

Reserved on 22.03.2022

Delivered on 09.05.2022

**Court No. - 1**

**Case :-** CAPITAL CASES No. - 1 of 2014

**Appellant :-** State of U.P.

**Respondent :-** Deen Dayal Tiwari

**Counsel for Appellant :-** Govt. Advocate, Jyotindra Misra (Amicus),  
Kapil Misra

***Connected with***

**Case :-** CRIMINAL APPEAL No. - 1776 of 2016

**Appellant :-** Deen Dayal Tiwari

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Kapil Misra

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Ramesh Sinha, J.**

**Hon'ble Brij Raj Singh, J.**

**( Per Ramesh Sinha, J. for the Bench )**

**(A) INTRODUCTION**

1. The accused, **Deen Dayal Tiwari**, was tried by the learned Additional District & Sessions Judge, Court No.5, Faizabad in Sessions Trial No. 24 of 2013 : *State Vs. Deen Dayal Tiwari*, arising out of Case Crime No. 746 of 2011, under Section 302 I.P.C., Police Station Pura Kalandar, district Faizabad.
2. Vide judgment and order dated 29.01.2014/30.01.2014, the learned Additional District & Sessions Judge, Court No.5, Faizabad, convicted the appellant-Deen Dayal Tiwari under Section 302 I.P.C. and sentenced him to be hanged to death till he is dead and with fine of Rs.50,000/-.

3. Aggrieved by the aforesaid judgment and order dated 29.01.2014/30.01.2014, convict/appellant, **Deen Dayal Tiwari**, preferred Criminal Appeal No. 1776 of 2016 : *Deen Dayal Tiwari Vs. State of U.P.*
4. Capital Case No. 1 of 2014 arises out of the Reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of convict **Deen Dayal Tiwari**.
5. Since the above-captioned capital sentence reference and appeal arise out of a common factual matrix and impugned judgment and order dated 29.01.2014/30.01.2014 passed by the trial Court, we are disposing of the aforesaid reference and appeal by this common judgment.

**(B) FACTS**

6. The informant P.W.1-Dinanath Tiwari had lodged a written report (Ext. Ka.1) on 12.11.2011, at 06:10 a.m., in police station Pura Kalandar, district Faizabad, alleging therein that on 11/12.11.2011, at about 02:30 a.m., on hearing the noise “बचाओ-बचाओ” (save-save) of the wife and daughters of his elder brother Deen Dayal Tiwari (convict/appellant), he (P.W.1) and his wife Smt. Suneeta alias Anita (P.W.2) came out of their house and reached to the house of Deen Dayal Tiwari (convict/appellant). Thereafter, they asked Deen Dayal Tiwari

(convict/appellant) to open the door but the door was not opened. Then, they threatened to break the door. After that Deen Dayal Tiwari (convict/appellant) came out of the house armed with blood stained axe and attacked upon them also and asked them to leave from there and said that he had cut down his wife and four daughters; and he would also kill all of them. On being cried, villagers gathered there, then, they all controlled his elder brother Deen Dayal Tiwari (convict/appellant) and went inside the room, where they saw that Deen Dayal Tiwari (convict/appellant) had cut down all his four daughters and his wife.

7. The informant P.W.1-Dinanath Tiwari got scribed the aforesaid written report (Ext. Ka.1) from a person of his village and after affixing signature thereon, proceeded to lodge the same to police station Pura Kalander, District Faiazabad and lodged it. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Purakalander was 15 kilometer. A perusal of the chik FIR also shows that on the basis of written report of P.W.1-Dinanath Tiwari, Case Crime No. 748 of 2011, under Section 302 I.P.C., Police Station Pura Kalander, district Faizabad was registered against convict/appellant, Deen Dayal Tiwari.
8. The investigation of the case was conducted by P.W.5-Ajay Prakash Mishra, who, in his examination-in-chief, had deposed before the trial Court that on 12.11.2011, he was posted as

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Station Officer at police station Pura Kalandar, district Faizabad. On the same day, he got information that the incident had taken place in his area. After getting the investigation, he made entry of chik and the F.I.R. in the case diary and recorded the statement of informant Dinanath Tiwari (P.W.1). He reached the spot in the morning and saw that Deen Dayal Tiwari (convict/appellant) was present inside the room in his house after closing the door from inside; the door was bolted from outside also; and many people of the village and nearby places were present there. One brick of the eastern wall of the room was out from which he peeped and saw inside the room that Deen Dayal Tiwari (convict/appellant) armed with blood stained 'axe' was present and was walking inside the room. With the help of people present, namely, Visheshwar Nath Mishra (P.W.3), Vishun Tiwari, opened the door of the room by pushing it. The convict/appellant Deen Dayal Tiwari, thereafter, looked behind and wanted to run away but he was caught with the help of the police. After recovering one 'axe' from his right hand, the same was taken by the police in its custody. The stain of blood in the iron part of the axe was present and fresh blood in the बेट (wooden portion of the axe) was also present. He prepared memo of the same separately under his handwriting and signature. When he asked the name and address of the convict/appellant, he told his name Deen Dayal Tiwari (convict/appellant) son of Late Laxman Prasad Tiwari. Thereafter, he arrested the convict/appellant and

handed over by him to the police and instructed to keep him under safe custody. He further deposed that on the pointing out of the convict/appellant, two knives were recovered from the room. After that, he took possession of two knives ( one green belt and other yellow metal red green dotted) and one axe and thereafter, he sealed it and prepared memo of the same under his handwriting and signature (Ext. Ka.7). After that, he took possession from the spot of blood stained and plain cloth and bed, recovery memo (Ext. Ka.8) of which, was prepared by him in the presence of witnesses. He, thereafter, collected blood stained soil and plain soil and recovered one sweater and lungi etc. from the spot and thereafter, he sealed it and prepared a recovery memo of it and proved it as Ext. Ka.9 and Ext. Ka. 10 before the trial Court. He further stated that on the pointing out of the informant (P.W.1), he prepared the site plan (Ext. Ka.11) under his handwriting and signature. After that, he recorded the statement of Deen Dayal Tiwari (convict/appellant), who confessed the crime and stated that *“ his wife was of a bad character and had illicit relation with someone of the village, due to which his relation with his wife became strained, on account of which, on 11.11.2011 in the evening itself, he had decided that tonight itself he would kill his wife, therefore, he had kept the ‘knife’ and ‘axe’ in the evening itself and at around 3 o'clock in the night, when his wife and his daughters were sleeping, he firstly hit the head of his wife Siallali with axe, due to which she screamed, then, he*

*stabbed her with knife. After that, his daughters woke up and came to save their mother, then, he killed them in turn. Among their daughters, he firstly killed Mani Tiwari, then Riya, then Guddan/Gunjan, then Kumari Mahima with a 'knife' and 'axe'. On hue and cry of बचाओ बचाओ (save save) of his daughters, people of his village and members his family had gathered and these peoples were threatening to break the door and asked him to come out of the room, therefore, he had closed the door inside of his room."* He further deposed that on the same day i.e. on 12.11.11 on his dictation, S.I. R.K. Tiwari and Manushekhhar Singh had prepared the 'panchayatnama' of all the dead bodies lying on the spot inside the room viz. Siallali, Mani Tiwari aged 11 years, Riya Tiwari aged 8 years, Guddan Tiwari aged 6 years and Mahima Tiwari aged 4 years (Ext. Ka.12, Ext. Ka.13, Ext. Ka.14, Ext. Ka.15 and Ext. Ka.16). At the same time, the forms related to the dead bodies, photo lash, challan lash, sample seal, Form-13, letter to RI, letter to CMO etc. were prepared by him under his writing and signature (Ext. Ka. 17 to Ext. Ka. 36). After that, recovered knives, axe and clothes were sent to Forensic Science Laboratory, Lucknow through CJM Faizabad, which is marked as Ext. Ka. 37.

P.W.5 Sri Ajay Prakash Mishra had further deposed that on 13.11.2011, he recorded the statement of eye-witness Anita (P.W.2), Vishnu Tiwari and witnesses of 'panchayatnama'. On

14.11.11, the 'panchayatnama' was copied in the CD. On 01.12.2011, he recorded the statement of Ashok Tiwari, Ugrasen, Anil Chaurasia and Vishesharnath Mishr (P.W.3). On 02.12.2011, he made entry of all finger impressions taken from the spot in CD. On 13.12.11, he recorded the statement of witness Sanjay Chaurasia and Kashiram Kori and after completion of investigation, he filed charge-sheet (Ext. Ka. 38) against convict/appellant Deendayal Tiwari before the court concerned under his handwriting and signature.

