IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
CIRCUIT BENCH AT JALPAIGURI

BEFORE: -

The Hon'ble Justice Soumen Sen
And
The Hon'ble Justice Partha Sarathi Sen

D.R. 2 of 2023
In
CRA 2 of 2021

PADAM SUBBA
VS.
STATE OF WEST BENGAL

For the Petitioner : Mr. Arjun Chowdhury, Adv.,
Ms. Pratusha Dutta Chowdhury, Adv.,
Ms. Riya Agarwal, Adv.

For the State : Mr. Aditi Shankar Chakraborty, ld. APP
Mr. Ujjal Luksom, Adv.,
Mr. Subhasis Misra, Adv.

Hearing concluded on : 25th April, 2024

Judgment on : 22nd May, 2024

***Soumen Sen, J.*:**

1. The brutality of murder of Maya Subba, a house maker and her 13 year old child by inflicting multiple wounds has resulted in a conviction with death sentence by the learned Sessions Judge, Darjeeling which is the subject matter of challenge in this appeal.

2. The investigation commenced on the basis of a written complaint by one Sumit Limbu on 2nd September, 2017 before the Officer in Charge, Pulbazar P.S. *inter alia,* stating that on 1st September, 2017 at about 11 P.M. his uncle who

happens to be the husband of his aunt informed him over telephone that his mother Maya Subba aged about 50 years and his younger sister Ms. Pragya Subba aged about 13 years have been brutally murdered with the help of sharp and heavy weapon by Padam Subba aged about 42 years who happens to be one of his close relatives and usually performed domestic and household job and had two meals a day.

3. In the FIR it has been stated that his uncle Dambar Subba narrated the incident of the murder that took place at around 10.30 P.M to him. The complaint, *inter alia,* states that Dambar Subba on being alerted by the screaming of Pragya rushed to the house along with his wife Gouri Subba and while they were on their way they found Padam was coming out from the said house and was going towards his own house. When they met Padam on the way and enquired from Padam as to what had happened Padam did not give any reply and went away. Thereafter, Dambar and his ailing wife reached the house where they found Maya lying dead in kitchen in pool of blood. The uncle and aunt of the complainant/informant became scared and fled from the house and reached the house of Sudip Gurung and narrated the entire incident to Sudip. Thereafter, all the villagers were informed and when all the villagers assembled his uncle along with other villagers again visited the said house and during their search they found the dead body of his sister Pragya with bleeding injury in a ground adjacent to Latrine. However, Padam Subba could not be traced and he fled away from the said village.

4. On the basis of the written complaint the investigation was initiated. The accused was arrested on 3rd September, 2017. At the trial, 18 witnesses have been examined.

5. The learned District and Sessions Judge on the basis of the evidence both oral and documentary awarded capital punishment in view of the fact that Maya and Pragya have been brutally murdered with sharp and heavy weapon. In arriving at the said finding the learned Sessions judge has *inter alia,* relied upon the testimony of the eye witnesses and forensic evidence. While awarding the sentence of capital punishment the learned Sessions Judge did not find any mitigating circumstances to commute the sentence to life imprisonment or to any lesser punishment.

6. Mr. Arjun Chowdhury, learned Counsel engaged by the District Legal Services Committee has ably argued the death reference on behalf of the appellant. Mr. Chowdhury has referred to the FIR and the evidence of the eye witnesses to show that the cases made out by the prosecution is inconsistent and contradictory. There are variations in the statement narrated in the FIR and the testimony of the witnesses who claimed to have seen the accused in committing the murder or leaving the house of Maya after committing the murder.

7. The submission of Mr. Chowdhury with regard to the evidentiary value and unreliability of the witnesses are summarized below:

i) **PW 1-SUMIT LIMBU**

a. PW-1 is the de-facto complainant. He is the Son of the deceased Maya Subba and brother of the minor deceased Pragya Subba. He was not present at the place of occurrence during the fateful night and was informed about the incident by his uncle Damber Subba (PW2) and as such his evidence is hearsay in nature. Furthermore, in the FIR, he stated that as per his uncle's/PW2's version, he was simply coming out of the deceased's house but during his evidence, he improved his version and said that his uncle/PW2

narrated to him that on their way they saw Padam Subba was coming down with a torch light and was also armed with one "Bhamfok". Also, when the husband-wife duo asked Padam Subba as to where he was going he did not reply and went away.

b. During his cross-examination, he admits that in the Written Complaint, there was no endorsement that it was read over to him. He also admits that the seized Alamat i.e. the offending weapon was not identified by him in the court and further states that such Bhamfok is available in the open market.

c. From the FIR and the evidence of PW1, a probable suspicion occurs that either the PW1 has made certain incorrect allegations with respect to the identification of Padam Subba by the PW2 and PW5 or he was deliberately provided with incorrect information by the PW2.

ii) **PW 2- DAMBER SUBBA**

a) He deposed that when he along with his wife was moving towards the place of occurrence he saw Padam Subba was coming from the place of occurrence and was holding a torch light in his hand. When his wife asked Padam Subba what has happened then he just said "han" and ran away. Surprisingly while recording his statement under Section164 Cr.P.C he had stated before the Magistrate that at that point in time he and his wife saw Padam Subba was coming out from the Place of occurrence with a Bhamfok in his one hand and a torch light in the other hand and when his wife asked Padam by his name he did not reply and went towards his room.

