law. Thus, prejudice has

been caused to accused-appellant in defending his case. At this stage,

learned Amicus Curiae also referred to statement of accused-persons

recorded under Section 313 Cr.P.C. It was next argued that there is

contradiction in the statement of prosecution witnesses on point of arrest

of accused, taking of clothes worn by accused and also recovery of

weapons. Next submission is that it appears improbable and unbelievable

that incident took place in the night and accused-persons wearing blood

stained clothes were present on next day at 1:00 P.M. at Railway Station.

Referring to this fact, it is urged that arrest of accused-persons from the

place shown in prosecution evidence is doubtful. Recovery of clothes

from body of accused is also doubtful particularly keeping in view the

statement of P.W.2. It was next contended that motive is not established in

this case. It is further argued that there is chance of false implication of

accused-appellant. Prosecution did not disclose name of villagers, who

had seen accused-persons in the house of deceased persons in the night of

incident. Chain of circumstantial evidence is not so linked with each other

to form a complete chain and on that basis presumption against accused-

appellant cannot be drawn. Findings of the Trial Court are perverse and

illegal. Medical evidence is also against oral version. Time of death of

deceased differs with oral version. To substantiate this argument, at this

stage, learned Amicus Curiae referred to the statement of P.W.8 Dr. Vinod

Kumar. Blood found on weapon *kulhari* was not matched with the blood

group of deceased, therefore, recovery cannot be used against accused-

appellant. Next contention was that accused were implicated in this case

on the basis of suspicion only. Prosecution witnesses examined in the

matter are closely related to deceased and they are not reliable witnesses.

Since they were procured by the police during investigation, therefore,

discrepancies in prosecution evidence have occurred on material points.

P.W.6 and P.W.7 both are unreliable witnesses. It is further argued that

since arrest of Smt. Gayatri was found doubtful, hence entire prosecution

case against appellant also collapsed. Thus referring to entire evidence it

was urged that findings of the Trial Court in the impugned judgment and

order are based on conjecture and surmises against appellant, which need

interference by this Court. In support of his contention, reliance was also

placed by learned Amicus Curiae on following case laws :

(i) Badam Singh v. State of M.P., (2003) 12 SCC 792.

(ii) State of Orissa v. Babaji Charan Mohanty & Another, (2003) 10

SCC 57.

(iii) Bhimapa Chandappa Hosamani & Others v. State of Karnataka,

(2006) 11 SCC 323.

(iv) Dhan Raj alias Dhand v. State of Haryana, (2014) 6 SCC 745.

(v) Sahadevan & Another v. State of Tamil Nadu, (2012) 6 SCC 403.

(vi) State of Rajasthan v. Talevar & Another, (2011) 11 SCC 666.

(vii) Anter Singh v. State of Rajasthan, (2004) 10 SCC 657.

(viii) Brajendra Singh v. State of Madhya Pradesh, (2012) 4 SCC 289.

44. On other hand, learned A.G.A. argued that prosecution was able to

prove its case beyond reasonable doubt. P.W.1 to P.W.5 had reached at the

place of occurrence in the morning after receiving information. Distance

between the place of occurrence and village of these witnesses is only 6 -

7 Kms. Therefore, existence of F.I.R. on the date and time mentioned

therein is possible one. F.I.R. is not an ante-timed document nor it is

based on due consultation or an afterthought. What information was

received by P.W.1 from the villagers, he mentioned the same in written

report (Ex.Ka.-1). Motive attributed to accused-appellant has been proved

beyond reasonable doubt. Deceased Satyabhan and accused-appellant

Gambhir Singh both were real brothers and also involved in committing

murder of their mother. Immovable property owned by accused-appellant

was sold for the expenses to obtain bail in that criminal case and it was

purchased by deceased Satyabhan himself in the name of his wife.

Accused-appellant Gambhir Singh always insisted for return of his land

and quarrel took place between them. He also threatened deceased of dire

consequences and due to that reason, present offence was committed by

him along with his companion. Learned A.G.A. also argued that recovery

has been proved beyond reasonable doubt and blood was found on the

weapon kulhari said to have been used in commission of crime. Trial

Court has rightly relied upon the recovery of weapon “axe” and clothes.

Prosecution has also proved recovery of ornaments. There is no chance of

false implication as motive to commit the present offence is against

accused-appellant because he will inherit the immovable property of

deceased. Arrest of accused-persons is also not doubtful and statement of

prosecution witnesses cannot be thrown out on point of recovery and

arrest merely on the ground of some exaggerations or contradictions. It

was further contended that contradictions, exaggerations or laches on part

of the Investigating Officer do not go to the root of the case. F.I.R. was

lodged against accused-persons on the basis of cogent evidence. Findings

of the Trial Court regarding guilt of accused-appellant in the impugned

judgment and order are not perverse. Chain of circumstances are

linked

with each other supported by recovery of weapon. Therefore, Trial Court

has rightly held guilty to accused-appellant for charges levelled against

him. Referring to postmortem reports, it was further argued that manner in

which deceased persons were done to death clearly demonstrates that

accused-appellant along with his companion have committed murder of

deceased persons causing extreme brutality. All family members have

been eliminated. This fact itself shows the premeditated plan of accused.

Thus the Trial Court has rightly held this case in the category of “rarest of

rare” cases. Burden to prove its case beyond reasonable doubt has been

discharged by the prosecution. Referring to the finding regarding acquittal

of co-accused Smt. Gayatri, it was further argued that although nothing

has been recovered on her pointing out yet she was also arrested along

with accused-appellant Gambhir Singh. Passbook and other

documents

relating to deceased Satyabhan were also recovered from her possession.

Circumstantial evidence adduced by prosecution also clearly demonstrate

her involvement in this matter. Trial Court finding on point of her

acquittal is not based on correct appreciation of facts and evidence.

45. Learned counsel appearing for co-accused Smt. Gayatri (acquitted)

argued that nothing is on record to connect Smt. Gayatri with present

matter nor any test identification parade was arranged nor any

incriminating material was recovered on her pointing out to connect her

with this matter. Motive is also not attributed to her. Therefore, Trial

Court has rightly acquitted her from all charges. There is no illegality or

infirmity in the impugned judgment and order on point of acquittal

of co-

accused Smt.
Gayatri.

46. We have considered the rival contentions raised by learned counsel

for the parties and have gone through entire record carefully and

cautiousl
y.

47. Finding of Trial Court recorded in the impugned judment and order

are as
follows :

(i) F.I.R. lodged in the matter is a genuine document and it is not an

ante-timed
document.

(ii) Date, time and place of occurrence have been proved by

prosecution from its evidence beyond reasonable
doubt.