P.W.5 Sri Ajay Prakash Mishra had further deposed that Constable Durga Prasad Mishra was working with him at police station Pura Kalander, district Faizabad, whose handwriting and signature are familiar to him and probably he is posted in Ballia district. Constable Moharrir Durga Prasad Mishra had prepared chik no. 211/11 in his handwriting and signature (Ext. Ka. 39) and endorsed its entry in GD as report no. 7. He proved the carbon copy of GD (Ext. Ka. 40). In report no.16 of G.D., he endorsed his return to the police station and recovery of 'knife', 'axe' and 7 bundles of cloth marked as Ext. Ka. 41.

In cross-examination, P.W.5 Sri Ajay Prakash Mishra had deposed that he had reached the spot in the morning but he did not remember the time. There was no sunrise. He did not remember the time when he left for place of occurrence from the police station. The information about this case was given

by the informant Dinanath Tiwari (P.W.1). He did not remember the time of arrival of P.W.1 at the police station. As soon as the information was received from informant (P.W.1), he left from the police station. The FIR was lodged in his presence. He did not remember how much time it took to write the FIR. He started from police station to the place of the incident at 6.10 a.m. Along with him, S.I. R.K. Tiwari, Constable K.K. Singh, Constable Istiaq, Constable Harihar Tiwari went on a Jeep to the place of incident. The statement of the informant (P.W.1) was recorded on the same day at the police station itself. The informant (P.W.1) had reached the spot by his own conveyance. The place of the incident is 14 Km. from the police station. When he reached to the place of occurrence, the outer door of the house of Deen Dayal (convict/appellant) was opened. There were two rooms, one outside and one inside. The सिटकनी (iron grill) fixed in the inner door was broken due to push but it was not taken into possession by the police. He denied the suggestion that there was no iron grill inside nor it was broken.

P.W.5, in cross-examination, had further deposed that the body of the wife of the convict/appellant, namely, Siyallali was lying on the cot adjacent to the western wall and the bodies of four daughters were lying on the floor of the room. The width of the room was five steps and the length was seven steps in which the corpses were lying. One axe was recovered from the



possession of the convict/appellant and on his pointing out, two knives were recovered. Both the informant (P.W.1) and the convict/appellant are real brothers. The gallery was covered with bricks and it was not cemented and when he reached there, the bricks were fallen. He deposed that there is no signature of the convict/appellant on the seizure memo of weapon of assault. He denied the suggestion that no murder weapon was recovered from the convict/appellant and he had made fake memo. He deposed that first of all, he did the 'panchayatnama' of Siallali which started at 6:40 a.m. and ended at 7:25 a.m. The distance from the place of the incident to the police station was written in the 'panchayatnama' about 10 km. After that the 'panchayatnama' of Km. Mahima was conducted from 7.30 a.m. to 8.00 a.m. The 'panchayatnama' of all was over at 11:30 a.m. The panchayatnama started only after the body was found. The convict/appellant was wearing lungi, vest and sweater. He inspected the place of the incident before the 'panchayatnama'. The witnesses in the 'panchayatnama' were Vishesharnath Mishra (P.W.3), Vishnu Tiwari, Sanjay Chaurasia, Umashankar Mishra, Kashiram Kori. He also denied the suggestion that apart from axe, knife, there was no injury of stick etc. He also denied the suggestion that all the three weapons were not used by the same person and number of attackers were larger one. He also denied the suggestion that all proceedings was done by him on one day and recorded the statement of Vishesharnath (P.W.3) at the

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place of the incident on 01.12.2011. He further deposed that he recorded the statement of the wife of the informant at the place of occurrence on 13.11.2011 but he could not remember the time. He denied the suggestion that the informant had not gone to the police station and informant was unconscious at the place of occurrence. He also denied the suggestion that convict/appellant Deen Dayal came to the place of the incident from his *khaliyan* (barn). He also denied the suggestion that accused was shouting that the enemies killed his daughters and wife. He further deposed that at 11.30 a.m., he went to the police station after sending the dead bodies for post-mortem. He came to the police station at 01.00 p.m. He further deposed that when he reached the spot, he inspected the place of the incident, did 'panchayatnama', and sent the body for post-mortem. Before starting the 'panchayatnama', he prepared all the memos in his handwriting and signature. It would have taken an hour to make all the five memos. He denied the suggestion that no recovery was made from the convict/appellant and under the pressure of the villagers, they were falsely implicated the convict/appellant.

9. The autopsy on the dead bodies of Smt. Siyallali wife of convict/appellant Deen Dayal Tiwari aged about 36 years and Km. Mani aged about 11 years, Km. Riya aged about 8 years, Guddan aged about 6 years Mahima aged about 4 years, daughters of convict/appellant Deen Dayal Tiwari were

conducted on 12.11.2011, at 01:00 p.m., 02:30 p.m., 02:30 p.m., 02:00 p.m and 01:30 p.m., respectively, by Dr. S.K. Shukla (P.W.4), who, found on their persons ante-mortem injuries, enumerated hereinafter :--

**“Ante-mortem injuries of Smt. Siyallali wife of convict/appellant Deen Dayal Tewari, aged about 36 years :**

1. Incised wound of Lt. side of forehead 2 cm above to Lt. upper eyebrow. Size .5 x 1.0 x bone deep.
2. L/w of Lt. eye orbit just above to Lt. upper eyelid. Size 6 x 2.0 cm x bone deep.
3. Incised wound of left side of face 2 cm below to Lt. down eyelid. Size 2.0 x 1.0 x bone deep.
4. Multiple L/w of Rt. side of face including forehead, 3 c.m. medial to Rt. ear. Size of longest bone 8.0 x 4.0 x bone deep and size of smallest one 2.0 x 1.0 cm x bone deep.
5. L/w of Lt. shoulder at mid of clavicle. Size 3 x 2.0 x bone deep.
6. Multiple L/w of Lt. side of neck. Size of largest one 3.0 x 1.5 x bone deep.
7. Multiple CRUSH injury of abdomen in epigastric region, including chest cage. Size of longest one 15 x 5.0 cm x bone deep & size of smallest one (paper torn) 1.0 cm.

**Ante-mortem injuries of Km. Mani daughter of convict/appellant Deen Dayal Tiwari aged about 11 years:**

1. L/w of skull 3 cm above to Lt. ear. Size 5.0 x 5.0 x bone deep.
2. Contusion of forehead at frontal region. Size 7.0 x 5.0 cm.

3. Left section of neck. Size 10 x 4.0 x bone deep.
4. Incised wound of mandible. Size 4.0 x 1.0 x bone deep.

**Ante-mortem injuries of Guddan daughter of convict/appellant Deen Dayal Tiwari aged about 6 years :**

1. CRUSH injury of Lt. side of skull 2 cm above to Lt. ear. Size 7 x 6.0 x bone deep.
2. Cut Section of Neck at anterior aspect. Size of 8 x 3.0 cm x bone deep.
3. Multiple penetrating wound of Abdomen. Size of longest one 8.0 x 5.0 cm & smallest one 4.0 x 3.0 cm.

**Ante-mortem injuries of Km. Riya daughter of convict/appellant Deen Dayal Tiwari aged about 8 years :**

1. L/w of Lt. side of face 2 cm medial Lt. ear. Size 4.0 x 2.0 x bone deep.
2. Left section of neck. Size 6.0 x 9.0 x bone deep.
3. Incised wound of chest at Lt. side 3 cm above to epigastric region. Size 2.0 x 1.0 cm.
4. Multiple L/w of Rt. leg. Size of longest one 3.0 x 1.5 cm and smallest 1.5 x 1.0 cm

**Ante-mortem injuries of Km. Mahima daughter of convict/appellant Deen Dayal Tiwari aged about 4 years**

1. L/w of skull 2 cm above to Lt. upper eyebrow. Size 4.0 x 3.0 x bone deep.
2. L/w of occipital region of skull. Size 12 x 5.0 x Bone deep.”

The cause of death spelt out in the autopsy reports of the deceased Smt. Siyallali, Km. Mani, Km. Riya, Guddan and Mahima was shock and hemorrhage as a result of ante-mortem injuries.

10. It is significant to mention that in his deposition in the trial Court, Dr. S.K. Shukla (P.W. 4) has reiterated the said cause of death and also stated therein that on 12.11.2011, he was posted as Anesthetic in District Woman Hospital, Faizabad. On the same day, at 01:00 p.m., he conducted the postmortem of the deadbody of deceased Siyallali wife of convict/appellant Deen Dayal Tiwari, which was sent by S.O. Purakalander, district Faizabad in a sealed condition through Constable Ram Niwas and Lalji Pal, Police Station Pura Kalander, District Faizabad along with ten other enclosures. He deposed that the deceased Siyallali was aged about 36 years; the deadbody was about half a day old; stiffness was present in her body both, above and below, in her hands and feet after death; mouth was open; and both the eyes were open. He further deposed that on internal examination of deadbody of deceased Siyallali, he found that head, neck and skull were as described in the ante-mortem injuries. The membranes of brain and brain were torn; blood clot was present inside the brain; the chambers of both sides of the heart were empty, meaning thereby blood was oozing out; and the upper abdominal membrane was damaged. He also found that the stomach was empty; foods and gases were

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present in the small intestine; faces and gas were present in the large intestine; liver was pale; gall bladder was full; the bladder was half full; and uterus was empty. He deposed that all the aforesaid injuries were half day old and it seemed to be attributable by 'axe' and 'knife'. All the injuries could be attributable on 11.11.2011 at about 2:30-3:00 a.m.

