IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL CONFIRMATION CASE No. 4/2024

WITH

CRIMINAL APPEAL NO. 316/2024.

....

CRIMINAL CONFIRMATION CASE No. 4/2024.

State of Maharashtra,
through Police Station Officer,
Police Station Hivarkhed, Tahsil
Talhara, District Akola. ... APPELLANT.

VERSUS

1.Haribhau Rajaram Telgote.
2.Mrs.Dwarkabai Haribhau Telgote,
3.Shyam @ Kundan Haribhau Telgote,

All residents of Rahul Nagar, Akot,
District Akola. ... RESPONDENTS.

Mr. S.S. Doifode, Addl.P.P. with Mr.A.M. Badar, A.P.P. for the Appellant/State.
Mr. R.M. Daga, Advocate for Respondents/Accused.

Rgd.

WITH

CRIMINAL APPEAL No. 316/2024.

1.Haribhau s/o Rajaram Telgote,
Aged 66 years, Occupation Labour,

2.Mrs.Dwarkabai w/o Haribhau Telgote,
Aged about 55 years, Occupation Labour,

3.Shyam @ Kundan s/o Haribhau Telgote,
Aged about 35 years, Occupation – Labour,

All residents of Rahul Nagar, Akot,
District Akola. (All in jail) ... APPELLANTS.

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station Hivarkhed, Tahsil
Telhara, District Akola. ... RESPONDENT.

Mr. R.M. Daga, Advocate for Appellants/Accused.
Mr. S.S. Doifode, Addl.P.P. with Mr.A.M. Badar, A.P.P. for the Respondent/State.

CORAM : VINAY JOSHI AND
ABHAY J. MANTRI, JJ.

Rgd.

RESERVED FOR JUDGMENT ON : 17.10.2024
JUDGMENT PRONOUNCED ON : 13.11.2024.

JUDGMENT (PER VINAY JOSHI, J.) :

Extreme penalty provided under the Indian Penal Code (IPC) i.e. Death Penalty imposed by the Sessions Judge is placed before us for scrutiny due to mandate of Section 366 of the Code, as well as by virtue of appeal preferred by the accused in terms of Section 374[2] of the Code of Criminal Procedure (Cr.P.C.)

2. Appellant Nos.1 to 3 were tried and convicted by the Additional Sessions Judge, Akot vide judgment and order dated 17.05.2024 in Sessions Case No.57/2015 for the offence punishable under Sections 302 read with Section 34 of the IPC and Section 506 [Part-II] read with Section 34 of the IPC. Though they have also been charged for the offence punishable under Section 323 of the Indian

Penal Code, however, they were acquitted for the said charge. For offence punishable under Section 302 read with Section 34 of the IPC, accused nos.1 to 3 have been sentenced to death penalty along with fine of Rs.50,000/- each, with stipulation of default. For offence punishable under Section 506 [Part-II], read with Section 34 of the IPC, they have been sentenced to undergo rigorous imprisonment for 7 years along with fine of Rs.10,000/- each. Both sentences were directed to run concurrently. The trial Court has accorded benefit of set off to accused in terms of Section 428 of the Cr.P.C.

3. Accused were related to each other. Accused no.1 Haribhau and accused no.2 Dwarkabai are husband and wife, whilst accused no.3 Shyam @ Kundan is their son. They have been charged for committing murder of 4 persons namely Shubham, Dhanraj, Gaurav and Baburao. The deceased are also interrelated to each other. Shubham and Gaurav were sons of Dhanraj, whilst 4th deceased Baburao was real brother of Dhanraj. Not only that rival parties are also related to each other. Accused no.2 Dwarkabai is real sister of

deceased Dhanraj and Baburao, and thus, all are in relations.

4. It is the prosecution case that family of deceased Dhanraj and Baburao had 29 Acres of ancestral agricultural land at village Malpura. Accused no.2 Dwarkabai, who was real sister of both brothers [Dhanraj and Baburao] was insisting for share in the said agricultural land. For the said purpose, accused no.2 Dwarkabai has filed a civil suit for partition long back in the Civil Court at Telhara. On account of allotment of share to accused no.2 Dwarkabai in ancestral land, there happened to be a dispute in between two brothers and sister Dwarkabai [accused no.2]. One month preceding to the incident accused no.2 Dwarkabai had sown cotton in 2 acres of ancestral land in between the field of two brothers Dhanraj and Baburao. For the reason of sowing in the land, accused no.2 Dwarkabai used to pick up quarrel with her two brothers.

5. On 28.06.2015 around 3 p.m., accused no.2 Dwarkabai was sowing cotton crop in the field to which Dhanraj and his son

Shubham objected. There was oral altercation in between them. Dwarkabai rushed on the person of Dhanraj on which Shubham intervened to pacify. Dwarkabai got annoyed and said to Shubham as to how he has touched her. Gaurav also arrived on the spot and tried to convince Dwarkabai. Then Dwarkabai came to the village Malpura by hurling abuses to Dhanraj and his two sons Shubham and Gaurav. Dwarkabai informed on mobile about the said quarrel to her two sons i.e. accused no.3 Shyam and Mangesh, who is child in conflict with law (CCL).

Within short time i.e. around 5 p.m. accused no.1 Haribhau, accused no.3 Shyam and Mangesh [CCL] arrived on the spot by giving abuses. Accused no.2 Shyam was armed with a knife, CCL- Mangesh was armed with sickle, whilst accused no.1 Haribau was armed with an axe. All of them went towards the ota [platform] where Shubham was seated. Accused no.3 Shyam and Mangesh [CCL] rushed on the person of Shubham and started assaulting him. Since Subham raised alarm, Dhanraj and Gaurav came to his rescue. Accused no.3 Shyam, CCL- Mangesh and accused no.1 Haribhau

assaulted all of them. Baburao also arrived and intervened to separate the quarrel. Accused no.1 Shyam inflicted a knife blow at the abdomen of Baburao on which his intestine came out. Baburao was taken to the near by house where handkerchief was tied. Informant Yash [son of Baburao] and Amol made Baburao to sit on the motorcycle and were about to proceed to the hospital, however, accused no.1 Haribhau, accused no.3 Shyam and CCL Mangesh accosted them in the way. Mangesh and Shyam assaulted him by means of sharp weapons, as a result of said assault all 4 were lying on the spot in the pool of blood. At that time Najukrao tried to intervene, who was also assaulted. Several people of the vicinity have witnessed the incident.

6. P.W.7 Smt. Kiran Thakare, who was Village Police Patil also witnessed the incident. She telephonically reported the things to Police Constable Sheikh Sabir [P.W.12] of Hiwarkhed Police Station. Police Constable Sk.Sabir informed the incident to Police Inspector P.W.18 Tanwar, who in turn arrived at the spot with police sleuth.

Relevant station diary entry was taken. When police came to the spot, dead bodies of 4 persons namely Shubham, Dhanraj, Gaurav and Baburao were lying near ota [platform], at the side of village flag post. Police Inspector Tanwar [P.W.18], carried panchnama of the scene of offence. While carrying the panchnama, he has seized incriminating material including blood mixed earth, pair of chappal, one bamboo stick. Rough sketch of the place of occurrence was drawn. Crowd was dispersed and spot was guarded by deploying police personnel. Police Inspector Tanwar passed a message to cordon the area in order to catch the culprits. P.W.17 Head Constable Mohanlal after receiving the message has cordoned the possible way outs. Around 6.30 p.m. he has stopped an auto rickshaw on Hiwarkhed road. Three male and one female were seated in the said auto rickshaw. It was noticed that their clothes were stained with blood. On enquiry, they disclosed that they have committed murder of 4 persons at Malpura, and therefore, blood stains on their clothes. Immediately P.W. 17 Mohanlal took them in charge and brought them to the Hiwarkhed Police Station, which was followed by their arrest.

7. Dead bodies were sent for autopsy. Inquest panchnama was drawn, blood stained clothes of deceased were seized. On the following day autopsy was conducted by P.W.14 Dr. Anil on all dead bodies. After arresting accused their blood stained clothes were seized. Since accused no.1 Haribhau has sustained bleeding injury, he was sent for medical examination. While accused no.3 Shyam was in custody, he made disclosure statement, pursuant to which the weapons used in the commission of crime came to be seized. The seized articles were sent for chemical analyzation. Necessary statement of witnesses were recorded. After completion of the investigation, final report came to be filed in the Court of concerned Magistrate. Since Mangesh was child in conflict with law, he was produced before the Juvenile Justice Board.

8. On committal, the trial Court has framed the charges. Though the accused denied the guilt, however, the incident is admitted. To be specific, the accused denied that they assaulted all the

deceased and done to death. However, it is their defence that at the relevant time, quarrel erupted on account of Shubham outraging modesty of Dwarkabai. In the said quarrel, CCL Mangesh got furied and in a fit of anger, assaulted all the deceased. Moreover, it is also their defence that at the relevant time the deceased Shubham and others were holding weapons by which they started to attack the accused. Accused no.1 Haribhau and accused no.3 Shyam tried to snatch the weapons from the deceased, in which they sustained injuries, whilst the deceased also sustained grave injuries by their own weapons as a result of which they died. According to the defence, Dwarkabai was merely present on the spot, but, she did not participated in the occurrence. To substantiate the defence, the accused have examined defence witness no.1 Dr. Sujata to establish the injuries sustained by accused no.1 Haribhau. CCL Mangesh also stepped into the witness box. Precisely, by denying the guilt and putting such a defence the accused put the prosecution to the task of establishing the guilt with requisite standard of proof.

Rgd.

9. In order to bring home the guilt of the accused, the prosecution endeavored into examining as many as 20 witnesses. The prosecution evidence mainly consists of 7 eye witnesses, panch witnesses, medical officers and police officers. As referred above, the defence has examined only two witnesses. During recording of statement under Section 313 of the Cr.P.C., the accused denied incriminating material and by filing written submission echoed the defence version.

10. After analyzing oral and documentary evidence, the trial Court by fully relying on the evidence of eye witnesses and other corroborating material, held that the prosecution has duly established that accused nos. 1 to 3 have assaulted all deceased by means of dangerous weapons. They have caused multiple injuries of grave nature on the vital parts of the body resulting into death, and thus all the accused have committed the offence of murder as defined under Section 300 of the I.P.C. which is punishable under Section 302 of the I.P.C. read with Section 34.

11. The learned trial Court has heard the accused on the point of sentence. It reveals from the impugned judgment that the accused preferred to remain silent on the point of sentence. The learned Counsel appearing for the accused stated that whatever they want to say on the point of sentence, they will state before the High Court. In short the accused neither stated anything for claiming leniency, nor stated mitigating circumstances. On the other hand, the learned Addl.P.P. has strongly recommended for imposition capital punishment on account of brutality, cruelty, multiple deaths and the manner in which the crime has been committed.

12. The trial Court has considered the case on set parameters and was of the opinion that the case squarely falls in the category of "rarest or rare case" resulting into awarding death penalty. After pronouncing the capital punishment, the Trial Court has forwarded the proceeding to this Court for confirmation in terms of Section 366[1] of the Cr.P.C. Likewise, being aggrieved and dissatisfied by

the order of conviction and proportionality of sentence, the accused have also filed an appeal under Section 374[2] of the Code.