iii) **PW3- Deo Kumar Thapa**

a) He is the Brother-in-law of the Complainant. The said witness is a post-occurrence witness and as such his evidence is not relevant and cannot be relied.

iv) **PW4- Rabi Rai**

a) He is the neighbour of the deceased and claims to be present at the place of occurrence after hue and cry was raised by the neighbours relating to the murder of Maya Subba. He also claims to be the witness of the seizure from the place of occurrence and also claims to sign the seizure list as a seizure witness.

b) His evidence in the form of examination in chief was deferred on the prayer of the prosecution but surprisingly he was never recalled as a witness by the prosecution to complete the examination in chief and as such the defence did not get the opportunity to cross-examine this witness. In such a factual scenario, his entire evidence has to be discarded and cannot be considered as evidence at all.

v) **PW5- Gauri Subba (wife of PW2 and sister of deceased Maya Subba)**

a) She is the wife of PW2 and sister of deceased Maya. She has categorically stated that when she and her husband were moving towards the house of Maya they allegedly saw Padam coming out from the house of the deceased and when she asked him as what had happened, he did not say anything and went away. This evidence is contrary to the evidence of her husband PW2 with regard to the identification of Padam Subba at that point in time and is a material contradiction raising questions on credibility of the witness.

b) In her cross-examination, she admits that the house of Sudip Gurung (neighbour/PW12) is at a 10-minute distance from the place of occurrence and the house of Suraj Subba(neighbour/PW11) is just beneath the house of Maya Subba. It is surprising that despite the house of PW11 being in the closest proximity to the place of occurrence and the PW12's house being situated a little far from the place of occurrence, the PW5 and the PW2 choose to go to the house of PW12 (Sudip Gurung) rather than seeking help from PW11 (Suraj Subba) which also raises doubt on their version of evidence.

vi) **PW 6-PURNI SUBBA**

a) She is the daughter of Maya Subba (deceased). She deposed that as her newborn baby was suffering from some ailment she asked her husband Sunil Rai (PW-7) to go to Maya Subba's house and bring her to her house.

b) In her cross-examination, she states that her husband went to the house of the deceased Maya Subba at 10 p.m. and must have reached there by 10:05 p.m., as according to her, the distance between her house and Maya Subba's house is only 5 minute's walk. Her husband stated to have witnessed the murder whereas other witnesses (PW2 and PW5) have confirmed that they heard the screaming sound at 10:30 p.m. which negates the theory of PW7 Sunil Rai being the eye witness. Such contradiction raises doubt on the credibility of the witness and the benefit of the doubt goes in favour of the accused.

vi) **PW 7-SUNIL RAI**

a) This witness claims himself to be the eye witness of the Murder of Maya Subba but the evidence of PW6 and the timings of PW7 visiting Maya

Subba's house as revealed from the cross-examination of PW6 negates the fact that PW7 is the alleged eye witness of the murder of Maya Subba.

viii) **PW 11- SURAJ SUBBA**

a) This witness claims that the accused allegedly after committing the offence of murder went to his house and confessed before him that he had killed Maya Subba and Pragya Subba. The witness claims to be in his house and was sleeping at the relevant point of time. Furthermore, in his evidence, he deposed that he was a witness to the seizure of one wooden cover of a chopper (Bhamfok) having length of 11 inches and breadth of 5 inches. It is surprising and equally astonishing that the witness who was sleeping at his home at the relevant point of time surprisingly witnessed the seizure of the blood-stained earth and the cover of the Bhamfok, without any plausible explanation as to how he reached the place of occurrence. It raises questions on the credibility of the witness and the extra-judicial confession allegedly made before him by the accused appears to be false and motivated.

b) During his cross-examination, he also admits that at the time of the incident it was dark which further gives credence to the fact that the identification of the accused by the PW2 and PW5 appears to be untrue coupled with the fact that none of the witnesses has said anything in respect of blood-stains being present or not on the clothes of the accused Padam Subba.

ix) **PW 12-SUDIP GURUNG (neighbour of the deceased)**

a) The evidence of the witness is more or less hearsay and he had no personal knowledge of the events and as such his evidence has no direct evidentiary value.

x) **PW 13- NARDHOJ SUBBA**

a) This witness is the scribe of the FIR and has only heard about the incident as such he had no personal knowledge about the incident.

xi) **PW 15- RABI SUBBA**

a) He is the witness of seizure of the Bhamfok but states that he has not witnessed the incident and only heard about the same. He further says that Police seized the Bhamfok from the house of Suk Bahadur Subba (PW16) but the seizure list reveals that the accused Padam Subba produced the offending weapon which raises doubts on the alleged seizure of the Bhamfok (offending weapon) as claimed by the prosecution.

xii) **PW16-SUK BAHADUR SUBBA**

a) This witness is also claimed to be a Seizure List witness of the Bhamfok (offending weapon). He claims that on September 3, 2017 in the morning hours, the accused Padam Subba went to his house and told him that the Police were looking for him. He further claims that at the relevant time, he hide the offending weapon at his house but did not state where did he hide the offending weapon.