Dr. S.K. Shukla (P.W. 4) had further deposed that on the same day (12.11.2011), at 1:30 p.m., he conducted postmortem of the deadbody of Km. Mahima daughter of convict/appellant Deen Dayal Tiwari, whose age was about 4 years. Her death could be caused about half a day. Her body was average height; stiffness was present after death on the upper and lower parts of her body; her mouth was open; and both eyes of her were closed. On internal examination of the deceased Km. Mahima, he found that injuries on head was as described in the ante-mortem injuries. Her membranes and brain were torn; blood clot had accumulated; there was no internal injury to the chest; the chambers on both sides of the heart were empty, meaning thereby blood was oozing out; teeth in the mouth was 11/11; the stomach was empty; there was food and gas in the small intestine; stool and gas were present in the large intestine; the liver became yellow; the gall bladder was full; the bladder was empty; and there was no irregularity or deficiency in the genital and it was normal. He further deposed that these injuries could be attributable by 'axe' or

'danda' (stick) and it could be caused on 11.11.2011 at about 2:30-3:00 a.m.

Dr. S.K. Shukla (P.W. 4) had further deposed that on the same day (12.11.2011), at about 2:30 p.m., he conducted the postmortem of the corpse of deceased Km. Mani Tiwari daughter of convict/appellant Deen Dayal Tiwari, whose age was about 11 years. Her deadbody was half a day old; the deceased was of average height; the post-death stiffness was present in both the upper and lower portion; her mouth was half open; and both her eyes were closed. On her internal examination, he found that the membranes of the brain and brain was torn; clot of blood was present in the brain; blood from all injuries of the heart was oozing out; teeth was 12/13; and the uterus was empty. He further deposed that all the above injuries seemed to have been attributed by some sharp edged weapon and it could be caused on 11.11.2011 between 2:00-2:30 a.m.

Dr. S.K. Shukla (P.W. 4) had further deposed that on the same day (12.11.2011), at about 3:00 p.m., he conducted the postmortem of the deadbody of the deceased Km. Riya, daughter of convict/appellant Deen Dayal Tiwari whose average age was 8 years. The body of her was half a day old; stiffness was present in both parts of the body after death; teeth was 13 / 13; mouth was half open; and eyes were closed. On her internal examination, he found that the membranes of the

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brain were torn; blood clot was found inside the brain; heart was bleeding; the stomach was empty; the uterus was empty; food was present in the small intestine and fecal gas was present in the large intestine; and everything else was found to be normal of the deceased. He further deposed that all these injuries could be attributable by 'axe' and 'knife' and these injuries could be caused on the night of 11.11.11 at 2.30 p.m.

P.W.4 had further deposed that on the same day, at 02:00 p.m., he conducted the post-mortem of the deadbody of deceased Kumari Guddan daughter of convict/appellant Deen Dayal Tiwari at 2 p.m. whose age is about 6 years. Her body was of average; post-death stiffness was present in both parts of the body; and her mouth and eyes were closed. On internal examination, he found that the upper membranes of the brain as well as brain were torn; blood clot was present inside the brain; both the lungs turned yellow; heart was empty; the stomach was empty; food and gas inside the small intestine and feces and gas from the large intestine were present; the liver turned yellow; the gallbladder was full; the bladder was empty; and genital was normal.

P.W.4 had further deposed that all the injuries of the deceased seems to have inflicted with a sharp edged weapon like 'axe' and 'knife', and almost all these injuries were about half a day old before the death. All these injuries appear to have caused at 2.30 am on 11.11.2011. He proved the post-mortem report of



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the deceased (Ext. Ka. 2, Ext. Ka.3, Ext. Ka.4, Ext. Ka.5 and Ext. Ka. 6).

P.W.4-Dr. S.K. Shukla, in cross-examination, had deposed that post-death claudication begins within 12 hours after the deceased dies and in the next 12 hours after death, stiffness occurs in the whole body. Hence, in 24 hours, the stiffness spreads throughout the body after death. After 24 hours, this stiffness starts to dissipate slowly from the body after death. He deposed that he gave the statement of the time of injuries of the deceased as 2:30-3:00 am in the morning. In this, there can be a gap of four hours back and forth because there is a difference of temperature (winter heat). In this way, the injuries to the deceased could be attributable 11 O'clock or 12 O'clock in the night of 11.11.2011. There are seven cuts and stab wounds found on the body of the deceased, which is possible to come by sharp edged weapon. He further deposed that 12 ruptured injuries, contusion marks, abrasion which are also possible to come from Lathi, Danda.

P.W.4 had further deposed that injury no.3 of Kumari Mani was not attributable by the weapon like knife and axe. This injury no.3 is possible to come from the edge whose width is larger. The injury no.2 of the deceased Miss Guddan whose size is 8 cm. x 7 cm x deep to the bone is not possible to come from weapons like knife and axe. These injuries is also possible to come from a wide-edged weapon. He further

deposed that there are two types of knives; one is sharp; and the other is blunt. One end of a knife is sharp and blunt and the tip is sharp on both sides, which makes it possible to have ruptured wound. If this type of knife used for committing murder by stabbing, then, it will be sharp on one side and blunt on the other. He denied the suggestion that the injuries on the bodies of the deceased are not possible to come at 2:00-2:30 p.m. in the night.

11. The case was committed to the Court of Sessions by Chief Judicial Magistrate. The trial Court had framed charges against the convict/appellant, Deen Dayal Tiwari, for the offence under Sections 302 I.P.C. He pleaded not guilty to the charges and claimed to be tried. His defence was of denial.
12. During trial, in all, the prosecution examined five witnesses, namely, P.W.1-Dinanath Tiwari, who is the informant and brother of convict/appellant Deen Dayal Tiwari, P.W.2-Smt. Suneeta *alias* Anita, who is the wife of informant (P.W.1), P.W.3- Vishesharnath Mishra, who is independent witness, P.W.4 Dr. S.K. Shukla, who conducted the postmortem of the corpse of the deceased and P.W.5-Ajay Prakash Mishra, who conducted the investigation of the case.
13. The informant P.W.1-Dinanath Tiwari, in his examination-in-chief, had deposed before the trial Court that he has two

brothers and 5 sisters. The five sisters are in their in-laws' house. Both the brothers were living separately for about 4 years. The house of both of the brothers is adjacent. His exit is in the north direction and the exit of Deen Dayal Tiwari (convict/appellant) is in the east direction. His brother Deen Dayal Tiwari (convict/appellant) used to repair and make City Scan and X-ray machines at Lucknow. After doing B.Sc in Lucknow, his brother Deen Dayal Tiwari (convict/appellant) was doing a job there. His brother Deen Dayal Tiwari (convict/appellant) came from Lucknow for 5-6 months before the incident and was living with his wife and daughters in the village. The incident is dated 11/12.11.11 at 2:30 am in the night. He was sleeping with his children at his house. After hearing the noise of बचाओ बचाओ (save save), he came out of his house and saw that the voice of wife and children of Deen Dayal (convict/appellant) was coming. Till then, some people of the village had come. They tried to open the door. When the door did not open, they started demolishing the wall. Till then, Deen Dayal Tiwari (convict/appellant) opened the door and came out with blood stained axe in his hand and threatened them to run away from there, otherwise, he would kill them too. After that, the door was closed. At the same time, the police came and after opening the door, arrested him (convict/appellant Deen Dayal Tiwari). The dead body of the wife and daughters of Deen Dayal Tiwari (convict/appellant) were lying inside the house. He got scribed the report of the

incident from a man of the village and after putting signature thereon, gave it to the Inspector at the place of the incident. He proved the written report (Ext. Ka.1). The Inspector did not record his statement and went away with his report. At that time, his mental condition was not good because five murders took place in the house. These five murders were done by his brother Deen Dayal Tiwari (convict/appellant). His wife (P.W.2) and Vishnu Tiwari of the village, Ashok Tiwari and others (not examined by the prosecution) were present on the spot.