13. We have heard the learned Addl.P.P. Shri Doifode, for the State on the point of confirmation of sentence and Shri Daga, the learned Counsel for the appellants/accused in support of challenge to the impugned judgment and order. We have given our thoughtful consideration to the rival submissions, carefully examined the entire material and also gone through the various precedents cited by both sides in support of their respective contentions. We prefer to make contextual reference of the rival submissions, in the later part of this judgment.

At the inception, we may note that the defence had not challenged that all the deceased met with homicidal death. The question falls for consideration is – Whether the evidence adduced by the prosecution is sufficient to fasten the guilt on the accused and if so, whether the case falls in the arena of 'rarest of rare category', as explained by the Supreme Court in catena of decisions.

14. Though the homicidal death of Shubham, Gaurav, Dhanraj and Baburao was not denied, to satisfy ourselves on said aspect we have gone through the relevant material. The incident had occurred on 28.05.2015, whilst P.W.14- Dr. Anil Mal, attached to the Rural Hospital Telhara has conducted autopsy on all dead bodies on the following day. For the sake of convenience, we have extracted the relevant translated portion of medical evidence of Dr.Anil Mal from the decision of the trial Court (paragraph nos.26 to 36 at page no.633 of the paper book), which reads as below :

> *"**26.** First of all, in his examination-in-chief (Exhibit No. 147, Page no. 1 Paragraph No. 2), Dr. Anil has stated, "I found the following injuries on **Gaurav's** body."*
>
> *1) Cut and crush injury around neck, extending from angle of mandible to angle of mandible of size 8 cm x 3 cm x neck deep. Cutting carotid, trachea, oesophagus and all the vascular structures.*
>
> *2) Incised wound of size 4 cm x 2 cm x bone deep above right eye.*
>
> *3) Incised wound of size 4 cm x 2 cm x bone deep over right frontoparital region of skull.*

4) *Stab injury of size 4 cm x 2 cm x cavity deep over right hypochondric region of abdomen protruding coils.*

5) *Incised wound of size 5 cm x 2 cm x cavity deep over centre of back.*

27. *Dr. Anil (P. W. No. 14) in his examination-in-chief (Exhibit No. 147, Page No. 2, Paragraph No. 4) mentioned two injuries that were found in Gaurav's internal examination.*

1) *Laceration with clots at frontoparital region of skull.*

2) *Thorasic cavity filled with around 800 ml to 1000 ml of blood and trachea was cut.*

28. *Dr. Anil has stated that all the injuries on Gaurav's body, both external and internal, are his ante-mortem injuries. All these injuries are described in detail in the post-mortem report and Gaurav's post-mortem report at Exhibit No 148 has been proved by Dr. Anil on all legal, technical parameters.*

29. *Similarly, in his examination-in-chief (Exhibit No. 147, Page No. 2 Paragraph No. 8), Dr. Anil (P. W. No. 14) has stated, "Then I performed post-mortem examination on the body of Shubham as well and at that time, I found the following injuries on* ***Shubham's*** *body."*

1) *Cut and crush injury around neck from angle of mandible to angle of mandible cutting carotid, trachea, oesophagus and all the vascular structures.*

2) *Stab injury of size 3 cm x 2 cm x cavity deep over right side of chest.*

3) *cut injury over right upper arm and forearm, cutting bones.*

4) *Incised wound of size 5 cm x 2 cm x cavity deep over*

left side of chest.

5) Incised wound 5 cm x 2 cm x bone deep below right shoulder.

30. *Similarly, Dr. Anil has also described in his examination-in-chief in Paragraph No. 10, the three internal injuries found in the dead body of Shubham. They are as follows.*

1) There was fracture of multiple ribs.

2) Trachea was cut.

3) Multiple lacerations over both the lungs.

31*. Dr. Anil has stated in his examination-in-chief that all the internal and external injuries on Shubham's body are ante-mortem. Dr. Anil has described all those injuries in detail and proved Shubham's post-mortem report marked as Exhibit No. 149 on all legal parameters.*

32. *In Paragraph No. 14 of his examination-in-chief, Dr Anil has stated, "Then, on the same day (i.e., on the date 29.06.2015) I performed post-mortem examination of Dhanraj Sukhdeo Charhate too. I found six external injuries on the person of Dhanraj" and he has also stated the following six external injuries found on* ***Dhanraj's*** *body.*

1) Incise wound of size 8 cm x 2 cm x bone deep extending from ramus of right side of mandible to angle of mandible left side.

2) Cut and crush injury around neck extending from angle of mandible to angle of mandible cutting carotid, trachea, oesophagus and all the vascular structures.

3) Incise wound of size 6 cm x 2 cm x right lung deep.

4) Incise wound of size 5 cm x 2 cm x apex of left lung

near left shoulder.

5) Incise wound of size 3 cm x 1 cm x cavity deep at centre of chest.

6) Two stab injuries of size 3 cm x 2 cm x cavity deep over left side of abdomen, protruding coils.

33. *In Paragraph No. 16 of his examination-in-chief, Dr. Anil has stated, "During post-mortem examination of Dhanraj, I found following five internal injuries " and he described all the five internal injuries on the body of Dhanraj, in detail, as follows.*

1) Thorasic cavity filled with around 1.5 to 2 liters of blood.

2) Trachea cut.

3) Multiple lacerations on both the lungs.

4) pericardium was ruptured.

\5) Lacerations cavity deep over heart.

34. *Dr. Anil states that all the above-mentioned internal and external injuries on Dhanraj's body are ante-mortem. All those injuries have been explained in great detail by Dr. Anil in his examination-in-chief and post-mortem report at Exhibit No. 150, of Dhanraj with the description of all those injuries, external and internal, has been proved by Dr. Anil on all legal technical parameters.*

35. *Similarly, in his examination-in-chief (Exhibit No. 147, Page No 4, Paragraph No. 20), Dr. Anil has stated, "On the same day, I also performed the post-mortem of deceased Baburao Sukhdeo Charhate. I found the following injuries on his body " and he explained the following external injuries found on* ***Baburao's*** *dead body.*

1) Cut and crush injury from mandible of left ramus,

cutting chin of size 6 inch x 3 cm x 2 cm.

2) *Crush and cut injury over neck from angle of mandible to angle of mandible, cutting carotid, trachea, oesophagus and all the vascular structures.*

3) *Incise wound of size 4 cm x 2 cm x cavity deep over left side of chest, piercing lungs.*

4) *Stab injury of size 3 cm x 2 cm x cavity deep over left side of abdomen, coils protruded out from injury site.*

5) *Incise wound of size 3 cm x 2 cm x 2 cm over centre of back.*

36. *In his examination-in-chief (Paragraph No. 22) Dr. Anil has stated, "While performing post-mortem examination of Baburao Sukhdeo Charhate. I found the following internal injuries in his body " and he explained the following internal injuries found on Baburao's dead body.*

1) *Thorasic cavity filled with around 1 to 1.5 liters of blood.*

2) *Lacerations were present over left lung.*

3) *Pericardium was ruptured."*

15. On examination, the medical officer P.W.14 Dr.Anil has expressed the cause of death as neck injury as regards to all the 4 deceased. Besides that it is quite evident from the medical evidence that there were multiple incise wounds all over the body of the deceased, which were caused by sharp and heavy object. Apparently

all external injuries coupled with corresponding internal injuries were fatal. All deceased died due to internal hemorrhage caused due to deep cut wounds on neck, head, abdomen, lungs etc. In the circumstances without hiccup it can be held that all of them met with homicidal death. Moreover, the defence has not challenged the nature of death and therefore, we may safely return the finding that the deceased Shubham, Gaurav, Dhanraj and Baburao met with homicidal death.

16. In view of that, the enquiry proceeds to decide the crucial issue which pertains to the authorship of the fatal injuries which took four lives. The prosecution was heavily banking upon the direct evidence of eye witnesses to establish the guilt of the accused. In this regard, the prosecution has examined total 7 eye witnesses i.e. P.W.1 Yash Charhate [Exh. 61], P.W.4 Amol Charhate [Exh. 95], P.W.5 Vishal Gawarguru [Exh. 98], P.W.7 Sau.Kiran Thakre [Exh.120] and P.W.11 Rajendra Dandge [Exh.135]. Though the prosecution has relied on other circumstantial evidence, however, as the prosecution

case is based on the evidence of eye witnesses, initially we prefer to deal with the direct evidence which is of vital importance.

17. At the inception we remind ourselves that the defence has not denied the presence of accused at the time of occurrence. Inasmuch as, the incident was also not denied, but, the defence has some other version to tell. Keeping in mind the said position, we have assessed the direct evidence. P.W.1 Yash Charhate [informant], was the son of deceased Baburao. He has stated about the earlier quarrel in between the parties dated 24.06.2015. It is his evidence that on 28.06.2015 around 3 p.m. accused no.2 Dwarkabai was sowing cotton in the field. Informant Yash was also present in the field. Deceased Dhanraj desisted Dwarkabai from doing agricultural activities on which Dwarkabai rushed at his person. Deceased Shubham [son of Dhanraj], intervened, on which Dwarkabai got annoyed by saying that as to why Shubham has touched her. Dwarkabai by giving abuses returned to the village Malpura.

18. P.W.1 Yash deposed that Dwarkabai in his presence made phone call to someone. Around 5 p.m. Dwarkabai's husband accused no.1 Haribhau and two sons accused no.3 Shyam and CCL Mangesh arrived with deadly weapons. Particularly accused no.3 Shyam was holding knife, CCL Mangesh was holding sickle, whilst accused no.1 Haribhau was holding an axe. At the relevant time deceased Shubham was seated on ota [platform] near village flag post. It is his evidence that initially accused no.3 Shyam assaulted Shubham by means of knife, whilst CCL Mangesh assaulted him by means of sickle. As their was shout, Dhanraj and Gaurav rushed to the spot, who were also dealt with the same treatment. He deposed that accused no.3 Shyam assaulted them by means of knife, whilst Mangesh assaulted by means of sickle and Haribhau by axe.

19. P.W.1 Yash further deposed that his father Baburao came for rescue, however, accused no.3 Shyam also stabbed at the stomach of Baburao by means of knife. In order to save Baburao, witness P.W.1 Yash along with P.W.4 Amol Charhate, took injured Baburao

to their house, tied a scarf at his stomach, made Baburao to sit on a motorcycle and were about to proceed for medical treatment. However, the accused accosted them on which CCL Mangesh again assaulted Baburao at his neck by means of sickle. Precisely it is the evidence of informant Yash that after initial quarrel in the field, Dwarkabai returned to the village Malpura, and telephonically called her husband and two sons. All three arrived within short time with deadly weapons and indiscriminately assaulted all four deceased which took their lives.

20. Evidence of P.W.4 Amol Charhate is on the same line. He too deposed about the exact incident occurred around 5 p.m. at ota [platform] near flag post in the village Malpura. It is his evidence that he saw that while Shubham was seated on the ota [platform], accused no.3 Shyam and CCL Mangesh assaulted him by means of weapons. He saw that Baburao was lying in injured condition, hence, with the assistance of Yash they took Baburao to the house. While they were carrying Baburao on motorcycle for treatment, accused no.3 Shyam

accosted and assaulted Baburao on neck by means of sickle. His evidence is restricted to the exact occurrence wherein he named that accused no.3 Shyam and CCL Mangesh assaulted deceased Shubham and Baburao. It emerges from his evidence that he has not witnessed the entire occurrence, but, when he came out of the house, he saw that Shubham was assaulted by Shyam and Mangesh, and saw that Shyam again assaulted Baburao by means of sickle.