(iii) Although P.W.6 and P.W.7 are not reliable witnesses, yet

prosecution was also able to prove recovery of axe on pointing out of

accused-appellant as well as clothes worn by accused-appellant at the time

of committing the offence on which blood stains were

found.

(iv) Prosecution was also able to connect the recovery of axe and

clothes recovered from accused-appellant through F.S.L. report with

present
offence.

(v) Arrest of accused-appellant is not
doubtful.

(vi) Medical evidence fully supports the oral
version.

(vii) Prosecution was also able to prove motive against the accused-

appellant to commit present
offence.

(viii) Chain of circumstantial evidence has been established by

prosecution firmly and cogently from its evidence and same is linked with

each other to form unerringly a conclusion regarding guilt of accused-

appellant in committing present
offence.

(ix) Trial Court was also of the view that present case comes under

the category of “rarest of rare” cases, thus has imposed death

penalty

upon
accused-appellant.

48. Trial Court while acquitting co-accused Smt. Gayatri was of the

view that motive established by prosecution is not attributable to co-

accused Smt. Gayatri (acquitted). Nothing has been recovered on her

pointing out to connect her with this case. No benefit could derive by her

from the pass-book etc. said to have been recovered from her possession.

Thus, Trial Court, extending the benefit of doubt, has acquitted co-

accused Smt. Gayatri from all
charges.

49. First of all Court proceeds to deal with submissions raised on point

of F.I.R. lodged in this matter. Offence is said to have been committed in

the intervening night of 08/09.05.2012 in Village *Turkia*, Police Station

Achhnera, District Agra. Entire family members were done to death. No

one in the family was spared to lodge the F.I.R. It appears that some

villagers have informed P.W.1, who is brother-in-law (*sala*) of deceased

Satyabhan, in the morning of 09.05.2012 at about 6:00 - 6:30 AM about

this incident. Thereafter he along with other villagers came to the

concerned village, which was about 7 - 8 Kms. away from his village. It

also appears that after reaching the place of occurrence, P.W.1, on the

basis of information gathered from the villagers, although their names

have not been disclosed by prosecution, prepared written report through

scribe, went to police station and lodged the F.I.R. at 8:00 AM. Distance

between police station and the place of occurrence is 7½ Kms. If

statements of P.W.1, P.W.2 and PW.3 are taken into consideration on this

point in consonance with the submission raised by learned Amicus

Curiae,

it is evident that information to P.W.1 was received at 6:00 to 6:30 AM.

He proceeded immediately to the concerned village and reached there at

about 7:30 AM. P.W.2 at one point of time has stated that when he reached

at the place of occurrence, police personnel were present there. Referring

to this fact, it was emphasized that prosecution did not explain as to how

and under what circumstances police reached the place of occurrence

before reaching of witnesses and it was also argued that this fact itself

shows that F.I.R. is ante-timed document. If submissions raised by learned

Amicus Curiae are minutely analyzed with statements of P.W.1, P.W.2,

P.W.3 and P.W.9 to P.W.12, it clearly emerges that aforesaid

statement

made by P.W.2 to this extent cannot place the prosecution case doubtful.

No question was put to P.W.2 that police personnel present at the place of

occurrence before reaching of P.W.2 were the police actually proceeded

from the police station concerned after registering the case or they belong

to patrol party. If such was the position, submission raised by learned

Amicus Curiae doubting the existence of F.I.R. at the time mentioned

therein cannot be accpeted. F.I.R. could come in existence at the time

mentioned in it. It may also be mentioned that F.I.R. is not the result of

afterthought or consultation. If contents of F.I.R. i.e. written report are

taken into consideration in the light of entire evidence, there was no

chance to falsely implicate accused-persons in this matter on the basis of

due consultation or an afterthought. It is also noteworthy that F.I.R. is not

an Encyclopedia. All necessary details required to set the law in

motion

have been mentioned in written report (Ex.Ka.-1). If for the sake of

argument or for a moment submission raised by learned Amicus Curiae on

point of F.I.R. is taken into consideration then also entire prosecution case

if proved from other evidence cannot be disbelieved on the point of ante-

timing of F.I.R. In present matter, six persons were done to death. P.W.1 is

brother-in-law (*sala*) of deceased Satyabhan. His sister, nephew (*bhanja*)

and nieces (*bhanjis*) were also done to death brutally. As per human

behaviour / conduct, as soon as P.W.1 received information about the

incident, he rushed to the place of occurrence. Keeping in view the

distance between the place of occurrence and the village of P.W.1, if he

reached at about 7:30 AM at the place of occurrence, it is not unnatural or

improbable. Time of receiving of information and reaching the place of

occurrence of witnesses shown in prosecution evidence is not based on

exact recording of time, but is based on assumption. Written report is

briefly stated document. It could be prepared within few minutes and thus

on this point, existence of F.I.R. cannot be doubted. Therefore, in our

considered view, finding of the Trial Court regarding existence of F.I.R. in

this matter cannot be termed to be illegal, rather it is based on correct

appreciation of facts, evidence and law. No interference is required in

finding of the Trial Court on this
point.

50. Since emphasis has been laid by learned Amicus Curiae about non-

compliance of mandatory provisions provided under Section 313 Cr.P.C.,

therefore, we proceed to deal with the submission raised on this issue.

Before dealing with facts and evidence of present matter, we would like to

refer the settled legal proposition on this
point.

51. In **Nar Singh Versus State of Haryana, (2015) 1 Supreme Court**

Cases 496, Court after setting aside judgment of Trial Court as well as

High Court remitted the matter back to Trial Court for formulating correct

questions and putting same before accused-appellant observing that

prejudice is caused to accused-appellant on account of omission to put the

question as to the opinion of the Ballistic Expert, which was relied upon

by Trial Court as well as by High Court. Court also held that accused is

not entitled to acquittal on the ground of non-compliance with the

mandatory provisions of Section 313 Cr.P.C. Court has also discussed the

ratio laid down in **Paramjeet Singh alias Pamma v. State of**

Uttarakhand, **(2010) 10 SCC 439**; **Basava R. Patil & Ors. v. State of**

Karnataka & Ors., **(2000) 8 SCC 740**, **Avtar Singh & Ors. v.**

State of

Punjab, **(2002) 7 SCC 419**; **Wasim Khan v. The State of Uttar**

Pradesh, **AIR 1956 SC 400**; **Bhoor Singh & Anr. v. State of Punjab**,

AIR 1974 SC 1256; **Santosh Kumar Singh v. State through CBI,**

(2010) 9 SCC 747; **State of Punjab v. Hari Singh & Ors. (2009) 4 SCC**

200; Kuldip Singh & Ors. v. State of Delhi (2003) 12 SCC 528 and

Alister Anthony Pareira v. State of Maharashtra (2012) 2 SCC 648

wherein it has been held that Trial Court is under a legal obligation to put

incriminating circumstances before the accused and solicit his response.