b) He contradicts his statement made in the chief by saying that he did not see where the offending weapon was hidden and he was unaware of the contents of the seizure list but as he was insisted by the IO to put his signature on the same, he did so. He further clarified that such type of Bhamfok is easily available in the locality.

c) PW15 as well as PW16 both being seizure witness to the alleged offending weapon, through their evidence make the seizure of the offending weapon doubtful and the foundation of the prosecution case, being the seizure of the offending weapon, is shaken.

xiii) **PW17-DR. SUBHRADIP BAG**

a) This witness is the autopsy surgeon who had conducted the post-mortem on the deceased. In his cross-examination, he categorically admits that the weapon of offence has to be heavy to cause such injuries. He further admits that apart from the Bhamfok there may be other sharp-cut weapon used for causing such injuries, particularly the injuries caused to the victim Pragya Subba.

b) The evidence of the doctor assumes significance in the light of the fact that a Bhamfok is not sufficient to cause such grievous injuries and some other weapon may have been used.

c) The investigation from the very inception was started on the premise that Padam Subba is the sole accused and he has used a Bhamfok as the offending weapon to commit the offences of murder. However, the investigating agency ruled out the possibility of any other person being involved and any other weapon being used, thereby proceeding with a bias against the present accused person and ruling out all other possibilities in the alleged offence. The investigation was so motivated that the investigating agency did not explore other avenues and possibilities of a third party being involved in committing such a horrendous offence.

xiv) **PW18- BINOY CHETTRI (Investigating Officer)**

The I.O. claims in his evidence that the Bhamfok was recovered on the basis of a disclosure statement made by the accused. However the I.0 failed to bring on record the disclosure statement and it was not admitted as evidence. In such circumstances, the recovery of the offending weapon remains unproved and the prosecution cannot take any benefit of the provisions of Sec 27 of The Indian Evidence Act as clearly stated in ***Babu Sahebagouda Rudragoudar & Ors. v. State of Karnataka,***[1] (Paragraphs **58-69)**

8. Mr. Chowdhury submits that the RFSL report allegedly received by the prosecution was tendered in evidence and marked as Ext. 25. However the maker of the said document was not cited as a witness by the prosecution and without examining the maker of the said report, the report was admitted in evidence which runs contrary to the settled proposition of law and is utterly illegal. The trial court in haste and without adhering to the legal principles admitted such documents in evidence which is not only bad in law but also caused a miscarriage of justice thereby causing grave prejudice to the Appellant.

9. Though no credence can be placed on the RFSL report, being inadmissible in evidence, the RFSL report however would establish the fact that the investigation, from its very inception, was perfunctory and proceeded only with the intention to prosecute and convict the appellant. The investigating agency completely ignored and overlooked that there could be other probable cause for commission of the offence, which is prejudicial to the fundamental rights of the appellant.

10. Mr. Chowdhury has submitted that the learned trial court has placed significant reliance on the evidence of the so-called eye witness, namely, PW2, PW5, PW6 and PW7.

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[1] **2024 INSC 320**

11. The statement of PW2 recorded under Section 164 Cr.P.C before the learned Magistrate and his narration of facts to the complainant/PW1 appears to be contradictory and casts serious doubts on the reliability of the evidence adduced by him. It is not uncommon that in hilly villages, due to lack of light or poor light during night hours, it is extremely difficult for a person to identify another person on the streets and as such in the FIR as well as in the statement under Section164 Cr.P.C it was correctly stated that the accused person did not reply to the call of the PW2 and PW5, as in all likelihood and there is a strong possibility that the said person was someone else other than Padam Subba and consequently he did not reply to PW5. The lack of light in the said area is also evident from the fact that the alleged accused person said to be Padam Subba was also carrying a torch light in his hand and in the odd hours at night, without proper light, it was difficult to identify the other person. However, it is not the case of PW2 and/or PW5 that they were also carrying a torch light and/or any electrical gadget using which they have identified the said person to be Padam Subba. Henceforth the evidence of PW2 with respect to identification of Padam Subba, coming out from the place of occurrence is doubtful and should not be given any credence.

12. It is also astonishing that neither PW2 nor PW5 had stated that the clothes worn by the person claimed to be Padam Subba were at all blood-stained. The brutality of the murder and the way in which the injuries were caused, leaves no room to say that a person who has murdered two persons in such a horrendous way, will have blood-stains not only on his clothes but also on his body parts which were uncovered. There is no whisper in the statement under Section164 Cr.P.C of the PW2 and PW5, nor in their evidence before the court that the said person claimed to be Padam Subba had any blood-stains on his clothes or on his body which casts a

serious doubt as to whether they have at all seen Padam Subba at the place and time, as they claimed in their evidence. Such a vital fact was overlooked by the Learned Trial Court while considering the case and the imposition of the sentence.

13. It is submitted that the offending weapon that was allegedly seized and the offending weapon that was sent for RFSL examination do not match and the dimensions of both the Bhamphoks are different. The I.O has also admitted in his cross-examination that there are few houses in and around the place of occurrence and if any hue and cry is raised, that can be heard by the neighbours.