21. Before considering the evidence of rest of the eye witnesses, we would like to note that both these eye witnesses have not stated about role of accused no.2 Dwarkabai. It emerges that P.W.1 Yash was throughout present during the entire occurrence, however, he has not ascribed role to Dwarkabai. P.W.4 Amol arrived on the spot while the incident was going on. Though he has limited occasion to see the occurrence pertaining to the assault on Shubham and Baburao, however, the fact remained that both these eye witnesses have not ascribed any role to Dwarkabai. True, P.W.4 Amol has also not assigned any role to accused no.1 Haribhau, however, the

evidence is to be appreciated as a whole.

22. Contextually we may refer to the defence submission that these two witnesses have not assigned role to Dwarkabai, and thus, it is quite doubtful about her participation, though it was belatedly stated by other witnesses. Prima facie, the said submission holds water, and is required to be tested on the basis of entire material as a whole.

The prosecution has examined P.W.5 Vishal Gawarguru, who has stated about the role of all accused. It is his evidence that at the relevant time Shyam was holding knife, Haribhau was armed with an axe, while Dwarkabai and Mangesh were holding sickles. Besides the role of Shyam, Mangesh and Haribhau, he has specified the role of Dwarkabai. It is his evidence that Dwarkabai and Mangesh assaulted Shubham at his throat by means of sickle. Both of them assaulted Gaurav by weapon, so also Dwarkabai and Mangesh assaulted Haribhau at his neck by means of sickle. Pertinent to note that though P.W.1 Yash and P.W.4 Amol are silent about the role of

Dwarkabai, however, P.W.5 Vishal in his evidence has stated that Dwarkabai and Mangesh assaulted Shubham and Dhanraj at neck by sickle and also to Gaurav. He has not distinguished the role of Dwarkabai and Mangesh separately, but, in one breath stated that both of them did so. Be that as it may, we have turned to the evidence of another eye witness P.W.6 – Ratnabai Charhate, who has equally stated about the role of Dwarkabai assaulting all the deceased along with CCL Mangesh by means of sickle. Her evidence is quite similar on the line of the version of P.W.5 Vishal. The prosecution has examined P.W.7 Smt.Kiran Thakre, Police Patil in the capacity of eye witness, however, we prefer to come to her evidence after short while, as her evidence stands on somewhat different footing.

23. The next eye witness is P.W.11 Rajendra Dandge. It is his evidence that all accused were armed with deadly weapons. He has specified the weapons held by each of the accused. In particular he deposed that Shyam stabbed at the abdomen of Shubham by means of knife, Haribhau assaulted Shubham by means of an axe and remaining

assaulted him with sickle. It is his evidence that Dhanraj and Gaurav arrived at the spot, on which Shyam stabbed at the stomach of Dhanraj and others also assaulted him. Gaurav was also stabbed by Shyam, whilst Mangesh and Dwarkabai assaulted him by means of knife. He deposed that on arrival of Baburao, he was also assaulted by Shyam. While Baburao was about to shift, all accused accosted and assaulted him. The role assigned to accused no.3 Shyam is quite consistent that he has assaulted all deceased by means of knife. He has also stated that Haribhau was holding an axe by which he assaulted three deceased. As regards to Dwarkabai, he assigned a joint role to her with CCL Mangesh of assaulting by means of sickle. The last eye witness is P.W.13 Santosh Charhate, who is a nearby resident. His evidence is in general form that he saw all four accused assaulting Shubham, Gaurav, Dhanraj and Baburao by means of weapon. He has not spelt out the specific role of each of them.

24. So far as P.W.7 Kiran Thakre is concerned, she is village Police Patil. It is her evidence that she has not witnessed the incident

as a whole. She deposed that after hearing alarm, she came out of the house and saw that Shubham and Dhanraj were lying in the pool of blood near platform/ota of Panchsheel flag post. Dhanraj was leaning on the person of Shubham. At that time, Shyam inflicted knife blows on the abdomen of Dhanraj. She deposed that she was called by her husband, hence she returned to her house and telephonically contacted the police. Thus, she did not witnessed the entire incident, but, has only seen accused no.3 Shyam stabbing at the abdomen of Dhanraj. Her evidence is not of much assistance, except for the role of accused no.3 Shyam.

25. The learned Counsel for the appellants/accused has straneously argued that though as per the prosecution case the genesis flows from Dwarkabai, however, she did not partake in actual assault. He would submit that the first information report is totally silent about the role of Dwarkabai. Likewise, the first informant P.W.1 Yash has not stated the role of Dwarkabai, which was the initial version. He would submit that after two days Dwarkabai has been falsely

implicated by assigning additional role of joining others in the assault by use of sickle. In order to appreciate said submission he has invited our attention to the detailed statement of the eye witnesses who have stated about the role of Dwarkabai.

26. Per contra, the learned Addl.P.P. would submit that though initial two witnesses have not stated the role of Dwarkabai, however, remaining five witnesses have specifically stated that Dwarkabai assaulted all deceased by means of sickle, therefore, her presence with the overtact is duly proved. We are not behind the number of witnesses who spoke from which side. The credibility of the evidence matters than the quantity. Merely because five witnesses have deposed about the role of Dwarkabai, it does not mean that the said evidence has to be accepted as a gospel truth. If on close scrutiny the Court comes to a conclusion that the evidence of five eye witnesses who stated about role of Dwarkabai is not free from doubt, then certainly benefit goes to Dwarkabai. One cannot be convicted on assumption or surmises, but, law requires that the guilt has to be

proved beyond reasonable doubt. Certainly a doubt which clicks to a prudent mind and not a fanciful one. In the light of said position, we have revisited the evidence of all seven eye witnesses.

27. The learned defence Counsel would submit that variance in the evidence of eye witnesses would affect the prosecution case. In this regard he has relied on the decisions in case of **Subhash .vrs. State of Uttar Pradesh – 2022 All MR (Cri) 1545 (SC)**. There can be no dispute, however, it is a factual aspect whether the inconsistencies or variance is material, so as to create a reasonable doubt. Needless to say that minor inconsistencies are bound to occur. In case at hand, the evidence of prosecution witnesses on the core issue is cogent, consistent and reliable and, therefore, above decision would not assist the defence in any manner.

28. Admittedly, the incident took place on 28.06.2015 around 5 p.m. on platform near flag post at village Malpura. The incident was witnessed by several villagers. P.W.1 Yash is son of one of the

deceased namely Baburao. Soon after the occurrence, P.W.7 Village Police Patil Kiran Thakre, telephonically summoned the police. Around 7.00 p.m. Police arrived on the spot and drew panchnama of the scene of offence in between 7.25 to 10.25 p.m. Dead bodies were shifted to the Rural Hospital for autopsy. Thereafter, P.W.1 Yash went to Hiwarkhed Police Station which was at the distance of 15 kms., and lodged report on the very day around 11.20 p.m. It assumes significance since the quick lodgment of the first information is generally presumed to be true version as there are less chances for adulteration. In said context the first information report [Exh.62] lodged within few hours from the occurrence carries importance.

29. P.W.1 Yash stated about the entire occurrence, however, he did not ascribed role to Dwarkabai. To be particular, the first information report is a detailed narration. He was very specific about the arms held by each of the accused. He has stated in detail about earlier dispute in the field, followed by Dwarkabai talking on mobile with someone, probably with her husband and children and then

actual incident occurred at 5 p.m. He has particularly stated that accused no.3 Shyam was holding knife, CCL Mangesh was holding sickle, whilst Haribhau was holding an axe. Then he detailed as to how these three armed men assaulted four deceased. At the cost of repetition, we may say that neither he stated that Dwarkabai was holding weapon, nor her participation in the actual assault. His evidence only speaks about the initial dispute of Dwarkabai with the deceased in the field, and Dwarkabai telephonically summoning her kins at village Malpura for help.

30. Had it been the fact that Dwarkabai had actively participated in the assault, that too by use of deadly weapon, that fact would not have gone unnoticed by P.W.1 Yash. We have considered the said aspect from every possible angle. There may be circumstances in which Yash had no opportunity to witness the entire occurrence or he was in frightened state of mind. However, we are not prepared to give such concession to P.W.1 Yash because his police report is not a cryptic version, but, a detailed narration about the entire occurrence

till the end. He has stated all minute details, including the weapons held by each assailant, particular act of each of them, but, it does not figure Dwarkabai in such detailed narration.

31. It is to be remembered that P.W.1 Yash is son of one of the deceased Baburao, and thus, it is highly improbable that he would exclude one of the culprit who has murdered his father - Baburao, uncle- Dhanraj and his two sons. It emerges that the genesis of the occurrence is Dwarkabai, who in fit of anger called her kins, but, on that basis it cannot be assumed that she has also partaked in the occurrence, that too in absence of reliable evidence. The absence of role of Dwarkabai on actual occurrence in the first information report which was lodged within 3 to 4 hours, gives a body blow to the prosecution case to the extent of role of Dwarkabai.

32. The incident occurred around 5 p.m. in the village. Apparently the villagers must have been terrified by witnessing such a gruesome multiple murders. Yash, P.W.1 who lost his father, went to

Hiwarkhed police station which was at a distance of 15 kms., which must have consumed some time and then lodged report in detail. The first quick version which is free from concoction excludes Dwarkabai from the actual occurrence, which according to us is a matter of great significance. Moreover, during entire evidence P.W.1 Yash did not state that Dwarkabai also assaulted with weapon to either of the victim.

33. We have considered the evidence of next eye witness P.W.4 Amol Charhate, whose father Najukrao also sustained minor injuries in the occurrence. He is resident of village Malpura and related to both sides. He has deposed about the entire occurrence however, did not assigned the role to Dwarkabai. He has deposed about the assault at the hands of Shyam and CCL Mangesh. Since he arrived little bit late i.e. after commencement of the occurrence, he has witnessed Mangesh and Shyam assaulting Shubham by means of weapon. He saw that Baburao was lying in injured condition to whom he himself and Yash were about to shift by motorcycle, however, they

were accosted and again Shyam dealt sickle blow to Baburao. His evidence is totally silent about the role of Dwarkabai. Neither he stated about the weapon held by Dwarkabai, nor overtact on her part. According to us his evidence carries importance since his statement was recorded by the police immediately on the following day i.e. 29.06.2015. As noted above, the first information report was lodged in late hours of 28.06.2015 around 11.20 p.m. and then on the next morning statement of P.W.4 Amol was recorded by the police. As his immediate statement which was transmitted into evidence does not figure the role of Dwarkabai, it accentuates the doubt which flows from the evidence of P.W.1 Yash.

34. Coming to the next batch of witnesses who speaks about the role of Dwarkabai, we prefer to deal with the evidence of P.W.6 Ratnabai, since her statement was also immediately recorded on 29.06.2015 i.e. on the following day. Though P.W.6 Ratnabai deposed about the role of Dwarkabai of assaulting some of the victims by means of sickle, however, her evidence on said point is full of

omissions. The defence has duly proved vital omissions through the evidence of the investigating officer. The improved version of Ratnabai on the point of role of Dwarkabai is of no avail. Apparently her entire evidence to the extent of role of Dwarkabai is totally improved version, hence, it loses its credibility.