This provision is mandatory in nature and casts an imperative duty on the

Court and confers a corresponding right on the accused to have an

opportunity to offer an explanation for such incriminatory material

appearing against him. Circumstances which were not put to the accused

in his examination under Section 313 CrPC cannot be used against him

and have to be excluded from
consideration.

52. It has also been held that statutory provision is based on the rules of

natural justice for an accused, who must be made aware of the

circumstances being put against him so that he can give a proper

explanation to meet that
case.

53. In **Santosh Kumar Singh** (supra), Court has also held that

omission to put any material circumstance to the accused does not ipso

facto vitiate trial and that the accused must show prejudice and that

miscarriage of justice had been sustained
by him.

54. Thus it is evident that any inadvertent omission on the part of Court

to question accused on an incriminating circumstance cannot *ipso facto*

vitiate trial unless it is shown that some material prejudice was caused to

accused by the omission of

Court.

55. In **Nar Singh** (supra), in para 20, Court has observed as follows :

> *"**20**. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.*

56. Court in **Nar Singh** (supra), in para 30, summarized the recourses

available to Court when such plea is raised in appeal and prejudice has

occasioned as
follows :

***30**. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under: **30.1**. Whenever a plea of non-compliance of Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer; **30.2**. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits. **30.3**. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh; **30.4**. The appellate court may*

decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused. *57.* If ratio laid down in aforesaid decisions are taken into

consideration, then in the facts and circumstances of the case, this Court

has to see what sort of incriminating evidence adduced by prosecution in

its evidence have not been put to accused-persons and how prejudice is

caused to them. It is also to be seen whether on account of failure of

putting incriminating circumstances, trial is vitiated and prejudice is

caused to
accused-persons.

58. In present matter, if the aforesaid legal proposition are taken into

consideration in the light of submissions raised by learned Amicus Curiae

appearing for appellant as well as learned counsel for co-accused Smt.

Gayatri (acquitted), it is evident that all incriminating materials were

placed before accused, which have been relied upon by the Trial Court in

the impugned judgment and order. None of the evidence, which have been

relied upon by Trial Court, have been left over to be placed before

accused in statement recorded under Section 313 Cr.P.C. If the manner of

answer given by accused-persons in statement under Section 313 Cr.P.C.

are taken into consideration, it clearly emerges that they were fully aware

about entire evidence including incriminating material / evidence adduced

by prosecution in its evidence and they have given answer on every such

facts e.g. when in additional statement recorded on 01.03.2017, chemical

examination reports submitted by F.S.L. through Ex.Ka.-24 to Ex.Ka.-28

were put to them, they specifically stated that facts mentioned in reports

are false. Meaning thereby, they were fully aware about contents of

aforesaid exhibits. Similar answers have been given by accused-persons in

the statement recorded on 19.10.2016. All exhibits and statements made

by prosecution witnesses were referred to them and they have made

answer that witnesses have made false statement. It also shows that they

were fully aware about the statement made by witnesses. Question no.7

put to accused-appellant Gambhir Singh under Section 313 Cr.P.C. about

statement of P.W.6 Dashrath and Question no.8 about statement of P.W.7

Kedar Singh were put to them, then accused-persons stated that these two

witnesses have made false statement. Answer given by accused also

shows that they were fully aware about statement of prosecution

witnesses. Thus if the amended provision of Code of Criminal Procedure

to record the statement of accused under Section 313 Cr.P.C. about the

manner of preparation of questions and discussions made here-in-above

on this point in light of aforesaid legal proposition are taken into

consideration, in our considered opinion, all incriminating materials /

evidence relied upon by Trial Court in impugned judgment and order were

put to accused-persons and they were fully aware about the same and have

also given answer thereto. No prejudice is caused to them, as they have

specifically stated that they will not adduce any evidence in their defence.

It is not a case in which incriminating materials, which have been relied

upon by Trial Court, were not put to accused in the statement under

Section 313 Cr.P.C. If such was the position, we are also of the view that

submission raised by learned Amicus Curiae on this point cannot be

accepted and prosecution case is not vitiated on this ground. No prejudice

is caused to accused persons. Mandatory provisions of Section 313

Cr.P.C. have been followed
literally.

59. Now we come to deal with motive part. It is true that motive is an

essential ingredient to commit an offence. Nothing specific was

mentioned by P.W.1 in Ex.Ka.-1 on this point as has been stated before

the Court. It is evident that when he was interrogated by the Investigating

Officer and examined before Court on oath, has stated that there was

enmity regarding land dispute between accused-appellant and deceased

Satyabhan. It has also been stated that deceased Satyabhan and accused-

appellant both were involved in murder of their mother. They were in jail.

Satyabhan was released on bail and later on accused-appellant was also

granted bail. Huge amount was incurred / spent by accused-appellant in

contesting his case due to which one bigha agricultural land was sold by

him to the wife of deceased Satyabhan. When accused-appellant released

on bail, he insisted to return the said land and due to that reason, on

several occasions, hot talks / altercation took place between them. It has

also come that accused-appellant used to extend threat to kill. Other

witnesses examined in the matter also belong to village of P.W.1

Mahaveer and some of them are closely related to him, but their statement

on point of motive has no relevance. If the cross-examination of P.W.1 is

taken into consideration, nothing has come out to impeach the statement

made by P.W.1 in examination-in-chief on point of motive. Murder of

mother of accused appellant and deceased Satyabhan has not been

disputed nor statement regarding transfer of immovable property in the

name of wife of deceased Satyabhan by accused-appellant was

specifically challenged in cross-examination. As regards

non-production

of documentary evidence to prove motive is concerned, it is noteworthy

that a fact may be proved by oral or documentary evidence. Statement

referred here-in-above on this issue will certainly come in the category of

direct evidence and same has not been specifically impeached in cross-

examination and nothing is on record to disbelieve the statement of P.W.1

on point of motive. Thus, we are of the view that submission raised by

learned Amicus Curiae on this point cannot be accepted. It may be

mentioned here that after the death of entire family members of

Satyabhan, accused-appellant will inherit the property owned by

Satyabhan, as no one was left in the family to inherit property of

Satyabhan except accused-appellant. So far as motive against accused

Smt. Gayatri (acquitted) is concerned, she will not inherit the property of

deceased Satyabhan nor documents said to have been recovered from her

possession will benefit her in any way. If such was the position, finding

recorded by Trial Court on the point of motive cannot be termed to be

illegal. Non-mentioning of this fact in written report (Ex.Ka.-1) will also

not render the statement of P.W.1 made before Court on oath for the

reason discussed here-in-above unbelievable. Thus, it can safely be held

that finding recorded by Trial Court on point of motive in impugned

judgment and order needs no interference and same is based on correct

appreciation of facts and evidence. Accused-appellant had motive to

commit this
offence.