14. It is argued that from the evidence, it is established that the house of PW11(Suraj Subba) is just beneath the house of Maya Subba, being in the closest proximity, but surprisingly Suraj Subba or his wife did not hear any hue and cry raised by Maya Subba or her daughter, but PW2/Damber Subba and PW5/Gauri Subba residing at a distance of atleast 10-15 minutes from the house of Maya Subba heard such noise and came out and also witnessed a person allegedly Padam Subba coming from Maya Subba's house casts doubt on their versions coupled with other factors including an organized attempt of this closely related witnesses to implicate Padam Subba with the offence to eliminate him from all future claims in properties or otherwise among the brothers as after elimination of Padam Subba, the PW-2 Damber Subba would be the only claimant in family property.

15. It is submitted that in view of the noticeable discrepancies with regard to the timing of commission of the alleged offence as well as the weapon alleged to have been seized during investigation is good enough for acquittal.

16. It is submitted that there is no evidence to show that the petitioner has committed a double murder. The murder of the sister of the complainant has not been proved. The dimension of the offending weapon has not been established at

the trial. There is also inconsistency in the evidence of the witnesses with regard to the recovery of the weapon namely, Bamfuk.

17. It is submitted that the Doctor who has performed the post mortem, in his cross-examination has stated that the weapon of offence has to be heavy for such type of injurious to occur the sword, Khukri also may cause this type of injuries.

18. Apart from the said bamfuk there may be other sharp cut weapon used for the purpose of this injury. The other sharp cut weapon can also cause injuries to Pragya. However, no other weapon was recovered apart from Bamfuk. Again the evidence with regard to the recovery of Bamfuk is inadmissible in evidence as there is no disclosure statement recorded under Section 27 of the Evidence Act inasmuch as the forensic examination report has been marked as 'Exhibit' without the Doctor or the Scientist who conducted such alleged examination and had claimed to have authored the report did not depose in favor of the report. The report of RFSL although was collectively marked as Exhibit 25 cannot be considered as a material piece of evidence since the said report is not proved in accordance with law.

19. It is submitted that the statement of Suk Bahadur Subba PW16 who claims to be a construction worker, cannot be relied upon to corroborate the recovery of the weapon as the said statement cannot be considered to be a statement admissible under Section 27 of the Evidence Act leading to the discovery of the offending weapon.

20. The learned Counsel has submitted that the evidence would show that when the alleged incident took place it was dark and it is not possible for the so-called eye witnesses to identify that the accused has committed the murder. The uncle and the aunt of the complainant did not find the sister of the complainant when they entered the house. They deposed that they had seen only the mother of the

complainant in a pool of blood. They were silent about the daughter. As such it cannot be contended and held that the appellant has committed the murder of Pragya.

21. With regard to death penalty, it is submitted that the finding of the learned Single Judge that the convict has committed the crime in pre-planned manner and it is a cold-blooded murder is based on conjecture and surmise. The learned Sessions Judge has proceeded with the presumption that the petitioner has committed double murder although the murder of the sister of the complainant could not be established.

22. The finding of the learned Sessions Judge that the accused has propensity for violence and it is of highest magnitude is also not established. There is no evidence showing that he has committed the murder first upon the mother of the complainant and when daughter witnessed the murder she was chased and murdered. This finding is also not corroborated by any evidence of any of the witnesses. The place of occurrence that is kitchen and toilet is not also established. The evidence of the uncle and aunt would only show that they have found the accused coming out from the house after allegedly committing the murder.

23. It is submitted that the learned Single Judge could not have relied upon the injury report and the forensic examination report without the RFSL and other medical report being proved in accordance with law. The multiple wounds all over the body at the instance of the appellant is seriously disputed and in absence of the other documents or evidence being produced at the trial the said findings cannot be used against the appellant for the purpose of conviction and that too of a capital punishment. It is submitted that the learned Sessions court having arrived at a finding that the motive for the murder could not be established no punishment could

have been awarded against the appellant. It is submitted that the finding of the learned Single Judge of hatred in the mind of the accused against Maya Subba and observation that there might be a reason where he developed some close proximity and subsequently he was forbidden by Maya Subba for the reason of "growing up of the daughter" is purely conjecture and surmise. There is also no basis for arriving at a finding that denial of further closeness by Maya Subba for this murder cannot be ruled out.

24. The learned Counsel while submitting that this is a fit case for acquittal in view of prevarication and contradictions in the statement of the witnesses failure to prove recovery of the offending weapon in accordance with law, non-examination of the author of the RFSL and the abrupt and hasty conclusion that Maya Subba could have been murdered as she denied access are sufficient to reverse the finding.

25. Mr. Chowdhury has submitted that even if it is assumed that the offence has been committed by the accused approach of the learned Trial Court in the matter of sentencing was contrary to law. The learned Trial Judge went overboard at the time of hearing on the point of sentence to hold that alleged murder by the accused/appellant was pre-planned and cold blooded. The learned Trial Court further adverted to the propensity and brutality of the crime to conclude that death sentence would be the appropriate punishment in the facts of the case. The learned Trial Court did not consider the possibility of reformation of the death row convict/appellant and neither there is any material or evidence on record to prove that the appellant/death row convict is not prone to reformation and proceeded on whims to award death sentence which is disproportionately harsh and contrary to the settled principles of law laid down by the Hon'ble Supreme Court.