35. P.W.5 Vishal and P.W.11 Rajendra had stated above the role of Dwarkabai. It is the evidence of P.W.5 Vishal that Dwarkabai and Mangesh assaulted Shubham by means of sickle on throat. Both of them assaulted Gaurav and Dhanraj by sickle on neck. Pertinent to note that this witness has assigned a joint role to Dwarkabai and CCL Mangesh of assaulting at the same part of the body of each of the deceased, which is not free from suspicion. Moreover, the statement of Vishal P.W.5, was recorded after two days i.e. on 30.06.2015, which leaves room for concoction.

P.W.11 Rajendra do stated the role of Dwarkabai, however, like Vishal he has also stated that Dwarkabai and CCL Mangesh assaulted Shubham by means of sickle, assaulted Gaurav by

means of knife. Then a joint role was assigned that all accused assaulted Dhanraj and Baburao. He has equally assigned similar role to Haribhau and Mangesh. This time he has changed the weapon from sickle to knife to the extent of Dwarkabai while assaulting Gaurav. Inasmuch as, the statement of Rajendra was recorded after three days i.e. on 01.07.2015, which is of great significance.

36. It has come in the evidence of P.W.5 Vishal that on the date of occurrence in his presence police have prepared panchnama of the scene of offence. He has stated that he did not personally approached to the police to say that he has witnessed the incident. He admits that when he attended funeral, police were present. He stated that after two days police patil called him for recording statement. Likewise evidence of P.W.11 Rajendra discloses that after the incident he was throughout in the village till 01.07.2015. He admits that police visited the village on 28th and 29th, but, still his statement was not recorded. No plausible explanation is given by the investigating officer about delayed recording of statement of these

witnesses in terms of Section 161 of the Code. In this regard the learned Counsel for the defence has rightly relied on the decision of Supreme Court in case of **Shahid Khan .vrs. State of Rajasthan – [2016] 4 SCC 96,** wherein the prosecution case has been discarded on account of delayed recording of statement in absence of reasonable explanation.

37. As noted above, though both witnesses P.W.5 Vishal and P.W.11 Rajendra were very much present in the village, available for recording statement, police frequented into the village on and often, still their statements have not been recorded. In such peculiar facts the delayed recording of their statement raises serious doubt about truthfulness of their belated version. Since their evidence as regards the role of Dwarkabai does not find corroboration from the foundational fact i.e. the first information report, coupled with evidence of informant P.W.1 Yash and P.W.4 Amol, we are quite hesitant to accept their version to the extent of role assigned to Dwarkabai in the occurrence.

Rgd.

38. Coming to the evidence of P.W.7 Smt. Kiran Thakre, police patil, who has admittedly neither witnessed the entire occurrence, nor has stated about the role of Dwarkabai. Moreover, her statement has also been recorded after three days despite she being police patil, which is not free from suspicion. Then the last eye witness is P.W.13 Santosh Charhate, who has stated in generalized manner that all accused inflicted blows on 4 victims. He is not specific about the role of either of them. Moreover, his statement has also been recorded after three days despite he is a villager and available throughout.

39. On careful scrutiny of the evidence of all seven eye witnesses, it prominently surfaces that the initial version which vouched about the credibility is the narration in the first information report lodged by Yash, followed by his evidence on oath. At the cost of repetition, we may say that his evidence is silent about the role of Dwarkabai which we have discussed above. Likewise, the evidence of

P.W.4 Amol is silent about the role of Dwarkabai though his statement was recorded immediately on the following day. Pertinent to note that P.W.6 Ratnabai, whose statement was also immediately recorded by the police on 29.06.2015, her evidence is a pure improved version to the extent of Dwarkabai. It is apparent that for first two days from the occurrence Dwarkabai was not in picture about the actual assault, but, after two days when the police recorded statement of other eye witnesses, she appeared with a sickle and role of assault. Thus, for above reasons, our judicial mind does not permit us to rely on such nebulous evidence to the extent of Dwarkabai as there is every possibility of belatedly roping her in the actual occurrence. Therefore, we are not inclined to accept the prosecution case to the extent of Dwarkabai on slippery path. It is cardinal principle of criminal jurisprudence that when the situation emerges two views, the view favouring to the accused would take precedence. Thus, for above reasons we hold that the prosecution has failed to establish that accused no.2 Dwarkabai has assaulted either of the deceased and thereby committed an offence of murder as defined under Section 300

of the Indian Penal Code.

40. The learned Addl.P.P. would submit that all the accused have participated in the deadly assault and thus each one is responsible by applying the principle of joint liability. In other words, the prosecution endeavored to state that even if it is assumed that accused no.2 Dwarkabai has not actually participated in the assault, still by invoking the principle of joint liability, she is liable for the end result. The principle enshrined under Section 34 of the Indian Penal Code is very commonly invoked provision in criminal cases. With a plethora of judicial decisions rendered on the subject, the contours and its impact seem still nigh delineated. We have considered the applicability of Section 34 to the extent of accused no.2 Dwarkabai, as on the basis of independent analysis we have already concluded that Dwarkabai did not participated into the act of actual assault.

41. The accused who is to be fastened with the liability on the strength of Section 34 should have done some act which has nexus

with the offence. The said act need not be very substantial, it is enough that the act is only for guarding or assisting or facilitating the crime. Act need not necessarily be overt. Even if it is only a covert act, it is enough, provided it was done in furtherance of common intention. The leading feature of this Section is an element of participation and existence of common intention animating the offenders. It is also necessary to remember that mere presence of the offender at the place of murder without any participation to facilitate the offence is not enough.

42. It emerges that since Shubham misbehaved with Dwarkabai, she got annoyed and called help from her two sons and husband, who in turn arrived on the spot armed with weapons. There is nothing on record as to what message was conveyed by Dwarkabai to her kins. The evidence only points out that due to prior incident of misbehaviour, she summoned her sons and husband. It has come on record that no sooner the trio came to the spot with weapons, immediately they started assaulting Shubham who was seated alone on

the platform, and assaulted others who came to his rescue. Considering the entire occurrence as a whole, there is nothing to indicate that there was a prior meeting of mind or sharing of common intention in between Dwarkabai, her husband and two sons.

43. The learned Addl.P.P. has relied on the decision in case of **Shiv Mangal Ahirwar .vrs. State of M.P. - AIR 2023 SC 1919**, to contend to fasten the guilt on accused no.2 Dwarkabai, as she allegedly shared the common object. The said decision would not assist to the prosecution, as there is marked distinction between common intention and common object. On the same line, further reliance is on the decision in case of **Masalti .vrs. State of U.P. - [1964] 8 SCR 133.** In said case, by invoking the principles of joint liability some of the accused have been held guilty. As discussed above, on facts we have rejected the submission that Dwarkabai has shared common intention, thus, being distinct fact, the said ruling has no application.

Rgd.

44. Undeniably till 5 p.m. of the date of occurrence, both sons and husband were at different places following their ordinary pursuit. They never dreamt that something would happen to Dwarkabai and on that account they would kill the victims. It is not the case that when the trio came to the spot, they had a discussion with Dwarkabai, so as to atleast give some clue to hold that they have planned to eliminate everyone. It is difficult to come to a conclusion that merely because Dwarkabai was present at or near the scene, without doing anything and without even carrying any weapon can also be convicted with the aid of Section 34 of the Indian Penal Code for the offence committed by other accused. The essential requirement of Section i.e. prior meeting of mind and sharing of common intention is totally missing, therefore, we are not prepared to accept the submissions of the learned Addl.P.P. to rope Dwarkabai by invoking the principle of joint liability.

45. Reverting to the role of rest of the accused, it is the prosecution case that no sooner Dwarkabai telephonically summoned

to her sons, both Shyam and CCL Mangesh and their father Haribhau armed with weapons arrived at village Malpura. As regards to CCL Mangesh, he being child in conflict with law, we are not concerned with him. It is informed that his case is still pending before the Juvenile Justice Board, hence we refrain ourselves from making comments in his regard. All the eye witnesses have stated specific role of accused no.3 Shyam and accused no.1 Haribhau. They have consistently stated that accused no.3 Shyam was holding a knife, who has opened the attack by stabbing at the stomach of Shubham. There is specific evidence that accused no.3 Shyam not only assaulted Shubham, but, particularly assaulted rest of the deceased. Not only that, while Baburao was being shifted to hospital, he was again made to stop and was dealt with knife blow at his neck. The evidence of eye witnesses is consistent about the role of accused no.1 Haribhau also in assaulting all of them by means of an axe. The first information report also spells out the specific weapon held by both, coupled with their positive act of assaulting all the deceased.

46. At this juncture, it necessitates us to deal with the defence version, though irrupted belatedly. CCL Mangesh has stepped into the witness box as a defence witness. The accused tried to put up defence theory, through his mouth. It is his evidence that on 28.06.2015, his mother Dwarkabai telephonically called him as she was misbehaved by Shubham. At the relevant time CCL Mangesh was at Akot, who immediately rushed to village Malpura. He stated that his father Haribhau was at another field at Malpura, who also arrived at the spot. It is his evidence that when he came to Malpura, he saw that Shubham, Dhanraj and Gaurav were holding weapons. All three rushed at the person of his father Haribhau. In order to save his father, CCL Mangesh tried to snatch knife held by Shubham, also tried to snatch axe held by Dhanraj and tried to snatch sickle held by Gaurav and in said bid, all of them sustained injuries, in which they died. In other words, it is the defence version that three deceased Shubham, Gaurav and Dhanraj were about to assault Haribhau, hence, CCL Mangesh tried to save his father, snatched weapons. He became furious and in such maily, all three sustained injuries and died.

We may note that though this was the defence version put forward before the trial Court, however, learned defence Counsel did not stick to said version. In other words, he did not argue about the probability of the defence version as tried to be projected before the trial Court. It appears that Mangesh being CCL, it was a calculated defence, belatedly raised since law does not provide harsh punishment to child in conflict with law under the provisions of Juvenile Justice Act. Be that as it may, the said fragile defence is totally improbable and unacceptable. The evidence of eye witnesses which we have detailed above, is very specific and consistent about the role of accused no.1 Haribhau and accused no.3 Shyam, which is consistent and worth to be believed. Moreover, no such suggestion was given to either of the witnesses, but, it appears that a fine idea of raising such defence erupted at the fag end of the case. Thus, the defence version is not acceptable which is against the direct consistent and trustworthy evidence of various eye witnesses, whose presence was quite natural.

47. The learned defence Counsel made another submission

that the case to the extent of accused no.1 Haribhau stands on different footing. It is his submission that since in the same incident, Haribhau sustained injuries, it is a sign to show that in sudden fight, Haribhau reacted, bringing his case under Exception 4 of Section 300 of the I.P.C. It is submitted that the injuries sustained by the accused have been suppressed by the prosecution, and thus, it creates doubt about the very foundation of the prosecution case. For this purpose, the learned defence counsel relied on the decisions in case of - **Kumar .vrs. State represented by Inspector of Police – [2018] 7 SCC 536, Dashrath Singh .vrs. State of U.P. – AIR 2004 SC 4488 (SC)** and **Gurvinder Singh .vrs. State of Punjab and another – [2018] 16 SCC 525,** wherein it is observed that failure of prosecution to explain injuries on the person of the accused weakens the prosecution case.

48. In above referred decisions it has been observed that generally failure of prosecution to offer any explanation regarding injuries suffered by the accused evolves two possibilities that the evidence of prosecution witnesses may be untrue or the defence plea

may be probable. True, it is the duty of the prosecution to furnish proper explanation about the injuries sustained by the accused. The investigating officer owes a responsibility to investigate in a fair manner to elicit truth.

49. Mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. The principle would not apply in cases where injuries are minor or where the evidence is so clear or cogent, so independent and disinterested, so probable and creditworthy that it far outweigh the effect of omission on the part of the prosecution to explain the injuries.

50. On facts we have been taken through the evidence of defence witness no.1 Dr. Sujata Chavhan, who has examined Haribhau on the following day. She has noted incise wound measuring 2 cm. over the right arm, incise wound on the middle finger and injury at left shoulder to accused Haribhau, which is not in much dispute.

51. It has come in the evidence that during initial assault, fourth deceased Baburao belatedly arrived along with a stick. It is argued that Baburao dealt stick blow to Haribhau, who in turn tried to snatch knife from the deceased which resulted into causing him injuries. On that count it has been argued that in sudden fight, as Haribhau was assaulted he reacted at the spur of moment, which brings the case under Exception 4 to Section 300 of the Indian Penal Code. We have also examined the case from said angle. It is not the case of erupting sudden quarrel between two groups. In order to constitute fight, it is necessary that something should be exchanged, at least verbally. Dwarkabai telephonically called her two sons and husband Haribhau, who came with weapons. Heat of passion requires that there must be no time to cool down. The incident as narrated discloses that armless Shubham was initially assaulted and done to death. When father of Shubham namely Dhanraj and brother Gaurav arrived, they were also assaulted. It was quite natural that Baburao in a bid to save his kins may have inflicted stick blows to Haribhau, but, that does not mean that it is a case of sudden fight. Attack was brutal,

repeated blows were dealt on vital parts of the body, that too without any overt act from the victim party.

52. It is well established that accused no.1 Haribhau by means of an axe dealt several blows on vital parts of the body of almost all the deceased, exposing his clear intention and thus, his case would not fall under Exception 4 to Section 300 of the Code, as claimed by the defence. In order to attract Exception 4 to Section 300, there must be a sudden fight that too, accused acted without taking undue advantage. In the result, the evidence of eye witnesses unerringly points out that accused no.1 Haribhau and accused no.3 Shyam [we have not dealt with the case of CCL Mangesh], arrived on the spot with deadly weapon and indiscriminately assaulted all four deceased on their vital parts of the body, which proved to be fatal. It is not the case of sudden fight as accused came with arms, used indiscriminately without any resistance or quarrel.

53. The defence counsel pointed from the evidence that fourth

deceased Baburao arrived at the place with stick, by which he dealt blow to Haribhau and thus, in retaliation Haribhau reacted. Though a specific plea of private defence has not been raised before us, however, it was endeavored to convince that since Haribhau was attacked by means of stick, he reacted in causing injuries. It is evident from the impugned judgment that in trial Court the theory of self-defence was raised, however, no specific submission was made before us in that regard. We have also examined said probability from the emerging material. Undisputedly, the accused need not step into the witness box to establish the case of private defence, which he could point out from the cross examination or from attaining circumstances. If we have a re-look to the entire evidence, it emerges that initially Shyam, Haribhau along with CCL Mangesh have assaulted Shubham by means of dangerous weapons. Since Dhanraj and Gaurav intervened, they have also been assaulted and thereafter Baburao arrived on the spot with a stick. Thus, it is not a case that at the initiation of the occurrence, fourth deceased Baburao used stick on which accused no.1 Haribhau reacted. But, the facts are clear enough to convey that

already as per the proved facts, Haribhau has assaulted Shubham, Dhanraj and Gaurav by means of sickle and then Baburao arrived with a stick. Therefore, the facts does not indicate that in exercise of private defence, Haribhau caused injuries, which extended to causing death.

54. The learned Addl.P.P. was right in his submission that in order to claim exception on account of private defence, the accused ought to have suggested so to the prosecution witnesses. In this regard, the learned Addl.P.P. has relied on the decision of Supreme Court in case of **Pulicherla Nagaraju .vrs. State of A.P. [2006] 11 SCC 444**, wherein the theory of self defence was rejected for the reason that such a plea was never put forth in statement under Section 313, nor brought out in the cross examination of any of the prosecution witnesses. The said observation clearly applies, as no such specific defence was raised.

55. The learned Addl.P.P. has rightly pointed out that in

absence of specific defence of sudden fight or exercise of private defence, the said theory cannot be accepted. For this purpose reliance is placed on the decision in case of **Ganga Singh .vrs. State of M.P. - [2013] 7 SCC 278**. In the said decision in absence of cross examination and specific defence, the stand taken by the accused has been rejected. On the same line reliance is placed on the decision in case of **Hanumantappa Bhimappa Dalavai and othes .vrs. State of Karnataka – [2009] 11 SCC 408**, which has acode the principle about the right of private defence.

56. The learned Addl.P.P. has further relied on the decision in case of **V. Subramani and others .vrs. State of T.N. [2005] 10 SCC 358**, to contend that in absence of reasonable apprehension, the theory of exercise of right of private defence cannot be adopted. The said submission holds merit, as herein also the accused are unable to point out the necessity of exercising of right of private defence. Section 96 of the Indian Penal Code provides that anything is not an offence which is done in exercise of private defence. While

considering said defence, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self defence, however, the onus lies on the accused to point out reasonable and probable apprehension to exercise such a right, merely the accused sustained some injuries, it does not necessitates that the theory of self defence be accepted. The injuries sustained by Haribhau are minor and superficial. In order to find whether the right of private defence is available, the entire incident has to be examined, which we have detailed above. In the result, it is not possible to accept either of the defence version about applicability of Exception 4 to Section 300 or exercise of right of private defence by accused no.1 Haribhau.

57. Apart the prosecution has relied on one other circumstance to fasten the guilt of the accused. It is the prosecution case that in pursuance to the disclosure made by accused no.3 Shyam, weapons used in the commission of crime have been seized. The prosecution led evidence of P.W.3 Ashok who is panch witness to the

memorandum [Exh.92] and consequential seizure [Exh.93] of four weapons namely two iron sickles, axe and a knife. All these articles were sealed and sent for chemical analyzation. On chemical analyzation, it was found that the seized articles were having blood stains, which were detected to be of some of the deceased. The defence has strongly criticized the evidence of seizure by claiming to be a farce. The learned defence counsel would submit that the evidence of P.W. 9 Prashant auto-driver falsifies the entire evidence of disclosure and seizure.

58. It is the prosecution case that P.W.9 Prashant, is an auto rickshaw driver. It is his evidence that on 28.06.2015, around 4 to 4.30 p.m. CCL Mangesh engaged his auto rickshaw so as to proceed to village Malpura, as he has been telephonically called by his mother Dwarkabai. Accordingly he took Mangesh by auto to Malpura, who was holding a nylon bag at the relevant time. Auto left Mangesh 2 kms away at the of the outskirts of village Malapura. When the auto on return journey reached hardly 2-3 kms, away, auto driver again

received a call from Mangesh to fetch them from Malpura as they wanted to return to the original destination Akot. P.W.9 Prashant deposed that within short time all 4 accused came near the stream-let. All of them were holding arms. He particularly deposed that Mangesh was holding sickle, whilst Shyam was holding knife. All of them boarded the auto and proceeded towards Akot. The defence has pointed out that while the accused along with CCL Mangesh were proceeding by auto towards Akot, they were accosted by police and took them in charge. It is argued that in above circumstances, it is difficult to believe the disclosure and recovery on 01.07.2015, as already weapons were with the accused whose arrest was immediately effected.

59. More importantly, we have been taken through the admission of P.W.9 Prashant that while the auto came near the railway crossing gate, police made them to stop. Particularly he admitted that he did not stopped the auto any where in the way till the police accosted. It is apparent from the evidence of this witness that after

occurrence when the accused boarded the auto they were holding weapons which they carried till they have been taken in charge by police i.e. P.W.17 Head Constable Mohanlal. In view of said evidence it is difficult to believe the evidence of alleged disclosure by Shyam on 01.07.2015 and consequential recovery. It is the prosecution evidence itself that soon after the occurrence the accused ran by auto with weapons and within short time they have been taken in charge. In the circumstances, it is not possible for the accused to get down from the vehicle, conceal the weapons in to bushes and proceed further. Though the trial Court assumed these things, however, in view of clear admission of P.W.9 Prashant, that he did not stopped the auto anywhere, it is not possible to accept said assumption. In the circumstances, it is difficult to accept the prosecution case to the extent of memorandum and seizure of weapons at the instance of Shyam on account of improbability.

60. The prosecution has also relied on the seizure of blood stained clothes of accused and finding of blood of deceased on the

clothes. It reveals that the clothes of accused no.1 Shyam have been seized on the very next day at police station Hiwarkhed, which were containing jeans pant, full sleeves shirt shoes of action company. Likewise clothes of Dwarkabai containing saree and blouse have been seized. Clothes of accused no.1 Haribhau have been seized on 30.06.2015. The chemical analyzers report indicates that on the clothes of Shyam blood of "A" group was found. On the clothes of Dwarkabai and Haribhau blood of "AB" group was found. The chemical analyzers report shows that the blood of deceased Baburao and Shubham was of "AB" group, whilst blood of Gaurav was of "A" group. Though the blood group of accused no.2 Dwarkabai was of "AB" group and accused no.3 Shyam was of "A" group, however, they did not sustain injury. Accused no.1 Haribhau sustained injuries, but, his blood group was "O". Thus it is evident that clothes of accused were having blood stains of the blood groups of some of the deceased, which is one of the additional circumstance in favour of the prosecution. Moreover, since it is the defence itself that there was a fight in between them, it was as good as an admitted factor that the

clothes of accused were stained with the blood of the deceased. This is one more additional link supporting the prosecution case.

61. The prosecution is also banking upon the evidence of extra judicial confession made by the accused to P.W.9 Prashant Telgote, an auto rickshaw driver. We have already referred the role of P.W.9 Prashant above. When the auto driver was called back to fetch the accused, he saw that the clothes of the accused were stained with blood, and they were holding weapons. Seeing so he has questioned the accused on which CCL Mangesh and Shyam replied that they have returned by committing four murders, and boarded the auto. It is a piece of extra judicial confession made by the accused. It is settled position of law that extra judicial confession if true and voluntary, it may be relied by the Court to convict the accused for commission of the alleged crime. Though conventionally evidence of extra judicial confession was treated to be weak, however, it cannot be ignored when shown confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances are tent to support

the statement. The extra judicial confessions are made to man of confidence. However, there was a reason for P.W.9 Prashant to inquire with the accused as they were armed with weapons and their clothes were full of blood. In response to the query, the accused replied accordingly, which is quite natural. Moreover, soon after the occurrence, immediately confession was made. As delineated above, there was reason for the accused to confess to P.W.9 Prashant about commission of crime, since the later has questioned as to how there was blood on their clothes and then had weapons. Thus, everything was natural, which cannot be doubted and therefore, this piece of evidence also needs to be used as a corroborative material against the accused.

62. The learned defence counsel has canvassed various points with the sole moto to convince that the prosecution evidence is not worthy of credit, as well as there are procedural lapses of which benefit shall be accorded to the accused. One of the submission is about non compliance in strict-sense, of the provisions of Section 313 of the

Code. It is submitted that the trial Court failed to seek explanation of the accused on some incriminating material, which has been relied by the trial Court while returning the finding of guilt. It is argued that the circumstances which are not put to the accused in his examination under Section 313, cannot be used against him and have to be excluded from consideration. To substantiate said contention reliance is placed on the decision of Supreme Court in cases of - **Raj Kumar Singh .vrs. State of Rajasthan – 2013 All MR (Cri) 2240 (SC)** and **Sujit Biswas .vrs. State of Assam – [2013] 12 SCC 406.** There can be hardly a dispute about the said proposition of law. The intent behind seeking explanation of the accused on incriminating material flows from the principles of natural justice. It requires that the accused may be given an opportunity to furnish his explanation on the incriminating material which would be used against them. Certainly it is the duty of the Court to examine the accused and to seek his explanation as on incriminating material that has surfaced against him.