In his cross-examination, P.W.1-Dinanath Tiwari had deposed before the trial Court that he has two brothers. Deen Dayal (convict/appellant) is elder and he is younger. He has passed High School. Deen Dayal Tiwari (convict/appellant) has passed B. Sc and used to work in Lucknow. Deen Dayal Tiwari (convict/appellant) had four daughters and has no son. He has 3 sons and has no daughter. 4-5 years ago, they used to live together and before separation, they were having love and affection with each other. Even at the time of the incident, Deen Dayal Tiwari (convict/appellant) believed in his family and the mutual relationship was cordial. There was no estrangement. In the partition, he got the verandah and half gallery respectively in the north of the house and Deen Dayal Tiwari (appellant) got two rooms, kitchen and half gallery in the southern part. He could not tell the exact length and width

of the room. There are no windows and ventilators in the room. There was a slight frost at the time of the incident. On the night of the incident, they had eaten and slept. He came to know about the incident in the morning when some people of the village gathered together and started speaking. At that time, Ashok Tiwari, Anil Chaurasia (not examined), Vishesharnath Mishr (P.W.3) of the village had come. Later, more people had come. As soon as he came to know about the incident, he fainted. After two hours, he regained consciousness. At that time, the police and officers had arrived. On regaining consciousness, he did not go to the police station to report. He got scribed the report from another and gave it to the Inspector. At that time, his mental condition was not good. He was not in a position to write and understand. He only affixed signature. He never went to the police station about the incident. When he regained consciousness, the dead body was sealed, loaded on the tractor and went from there. He did not go to the room. He came to know about the incident in the morning when some people of the village gathered together and started speaking of occurrence. The position of the corpse could not tell whose corpse was where. The body was in the brother's room. He had heard this when he regained consciousness. The Inspector had never taken any statement from him. He had not seen what his brother was wearing on the day of the incident because the police had caught him in the morning. The winter was light

due to which no one was wearing sweater. The peoples were wearing only light clothes.

P.W.1 had further deposed that the house of witness Visheshwarnath Mishr (P.W.3) is about 3 km away from the place of the incident. The house of Ashok Tiwari house is about 300 meters east from the place of the incident. In the middle, there are houses of another 2-3 people. Someone telephonically informed the police. No one had seen the occurrence of the incident. Everyone came to know in the morning. They have about 3 bighas of farmland, which both of brothers used to sow separately.

P.W.1 had further deposed that the distance of police station from his village is 14-15 Km. 2-3 months before the incident, Deen Dayal Tiwari (convict/appellant) had already lost his mind. He did not know about the treatment of his brother (Deen Dayal Tiwari) done at Lucknow and he is not even aware of any treatment of his for mental impairment in jail. His brother Deen Dayal Tiwari (convict/appellant) used to abuse the villagers and also used to quarrel with him. His brother Deen Dayal Tiwari (convict/appellant) also used to beat many people of the village. The villagers were fed up with this behaviour of Deen Dayal Tiwari (appellant) and were upset. His brother Deen Dayal Tiwari used to repair Cityscan and X-ray machines in Lucknow and earned a lot of money from this. The condition of the house had become good. For

this reason, the villagers were jealous of him. The incident is of the month of November. The rice paddy was cut. He did not know that Deen Dayal Tiwari (appellant) used to sleep in the field to take care of his paddy. He did not know that Deen Dayal Tiwari was sleeping in the barn on the day of the incident. He denied the suggestion that the Inspector wrote the report by speaking to someone, and got his signature. After that P.W.1 stated that report was wrote down on his dictation and he had signed on it. He denied the suggestion that Deen Dayal Tiwari (convict/appellant) was in the खलिहान (barn) on the night of the incident and at that time, the miscreants entered his house and started robbing him.

14. P.W.2-Smt. Sunita alias Anita, who is the wife of the informant (P.W.1), in her examination-in-chief, had deposed that the name of her जेठ (brother-in-law) is Deen Dayal Tiwari (convict/appellant) and the name of her husband is Dinanath (P.W.1). Two years before the incident, partition was happened between her brother-in-law and her husband. On the northern side of the house, there is a room and a verandah, which are on her share and two rooms from south-east respectively and one kitchen is in her brother-in-law's share and in the middle, there is a wall constructed with brick but it was not cemented. The four daughters of Deen Dayal Tiwari (convict/appellant) and his wife Siallali were sleeping in their room and they were sleeping in her room.

P.W.2 had further deposed that this incident happened on 11/12.11.11 at 2.30 am in the night. When she was sleeping in her room with her husband (P.W.1) and children, then, the sound of बचाओ बचाओ (save save) and crying came from her sister-in-law Sialali and her daughters. Hearing this noise, they came out of their house and made alarm, then, many people of the village came. Vishnu Tiwari, Ashok Tiwari etc. came on the spot. After that, they tried to open the door but it was not opened. Meanwhile, the police also came and removed them from there. The deadbodies of Sialali and her daughters Mani, Riya, Guddan, Mahima was in the room of Deen Dayal Tiwari (convict/appellant) and Deen Dayal Tiwari (convict/appellant) was also in the room. She was at her own door and saw that the police took away Deen Dayal Tiwari (convict/appellant). The police was investigating this incident. The police had not questioned her about this incident.

In cross-examination, P.W.2- Smt. Sunita alias Anita had deposed that she has three children and these three are boys. Her brother-in-law Deen Dayal Tiwari had four girls. Brother-in-law (convict/appellant) is elder and her husband (P.W.1) is younger. Her father-in-law was Laxman Prasad Tiwari and he was five brothers, amongst them her father-in-law was the eldest. Durga Prasad Tiwari, Shesar Pal Tiwari, Shivpal Tiwari, Sri Bhagwan Prasad Tiwari and her husband (informant - Dinanath Tiwari) are educated. She have studied till class



eight. She did not know how much the convict/appellant Deen Dayal Tiwari is educated. He used to work in Lucknow. She did not know what work he used to do. The situation of Deen Dayal Tiwari's house was good. Two years before this incident, separation took place with Deen Dayal Tiwari (appellant).

P.W.2 had further deposed that when a person from the village used to come to the house of convict/appellant Deen Dayal Tiwari, convict/appellant Deen Dayal Tiwari used to abuse him and drive him away from the door and said that he has nothing to do with them. She further deposed that there is no window or ventilators in the house of Deen Dayal (convict/appellant). This incident happened one and a half year ago. The incident is of November 2011. It was a light winter. The people used to wear winter and cotton ordinary clothes. She was sleeping in her house on the night of the incident. She was sleeping in deep sleep. She was sleeping in her house at night. In the night of the incident, the police came at 04:00-04:30 a.m. in the morning. She and her husband (P.W.1) did not give information of the incident. She did not know who informed the police about this incident. When the police came, it was morning. They wanted to go to Deen Dayal Tiwari's door when the police arrived but the police did not allow them to go towards the room of Deen Dayal Tiwari, therefore, she was at the door of her house. Her husband (P.W.1) was shocked to learn about this incident. Villagers Ashok Tiwari and Vishnu

Tiwari and other people had come in the morning whose names she did not know. There was a pile of brick standing as a wall in the gallery between her house and the house of Deen Dayal's house. She further deposed that how did the police break open the door of Deen Dayal's house, she did not know.

P.W.2 had further deposed that since they could not go there, therefore, it could not be told in what condition the dead bodies were present where they were. She did not see the corpse, hence she has no information about the injuries. The night of the incident was dark. At that time, the paddy was being cut and some paddy was empty to be harvested. She did not know whether Deen Dayal Tiwari (convict/appellant) was guarding the paddy or where he was present on the night of the incident. She could not even tell what weapons were or were not there in the room of the incident.

P.W.2 had also stated that they did not try to open the door of Deen Dayal Tiwari's house. The police opened the door of Deen Dayal Tiwari's house. She denied the suggestion that an unknown miscreant had entered Deen Dayal Tiwari's house on the night of the incident and robbed him and when his wife and children protested against it, assaulted them. She also denied that miscreants had robbed Deen Dayal Tiwari's house and killed his wife and children. She also denied the suggestion that the miscreants after looting and killing kept the outer door of the house opened. She also denied the suggestion that when

Deen Dayal Tiwari (convict/appellant) came to the house and found his wife and children in death condition, he was telling the villagers and alleging that all of you together had caused this incident. She also denied the suggestion that even after the arrival of the police, Deen Dayal Tiwari (convict/appellant) was levelling charges upon the villagers in front of the policemen about these killings, due to which the police was reprimanding. She also denied that the villagers had falsely implicated Deen Dayal Tiwari (convict/appellant) with the connivance of police. She also denied that the police had falsely implicated Deen Dayal Tiwari by making false story.