60. So far as medical evidence adduced by prosecution in this matter is

concerned, six persons namely, Satyabhan, Pushpa, Arti, Priya, Gudia and

Kanhaiya were done to death in the intervening night of 08/09.05.2012 in

the house of deceased Satyabhan. Postmortem was conducted on 9.5.2012

in between 4:50 PM to 6:00 PM. In all postmortem reports, time of death

of deceased persons has been shown as 3/4 day old. Injuries found on

body of deceased persons are incised and stab wounds.

61. Postmortem report (Ex.Ka.-17) of deceased Gudia, aged about 3

years, reveals that first injury is on neck in the form of incised wound.

Second injury is stab wound on abdomen. One incised wound was also

found on anus.

62. Similarly, in postmortem report (Ex.Ka.-16) of deceased Arti, aged

about 5 years, incised wounds were found on neck, shoulder and anus and

stab wound was found on abdomen. Other injuries were also found on her

body
.

63. So far as postmortem report (Ex.Ka.-15) of deceased Pushpa, aged

about 30 years, is concerned, incised wounds were found on neck, upper

part of abdomen, chest and fingers. Some injuries were also found on

other part of her
body.

64. On dead body of deceased Priya, aged about 5 years, during

postmortem (Ex.Ka.-14), one incised wound was found on
neck.

65. Postmortem report (Ex.Ka.-13) of deceased Kanhaiya, aged about 5

years, shows an incised wound on neck and stab wounds on abdomen.

66. As per postmortem report (Ex.Ka.-12) of deceased Satyabhan,

incised wounds were found on head, forehead and neck. Oesophagus and

trachea both were found cut. One stab wound on the right side of lower

part of chest was also
found.

67. In the opinion of the Doctor, cause of death of all deceased

persons

was due to coma, shock and haemorrhage as a result of *ante-mortem*

injuries. When P.W.8 Dr. Vinod Kumar was examined before the Court on

oath, he stated that vaginal smear and contents of stomach, kidney and

intestine were also preserved and same were sent for chemical

examination. Although in F.S.L. Report, neither spermatozoa nor any

poison was found in it, yet in the cross-examination, P.W.8 has

specifically stated that time of death of deceased persons was 3/4 day old.

Postmortem was conducted by a Panel of Doctors and this witness has

proved the signature of Doctors, who were in Panel. Video recording was

also made and CD was also handed over to the police concerned. If

statement of P.W.8 is compared in light of statement of other prosecution

witnesses examined in the matter, it is clear that all deceased persons were

done to death in the intervening night of 08/09.05.2012 within a few

minutes. Accused-persons used same weapon in committing murder of all

deceased persons. It is also evident from record that injuries found on

body of deceased persons can be caused with the weapon “axe” said to

have been recovered on pointing out of accused-appellant. Postmortem

report also reveals that accused-persons while committing murder of

deceased tried to behead deceased persons, as incised wounds have been

found on neck of all dead bodies. Thus, in our considered view, in instant

case, prosecution was able to prove date and time of death of deceased

person
s.

68. Incident took place in the month of May. Symptom of Rigor Mortis

shown in *postmortem* report of all deceased persons is probable and

possible one, as it was extreme hot season. Prosecution was also able to

prove the manner in which deceased were done to death and has

connected the weapon “axe” used by accused-appellant in committing

present offence. Thus, finding recorded by Trial Court in the impugned

judgment and order on point of medical evidence, in our considered

opinion, is also in accordance with facts and evidence which needs no

interference by this Court. It may also safely be held in this matter that

medical evidence is not contrary to oral version of prosecution.

69. So far as recovery of weapon and clothes as well as reports

submitted by F.S.L. are concerned, incident took place in the intervening

night of 08/09.05.2012. None of witnesses examined by prosecution were

aware about commission of offence till P.W.1 received information in the

morning of 09.05.2012. P.W.1 and other witnesses have reached

the place

of occurrence immediately in the morning itself and thereafter F.I.R. was

lodged by P.W.1. It is also evident that on the basis of F.I.R., local police

immediately proceeded to the place of occurrence. P.W.12 Tasleem

Ahmad has stated that after reaching the place of occurrence and deputing

police personnel for arranging the inquest proceeding of dead bodies, he

went in search of accused-persons, as F.I.R. was lodged against known

accused. Arrest and recovery memo (Ex.Ka.-22) also reveals that accused

were arrested at about 1:00 PM on same day at Eidgah Railway Station.

On inquiry made by P.W.12 and other police personnel, arrested accused

disclosed their names as Gambhir Singh (accused-appellant),

Abhishek

(trial separated) and Smt. Gayatri (acquitted). Some ornaments belong to

deceased Pushpa were also said to be recovered from possession of

accused-persons as well as passbook and cheque book said to be

belonging to deceased Satyabhan and identity card of deceased Pushpa.

P.W.12 has also stated that when accused-appellant was arrested, clothes

and shoes worn by him were found blood stained. Ornaments recovered

from his possession and clothes of accused-appellant were taken into

possession by concerned police and thereafter recovery memo Ex.Ka.-22

was prepared keeping articles in sealed cloth preparing sample seal. As

per this witness, on interrogation of accused-persons, they disclosed that

they have hidden the weapon used in commission of crime in the house of

deceased Satyabhan itself. P.W.12, on the basis of disclosure statement

made by accused-appellant Gambhir Singh and co-accused Abhishek (trial

separated), took them for recovery of weapon and on pointing out of

accused-appellant, as per recovery memo Ex.Ka.-2, weapon “axe” was

recovered from the room in the house of deceased. If statements of P.W.1

Mahaveer, P.W.2 Bahadur Singh and P.W.3 Shiv Ram Singh are taken into

consideration along with statements of P.W.12 and other police witnesses,

who were accompanying P.W.12 at the time of recovery of “axe”,

cumulatively, recovery of weapon “axe” on pointing out of accused-

appellant Gambhir Singh from the husk in the room situated in the house

of deceased Satyabhan has been proved by prosecution from its evidence

beyond reasonable doubt. Recovery of blood stained cloths, ornaments

and weapon said to have been used in commission of crime could

not be

doubted only on the basis that P.W.2 at one point of time, during

examination before the Court, has stated that when accused-appellant was

making recovery of weapon, clothes worn by him were blood stained.