63. On said count it is submitted that the trial Court did not

sought explanation of the accused on the point of chemical analyzer's report. In particular it is submitted that it has not been specifically asked to the accused regarding the blood group found on the seized clothes and weapons, which almost matched with the blood group of some of the deceased. In this regard, our attention has been invited to question no.666 similarly put to all the accused. The said question no.666 reads as below :

"[666] What have you got to say about the Chemical Analysis Report from Exh Nos.15 to 23 ?"

It is also submitted that the trial Court has asked exactly same total 700 questions to each of the accused. True though statement of each of the accused under Section 313 has been separately recorded, but the same questions were put to all of them. Questions may be the same, but, the legal requirement is to see whether the explanation of the accused has been called on every incriminating bit of circumstance. It may happen that some questions may be irrelevant for some of the accused, but, the result is that all the questions

containing entire incriminating material has to be put to everyone. There is no scope to say that only because common questions were framed, it caused prejudice, unless specifically shown.

64. The learned defence Counsel is only able to show a single circumstance regarding non seeking of specific explanation about the result of chemical analyzer's report. Besides that no submission has been canvassed to point out as to which incriminating material was not put to the accused. After microscopic analysis, the learned defence counsel was only able to point towards question no.666 pertaining to chemical analyzers report. It is not the case that the trial Court did not sought explanation of accused on the chemical analyzers report. Said circumstance was put to accused, but, in a generalized manner. The fact remains that the explanation has been sought though not specific and thus, the accused cannot muster any strength from the mode adopted by the trial Court while seeking explanation.

65. The defence has attracted our attention to the overwritten

portion in the first information report [Exh.62]. The informant Yash in his police report stated that after telephonic talk, Haribhau, Shyam and Mangesh arrived on the spot. At that time 'Shubham' was armed with knife, Mangesh was armed with sickle and Haribhau was armed with axe. True in the police report, the first assailants name holding knife was initially mentioned as 'Shubham', and then by scoring it has been replaced by the word 'Shyam'. Taking us through said overwriting, it has been argued that at the relevant time deceased 'Shubham' was holding knife, but, later it has been converted into 'Shyam' by overwriting. We are not prepared to accord any advantage to the defence by such mistake committed by the police while writing the report. We have reason to say so, because in the same breath the informant Yash stated names of other assailants with their weapons like Haribhau and Mangesh. If entire sentence is read in continuity, it conveys that the informant intended to state name of Shyam, then Mangesh and then Haribhau, and therefore, silly mistake committed by the police writer cannot be capitalized for any purpose. Moreover, the mistake was corrected then and there only at the time of

registration of the crime. Thus, submission on said count need no consideration.

66. The learned Addl.P.P. would submit that there was sufficient motive for the accused to commit the crime. It is submitted that on account of property dispute, the crime was committed. Accused no.2 Dwarkabai wanted more share in the ancestral property which the victims denied, hence, the motive for the occurrence. It is not denied that there was a property dispute in between the parties, however, that cannot be construed as a motive for commission of crime. It emerges from the evidence that, 29 acres of ancestral land was owned by father of Dwarkabai and her two brothers namely Haribhau and Baburao. Dwarkabai was cultivating 2 acres of land and was also insisting for more share. Pertinent to note that as per the evidence Dwarkabai had filed a civil suit for partition, which was pending since long, therefore, the said land dispute cannot be construed as a motive as a cause of property dispute was ever lasting. It appears from the evidence that since Shubham has misbehaved with

Dwarkabai, it has triggered the quarrel, which ultimately resulted into taking four lives. Thus one can not say that there was strong motive for commission of crime, but, at the place of occurrence there was a quarrel on account of mis behaviour, which took ugly turn. Besides that we may hasten to add that when the prosecution case rests on direct evidence, the motive loses its significance. We have already detailed above, that there was cogent, reliable and trustworthy direct evidence on the point of occurrence and thus, the motive for commission of crime would take back seat.

67. Taking the entire incident as a whole, it is evident that accused no.1 Haribhau and accused no.3 Shyam by means of deadly weapon caused multiple injuries at the vital parts of the deceased. The injuries were specifically aimed at neck, chest, abdomen which clearly demonstrates their intention to eliminate the victims. The act of accused causing multiple injuries of grave nature by sharp edge weapon itself demonstrates their definite intention, attracting the offence of murder. Since a faint plea of self defence and claim of

Exception 4 to Section 300 is rejected, undoubtedly the overwhelming material indicates that accused no.1 Haribhau and accused no.3 Shyam are guilty for the offence of murder punishable under Section 302 of the Indian Penal Code.

68. The next debatable question is about the proportionality of the sentence. The Trial Court heard both sides on the point of sentence. After considering the mitigating and aggravating circumstances, the Trial Court was of the opinion that the case falls in the category of 'rarest of rare case', and thus, awarded capital punishment. Certainly, it is a matter of concern, which requires meticulous examination of all relevant factors to see the proportionality of the sentence.

69. The learned Counsel appearing for the defence has vehemently argued that the Trial Court has not properly appreciated the mitigating circumstances in favour of the accused. It is submitted that the accused are not criminals or professional killers. There was no

strong motive, but, at the spur of moment, the incident occurred. It was not a pre-planned attack, nor the act demonstrates extreme brutality. In short, the case does not fall into the exceptional category.

Per contra, learned Addl.P.P. on behalf of the State has supported the capital punishment awarded by the Trial Court. It is submitted that the Trial Court in detail considered the mitigating circumstances and also rejected them. Considering that the accused have committed brutal murder of four defenseless persons, the Trial Court has properly awarded the punishment. After considering the balance-sheet of the aggravating and mitigating circumstances, the Trial Court has imposed the death sentence, which is appropriate one. In substance, he would submit that the present case can be said to be a 'rarest of rare' case, warranting a death sentence.

70. To substantiate death penalty, learned Addl.P.P. has relied on the various decisions of the Supreme Court in following cases:

[1] Ram Singh vs. Sonia and ors. - [2007] 3 SC 1

[2] Surja Ram .vrs. State of Rajasthan – AIR 1997 SC 18.

[3] Govindaswami .vrs. State of T.N. - [1998] 4 SCC 531.

[4] Suresh and another .vrs. State of U.P. - AIR 2001 SC 1344.

[5] Atbir .vrs. Govt. of N.C.T of Delhi – AIR 2010 SC 3477.

[6] Ishwarilal Yadav and another .vrs. State of Chhattisgarh - [2019] 10 SCC 423.

[7] Ravji @ Ram Chandra .vrs. State of Rajasthan – [1996] 2 SCC 175.

[8] Machhi Singh and others vs. State of Punjab - (1983) 3 SCC 470.

[9] Bachan Singh .vrs. State of Punjab - (1980) 2 SCC 684.

[10] State of Maharashtra .vrs. Vivek Gulabrao Palatkar – Criminal Confirmation Case No.2/2023 decided on 27.03.2024 (Bombay High Court, Nagpur Bench).

We have gone through the above decisions and noted the principles laid therein. We may hasten to add that always precedents would serve as a guiding factor, but, the Courts have to decide the nature and

quantum of punishment on peculiar facts of each case.

71. We appreciate the herculean exercise taken by the learned Addl.P.P. to find out some what similar cases wherein death penalty was confirmed on account of cruelty and multiple deaths. In most of the cases, the deceased were women and minor vulnerable children. On the basis of given facts and circumstances, death penalty was confirmed, which cannot be blindly applied to the distinct facts. However, in order to understand the judicial trend, we have carefully examined all above decisions.

72. Since long, in series of decisions, this question has been dealt with whether in the facts and circumstances of the case, death penalty is warranted ? Almost, in every decision we find reference to the celebrated decisions in the field, namely **Bachan Singh vs. State of Punjab [supra]** and **Macchi Singh vs. State of Punjab [supra]**, wherein the issue has been extensively dealt and several guidelines are laid down. Recently the Supreme Court in case of **Manoj Pratap Singh vs.**

State of Rajasthan - (2022) 9 SCC 81, after considering the above celebrated judgments, made certain observation which would provide guiding factor. The relevant observations made in paragraphs 76, 77 and 80 read as below :

> *"76. The Court also stated that 'special reasons' in the context of Section 354(3) CrPC would obviously mean 'exceptional reasons', meaning thereby, that the extreme penalty should be imposed only in extreme cases in the following terms: - (Bachan Singh vs. State of Punjab (1980) 2 SCC 684)*
>
> > *"161. ....The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases."*
>
> *77. After taking note of various circumstances projected before it, which could be of mitigating factors, and while observing that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction, the Court proceeded to uphold the*

constitutional validity of Section 354(3) CrPC, with the observations that the legislature had explicitly prioritiesed life imprisonment as the normal punishment and death penalty as being of exception, and with enunciation of rarest of rare doctrine in the following words: - (Bachan Singh vs.State of Punjab (1980) 2 SCC 684)

> *"209.....It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. 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."*

…..

80. The Court also explained the relevant propositions of Bachan Singh (supra) and the pertinent queries for applying those propositions in the following terms: - (Macchi Singh v. State of Punjab (1983) 3 SCC 470).

> *"38. In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions*

emerge from Bachan Singh case:

> *(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.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

73. In the earlier decision in case of **Shankar Kisanrao Khade vs. State of Maharashtra - (2013) 5 SCC 546**, the Supreme Court surveyed a large number of cases on either side, i.e. where the death sentence was upheld/awarded or where it was commuted; and pointed

out the requirement of applying 'crime test', 'criminal test' and 'rarest of rare test'. The Supreme Court recounted with reference to previous decisions, the aggravating circumstances (crime test), and the mitigating circumstances (criminal test), in paragraph 49 of the decision, which reads as under :

> *"49. In Bachan Singh and Machhi Singh cases, this Court laid down various principles for awarding sentence: (Rajendra Pralhadrao case, SCC pp. 47-48, para 33-*
>
> > *'Aggravating circumstances — (Crime test)*
> >
> > *(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 of the Code of Criminal Procedure.

(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 — (Criminal test)

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

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

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

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

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the

facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

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

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

74. We may also recall the observations made by the Supreme Court in case of **Rajendra Pralhadrao Wasnik vs. State of Maharashtra - (2019) 12 SCC 460** were in paragraph nos.45 and 47, which read as follows :

"45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3)

CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

(46) ...