15. P.W.3-Vishweshwar Nath Mishra, in his examination-in-chief, had deposed that on 11.12.11.2011, he was sleeping at his house. At around 2:00-2:30 o'clock in the night, he got a call that some incident had happened at Deen Dayal Tiwari's house and the crowd gathered there. After that, he immediately reached in front of Deen Dayal Tiwari's house and saw that crowd had gathered in front of Deen Dayal Tiwari's house and the police had also reached the spot in front of him. The room of Deen Dayal Tiwari was closed from inside. They tried to get open the door but the door was not opened. Then, they peeped inside through the window of the wall and saw that lantern was burning in the room and Deen Dayal Tiwari (convict/appellant) was walking in the room with drenched axes in his blood soaked hand and inside the room the dead bodies of his wife

Siallali and her four daughters were lying in the room. When the police forced to get open the door, then convict/appellant Deen Dayal Tiwari came out with blood stained axe and was arrested by the police on the spot. He (P.W.3) and many other people of the village entered into the room of Deen Dayal Tiwari and saw that the corpse of his wife drenched in blood was lying on the cot and on the ground, corpse of four girls were lying. Deen Dayal Tiwari (convict/appellant) told them that he had killed his wife and girls. Two blood stained knives were also lying on the spot.

PW.3 had further deposed that the Inspector first took into custody a Sweater, one piece of lungi and collected blood stained and plain soil from the spot and also recovered blood stained and plain clothes, bed, one axe, one knife of green handle, one knife of yellow metal handle etc., memo of which was prepared by the Inspector separately on the spot before him and he made his signature on the same. He proved the memo and his signature thereon. He also deposed that the Inspector had prepared the panchayatnama of five corpses before him, upon which he put signature thereon. The Inspector had prepared the 'Panchayatnama' separately for the five dead bodies before him. The Inspector took his statement regarding this incident and five deadbodies were sent for postmortem. He further deposed that the clothes, which were wearing by Deen Dayal (convict/appellant), were having blood stained at everywhere, which was taken in custody by the

police. Deen Dayal Tiwari (convict/appellant) told on the spot that his wife was a bad character, due to which he had killed his wife along with his four daughters. He went to the postmortem house with the dead bodies.

In cross-examination, P.W.3- Vishweshwar Nath Mishra deposed that the place of incident is the Pure Brijlal Tiwari Moiya Kapurpur. His house is in Pure Ram Roop Mishra. His house is 1-1½ KM away from the place of incident. He came to know about the incident at 2:00-2.30 O'clock in the night. The phone call was made to him by Vishnu Tiwari. His village is about 1200 meters away from Bharathipur. On getting information from the phone, he went wearing clothes after 10 minutes and reached the spot in five minutes. He reached the spot at around 03:00 a.m.-3.15 a.m. He and the police had arrived together. The police station is about 12-13 Kms. east direction from the place of the incident. His house is in south direction from the place of the incident. Deen Dayal's house has two or three rooms. When he reached at the place of the incident, the main door of Deen Dayal was open and the door of the room where the murder took place was closed. It is wrong to say that the door was not opened by the police by pushing it, but it was opened.

P.W.3 had further deposed that about one o'clock, the entire Panchayatnama proceedings were over. The body was sent for the postmortem. The memo of axe, knife, soil, clothes etc. were prepared. At about 07:00 O'clock, convict/appellant was

sent to police station and after sending the convict/appellant to police station, all the memos were prepared. He also went to the place of postmortem. The postmortem was conducted between 03:00-04:00 O'clock. He reached home at about 07:00 O'clock after conducting funeral of the deadbodies.

P.W.3 had further deposed that when the convict/appellant was pulled out, he was on underwear and in the same condition, he was sent to the police station. He denied the suggestion that he had any quarrel with Deen Dayal before the incident. He further deposed that he had no enmity with Deen Dayal. There was no window and ventilators in Deen Dayal's room in which the body was found. The body of his wife was lying in front of the door; the bodies of two girls were on the ground and two were on the bed. On seeing the memos of weapons of murder and knives, he deposed that the signature of convict/appellant is not thereon. He denied the suggestion that accused Deen Dayal was in his barn on the day of the incident. It is wrong to say that when Deen Dayal came to his house from the barn and came to know about the incident, he started shouting that the villagers finished his family through the miscreants. It is also wrong to say that the policemen scolded him. It is also wrong to say that the villagers made Deen Dayal culprit. He deposed that the edge of the axe is four inches; the fall was nine inches; and the handle was two and a half feet.

16. In the statement under Section 313 Cr.P.C., convict/appellant claimed to be innocent and denied the allegations levelled against him and stated that the prosecution witnesses had falsely implicated them on account of enmity. The convict/appellant stated in his statement under Section 313 Cr.P.C. that before the incident, he was working at Lucknow, upon which he got a good amount of salary and his condition was good. On account of his good condition, his *pattedar* and villagers were getting jealous to him. He had four daughters and no sons. His brother (informant) had only son. He told that he would give all the properties to his daughters, which was not liked by his brother Dina Nath (informant) because he wanted to get all his properties. He had cordial relationship with his wife and daughters and he loved a lot to his wife and daughters and there were no enmity between them. Before the incident, altercation took place with Visheshar Nath, on account of which, he was inimical to him. He further stated that on the night of the incident, he was sleeping at barn for safety of cutting paddy. When he came home in the morning, he came to know about the incident. He has faith that this incident was done by the villagers and his brother through miscreants. He was stated this by crying but they have falsely implicated him with the connivance of police. No weapon of murder i.e. axe and knife were recovered from his possession.

17. The learned trial Court believed the evidence adduced by Dina Nath Tiwari (P.W.1), Smt. Suneeta alias Anita (P.W.2) and Visheshwar Nath Mishra (P.W.3) and convicted and sentenced Deen Dayal Tiwari in the manner stated in paragraph-2, hereinabove.

18. Hence, the above-captioned appeal and reference.

**(C) CONVICT/APPELLANT'S ARGUMENTS**

19. On behalf of the convict/appellant, Shri Jyotindra Misra, learned Senior Advocate/Amicus Curiae assisted by Shri Kapil Misra, learned Counsel argued :-

(I) That the case rests entirely on the circumstantial evidence. Unless and until the prosecution proves its case beyond all reasonable doubt, the conviction in a case of circumstantial evidence would not be warranted. His submission is that merely on the basis of suspicion, conviction would not be sustainable.

(II) That the F.I.R. was lodged after arresting of the appellant and, therefore, the F.I.R. is anti-time.

(III) That the investigation of the instant case is tainted as signature of the convict/appellant was not on the seizure memo of weapon of assault. There is no exhibit before the Trial Court to prove that the alleged recovered weapons were used by the convict/appellant.



Furthermore, there is no proved serologist report to show that the blood on the murder weapons were of human being and of the deceased. There is a false recovery of axe and knives alleged to be used in the incident by the convict/appellant.

- (IV) That P.W.4-Dr. S.K. Shukla, who conducted the postmortem of the deceased had stated in his deposition that some of the injuries over the body of the deceased cannot be caused by alleged recovered weapons.
- (V) That there are major contradictions in the statements of P.W.1, P.W.2, P.W.3 and P.W.5.
- (V) That the presumption of Section 106 of the Indian Evidence Act cannot be drawn against the convict /appellant. His submission is that unless the initial burden is discharged by the prosecution, the burden would not shift on the convict/appellant. The convict/appellant in his statement recorded under Section 313 Cr.P.C. had stated that at the time of the incident, he was sleeping in barn for saving his paddy but the trial Court has not considered this fact while convicting the convict/appellant by means of the impugned order.
- (VI) That there was no motive for the convict/appellant to commit the alleged crime as alleged by the prosecution.

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His submission is that in the case of circumstantial evidence, motive plays an important role and the prosecution has utterly failed to prove the case as to motive.

(VII) That when two views are possible, one leaning towards acquittal and another towards conviction, the benefit should be given to accused.

(VIII) That the findings of guilt recorded by the trial Court is based on surmises and conjectures, hence the impugned judgment is liable to be set-aside.

(IX) That the learned trial court has committed error in concluding that the case of the convict/appellant is covered under the 'rarest of rare cases' and, therefore, the death sentence awarded to the convict/appellant is not legally justified.

**(D) RESPONDENT/STATE ARGUMENTS**

20. On behalf of the State, Shri Vimal Kumar Srivastava, learned Government Advocate assisted by Shri Chandra Shekhar Pandey, learned Additional Government Advocate has argued :-

(I) that the motive for the crime was duly proved.

(II) that place of occurrence is proved without doubt as there is no suggestion that the incident occurred at any other place.

- (III) that the house of informant P.W.1 is besides the house of the appellant, where the incident had occurred and their houses are partitioned with pile of brick, therefore, it is quite natural and informant P.W.1 and his wife P.W.2 had heard the noise of the daughters and wife of the appellant and after hearing the noise, both of them i.e. P.W.1 and P.W.2 came out of his house and saw the incident.
- (IV) that though the deceased are the family members of P.W.1 and P.W.2 and are related to each other, their testimony cannot be discarded merely because the relationship can never be a factor to affect the credibility of witnesses. His submission is that P.W.1 and P.W.2 have established their presence at the place and time of occurrence and their statements are trustworthy.
- (V) that the statements of P.W.1, P.W.2 and P.W.3 have been clear and consistent while describing the sequence of events that had taken place on the day of the occurrence. There is no material discrepancy or contradiction in the statements of P.W.1, P.W.2 and P.W.3 as they had identified the convict/appellant, who committed the murder of the deceased with axe and knives, which also corroborates with the medical evidence. Hence, merely not appended the signature of the convict/appellant on

the memo of the recovery of the weapons of assault i.e. axe and knives, cannot be said that the whole testimonies of P.W.1, P.W.2 and P.W.3 are not trustworthy and unreliable.