26. The Indian Criminal Justice System follows the reformative theory of punishment. It emphasizes rehabilitation and reformation of the offenders as the primary purpose of the punishment, rather than retribution or deterrence. According to this theory, the offenders are not seen as inherently evil or irredeemable, but rather as individuals who can be reformed and reintegrated into society with appropriate interventions.

27. The same finds credence from the principles laid down by the Hon'ble Supreme Court in the following decisions:

i. ***Bachan Singh v. State of Punjab***[2] paragraphs 204-207

ii. ***Sundar @ Sundarrajan v. State by Inspector of Police,***[3] paragraphs 72-75, 79-89.

iii. ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***[4]***,*** paragraphs 43, 44, 45, 46 47.

iv. ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,***[5] paragraph 66.

v. ***Anil v. State of Maharashtra,***[6] paragraph 33

vi. ***Surjey Bhujel v. State of West Bengal,***[7] page 86 (last paragraph) onwards.

28. Per contra Mrs Aditi Shankar Chakraborty, learned Additional Public Prosecutor appearing on behalf of the State has submitted that it is one of the rarest of the rare case where the capital punishment is required to be upheld.

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[2] **1980 (2) SCC 684**
[3] **2023 LiveLaw (SC) 217: 2023 (5) SCR 1016**
[4] **2019 (12) SCC 460: AIR 2019 SC 1**
[5] **2009 (6) SCC 498: 2009 (9) SCR 90**
[6] **2014 (4) SCC 69: 2014 (3) SCR 34**
[7] **2023 SCC Online Cal 1877**

29. The learned APP has submitted that at least three eye witnesses deposed in the said proceeding has clearly established the commission of this gruesome murder by the appellant who was given a shelter in the house and provided with two meals a day. He has misused his faith and trust reposed on him. The brutality with which he has committed the crime on a helpless lady and her daughter does not deserve any mercy. It is submitted that even if it is assumed for the sake of argument that the RFSL report has not been proved in accordance with law, the autopsy report clearly established the murder and the Doctor was examined. It is submitted that the offending weapon was recovered on the basis of the statement of the accused. Minor discrepancies in the evidence of the witnesses either with regard to the commission of the offence or recovery of the offending weapon does not in any manner dilute the heinous nature of the crime perpetrated by the accused.

30. The learned APP has submitted that the murder is established by the ocular evidence.

31. It is submitted that PW-2 namely Dumbar Subba is an independent eye witness. He deposed that on the date of incident i.e. on 1st September, 2017 at about 10:10 to 10:30 P.M as soon as he heard the screaming sound of the deceased victims and proceeded when he witnessed the accused Padam Subba coming out from the house of the deceased victim holding a torch light in his hand. While his wife asked the accused, the accused said 'Han' and ran away from that place. It was further deposed that thereafter when PW2 reached the house of the deceased victims he spotted the dead body of one of the deceased victim Maya in a pool of blood.

32. PW-05 namely Gouri Subba wife of PW-2 also jointly witnessed the accused at the relevant point of time was coming out from the crime scene holding the murder weapon.

33. The accused made his extra judicial confession immediately after committing the crime before PW11.

34. The murder weapon "BAMFOK" was seized from the house of this PW-16, the prosecution witness where the accused went two days after the date of incident.

35. On the basis of the aforesaid evidence it is submitted that it is well established that if there is a discrepancy in the ocular evidence and scientific evidence the former shall prevail. In the instant case at least three eye witnesses namely, Gauri Subba PW5, Sunil Rai PW 7 and Suraj Subba PW11 in their evidence has established beyond any reasonable doubt with regard to the presence of the appellant at the place of occurrence of the crime. Inflicting injury on Maya and her daughter have been established beyond any reasonable doubt.

36. The Ld. Session Judge upon consideration of the indispensable and prudent ocular evidence which has directly corroborated the entire prosecution case awarded the sentence.

37. It is submitted that encompassing all these ocular evidence directly implicate that the brutal crime of murder has been single handedly committed by the accused in a planned mind. It is further submitted that the prosecution witnesses being the PWs- 2, 5, 11 and 16 have been consistent in their depositions which implicates the direct involvement as well as pointing out the guilt of the accused in committing the brutal, heinous and barbaric crime upon the deceased victims.

38. The unshaken ocular evidence of PW2 duly corroborated leaves no room for doubt and dichotomy as to the fact of commission of murder by the present appellant.

39. In so far the deposition of PW16 is concerned murder weapon being the 'Bambok' has been recovered from his house and the entries in the seizure list coupled with the signature of the accused therein goes to suggest that the weapon was seized from and/or being produced by him. This fact had never been disputed by the accused during the his examination in terms of Sec 313 Cr.P.C where he was given adequate opportunity to have a direct dialogue with the trial judge to explain the evidence against him.

40. In considering the propensity of violence and the magnitude of his crime while committing the gruesome crime of brutally murdering the two helpless innocent women including a child of tender age certainly attracts the principle of "rarest of rare case" thereby the quantum of punishment of death penalty imposed by the learned trial court is adequate and sufficient. It demands no lenient view and therefore the accused person does not require any consideration.