47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasized. Until Bachan Singh (supra), the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances… where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet Vs. State of Haryana (2013) 2 SCC 452. "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his

> *crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyze this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible."*

75. Recently, Three Judge Bench decision of the Supreme Court in case of **Manoj and ors. Vs. State of Madhya Pradesh - (2023) 2 SCC 353,** took review of series of decisions in the field and observed as under :

> *"223. The decades that followed, have witnessed a line of judgments in which this court has continually taken judicial notice of the incongruence in application of the 'rarest of rare' test enunciated in Bachan Singh, and therefore, tried to restrict imposition of the death penalty, in an attempt to strengthen a principled application of the same.*
>
> *224. This aspect was dealt with extensively in*

Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra (2009) 6 SCC 498 where the court articulated the test to be a two-step process to determine whether a case deserves the death sentence – firstly, that the case belongs to the 'rarest of rare' category, and secondly, that the option of life imprisonment would simply not suffice. For the first step, the aggravating and mitigating circumstances would have to be identified and considered equally. For the second test, the court had to consider whether the alternative of life imprisonment was unquestionably foreclosed as the sentencing aim of reformation was unachievable, for which the State must provide material.

225. …

226. …

227. Recently, while considering a review petition, this court in Rajendra Pralhadrao Wasnik v. State of Maharashtra (2019) 12 SCC 460 held that Bachan Singh had intended the test to be 'probability' and not improbability, possibility or impossibility of reformation and rehabilitation as a mandate of Section 354(4) CrPC. The court analyzed numerous earlier precedents, noting that evidence by the state on this has been sparse and limited, but was essential for the courts to measure the probability of reform, rehabilitation and reintegration. The court located this requirement in the right of the accused, who regardless of being ruthless, was entitled to a life of dignity, notwithstanding his crime. While this process is not easy, it was noted that the neither is the process of rehabilitation since it involves reintegration into

society. When this is found to be not possible in certain cases, a longer duration of imprisonment was instead permissible.

227. …

228. …

229. …

230. …

231. …

232. This court in Rajesh Kumar v. State (2011) 13 SCC 706 again reiterated that brutality in itself, was not enough to impose death sentence – the accused was convicted for murder of two children who offered no provocation or resistance to the brutal and inhuman fashion in which the accused committed the crime, however, it was held that due consideration to the mitigating circumstances of the criminal still had to be given. Evidence had to be placed on record by the State, demonstrating that he was beyond reform or rehabilitation, the absence of which was a mitigating circumstance in itself. The High Court had merely noted that he was a first-time offender and had a family to take care of – which this court noted was a very narrow and myopic view on the mitigating circumstances.

233. Therefore, 'individualised, principled sentencing' – based on both the crime and criminal, with consideration of whether reform or rehabilitation is achievable (held to be 'probable' in Rajendra Pralhadrao Wasnik), and consequently whether the option of life imprisonment is unquestionably foreclosed – should be the only

factor of 'commonality' that must be discernible from decisions relating to capital offences. With the creation of a new sentencing threshold in Swamy Shraddananda (2), and later affirmed by a constitution bench in Union of India v. V Sriharan (2016) 7 SCC 1, of life imprisonment without statutory remission (i.e., Article 72 and 161 of the Constitution are still applicable), yet another option exists, before imposition of death sentence. However, serious concern has been raised against this concept, as it was upheld by a narrow majority, and is left to be considered at an appropriate time.

234. …

235. …

236. …

237. …

238. …

239. …

240. …

241. In Santosh Bariyar, making observations on nature of information to be collected at the pre-sentencing stage, this court further observed that -

> *"56. At this stage, Bachan Singh [(1980) 2 SCC 684 informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects*

> *relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission."*

76. Per contra, the learned defence Counsel relied on the following decisions of Supreme Court in cases of -

[1] **Manoj and others .vrs. State of Madhya Pradesh – [2023] 2 SCC 353.**

[2] **Madan .vrs. State of Uttar Pradesh – 2023 SCC Online SC 1473.**

[3] **Suo Motu Writ Petition (Cri) No.1/2022 – 2022 Live Law (SC) 777.**

[4] **Rabbu @ Sarvesh .vrs. The State of Madhya Pradesh – Criminal Appeal No.449-450 of 2019 decided on 12.09.2024.**

[5] **Bhagchandra .vrs. State of Madhya Pradesh – AIR 2022 SC 410,**

to contend that this case does not falls in the exceptional category

namely 'rarest of rare case' and thus, the trial Court utterly failed in awarding capital punishment.

77. The learned trial Judge has assigned reasons in paragraph nos.333 to 354 for awarding extreme penalty. On account of aggravated circumstances, the trial Court took into account the indiscriminate attack on four persons and multiple injuries on vital parts. The aggravated circumstances culled out by the trial Court in paragraph nos.337/1 to 337/18 precisely are as below :

[1] Lack of repentance.

[2] Inhuman cruelty.

[3] Accused armed with lethal weapons, whilst victims were unarmed.

[4] Total absence of provocation.

[5] Absence of life threat to the accused.

[6] Victims did not got chance to defend.

[7] No compulsion to commit crime.

[8] Crime occurred without pressure or coercion.

[9] Determined intention of accused and aggressiveness.

[10] Victims entire family was destroyed.

[11] Life threat was also to Yash and Amol who survived.

[12] Disregard of accused to their close relations with victims.

[13] Accused Baburao was a teacher, whilst deceased Dhanraj was Head Constable, but, there was no apprehension to the accused of said position.

[14] Accused were of cruel mindset. Tender age of 17 and 19 years of two deceased.

[15] Accused Haribhau was a teacher who tarnished the image of noble teaching profession.

[16] After initial attack on Baburao, he was chased and killed.

[17] Crookedness of accused in taking defence of thumping blame on CCL Mangesh by taking disadvantage of legal position.

[18] Accused have no sanctity of relations.

78. On the other hand, the trial Court has considered the mitigating circumstances in paragraph nos.333/1 to 333/3, which are as under :

[1] Age of accused is considered, but, expressed that it is not a mitigating circumstance.

[2] Gender of accused no.2 Dwarkabai was considered, but, it was not found to be a mitigating factor [we have already accorded benefit of doubt to Dwarkabai]

[3] Absence of criminal antecedents, but, held that the accused

were of criminal tendency.

79. The Trial Court in true sense has not categorized the mitigating circumstances, which surfaced from the facts of the case. In the decision of Manoj Pratap Singh vs. State of Rajasthan (supra), the Supreme Court laid emphasis that the burden of eliciting mitigating circumstances, lies on the Court, which has to consider them liberally and expansively. On the other hand, the responsibility of providing material to show that the accused is beyond the scope of reformation or rehabilitation, thereby unquestionably falls on the State. In true sense the trial Court did not endeavored in that regard.

80. The learned Addl.P.P. has made elaborate submissions to impress us that the case falls in 'rarest of rare category'. In order to arrive at such a conclusion, he has attracted our attention to few circumstances which are – the accused arrived on the spot with dangerous weapons; all the deceased were unarmed; accused acted in pre-planned and calculated manner; assault was mainly on vital parts

i.e. neck, chest, abdomen of the deceased; false defence has been raised; motive was a property dispute, and the accused were remorse less and the entire family has been done to death. We would like to test this submission on the touchstone of the factual score.

81. It is the prosecution case itself that on the date of occurrence around 3 p.m. Dwarkabai was sowing cotton crop in the ancestral field. Deceased objected to such agricultural activities on which there was ruckus. In the said altercation, deceased Shubham misbehaved with Dwarkabai, which enraged her. Dwarkabai returned from the field to the village Malpura by hurling abuses, and in anger telephonically called her two sons and husband at village Malpura. In turn the accused arrived with weapons, and saw that the deceased Shubham was seated alone on the platform near flag post. Immediately accused no.3 Shyam stabbed Shubham with knife at his stomach. Hearing shouts, Haribhau and Gaurav came to the rescue of Shubham, however, accused assaulted and axed them too. It was followed by Baburao arriving on the spot, but, he was dealt with the

same treatment. The entire chain of events is to be appreciated as a whole to understand whether it was a pre-planned attack.

82. The above facts are clear enough to convey that before 3 p.m. everything was peaceful and normal. Even it is not the prosecution case that the accused have predetermined to kill all four deceased, and to execute the plan, they came and done victims to death. It can be gathered from the prosecution case itself that the accused i.e. Shyam and Haribhau were leading their normal day to day affairs till receiving phone message. It can be easily perceived that Dwarkabai informed that she has been manhandled by Shubham, that is why they have been called. Perhaps may be to teach a lesson to Shubham. In response, Shyam and Haribhau got annoyed and came to the spot with weapons at their own. Undoubtedly Shyam came by auto from their residential place i.e. Akot, whilst Haribhau who was working in another field at village Malpura also came to the spot. It is evident that both of them had no prior communication, but, as Dwarkabai summoned, they came at their own to the help of

Dwarkabai. The evidence discloses that there was no interaction, but, no sooner they saw Shubham seated on ota [platform], both of them assaulted him by means of deadly weapons. These facts do not indicate that it was a pre-planned attack.

Moreover, it requires to be noted that the initial assault was restricted to Shubham only. Since Gaurav and Dhanraj intervened to save Shubham, they became the prey. Likewise, Baburao also arrived on the spot with stick, hence, he was affected by the angried action of the accused. These circumstances indicate that accused did not planned to eliminate four persons, but, as the rest victims at their own came to the spot, it was at their detriment. The chain of events no where signals that the accused were predetermined to eliminate entire family of the victim, therefore, we are not in agreement with the submission advanced by the learned Addl.P.P. that it was a pre-planned murder of four victims. It is not the prosecution case that all the accused with predetermined intention to kill came to the spot in search of victims and by finding, done them to death.

Rgd.

83. No doubt, the accused were armed with deadly weapons, whilst victims were defenseless. The attack was severe as the accused indiscriminately assaulted at the vital parts of the body of all the four deceased amounting to the offence of murder. However, we are considering the case from the point whether it can be fitted in exceptional category.

84. Though the trial Court has culled out various circumstances, as referred in the above paragraphs, it needs consideration whether in real sense those can be termed as aggravating circumstances. The trial Court has culled out total 18 circumstances, however, most of them are repetition of one and the other. We fail to understand as to how the circumstances as delineated in paragraph nos.337/7 and 337/8, that there was no compulsion to commit murder or the accused were not under pressure or coercion to commit crime, can be termed as incriminating circumstance. Likewise, the circumstances culled out by the trial Court in paragraph no.337/13 and 337/15 that the accused Haribhau was a teacher which is a noble

profession, however, how it can be termed as incriminating circumstance. The trial Court in paragraph no.337/17 has also observed that the accused took a false defence of shifting the responsibility on CCL Mangesh in a crooked manner. In our considered view taking a particular defence cannot be termed as an aggravated circumstance. It is a statutory right of every accused to take defence, apart he may succeed or not, but, that cannot be treated as an aggravated circumstance. True, falsity of defence can be termed as an additional circumstance while recording finding of guilt, but, it cannot be termed as an aggravated circumstance while deciding the case on the set parameters of exceptional category.

85. More interestingly the reasoning assigned by the trial Court for awarding capital punishment [paragraph nos.341 to 354] are quite strange. The trial Court has quoted a verse from Mahabharata, which we feel to be an unwarranted exercise. More interestingly in paragraph no.344 of the decision, the trial Court has reproduced some crime data regarding State of Maharashtra of last 10 years. It has been

stated that during last 10 years, 23,222 offence of murder have occurred in the State. Incidents of 4 murder in a single occurrence in last 10 years are 19 in number. On the basis of said statistical data, it has been expressed that such incident of committing 4 murders in a single incident are rare and therefore, falls in the category of rarest of rare case. According to us, the said approach of the trial Court is erroneous, as on the basis of some statistical data, without returning to the facts of this case, the category cannot be decided. In criminal trial each case has its own feature and distinctions. The Court has to evaluate the case strictly on the facts of the case and not to be swayed by the statistics and numbers of similar cases. The said approach is wholly erroneous, which shall be kept out of consideration.