(VI) that the statements of P.W.1, P.W.2 and P.W.3 show that appellant committed the murder of his wife and four minor daughters in the intervening night of 11/12.11.2011 at about 02:30 a.m. with axe and knife and the medical evidences have also supported the prosecution case. The trial Court has rightly discarded the plea of the appellant.

(VII) that the defence had not made suggestion to the Investigating Officer or any member of his team of having any ill motive to falsely implicate the convict/appellant, therefore, there is no occasion to accept the submission that the FIR has been ante-timed, particularly when the record and the GD entry proves prompt lodging of the F.I.R.

(VIII) that the prosecution witnesses i.e. P.W.1, P.W.2 and P.W.3 gave a graphic description of the incident which finds corroboration in the medical evidence as also the position in which the body was noticed at the time of inquest proceedings.

(IX) that absence of serologist report would not make a material difference as this is a case based on ocular account and the spot arrest of the convict/appellant by the police with blood stained axe and knife.

(X) that so far as the sentence is concerned, while placing reliance upon **Machhi Singh and others Vs. State of Punjab** : (1983) SCC 470, he argued that the trial Court has rightly sentenced the appellant for capital punishment as the prosecution has fully established that this case falls under the category of '*rarest of rare cases*'.

(XI) Hence the impugned order is not liable to be set-aside.

**(E) DISCUSSION/ANALYSIS**

21. We have heard Sri Jyotindra Mishra, learned Senior Advocate/ Amicus Curiae assisted by Sri Kapil Mishra, learned Counsel appearing on behalf of the convict/appellant, Sri Vimal Kumar Srivastava, learned Government Advocate assisted by Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State/ respondent at length and have carefully gone through the impugned judgment and order of conviction and sentence awarded by the learned trial Court by means of the impugned judgment.

22. It would become manifest from the aforesaid that the learned trial Court has based the conviction of convict/appellant on testimonies of the informant Dina Nath Tiwari PW-1, his wife Smt. Suneeta alias Anita PW-2, who are the brother and sister-in-law, respectively, of the convict/appellant and whose house is besides the house of convict/appellant partitioned with brick and Visheshwarnath Mishr P.W.3, who is the independent witness.
23. First, this Court proceeds to test whether the F.I.R. is ante-timed. The offence is said to have been committed in the intervening night of 11/12.11.2011 at 2:30 a.m. The wife and four daughters of the convict/appellant were done to death. The convict/appellant was not spared to lodge the F.I.R. nor informed the police about the incident. It appears that the informant P.W.1-Dina Nath Tiwari, who is the younger brother of the convict/appellant, prepared written report through scribe, whose name has not been disclosed by the prosecution, went to the police station and lodge the F.I.R. at 06:10 a.m. on 12.11.2011. The distance between police station and the place of occurrence is 15 Kms. If statements of P.W.1, P.W.2 and P.W.3 are taken into consideration on this point in consonance with the submission raised by the learned Senior Counsel/ Amicus Curiae, it is evident that information to P.W.1 was received at 02:30 a.m. on 11/12.11.2011. P.W.1 and P.W.2 have stated that when they heard the noise of wife and four

daughters of the convict/appellant, they came out of their village and were trying to get open the door of convict/appellant but when the door was not opened, they started removing bricks of the wall and thereafter the convict/appellant opened the door and came out with blood stained axe and threatened them and other villagers who were gathered there to leave from there, otherwise, he would also kill them and after that convict/appellant closed the door. Immediately thereafter, the police reached there and after opening the door by pushing with the help of the villagers, arrested the convict/appellant on spot with blood stained axe and saw that five deadbodies were lying inside the house of the convict/appellant. Furthermore, on the pointing out of convict/appellant, two knives were recovered by the police inside the room.

24. Referring to the aforesaid fact, it was emphasized by the learned Senior Counsel/Amicus Curiae for the convict/appellant that prosecution did not explain as to how and under what circumstances, police reached the place of occurrence and it was argued on behalf of the appellant that this fact itself shows that F.I.R. is ante-timed.
25. If submissions raised by the learned Senior Counsel/Amicus Curiae are minutely analyzed with statements of P.W.1, P.W.2, P.W.3 and P.W.5, it clearly emerges that aforesaid statement made by P.W.1 to this extent cannot place the prosecution case

doubtful as no question was put to P.W.1 that police personnel came there at that moment whether 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 the learned Senior Counsel/Amicus Curiae doubting the existence of F.I.R. at the time mentioned therein cannot be accepted. 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 convict/appellant 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 (Ext. Ka. 1). If for the sake of argument or for a moment submission raised by learned Senior Counsel/Amicus Curiae on point of F.I.R. is taken into consideration, then, also entire prosecution if proved from other evidence cannot be disbelieved on the point of ante-timing of F.I.R. In the present case, five persons including four minor girls were done to death. P.W.1 is brother-in-law (देवर) of deceased Siyallali and his four niece were also done to death brutally by his elder brother Deen Dayal Tiwari (convict/appellant). Time of receiving of information and reaching the place of occurrence of witnesses shown in the prosecution evidence is not based on exact recording of time



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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. It also transpires from the evidence of the Investigating Officer P.W.5 that the defense had not put any suggestion to him of having ill-motive to falsely implicate the convict/appellant or there was enmity with the Investigating Officer. Hence, no interference is required in finding of the trial Court on this point.

26. 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 written report (Ext. Ka.-1) on this point. It is evident that when the convict/appellant was interrogated by the police, then, he stated that the character of his wife was bad and she had affair with some person of the village, therefore, he murdered his wife with axe and knife and when their daughters came to rescue their mother, he also murdered their daughters. P.W.3-Visheshwarnath Mishra examined in the matter had testify the aforesaid confession of the convict/appellant made before the police. Murder of wife and daughters of convict/appellant in the house of the convict/appellant has not been disputed nor statement

regarding pressurizing by P.W.1 to transfer of immovable property in his name upon convict/appellant was specifically challenged in cross-examination.

27. 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. The confession 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 said confession made by the convict/appellant before the police on point of motive. Thus, we are of the view that submission raised by learned Senior Advocate/Amicus Curiae on this point cannot be accepted. Thus, it can safely be held that finding recorded by Trial Court on point of motive in impugned judgment needs no interference and same is based on correct appreciation of facts and evidence. Convict/appellant had motive to commit this offence.

28. So far as medical evidence adduced by prosecution in this case is concerned, five persons, namely, Siallali, Km. Mahima, Km. Mani, Km. Riya and Guddan were done to death in the intervening night of 11/12.11.2011 in the house of convict/appellant. Postmortem was conducted on 12.11.2011 in between 01:00 p.m. to 02:30 p.m. In all postmortem reports, time of death of deceased persons has been shown as 1/2 day old. Injuries found on body of deceased persons are incised,

multiple incised, lacerated, multiple lacerated, contusion, multiple penetrating and crush wounds.

29. Postmortem report (Ext. Ka.-2) of deceased Smt. Siyallali, aged about 36 years, reveals that first injury is on left side of forehead in the form of incised wound. Second injury is lacerated wound on eye orbit just above to left upper eyelid. Third injury is on left side of face in form of incised wound. Fourth injury is multiple lacerated wound on right side of face including forehead. Fifth injury is lacerated wound on shoulder at mid of clavicle. Sixth injury is multiple lacerated wound on left side of neck and seventh injury is multiple crush of abdomen in epigastric region including chest cage.
30. In postmortem report (Ext. Ka.-3) of deceased Km. Mahima, aged about 4 years, lacerated wounds were found on skull above to left upper eyebrow and occipital region of skull.
31. So far as postmortem report (Ext. Ka.-4) of deceased Km. Mani, aged about 11 years, is concerned, lacerated wound was found on skull 3 cm above to left ear; contusion was found on forehead at frontal region; left section of neck was 10 x 4.0 x bone deep; incised wound was found on mandible size 4.0 x 1.0 x bone deep.
32. On dead body of deceased Kumari Riya, aged about 8 years, during postmortem (Ext. Ka.-5), lacerated wound was found

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on left side of face 2 cm medial left ear; left section was found on neck size 6.0 x 9.0 x bone deep; incised wound was found on chest at left side above to epigastric region; and multiple lacerated wound was found on right leg.

33. As per postmortem report (Ext. Ka.-6) of deceased Guddan, aged about 6 years, crush injury was found on left side of skull; cut section was found on neck at anterior aspect; and multiple penetrating wound was found on abdomen.
  