41. The learned APP relying upon the judgment of the Hon'ble Apex Court in ***Machi Singh v. The State of Punjab,***[8] and ***Devendar Pal Singh v. State of (NCT of Delhi),***[9] has submitted that the aforesaid decisions have formulated few relevant factors where the capital punishment can be imposed. Prosecution case fulfills the parameters laid down in the said decision. The manner of Commission of the crime, the abhorrent nature of the crime and more particularly the murder of an innocent child Pragya along with her helpless mother are relevant factors properly considered by the learned Trial Court during sentencing. Considering the intensity, heinousness,

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[8] **1983 (3) SCC 470: AIR 1983 SC 957**
[9] **2002 (5) SCC 234: AIR 2002 SC 1661**

barbarism and above all the inhuman mental element and the circumstances under which the brutal double murder was committed the learned APP has submitted that the sentence is appropriate and required to be upheld.

42. In the backdrop of the aforesaid submission and evidence of the witnesses including the statement of the accused recorded under Section 313 of the Cr.P.C., the nature, gravity and seriousness of the offence and its consequence are to be assessed. The learned trial Court has proceeded on the basis that the commission of the crime is established by eye witnesses, confessional statement and recovery of the offending weapon. All these factors put together with the medical reports showing the nature and extent of the severe injury caused to the body of the victims have persuaded the court to apply "the rarest of the rare doctrine" to impose capital punishment.

43. It is thus, necessary to find out first whether the prosecution was able to establish the commission of the offence by the accused at the trial. The deposition of four witnesses are extremely vital and of great importance, they are Dambar Subba-PW2, Gauri Subba-PW5, Sunil Rai-PW7 and Suraj Subba-PW11.

44. Damber Subba is the brother of the accused Padam Subba. In his deposition he has stated that at about 10.30 pm he and his wife Gauri heard screaming sound of Pragya Subba. The distance between the two house is about 4-5 minutes. The moment PW2 came from his house she could see Padam Subba coming to the house of Pragya Subba and he was holding a torch light in his hand. The wife of PW2 Gauri asked Padam about the incident and in reply thereto he said 'HAN' and then ran away. No other people were there at the relevant time. Thereafter Damber and Gauri went to the house of Pragya and upon reaching they found the dead body of Maya Subba lying in pool of blood towards kitchen side. This

horrific sight makes Gauri unconscious. They ran away from that house and took shelter in the house of one Sudip Gurung and narrated the incident to him. They were frightened the accused Padam Subba may return to the place of occurrence and for that reason they ran away from the house of Pragya. Thereafter Sudip along with the co-villagers accompanied by PW2 and Gauri went to the house of Maya and discover that apart from Maya Pragya Subba was also murdered and lying dead with pool of blood near toilet. In the cross examination PW2 has stated the accused Padam is to work in the house of deceased Maya and have food there and in the night used to return to his home. Padam was having good relation with Maya and Pragya. There was light in the locality. He denied to have any land dispute with his brother Padam, the accused and any enmity with his brother.

45. Gauri, PW5 is the sister of Maya and wife of Damber, PW2. In his chief she has stated that she heard the screaming sound from the house of her sister Maya and thereafter she along with her husband rushed towards the house of her sister. There she saw the accused coming out from the house carrying one torch in his left hand and one Bamphok in the right hand. When they enquired about the reason for the screaming Padam did not say anything and proceeded towards his house. Thereafter they went to the house of Maya and saw Maya was lying at kitchen with pool of blood. She became nervous and about to be collapsed having fear and both of them ran towards the house of Sudip and they narrated the incident to him. Thereafter along with Sudip and co-villagers they reached the house of Maya. In search of Pragya they found Padam was also murdered and her body was found near toilet. In her cross examination she has stated that at around 10.30 pm she heard the screaming sound from the house of Maya. Padam used to cultivate

and do household work for Maya at the time Maya was having good relation with the accused Padam.

46. Suraj Subba PW11 in his chief has stated that on the day of occurrence approximately between 10.30 to 11 pm when he was sleeping he heard a sudden knocked on the door when he open the window he saw the accused Padam equipped with Bamphok in one hand and torch light on the other hand. When he was asked as to what happened he told him that he killed Pragya and Maya. Suraj became panic and shocked and shut the window. He recorded his statement under Section 164 of the Cr.P.C. He has further deposed that Investigating Officer ceased some "blood controlled earth" with some portion of the hair of deceased Pragya, one black colour rubber sleeper of deceased Pragya. All these articles were seized from the toilet of the deceased Pragya. After the articles were seized he put his signature in the seizure list, marked as Exbt.16. The investigating officer also seized "earth controlled smeared with blood stained" of deceased Maya, sample of controlled earth, black colour rubber sleeper of deceased Maya, one wooden cover of chopper (Bakphok) having length of 11'' and breath 5'', all these articles were seized from the kitchen room of the deceased Maya. Suraj put his signature on the seizure list marked as Exbt.8/3. During his cross examination he has stated that at the time of incident it was dark. The accused Padam used to work in the house of Maya. Suraj has cordial relationship with Padam prior to this incident. After the seizure of the articles in his presence Suraj put his signature in the seizure list voluntarily. He denied that the confession made by the accused before him on that night is false.