Aforesaid statement made by P.W.2 Bahadur Singh might be result of

exaggerations, which does not demolish the statements made by P.W.1,

P.W.3 and P.W.12 as well as other police witnesses on point of recovery of

“axe”. Even P.W.2 has also supported the factum of recovery of “axe” on

pointing out of accused-appellant Gambhir Singh. It is also noteworthy

that “axe” said to have been recovered on pointing out of accused-

appellant was sent for chemical examination and report submitted by

F.S.L. (Ex.Ka.-25) clearly shows that blood was found on “axe” at the

time of chemical examination, which was human blood. Thus, findings

recorded by the Trial Court on issue of recovery of “axe” on pointing out

of accused-appellant Gambhir Singh need no interference by this Court

and same are based on correct appreciation of facts and evidence.

Accused-appellant was arrested from the place mentioned in Ex.Ka.-22

and clothes worn by him were blood stained and same were taken into

custody by police. Thereafter, accused-appellant Gambhir Singh and co-

accused Abhishek (trial separated) were taken by concerned police for

recovery of weapon used in crime, as there was disclosure statement made

by them. Thus, recovery of “axe” said to have been made in the matter

could safely be used as a piece of evidence to connect accused-appellant

Gambhir Singh with present offence. As far as recovery of documents

said to have been made from possession of co-accused Smt. Gayatri

(acquitted) is concerned, since motive attributed in present matter cannot

be a ground to commit present offence by this accused, no benefit could

be taken by her with the said documents i.e. passbook, cheque book etc.

of deceased Satyabhan or other documents, hence, in our considered view,

recovery said to have been made from co-accused Smt. Gayatri

(acquitted) cannot be used against her as a piece of evidence to hold her

guilty for committing present offence. It is also noteworthy that only on

this ground that arrest and recovery made from co-accused Smt. Gayatri

have not been relied upon by Trial Court, same cannot be a ground to

disbelieve the recovery against accused-appellant. Finding of Trial Court

on this point is also based on correct appreciation of evidence as well as

criminal
jurisprudence.

70. As far as truthfulness of statements of P.W.1, P.W.2 and P.W.3 is

concerned, certainly they are closely related to each other as also with

deceased persons, yet their statements, only on this basis, cannot be

discarded. None of them are eyewitness account. What information was

gathered by P.W.1 at the place of occurrence in the morning of

09.05.2012, he reduced the same in writing and moved to police station

concerned. Distance between the place of occurrence and village of

witnesses is less than 10 kilometers. Their close relatives were done to

death. Entire family was eliminated. Therefore, their presence at the place

of occurrence at the time stated by them cannot be doubted. Their

statements made before the Court can also not be doubted on this ground

that there are contradictions and exaggerations in their statements on

some points. If their statements are scrutinized cumulatively in its entirety,

there is no contradiction in their statements on point of recovery of

dead

bodies at the place of occurrence, taking of blood stained and plain earth

and other articles from the place of occurrence, which were sent to F.S.L.

for chemical examination and also on point of recovery of weapon “axe”.

Exaggerations and contradictions said to have been occurred in their

statements, as has been elucidated during course of arguments on behalf

of accused-appellant, in our considered view, do not go to the root of the

case and do not demolish prosecution evidence on material points.

Statement of P.W.1, P.W.2 and P.W.3 can also not be disbelieved on the

ground of their being close
relatives.

71. It is settled that the testimony of an eye-witness merely because he

happens to be a relative of the deceased cannot be discarded as close

relatives would be the last one to screen out the real culprit and implicate

innocent person. [vide : **Dilip Singh Vs. State of Punjab AIR 1953 S.C.**

364]**.** This aspect of the mater has further been clarified by the Court in

the case of **Dharnidhar Vs. State of Uttar Pradesh (2010) 7 SCC page**

759 as
follows:

> *"12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In* **Jayabalan v. UT of Pondicherry (2010) 1 SCC 199***, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim."*

72. Thus, in our considered view, statements of P.W.1, P.W.2 and P.W.3

on material points are fully reliable. Trial Court, while passing impugned

judgment and order, has rightly placed reliance on their statements and

finding recorded by Trial Court on this issue needs no interference.

73. As far as statements of P.W.6 and P.W.7 are concerned, Trial Court

itself has disbelieved their statement on the ground that time about last

seen of accused-persons stated by these two witnesses does not tally with

facts and circumstances of the case and statements made by P.W.1, P.W.2

and P.W.3. If statements made by P.W.6 and P.W.7 are scrutinized in light

of finding of Trial Court, we are also of the view that statements made by

P.W.6 and P.W.7 could not be relied upon.

74. As regards laches occurred on part of the Investigating Officer is

concerned, the Arresting Officer has not specified in the arrest memo

whether after taking possession of clothes worn by accused-appellant

Gambhir Singh, he was offered other clothes or not. Investigating Officer

also did not procure independent witnesses at the time of recovery, but

omissions / laches on part of the Investigating Officer said to have been

elucidated by learned Amicus Curiae during course of argument, in our

considered view, also do not go to the root of the case and do not affect

the prosecution case. It may be mentioned that since no prosecution case

is free from shortcomings, therefore, recovery on the ground that it is not

supported by any independent evidence cannot be disbelieved. In the

instant case, recovery of weapon “axe” is supported by statements of

P.W.1, P.W.2 and P.W.3, who were also present at the place of occurrence.

75. Further, if the prosecution case is established by the evidence

adduced, any failure or omission on the part of the Investigating Officer

cannot render the case of the prosecution doubtful [vide : **Amar Singh vs.**

Balwinder Singh, AIR 2003 SC 1164, Sambu Das vs. State of Assam,

AIR 2010 SC 3300].

76. In the case of **State of U.P. Vs. Krishna Master and others; 2010**

Cri. L.J. 3889 (SC) Court has held that "prosecution evidence may suffer

from inconsistencies here and discrepancies there, but that is a

shortcoming from which no criminal case is free. The main thing to be

seen is whether those inconsistencies go to the root of the matter or

pertain to insignificant aspects thereof." Further, Court in **Sampath**

Kumar vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124 has also

held that minor contradictions are bound to appear in statements of

truthful witnesses as memory sometimes plays false and sense of

observation differs from person to person.

77. Hence, the submission made by the learned counsel for

appellant in

this regard cannot be accepted and the finding recorded by the Trial Court

on this point is not liable to be interfered
with.

78. No we come to see evidence regarding involvement of accused-

appellant in commission of crime and nature of evidence adduced by

prosecution. Certainly, it is a case of circumstantial evidence, thus we

have to see whether circumstances established by prosecution against

accused-appellant are sufficient to sustain conviction of accused-appellant

for offence under Sections 302/34 and 404 IPC. Before dealing with

aforesaid question, it will be useful to quote settled proposition of law on

point of circumstantial

evidence.