34. In the opinion of P.W.4-Dr. S.K. Shukla, cause of death of all deceased persons was due to shock and haemorrhage as a result of ante-mortem injuries. P.W.4-Dr. S.K. Shukla was examined before the trial Court and deposed that time of death of deceased persons was 1/2 day old. If statement of P.W.4 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 11/12.11.2011 at 2:30 p.m. The convict/appellant 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" and "knife" said to have been recovered from the possession of the convict/appellant on spot. Thus, in our considered view, in instant case, prosecution was able to prove date and time of death of deceased persons.

35. It is pertinent to mention here that incident took place in the month of November. Symptom of Rigor Mortis shown in postmortem report of all deceased persons is probable and possible one. Prosecution was also able to prove the manner in which deceased were done to death and has connected the weapon "axe" and "knife" used by convict/appellant in committing the 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.
36. So far as recovery of weapon and clothes are concerned, incident took place in the intervening night of 11/12.11.2011 at 2:30 p.m. P.W.1 and other witnesses have reached the place of occurrence immediately in the intervening night 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.5 Ajay Prakash Mishra has stated that he reached the place of occurrence and after conducting inquest proceedings, he sent the deadbodies for post-mortem. Arrest and recovery memo also reveals that convict/appellant was arrested on spot from his house. On inquiry made by P.W.5, arrested convict/appellant confessed that he murdered his wife and children as his wife was bad character and she has

relationship with some person of the village. As per this witness, on interrogation of convict/appellant, he disclosed that he hidden the weapon used in commission of crime in his house itself. P.W.5, on the basis of disclosure statement made by convict/appellant and on pointing out of convict/appellant, as per recovery memo, weapons "axe" and "knife" were recovered from the room in the house of convict/appellant itself. If statements of P.W.1, P.W.2 and P.W.3 are taken into consideration along with statements of P.W.5, cumulatively, recovery of weapon "axe" and "knife" on pointing out of convict/appellant from the room situated in the house of convict/appellant has been proved by prosecution from its evidence beyond reasonable doubt. Thus, findings recorded by the Trial Court on issue of recovery of "axe" and "knife" on pointing out of convict/appellant need no interference by this Court and same are based on correct appreciation of facts and evidence.

37. As far as truthfulness of statements of P.W.1, P.W.2 and P.W.3 is concerned, certainly P.W.1 and P.W.2 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. Whatever information was gathered by P.W.1 at the place of occurrence, he reproduced the same in handwriting and proceeded to police station concerned. Both these witnesses i.e. P.W.1 and P.W.2 had deposed before the

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trial Court that the house of his elder brother i.e. convict/appellant and their house were adjacent and their houses were partitioned with brick of wall which was not cemented. Therefore, it is quite probable that P.W.1 and P.W.2, on hearing the noise of the wife and daughters of the convict/appellant, came out from their house and witnessed the incident. P.W.3- Visheweshwar Mishra had fully supported the statements of P.W.1 and P.W.2 and stated that at the time of the incident, he as well as P.W.1 and P.W.2 were present before the house of the convict/appellant and on their presence, the police came and arrested the convict/appellant on spot with blood stained 'axe' and 'knife'. 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 soil 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" and "knife". Exaggerations and contradictions said to have been occurred in their statements, as has been elucidated during course of arguments on behalf of convict/appellant, in our considered

view, do not go to the root of the case and do not demolish prosecution evidence on material points.

38. 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. This aspect of the matter has further been clarified by the Apex 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."

39. 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.
40. As regards laches occurred on part of the Investigating Officer i.e. recovery memo of weapons of assault i.e. 'axe' and 'knife' is defective one as signature of the convict/appellant was not



thereon is concerned, we are of the view that it does 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, merely in not available the signature of convict/appellant on the recovery memo of weapons of assault i.e. 'axe' and 'knife', cannot be disbelieved. In the instant case, recovery of weapon "axe" and "knife" is supported by statements of P.W.1, P.W.2 and P.W.3, who were also present at the place of occurrence.

41. 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].
42. In the case of **State of U.P. Vs. Krishna Master and others** : 2010 Cri. L.J. 3889 (SC), the Apex 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.
43. Further, the Apex 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.

44. The factum of arrest from spot was not denied by the convict/appellant. P.W.1, who is the younger brother of the convict/appellant, P.W.2, who is the wife of P.W.1, P.W.3, who is the independent witness and P.W.5, who is the Investigating Officer, had deposed in clear terms before the trial Court that the convict/appellant was arrested by the police from the place of the occurrence (i.e. from the house of convict/appellant) along with blood stained 'axe' and 'knives' as well as five dead-bodies (wife and four minor daughters of the convict/appellant). During the interrogation on spot, the convict/appellant made disclosure statement that *as his wife Siyallali had illicit relationship with someone of the village, due to which his relation with his wife became strained, on account of which, on 11.11.2011, in the evening itself, he had decided that tonight itself he would kill his wife, therefore, he had kept the 'knife' and 'axe' in the evening itself and at around 3 O'clock in the night, when his wife and his daughters were sleeping, he firstly hit the head of his wife Siyallali with axe, due to which she screamed, then, he stabbed her with knife. After that, his daughters woke up and came to serve their mother, then, he killed them in turn. Among their daughters, he firstly killed Mani Tiwari, then Riya, then*

*Guddan/Gunjan, then Kumari Mahima with a 'knife' and 'axe'. On hue and cry of save save of his daughters, people of his village and members of his family had gathered and these peoples were threatening to break the door and asked him to come out of the room, therefore, he had closed the door inside his room."* P.W.3, who is independent witness, has also deposed before the trial Court that the convict/appellant had made the aforesaid disclosure statement before him at the time of his arrest on the spot during interrogation by the police. The statement of the convict/appellant recorded under Section 313 Cr.P.C shows that he had no enmity with P.W.3. Furthermore, the convict/ appellant had not denied the fact either in the statement recorded under Section 313 Cr.P.C. or the written statement submitted by him under Section 313 Cr.P.C. before the trial Court that he had not made disclosure statement before the Investigating Officer P.W.5 or the disclosure statement made by him was concocted or it was made by him only on exerting pressure by the Investigating Officer.

45. At this juncture, it is relevant to mention here that the convict/ appellant admitted the fact that deadbodies of his wife and four daughters were found by the police from his house. The convict/appellant had alleged in the written statement submitted under Section 313 Cr.P.C. that on the date and time of the incident, he was sleeping at his barn for saving paddy crops and when he came in the morning, he came to know the

incident and further he alleged that he believed that his brother and villagers had committed this incident with the connivance of miscreants.

46. It is true that Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.
47. It is settled law that when a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.
48. In the instant case, it transpires from the record that the convict/appellant has failed to offer any reasonable explanation

in discharge of burden placed on him by virtue of Section 106 of the Evidence Act viz. the defense has failed to produce any clinching evidence (1) at the time of the incident, the convict/appellant was sleeping at his barn to save his crops; (2) the convict/appellant was not arrested from spot; and (3) his wife and daughters were murdered by his brother (P.W.1) and villagers with connivance of miscreants.

49. From the aforesaid discussion and evidence on record, this Court is of the view that the motive is proved by the prosecution; the prosecution witnesses had fully supported the prosecution case and proved their presence at the time of the incident on the place of occurrence; the medical evidence has also corroborated by the disclosure statement made by the convict/appellant itself before the police; and the convict/appellant was arrested on spot by the police with the weapons of assault. Thus, the circumstances established by the prosecution leads to only one possible inference regarding the guilt of the convict/appellant as the prosecution has proved the guilt of the convict/appellant beyond reasonable doubt by leading cogent evidence.

50. Hence, the submission made by the learned Senior Counsel/Amicus Curiae 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.

**(F) SENTENCE**

51. Now, we come to see evidence regarding involvement of convict/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 convict/appellant are sufficient to sustain conviction of accused-appellant for offence under Section 302 IPC. Before dealing with aforesaid question, it will be useful to quote settled proposition of law on point of circumstantial evidence.

52. In **Brajendra Singh v. State of Madhya Pradesh** : (2012) 4 SCC 289, the Apex 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. **Dhananjay 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.”

53. 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 11/12.11.2011 at the time and place mentioned in chik F.I.R. and stated by prosecution witnesses. Medical evidence also supports prosecution version. Five persons were done to death. Prosecution was able to prove motive against convict/appellant to commit present offence. Weapon "axe" and “knife” said to have been used in commission of crime was also made recovered by convict/appellant from his house itself. The factum of spot arrest of the convict/appellant has not been disputed and the convict/appellant has failed discharge his burden as per Section 106 of the Evidence Act. Thus, in our

considered view, what evidence have been made available by prosecution during trial are sufficient to connect convict/appellant with the present matter. Convict/appellant and deceased both were also residing at some house. Incident took place inside the house. 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 convict/appellant. All circumstances including motive and previous conduct of convict/appellant as well as recovery of weapon "axe" and "knife" said to have been made on his pointing out cumulatively point towards the guilt of convict/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 convict/appellant has committed present offence in which he has eliminated his wife and four daughters of his family.