86. The trial Court in paragraph no. 347 has expressed that instances of active involvement of women in committing offence of murder is normally low. Instances of women committing murder of her two brothers and nephew is zero, and thus, it is a case of rarest of rare. Again we repeat that this reasoning to compress the case in

exceptional category is wholly unjustified. As we have stated above, each case has its own feature and distinction, therefore, each and every case cannot be put in exceptional category by pointing out some unique feature. If such analogy is applied, then each case by its unique feature can be said to be falling in rarest of rare category. For example, by such analogy, murder by mother with two sons and husband perhaps may be unique, but, that cannot be an aspect for consideration.

87. The trial Court has further expressed in paragraph no.349 that the incident of murder of four close relatives occurred in bright day light, infront of various villagers. The community was terrified by such attack, and thus, it is a rarest of rare case. We quite see that this can be a little bit of circumstance for consideration, but, not of much significance.

88. The trial Court has expressed in paragraph no.351, that none of the accused have expressed slightest remorse for the crime

committed. Accused no.3 Shyam never stated that during his long incarceration of 9 years he has utilized the time for some fruitful purpose. Again this line of thinking is misdirected which has no connection. We fail to understand as what was the criteria or parameters for the trial Court to express that accused did not have repentance.

89. The trial Court in paragraph no.352 stated that the possibility of rehabilitation seems to be impossible. They have killed their close relatives in total disregard to the virtues, humanity and for the sake of selfishness. The said analogy like a literature has no place in the eyes of law. Moreover, it was a personal opinion of the trial Judge, that there was no possibility of rehabilitation of the accused. Unless there is some material, we cannot arrive at such a conclusion, particularly to act against the accused for putting them into gallows.

90. The trial Court has taken into account the conduct of the accused of non-cooperation. When the trial Court has asked the

accused as to what they went to say on the point of sentence they declined to express anything. The learned defence Counsel before the trial Court has stated that whatever they want to say on the point of sentence, they would say before the High Court. On such response, trial Court expressed that accused have undermined the trial Court. According to us, the trial Court went on emotional line, which ought to have been avoided. Taking note of such conduct, the trial Court has concluded that the accused did not cooperate the Court, and therefore, there is no possibility of reformation. Denial of accused to express on the point of sentence cannot be taken as an adverse, but, it has only little relevance.

91. Surprisingly the trial Court has expressed in paragraph no.354 that the Constitutional validity of death penalty has been upheld by the Supreme Court and thus, if in such a case death penalty is not awarded, then the blame will be pinned to the trial Court for not making the best use of upholding of Constitutional validity of death penalty. Less said is better about such type of reasoning to frame the

accused for capital punishment.

92. In case of Manoj .vrs. State of Madhya Pradesh [supra], the Supreme Court has held that the Court should consider Psychological Evaluation report, Probationary Officers report and Prison report including the material in respect of conduct of the accused and work done during their jail term. The trial Court did nothing in said regard. Neither the trial Court called for the report from the expert, Probationary officer or atleast the conduct report from the concerned jail for evaluation. The said exercise was done by this Court while admitting the matter itself by giving appropriate directions to the Authorities to submit the report.

93. The Jail Superintendent, Nagpur has submitted report dated 11.07.2024 regarding the conduct of the accused. It is reported that the conduct of accused no.1 Haribhau and accused no.3 Shyam was good and satisfactory. Accused no.1 Haribhau being old aged and infirm, he was kept in medical ward. Accused no.3 Shyam voluntarily

undertook the cleaning work in jail dispensary and canteen.

94. We are in receipt of the report of the Assistant Professor of Psychology dated 31.07.2024. It is reported that on examination, accused no.1 Haribhau was found to be psychologically and physically fit. The same is the opinion as regards accused no.3 Shyam. The District Probationary Officer in his report dated 05.08.2024, opined in detail about accused no.1 Haribhau and accused no.3 Shyam. It is stated that the conduct accused no.3 Shyam was satisfactory. He was not of criminal tendency. In past he was helping his father in milk business and used to partake in religious village functions. Accused Shyam has studied upto Bachelor in Science and was preparing for service in Police Department. It was his first offence. His behaviour in the vicinity was good and relations were cordial. As regards to accused no.1 Haribhau, it is stated that due to old age, he was suffering from neurological problem, diabetes, blood pressure and was frequently required medical treatment in jail. He has also studied upto B.Sc. and his over all conduct was good.

Rgd.

95. The reports received from the Authorities reflect that both accused have a record of over all good conduct in the prison and display inclination to reform. It is evident that while in prison, accused no.1 Haribhau was majorly suffering from ailments, whilst accused no.3 Shyam has taken steps towards bettering his life by doing services. Unequivocally it demonstrates that there is infact a probability of reformation. There is no material to conclude that they are beyond reformation. The State has not adduced any material that the accused are menace or danger to the society. Rather it emerges that they were leading a normal human life, their conduct prior to the date of incident was good as well as, during their long incarceration, it remained good. It was a first offence of both the accused. Meaning thereby they were not history sheeter. Certainly, the said aspect can be construed as a strong mitigating circumstance in their favour.

96. Time and again in various decisions the Supreme Court has expressed that multiple deaths is not the sole criteria to bring the

case into exceptional category. At the cost of repetition, we may say that the incident was occurred on a momentary quarrel. Before short time from the occurrence, nothing was planned or arranged, but, when accused learnt that Dwarkabai was manhandled, they got annoyed and rushed for her safety. They assaulted Shubham and only because the rest three came to the rescue of Shubham, in succession they have also been done to death.

97. We have tested the aforesaid mitigating and aggravated circumstances on the touchstone of guidelines laid in the cases of Bachan Singh vs. State of Punjab (supra) and Macchi Singh vs. State of Punjab (supra). Besides multiple murders, we could see no other uncommon feature to carve out the exception. It is not a case of brutal killing of defenseless or vulnerable section of the society, namely women or minor children. Moreover, there was no motive for the accused to kill all the four deceased. Everything erupted at a spur of moment on account of trifling issue of mis-behaviour with the accused no.2 Dwarkabai at the hands of deceased Shubham. Unfolded

evidence discloses that when the accused nos. 1 and 3 received a telephone call from accused no.2, they lost temper, and in retaliation, assaulted the deceased by the weapons which they brought and killed all four. The circumstances do not indicate that life imprisonment is altogether inadequate punishment compelling the Court to arrive at a conclusion that alternative mode would result into failure of justice. In above circumstances, in our opinion, the present case does not fall within the category of 'rarest of rare' case warranting the death penalty. Though, we acknowledge the gravity of the offence, we are unable to satisfy ourselves that the case would fall into the exceptional category. The offence has undoubtedly been committed, which can be said to be brutal, but, does not warrant a death sentence. There is no material to answer with certainty that there are no chances of reformation. Thus, we are of the considered opinion that it is a fit case for commutation of sentence.

98. Imposition of punishment is a delicate task of every criminal trial. The variety of circumstances needs to be considered

while imposing punishment. We have elaborately discussed above that the case does not fall in the category of 'rarest of rare category', thus, capital punishment is unwarranted. The alternate punishment provided under the statute for committing murder is life imprisonment. However, in certain cases Constitutional Courts may feel that mere life imprisonment is an inadequate sentence. In that perspective, we have independently examined the case of accused no.1 Haribhau and accused no.3 Shyam with its peculiarities.

99. It emerges from the evidence that accused no.3 Shyam has commenced the attack which he continued till the last victim. His role was crucial in assaulting all four deceased by means of dangerous weapon. At the time of commission of offence, Shyam was 25 years of age and acted in cruel manner. We are sure that mere imprisonment for life is inadequate punishment in accordance with the atrocities committed by the accused no.3 Shyam. Certainly, punishment of life imprisonment may prove too grossly inadequate as to the gravity of the offense for which the accused no.3 Shyam has been sentenced. In

reported case of **Swamy Shraddananda vs. State of Karnataka (2008) 13 SCC 767**, the Supreme Court took a note of above situation and ruled that there can be a third category of sentence without remission. Recently, in case of **Ravinder Singh vs. State of Govt. of NCT of Delhi (2023) AIR (SC) 2220**, the same issue was dealt by the Supreme Court and ruled that the High Courts are empowered to impose a modified punishment without remission through out, or for specified period. Therefore, this Court can always exercise the power to impose a modified or fixed-term of sentence by directing that a life sentence shall be of a fixed period of more than 14 years. Undoubtedly accused no.3 Shyam deserves for this third kind of punishment to meet the ends of justice.

100. The case of accused no.1 Haribhau lies on some what different footing, as he did not initiated the attack, but, joined his son Shyam. Secondly Haribhau was aged 55 years at the time of occurrence and now he is 65 years of age. The report submitted by the Jail Authorities, Probation Officer and Psychological Expert

indicates that Haribhau is suffering from different ailments and was treated in jail hospital. Considering said distinguishing feature, we deem it appropriate to award him the alternate mode suggested by the statute for the offence of murder, i.e. to under go imprisonment for life.

101. On careful consideration, we are of the considered opinion that the present case does not fall in the category of 'rarest of rare' case warranting the death penalty. For the aforesaid reasons, accused no.1 Haribhau is liable for alternate punishment of life imprisonment, as provided under law. However, considering that the accused no.3 Shyam has brutally attacked four innocents for no reason, allowing him to be released after 14 years of term is tantamount to trivializing the very purpose of sentencing policy. The ends of justice would be sufficiently served if the life imprisonment of the accused no.3 Shyam is for a minimum of 30 years of actual incarceration. We, accordingly, convert his death penalty into imprisonment of life, without remission for the period of 30 years of actual imprisonment.

Rgd.

102. The trial Court has convicted all the accused for the offence punishable under Section 506 (II) of the Indian Penal Code. There is no material to constitute said offence against accused no.2 Dwarkabai.

103. In conclusion we hold that the conviction rendered by the trial Court to the extent of accused no.2 Dwarkabai is unsustainable in law under all charges. However, we maintain the finding of the trial Court to the extent of holding accused no.1 Haribhau and accused no.3 Shyam guilty of the offence punishable under Section 302 of the Indian Penal Code. We also hold that the trial Court seriously erred in understanding the principle of 'rarest of rare' case as delineated by the Supreme Court in catena of decisions, ultimately misdirecting itself, by awarding the extreme penalty. Therefore, we commute the death sentence of both the accused i.e. accused no.1 Haribhau and accused no.3 Shyam. We convert the sentence of accused no.1 Haribhau into life imprisonment, whilst convert the sentence of accused no.3 Shyam to undergo life imprisonment without remission for a period of 30

years of actual imprisonment.

104. The trial Court has imposed fine of Rs.50,000/- on both i.e. accused no.1 Haribhau and accused no.3 Shyam for which we see no justification. We reduce the fine amount to the extent of Rs,10,000/- each with default clause as per the trial Court, for the offence punishable under Section 302 of the Indian Penal Code.

105. Accused no.2 Dwarkabai is acquitted of all charges. She be released forthwith, if not required in any other offence. The fine amount, if any, paid by her, be refunded.

106. We maintain rest part of the impugned order as it stands.

107. We decide the Confirmation Reference accordingly and partly allow the criminal appeal in the above terms.

108. Muddemal property be dealt with in accordance with the Rules.

JUDGE JUDGE

Rgd.