79. In paras 27, 28 and 29 of the judgment in **Brajendra Singh** (supra),

Court observed as
under :-

> *27. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. 28. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the*

case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. [Ref. Dhananjoy Chatterjee v. State of West Bengal, JT 1994 (1) SC 33; Shivu v. High Court of Karnataka, (2007) 4 SCC 713; and Shivaji v. State of Maharashtra, AIR 2009 SC 56]. 29. It is a settled rule of law that in a case based on circumstantial evidence, the prosecution must establish the chain of events leading to the incident and the facts forming part of that chain should be proved beyond reasonable doubt. They have to be of definite character and cannot be a

mere possibility. 80. In present case, none of the witnesses examined in the matter are

eye account witnesses of the incident. It is also evident that incident took

place in the intervening night of 08/09.05.2012 at the time and place

mentioned in chik F.I.R. and stated by prosecution witnesses. Medical

evidence also supports prosecution version. Entire family members (six

persons) were done to death. Prosecution was able to prove motive

against accused-appellant to commit present offence. On 09.05.2012 at

about 1:00 PM, when accused-appellant was arrested, clothes worn by

him were found blood stained and this fact was proved by prosecution

from F.S.L. Report. Weapon “axe” said to have been used in commission

of crime was also made recovered by accused-appellant from the house of

deceased itself. Thus, in our considered view, what evidence have been

made available by prosecution during trial are sufficient to connect

accused-appellant with the present matter. Accused-appellant and

deceased both were also accused in murder of their mother. To incur

expenses for obtaining bail, accused-appellant had spent a huge

amount

and for which he sold out his immovable property, as disclosed here-in-

above, to wife of deceased Satyabhan. When accused-appellant was

released in that case, he again and again insisted for return of said land.

Quarrel took place between them on many occasions. Threat had also

been extended by accused-appellant to deceased Satyabhan. Incident took

place inside the house. All family members were done to death.

Circumstances established by prosecution are firm, cogent and believable.

Chain of events are completed and linked with each other. There is no

chance of false implication of accused-appellant. All circumstances

including motive and previous conduct of accused-appellant as well as

recovery of weapon “axe” said to have been made on his pointing out

cumulatively point towards the guilt of accused-appellant. It is also

noteworthy that the best evidence which could be available in the facts

and circumstances of the case were proved by the prosecution.

Thus, on

the basis of evidence available on record, one and only one hypothesis can

be drawn that accused-appellant along with his companions has

committed present offence in which he has eliminated entire family of his

brother. If the ratio laid down in cases relied on by the appellant is

compared with the evidence available in the matter, we are of the view

that Trial Court has rightly held guilty to accused-appellant for

committing offence under Sections 302/34, 404 IPC. Finding of Trial

Court about the guilt of accused-appellant for aforesaid offences is based

on correct appreciation of facts and evidence which needs no interference

by this
Court.

81. As far as punishment imposed upon accused-appellant is

concerned,

Trial Court in its wisdom has imposed death punishment finding the

present case in the category of “rarest of rare” cases. Six persons were

done to death. All of them were belonging to same family. Four children

were less than the age of 5 years. Accused-appellant is brother of

deceased Satyabhan. Medical evidence adduced by prosecution clearly

shows that accused-appellant by cutting neck of all deceased persons

ensured their
death.

82. Aggravating and mitigating circumstances in the present matter can

be summarized as
under :-

**Aggravating
Circumstances**

(a) Offence in the present case was committed in an extremely brutal,

grotesque, diabolical, revolting and dastardly manner so as to arouse

intense and extreme indignation of
society;

(b) Offence was also committed in preordained manner demonstrating

exceptional depravity and extreme
brutality;

(c) Extreme misery inflicted upon his own brother, his brother's wife and

minor children less than the age of 5
years;

(d) Helpless children were done to death by cutting their
neck;

(e) Brutality and premeditated plan of accused-appellant also find support

from his act as he ensured the death of all deceased by cutting their neck;

(f) Act of accused-appellant is shocking not only to the judicial

conscience but also to the Society as he has eliminated entire family of his

brother only to grab the property of
deceased;

(g) act and conduct of accused-appellant itself shows that there is no

chance of reformation and he is menace to the Society; and

(h) it is a cold-blooded murder without provocation.

On the other hand, **Mitigating Circumstances**, as emerged, are

(a) age of the convict i.e. 30 years at the time of recording of statement

under Section 313 Cr.P.C.;

(b) he belongs to village background and offence was committed due to

property dispute;

(c) none left to look after the surviving member of accused-appellant's

family;

(d) chance for reformation and rehabilitation.

83. Now the question before us is whether death penalty in the present

case is justified. Before looking to the facts of present case on the

question of sentence, it would be appropriate to advert to judicial

authorities on the matter throwing light and laying down principles for

imposing penalty, in a case, particularly death
penalty.

84. One of the earliest case, in the matter is **Bachan Singh v. State of**

Punjab, (1980) 2 SCC 684. In para 164, Court said that normal rule is

that for the offence of murder, accused shall be punished with the

sentence of life imprisonment. Court can depart from that rule and impose

sentence of death only if there are special reasons for doing so. Such

reasons must be recorded in writing before imposing death sentence.

While considering question of sentence to be imposed for the offence of

murder under Section 302 IPC, Court must have regard to every relevant

circumstance relating to crime as well as criminal. If Court finds 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, Court may impose

death

sentenc
e.

85. Relying on the authority in **Furman v. Georgia, (1972) SCC**

OnLine US SC 171 Court noted the suggestion given by learned counsel

about aggravating and mitigating circumstances in para 202 of the

judgement in **Bachan Singh** (supra) which read as
under :-

> *"202. ... 'Aggravating circumstances: A court may, however,*
>
> *in the following cases impose the penalty of death in its*
>
> *discretion*
> *:*
>
> > *(a) if the murder has been committed after previous*
> >
> > *planning and involves extreme brutality; or*
> >
> > *(b) if the murder involves exceptional*

depravity; or

(c) if the murder is of a member of any of the armed

forces of the Union or of a member of any police force

or of any public servant and was committed –

(i) while such member or public servant was on

duty;
or

(ii) in consequence of anything done or

attempted to be done by such member or public

servant in the lawful discharge of his duty as

such member or public servant whether at the

time of murder he was such member or public

servant, as the case may be, or had ceased to be

such member or public
servant; or

(d) if the murder is of a person who had acted in the

lawful discharge of his duty under Section 43 of the

Code of Criminal Procedure, 1973, or who had

rendered assistance to a Magistrate or a police officer

demanding his aid or requiring his assistance under

Section 37 and Section 129 of the said Code."

86. Thereafter in para 203, Court said that broadly there can be no

objection to the acceptance of these indicators noted above but Court

would not fetter judicial discretion by attempting to make an exhaustive

enumeration one way or the other. Thereafter in para 206 of judgment in

Bachan Singh (supra), Court also suggested certain mitigating

circumstances as
under :-

"206. ... '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 conditions (3) and (4)

abov
e.