47. Sunil Rai, PW 7 has deposed that the deceased Maya Subba is his mother-in-law and PW6 Purni Subba is his wife. They live adjacent to his mother-in-

law and it takes about 10 minutes to reach the house of his mother-in-law. On the date of the incident at around 10 pm his new born baby was suffering from ailments and on the request of Purni he went to the house of mother-in-law to bring her to his house as there was no one to take care of the baby except his wife. When he reached the house of his mother-in-law he saw Padam was assaulting his mother-in-law in Bakphok on her body. He was petrified by the sight and ran away and after reaching home narrated the incident to his wife Purni. Thereafter he went to the house of Sudip where he found Gauri and Damber to be present. He narrated the incident to Sudip and thereafter all of them went to the house of Maya and found Maya lying in pool of blood with multiple injuries all over the body. They search for the sister in law and she was found dead in pool of blood near toilet. In his cross examination he has stated that Padam is the brother in law of Maya. He was not aware of the land dispute between Maya and Padam. He denied the suggestion that Padam did not assault her mother-in-law with Bamphok resulting to her death.

48. The prosecution has also strongly relied upon the evidence of Suk Bahadur Subba, PW16 from whose house the offending weapon was recovered. PW16 in his chief has stated that Padam is his brother in law and he came to his house on 3rd September, 2017. Padam came to his house and informed him that the police is looking after him and he wanted to hide the weapon of offence there. After about 40 minutes Suk Bahadur Subba came to learn that Padam murdered Maya and Pragya. Thereafter he handed over the weapon of offence to the police officer in front of his house. He identified the offending weapon seized by IO being produced by Padam. During his cross examination he has stated that he was unaware of the place where Padam hide the offending weapon. He has not aware of

the content of the seizure list but as he was asked to put his signature in the seizure list he did so. The Bamphok seized is easily available in the area.

49. Rabi Subba, PW 15 deposed that on 3rd September, 2017 Suk Bahadur Subba informed him that his brother-in-law Padam murdered Maya and her daughter Pragya. On that date Rabi went to the house of Suk Bahadur and there police seized one chopper (Bamphok) measuring about 11'' length with wooden handle having breath 4'' with blood stained over it. He put his signature in the seizure list being a witness of the seizure in his presence and the seizure list is marked as Exbt.17/1. The said Bamphok seized in his presence was marked as MAT Exbt.I. During his cross examination he has stated that the seizure list was written in his presence but he was not aware of the contents of the seizure list. The like of offending weapon is available in the locality.

50. The Investigating Officer in his evidence has stated that he seized Bamphok (chopper) in front of the house of Suk Bahadur Subba being produced by the accused Padam Subba and mentioned in the seizure list dated 3rd September, 2017 prepared in presence of the witnesses and was marked as Exbt.17. The seized Bamphok as was claimed to have been produced by Padam was identified as MAT Exbt.I. These are the primary evidence on which the conviction is based. The report of RFSL is ignored as it was not proved by the maker of the said document, which is essential for its admissibility in evidence and relevance.

51. The evidence would show that at least one of the witnesses Sunil Rai, PW7 the son in law of Maya one of the victims have seen Padam on 1st September, 2017 soon after 10 pm assaulting his mother-in-law with Bamphok (sharp cutting weapon) on her body. PW2 Damber and PW5 Gauri have also said that the crime was committed on 1st September, 2017 between 10 pm and 10.30 pm at night.

Damber and Gauri have seen Padam coming out from the house of the victims with torch light in his hand. Gauri in his deposition has stated in addition to torch light and Padam was holding a Bamphok in right hand. Damber while stated that on being asked by his wife as to what happened Padam just said 'HAN' . Gauri in his deposition has stated that Padam did not say anything and proceeded towards his house. The learned Counsel for the prosecution submits that the word 'HAN' in Nepali language would mean 'to strike a blow'. Suraj in his deposition has also stated that between 10.30 to 11 pm Padam knocked his door and while he opened the window he could see Padam with Bamphok in one hand and a torch on the other hand. Padam alleged to have told him that he killed Pragya and Maya. Padam is the brother in law of Suk Bahadur. On 3rd September, 2017 Padam claimed to have been at his place with the offending weapon with a view to hide the weapon there. The evidence of Damber, Gauri and Suraj are not demolished or shaken in the cross examination. The evidence of first three witnesses Damber, Gauri and Sunil would show that the incident had occurred on 1st September, 2017 between 10 pm and 10.30 pm. There has been no material contradiction in the evidence of three witnesses. At least two of the witnesses have stated that they have seen Padam with Bamphok. The argument that due to poor visibility and darkness it is not possible for any of the aforesaid witnesses to identify Padam coming out from the house of Maya on the fateful night between 10 and 10.30 pm cannot be accepted as Damber has clearly stated in the cross examination that the place was not dark and there was sufficient light. In any event Sunil in his deposition has stated that when he reached the house of his mother-in-law he found Padam assaulting his mother-in-law. Sunil petrified and shocked ran away for life and thereafter reached the place of occurrence with the other persons and co-villagers. The presence of Padam at the

place of occurrence with the Bamphok is established. Padam claimed to have made confessional statement to Suraj Subba with whom Padam have good relationship when the incident occurred. Mr. Arjun Chowdhury, the learned Counsel has strenuously argued that the said so called confessional statement is inadmissible in evidence.