54. So far as the submission of the learned Senior Counsel/Amicus Curiae that the convict/appellant was not present on the place of incident as he was sleeping in barn for saving his paddy on the date and time of the incident as has been stated by him in his statement under Section 313 Cr.P.C., hence, there was no question of the convict/appellant to murder his wife and four daughters, which is alleged to have occurred at 2:30 a.m.. on



11/12.11.2011, we cannot persuade ourselves to accept this contention of learned Senior Counsel/Amicus Curiae. This defence of alibi which has been pleaded by the appellant has not been proved by him, as enjoined upon him by Section 106 of the Evidence Act.

55. For convenience, Section 106 of the Evidence Act reads as under :-

**"106. Burden of proving fact within knowledge.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration

(a) When a person does an act with some intention other than that which, the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

56. In our opinion, the convict/appellant has not been able to discharge this statutory burden enjoined by Section 106 of the Evidence Act. Neither any defence witness has been examined on his behalf to show that he was sleeping in barn at the aforesaid time nor any documentary evidence has been adduced by him and proved which would establish this defence of the convict/appellant. We further find that no suggestion was given to any of the witnesses that at the time of the incident, the convict/appellant was not at the place of incident but was sleeping in barn. The solitary mention of such a

defence in his statement under Section 313 Cr.P.C. would not tantamount to the convict/appellant discharging burden upon him as enjoined by Section 106 of the Evidence Act.

57. In view of the aforesaid reasons, the aforesaid contention of learned Senior Counsel/Amicus Curiae for the appellant fails.

58. Thus, we are of the view that Trial Court has rightly held guilty to convict/appellant for committing offence under Section 302 I.P.C. Finding of Trial Court about the guilt of convict/appellant for aforesaid offence is based on correct appreciation of facts and evidence which needs no interference by this Court.

59. As far as sentence imposed upon convict/appellant is concerned, Trial Court in its wisdom has imposed death punishment finding the present case in the category of "*rarest of rare*" cases. Five persons were done to death. Convict/appellant is husband of deceased Siyallali and father of four minor daughters.

60. 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 wife and four minor daughters;

(d) Helpless children were done to death;

(e) Brutality and premeditated plan of convict/appellant also find support from his act as he ensured the death of all deceased by assaulting upon them on the vital part of deceased persons;

(f) Act of convict/appellant is shocking not only to the judicial conscience but also to the Society as he has eliminated his wife and four daughters only to take revenge from his wife as convict/appellant felt that his wife has bad character and she has eloped with some person of his village;

(g) act and conduct of convict/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.

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

(a) age of the convict/appellant i.e. 43 years at the time of recording of statement under Section 313 Cr.P.C.; (b) he belongs to village background and offence was committed because the convict/appellant felt that his wife had bad

character and she has illicit relationship some person of his village; and (c) chance for reformation and rehabilitation.

62. Now the question before this Court 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.
63. In the case of **Bachan Singh v. State of Punjab** : (1980) 2 SCC 684, the Apex Court, in para-164, observed 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 sentence.

64. Relying on the authority in **Furman v. Georgia**, (1972) SCC On-Line US SC 171, the Apex 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."

65. Thereafter in para 203, the Apex Court observed 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**), the Apex 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) above.

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

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

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

66. Again in para 207 in **Bachan Singh (supra)**, the Apex 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)**, the Apex 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.

67. 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."

68. The Apex Court in *Machhi Singh (supra)* further observed 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)

69. In **Haresh Mohandas Rajput v. State of Maharashtra** : (2011) 12 SCC 56, after referring to **Bachan Singh (supra)** and **Machhi Singh (supra)**, the Apex 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.

70. In para 20 of the judgment in **Haresh Mohandas Rajput (supra)**, the Apex 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 awarded.

71. The issue again came up before Hon'ble Apex Court in **Ramnaresh & others v. State of Chhattisgarh** reported in (2012) 4 SCC 257, wherein the Hon'ble Supreme Court

reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of Bachan Singh (supra) required to be taken into consideration while applying the doctrine of "rarest of rare" case. Relevant para of the same reads thus:-

"76. The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the "aggravating circumstances" while the other being the "mitigating circumstances". The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) of Cr.P.C.

**Aggravating Circumstances:**

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

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

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

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

(5) Hired killings.

(6) The offence was committed outrageously for

want only while involving inhumane treatment and torture to the victim.

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

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

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

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

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

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

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

Mitigating Circumstances:

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

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

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

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

(5) The circumstances which, in normal course of life, would render such a behavior 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 behavior 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 pre-ordained 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 eye-witness though prosecution has brought home the guilt of the accused."

72. In the case of **Dharam Deo Yadav vs. State of UP** reported in (2014) 5 SCC 509, the Hon'ble Supreme Court has held thus:-

"36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546 this Court laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention.

Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case.

Consequently, we are inclined to commute the death sentence to life and award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice."

73. In **Kalu Khan v. State of Rajasthan** reported in (2015) 16

SCC 492, the Hon'ble Supreme Court has held that:-

"30. In *Mahesh Dhanaji Shinde v. State of Maharashtra*, the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the *modus operandi* of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved.

However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence. This Court has placed reliance on the observations in *Sunil Dutt Sharma v. State (Govt. of NCT of Delhi)* as follows: (*Mahesh Dhanaji case*, SCC p. 314, para 35)

"35. In a recent pronouncement in *Sunil Dutt Sharma v. State (Govt. of NCT of Delhi)*, it has been observed by this Court that the principles of sentencing in our country are fairly well settled -- the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question -- Whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the Judge to reach the 'truth'."

74. 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.

75. The convict/appellant was 43 years of age, as is disclosed in his statement under Section 313 Cr.P.C.
76. Coming to the aggravating circumstances, we also find that convict/appellant had committed murder of not only his wife but also his four minor daughters. Postmortem reports disclose brutal, grotesque, diabolical murder, which clearly reflects the mindset of convict/appellant.
77. The present incident was committed when convict/appellant felt that his wife was of a bad character and had illicit relationship with someone of the village. 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 five persons were murdered by convict/appellant of his family in most brutal, grotesque, diabolical and dastardly manner arousing indignation and abhorrence of society which calls for an exemplary punishment. Four minor children including their mother have been murdered by convict/appellant 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 convict/appellant to commit such dastardly crime. Convict/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 tried to run away from the house when the

police arrived. Admittedly, when informant P.W.1 reached the house of convict/appellant, the convict/appellant was opened the door and also threatened to leave there, otherwise, he would also kill them. The convict/appellant was arrested on spot on 12.11.2011 in the morning. In the statement recorded under Section 313 Cr.P.C. also, we find no remorse on the part of convict/appellant.

78. The above conduct, attitude and manner in which murder of five persons of his family was committed by convict/appellant shows that convict/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 five 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.
79. Balancing mitigating and aggravating factors and looking to the fact that convict/appellant had 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 convict/appellant. We are also clearly of the view that convict/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.

80. In the circumstances, we are of the view that death punishment imposed upon convict/appellant for the offence under Section 302 IPC is liable to be confirmed. Reference No. 01 of 2014 is liable to be allowed and accepted to the extent of confirmation of death penalty.

**(G) CONCLUSION**

81. In the result, Capital Case No. 01 of 2014 submitted by Trial Court for confirmation of death punishment awarded to convict/appellant, **Deen Dayal Tiwari**, for the offence under Section 302 IPC is hereby accepted and death punishment awarded to convict/appellant in the present matter is hereby **confirmed**.

Consequently, Criminal Appeal No. 1776 of 2016 filed by convict/appellant, **Deen Dayal Tiwari**, is liable to be dismissed and is, accordingly, **dismissed**.

82. However, as provided under Section 415 Cr.P.C. execution of sentence of death shall stand postponed until the period allowed for preferring such appeal has expired and if an appeal is preferred within that period, until such appeal is disposed of. It is also clarified that death punishment shall only be executed



in accordance with law complying with all guidelines laid down by Hon'ble Supreme Court time and again.

83. Let a copy of this judgment along with Trial Court record be sent to Court concerned for compliance and two copies of judgment as well as printed paper book be sent to State Government, as required under Chapter XVIII Rule 45 of Allahabad High Court Rules, 1952.
84. A copy of the judgment be also sent to convict/appellant through Jail Superintendent concerned for intimation. Compliance report be also sent to this Court.
85. Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the distinguished assistance rendered by Shri Jyotindra Mishra, learned Senior Advocate/learned Amicus Curiae in the above-captioned cases.

**(Brij Raj Singh, J.)**

**(Ramesh Sinha, J.)**

**Order Date : 9<sup>th</sup> May, 2022**

Ajit/-