(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."

87. Again in para 207 in **Bachan Singh** (supra), Court further said that

mitigating circumstances referred in para 206 are relevant and must be

given great weight in determination of sentence. Thereafter referring to

the words caution and care, in **Bachan Singh** (supra) Court observed that

it is imperative to voice the concern that Courts, aided by the broad illustrative guidelines, will discharge 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. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

88. Then in **Machhi Singh v. State of Punjab, (1983) 3 SCC 470** stress was laid on certain aspects namely, manner of commission of murder, motive thereof, antisocial or socially abhorrent nature of the

crime, magnitude of crime and personality of victim of murder. Court

culled out certain propositions emerging from Bachan Singh (supra), in

para 38 and said as
under :-

> *“The following propositions emerge from Bachan Singh*
>
> *case*
> *:*
>
> > *(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 life imprisonment appears to*

be an

altogether inadequate punishment having regard to the

relevant circumstances of the crime, and provided, and

only provided, the option to impose sentence of

imprisonment for life cannot be conscientiously

exercised having regard to the nature and

circumstances of the crime and all the relevant

circumstances.

(iv) A balance sheet of aggravating and mitigating

circumstances 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."

89. The three-Judges Bench in **Machhi Singh** (supra) further said that

following questions must be answered in order to apply the guidelines :-

"(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?"

(Emphasis added)

90. In **Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12**

SCC 56, after referring to **Bachan Singh** (supra) and **Machhi Singh**

(supra), Court expanded the "rarest of rare" formulation beyond the

aggravating factors listed in **Bachan Singh** (supra) to cases where the

"collective conscience" of community is so shocked that it will expect the

holders of judicial power centre to inflict death penalty irrespective of

their personal opinion as regards desirability or otherwise of retaining the

death penalty, such a penalty can be inflicted. Court, however, underlined

that full weightage must be accorded to the mitigating circumstances of

the case and a just balance had to be struck between the aggravating and

the mitigating
circumstances.

91. In para 20 of the judgment in **Haresh Mohandas Rajput** (supra),

Court observed that the rarest of the rare case comes when a convict

would be a menace and threat to the harmonious and peaceful coexistence

of society. The crime may be heinous or brutal but may not be in the

category of "the rarest of the rare case". There must be no reason to

believe that the accused cannot be reformed or rehabilitated and that he is

likely to continue criminal acts of violence as would constitute a

continuing threat to the society. The accused may be a menace to the

society and would continue to be so, threatening its peaceful and

harmonious coexistence. The manner in which the crime is committed

must be such that it may result in intense and extreme indignation of the

community and shock the collective conscience of the society. Where an

accused does not act on any spur of the momentary provocation and

indulges himself in a deliberately planned crime and meticulously

executes it, the death sentence may be the most appropriate punishment

for such a ghastly crime. The death sentence may be warranted where

victims are innocent children and helpless women. Thus, in case the crime

is committed in a most cruel and inhuman manner which is an extremely

brutal, grotesque, diabolical, revolting and dastardly manner, where his

act affects the entire moral fibre of the society, death sentence should be

awarde
d.

92. In **Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC**

220, Court opined that imposition of appropriate punishment is the

manner in which Courts respond to the society's cry for justice against the

criminals. Justice demands that Courts should impose punishment

befitting the crime so that Courts reflect public abhorrence of the crime.

Courts must not only keep in view the rights of the criminal but also the

rights of the victim of crime and the society at large while considering

imposition of appropriate
punishment.

93. A three-Judge Bench in **Swamy Shraddananda v. State of**

Karnataka, (2008) 13 SCC 767, in para 43 of the judgment, said :-

"43. In Machhi Singh the Court crafted the categories of

murder in which `the Community' should demand death

sentence for the offender with great care and thoughtfulness.

But the judgment in Machhi Singh was rendered on 20-7-

1983, nearly twenty-five years ago, that is to say a full

generation earlier. A careful reading of the Machhi Singh

categories will make it clear that the classification was made

looking at murder mainly as an act of maladjusted individual

criminal(s). In 1983 the country was relatively free from

organised and professional crime. Abduction for ransom and

gang rape and murders committed in the course of those

offences were yet to become a menace for the society

compelling the Legislature to create special slots for those

offences in the Penal Code. At the time of Machhi Singh,

Delhi had not witnessed the infamous Sikh carnage. There

was no attack on the country's Parliament. There were no

bombs planted by terrorists killing completely innocent

people, men, women and children in dozens with sickening

frequency. There were no private armies. There were no

mafia cornering huge government contracts purely by

muscle power. There were no reports of killings of social

activists and 'whistle blowers'. There were no reports of

custodial deaths and rape and fake encounters by police or

even by armed forces. These developments would

unquestionably find a more pronounced reflection in any

classification if one were to be made today. Relying upon the

observations in Bachan Singh, therefore, we respectfully

wish to say that even though the categories framed in

Machhi Singh provide very useful guidelines, nonetheless

those cannot be taken as inflexible, absolute or immutable.

Further, even in those categories, there would be scope for

flexibility as observed in Bachan Singh itself."

(Emphasis added)

94. After referring to earlier authorities including **Bachan Singh**

(supra) and **Machhi Singh** (supra), Supreme Court in **Ramnaresh and**

others v. State of Chhattisgarh, (2012) 4 SCC 257 tried to lay

down a

nearly exhaustive list of aggravating and mitigating circumstances and in

para 76 said as
under :-

> *"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*
>
> *conviction*
> *s.*
>
> *(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

custod

y.

(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 of the Code of

Criminal Procedure. When the crime is enormous in

proportion like making an attempt of murder of the entire

family or members of a particular community. 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.

(9) When murder is committed for a motive which evidences

total depravity and meanness.

(10) When there is a cold-blooded murder without

provocation.

(11) 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." (Emphasis added)

95. The principles laid down in **Bachan Singh** (supra) and **Machhi**

Singh (supra) were sought to be followed and applied subsequently for

deciding as to what sentence should be awarded but later on it was felt

that the principles laid down in the above authorities are not being

correctly applied and have led to inconsistency in sentencing process in

India. It was also observed that the list of categories of murder crafted in

Machhi Singh (supra) in which death sentence ought to be awarded are

not exhaustive and needs to be given even more expansive adherence

owing to changed legal
scenario.

96. In a recent judgment in **Mukesh and another v. State (NCT of Delhi) and others, (2017) 6 SCC 1**, a three-Judges Bench has confirmed death sentence in two concurring judgments rendered by Hon'ble Dipak Misra,J. (for himself and Hon'ble Ashok Bhusan,J.) and by Hon'ble R. Banumathi,
J.

97. After referring to catena of decisions, earlier rendered on the question of sentence, it is observed that Court would consider cumulative effect of both factors i.e. aggravating and mitigating circumstances and has to strike a balance between the two and see towards which side the scale/balance of justice,
tilts.

98. Hon'ble R. Banumathi,J. observed that factors like poverty, young

age, dependants, absence of criminal antecedents, post crime remedies

and good conduct in imprisonment cannot be taken as mitigating

circumstances to take out the case in the category of rarest of rare case. In

para 516 of concurring judgment, Hon'ble R. Banumathi,J. Court said :-

> *"Society's reasonable expectation is that deterrent*
>
> *punishment commensurate with the gravity of the offence be*
>
> *awarded. When the crime is brutal, shocking the collective*
>
> *conscience of the community, sympathy in any form would be*
>
> *misplaced and it would shake the confidence of public in the*
>
> *administration of criminal justice system. As held in* ***Om***
>
> ***Prakash v. State of Haryana, (1999) 3 SCC 19****, the Court*
>
> *must respond to the cry of the society and to settle what*
>
> *would be a deterrent punishment for what was an apparently*

abominable crime." (Emphasis added)

99. In para 497 of the judgment in **Mukesh and another v. State (NCT of Delhi) and others** (supra), in concurring judgment by Hon'ble R.Banumathi,J. it is observed :-

> *" ... Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolical manner, the accused should be shown no remorse and death penalty should be awarded." (Emphasis added)*

100. The true import of aforesaid settled propositions of law is that awarding of life imprisonment for offence under Section 302 IPC is the rule and death sentence is an exception. Death sentence should only be awarded in cases which come under the purview of "rarest of rare" case.

Supreme Court, time and again has ruled that for awarding death sentence, Courts should specify the aggravating and mitigating circumstances of the case. What are the aggravating and

mitigating

circumstances would depends upon the facts of each case.

101. Mitigating circumstances are categorized as the manner and

circumstances in and under which offence was committed; the age of the

accused; the chances of the accused in not indulging in commission of the

crime again and the probability of the accused being reformed and

rehabilitated; if 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 and 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. Mitigating

circumstances may also be that if upon appreciation of evidence Court is

of the view that crime was not committed in a preordained manner and

that the death resulted in the course of commission of another crime.

Court has to see, if it is 'rarest of rare' case for awarding death sentence

and in the opinion of Court any other punishment i.e. life imprisonment

would be completely inadequate and would not meet the ends of justice

then only extreme punishment would be awarded. Moreover, aggravating

circumstances are in relation to crime and victim while mitigating

circumstances are broadly in relation to criminal. Balance between the

two has to be ascertained by Court while determining "Rarest of rare"

case. Circumstances discussed in aforesaid decisions are example but not

exhaustive. No fixed formula has been set to formulate aggravating and

mitigating circumstances and the discretion is left with Court which has to

evaluate, depending on the facts and circumstances of each case.

102. Applying the exposition of law as discussed above, in the facts of

the present case, we have examined the available aggravating and

mitigating circumstances in the case in hand.

103. At the time of incident, accused was 30 years of age, as is disclosed

in his statement under Section 313 Cr.P.C.

104. Coming to the aggravating circumstances, we also find that

accused-appellant has committed murder of not only his brother but also

his brother's wife and four minor children. Postmortem reports disclose

brutal, grotesque, diabolical murder by cutting neck of all deceased,

which clearly reflects the mindset of accused-appellant.

105. Present incident was committed when deceased Satyabhan

did not

agree to return the land belonging to accused-appellant, which he had

purchased after paying consideration amount. The manner in which

offence was committed and also the magnitude of crime, in our view,

places the present matter in the category of anti social or socially

abhorrent nature of crime. We concur with the finding of Trial Court that

six family members were murdered by accused-appellant along with his

companion in most brutal, grotesque, diabolical and dastardly manner

arousing indignation and abhorrence of society which calls for an

exemplary punishment. Four minor children who were less than 5 years of

age including their father and mother have been murdered by accused-

appellant and his companions when they were helpless and nothing is on

record to show that they aggravated the situation so as to arouse sudden

and grave passion on the part of accused-appellant to commit such

dastardly crime. Accused-appellant has also not shown any remorse or

repentance at any point of time, inasmuch as, he attempted to hide the

weapon in the same house and ran away from the house. Admittedly,

when Informant in the morning reached the house of deceased, accused-

appellant was not present there and after apprising himself of entire

incident, Informant lodged the report. Accused-appellant was arrested on

09.05.2012. In the statement recorded under Section 313 Cr.P.C. also, we

find no remorse on the part of
accused-appellant.

106. The above conduct, attitude and manner in which murder of six

persons has been committed by accused-appellant along with his

companions shows that appellant is a menace to the Society and if he is

not awarded with death penalty, even members of the Society may not be

safe. He slayed six lives to quench his thirst. The entire incident is

extremely revolting and shocks the collective conscience of the

community. Murders were committed in gruesome, merciless and brutal

manner.

107. Balancing mitigating and aggravating factors and looking to the fact

that appellant has committed crime in a really shocking manner showing

depravity of mind, in our view, the aggravating circumstances outweigh

the mitigating circumstances by all canons of logic and punishment of life

imprisonment would neither serve the ends of justice nor will be an

appropriate punishment. Here is a case which can be said to be in the

category of “rarest of rare” case and justify award of death punishment to

accused-appellant. We are also clearly of the view that accused-appellant

is a menace to the society and there is no chance of his rehabilitation or

reformation and no leniency in imposing punishment is called for.

108. In the circumstances, we are of the view that death punishment

imposed upon accused-appellant for the offence under Section 302/34 IPC

is liable to be confirmed. Reference No. 07 of 2017 is liable to be allowed

and accepted to the extent of confirmation of death penalty.

109. In view of foregoing discussions, Reference No. 07 of 2017

submitted by Trial Court for confirmation of death punishment awarded to

accused-appellant Gambhir Singh for the offence under Section 302/34

IPC is hereby accepted and death punishment awarded to accused-

appellant in the present matter is hereby confirmed. Conviction and

sentence of imprisonment for the offence under Section 404 IPC is also

confirmed against accused-appellant.

110. In the result, instant Appeal filed by accused-appellant is liable to

be dismissed and is accordingly dismissed. As regards Government

Appeal filed by State of U.P. against impugned judgment and order

whereby co-accused Smt. Gayatri has been acquitted, is concerned,

finding of Trial Court for the reasons discussed here-in-above cannot be

said to be illegal or perverse and no interference is warranted by this

Court in the impugned judgment and order to the extent of acquittal of co-

accused Smt. Gayatri. Thus, in view of settled position of law, as has been

held in the case of **S. Govindaraju Versus State of Karnataka, (2013)**