52. In the instant case, the evidence relating to the discovery of the offending weapon was whether sufficient to implicate the accused. In arriving at a finding of his guilt on the basis of disclosure statement is to be assessed by reference to Section 27 of the Evidence Act. Section 27 of the Evidence Act is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The restriction as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure.

53. The object of the provision *i.e*. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections be admitted in evidence. Under Section 27 the evidence leading to discovery of any fact admissible provided the information must emanate from an accused in the custody of the police. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what admissible being the information, the same has to be proved and not the

opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be disclosed and evidence to that effect has to be adduced. The idea encapsulated in Section 27 of the Evidence Act is the "doctrine of confirmation by subsequent facts: that is statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. [see ***Salvi & Ors. v. State of Karnataka***[10]). This doctrine is founded on the principle that if any fact is discovered as a result of a search made on the strength of any information obtained from an under trial, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory nature but if it results in discovery of a fact, it becomes a reliable information. [see ***State of Karnataka v. David Rozario***[11]***].***

54. The scope and ambit of Section 27 have been succinctly with illustration stated in ***Pulukuri Kottaya & Ors. v. Emperor***[12]***,*** in the following words:

> *"...it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to*

[10] **AIR 2010 SC 1974: 2010 (7) SCC 263**
[11] **2002 (7) SCC 728: AIR 2002 SC 3272**
[12] **AIR 1947 PC 67**

> *this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."*

55. The said principle was thereafter restated and reiterated in ***Anter Singh v. State of Rajasthan***,[13] and ***Mustakeem @ Sirtajudeen***[14]***.***

56. In a fairly recent decision in ***Babu Sahebagouda Rudragoudar*** *(supra)* the requirement under Section 27 of the Indian Evidence Act, 1872 to make the disclosure statement admissible is discerned in the following paragraphs:

> *"59. The statement of an Accused recorded by a police officer Under Section 27 of the Evidence Act is basically a memorandum of confession of the Accused recorded by the Investigating Officer during interrogation which has been taken down in writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of State of Uttar Pradesh v. Deoman Upadhyaya 1960: INSC: 107: AIR 1960 SC 1125.*
>
> *60. Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the Accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the Accused*

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[13] **2004 (10) SCC 657**
[14] **AIR 2011 SC 2769**

which has been taken down into writing leading to the discovery of incriminating fact(s).

61. As per Section 60 of the Evidence Act, oral evidence in all cases must be direct. The Section leaves no ambiguity and mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section in case of a person who asserts to have heard a fact, only his evidence must be given in respect of the same.

62. The manner of proving the disclosure statement Under Section 27 of the Evidence Act has been the subject matter of consideration by this Court in various judgments, some of which are being referred to below.

63. In the case of Mohd. Abdul Hafeez v State of Andhra Pradesh (1983) 1 SCC 143, it was held by this Court as follows:

> *5. ……If evidence otherwise confessional in character is admissible Under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information, when he is dealing with rpore than one Accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person.*

64. Further, in the case of Subramanya v. State of Karnataka 2022 INSC 1083, it was held as under:

> *82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:*
>
> *27. How much of information received from Accused may be proved. -*

Provided that, when any fact is deposed to as discovered in consequence of information received from a person Accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the Appellant herein which ultimately led to the discovery of a fact relevant Under Section 27 of the Evidence Act.

84. If, it is say of the investigating officer that the Accused Appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the Accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the Accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the Accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the Accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other Article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the Accused and the two independent

witnesses (panch-witnesses) would proceed to the particular place as may be led by the Accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other Article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated Under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

65. Similar view was taken by this Court in the case of Ramanand @ Nandlal Bharti v. State of Uttar Pradesh 2022:INSC: 1075, wherein this Court held that mere exhibiting of memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents. While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement.

66. If we peruse the extracted part of the evidence of the Investigating Officer (PW-27) (reproduced supra), in the backdrop of the above exposition of law laid down by this Court, the interrogation memos of the Accused A-2(Exhibit P-15) and A-1 (Exhibit P- 16), it is clear that the Investigating Officer (PW-27) gave no description at all of the conversation which had transpired between himself and the Accused which was recorded in the disclosure statements. Thus, these disclosure statements cannot be read in evidence and the recoveries made in furtherance thereof are non est in the eyes of law." (emphasis supplied)

57. In the instant case it is important to note that the IO (PW 18) who recorded the disclosure statement of the accused and effected the recovery did not prove the disclosure memo as required by law. The relevant part from the evidence of the IO (PW18) is reproduced below:

> *"There is another Seizure List dated 2nd September, 2017 by virtue of which I seized blood stained earth, controlled earth, black coloured rubber slipper of Maya Subba and wooden cover of "Bhamfok". It is marked Ext.8. The black pair of slipper is marked Mat.Ext.V, wooden cover of "Bhamfok" Mat.Ext.VI. Blood stained earth and controlled earth are marked Mat.Ext.VII,Mat.Ext.VIII.*
>
> *This is the label appended to "Bhamfok". It bears my handwriting and signature. It is prepared in presence of witnesses at that relevant time. The label is marked Ext.23.*
>
> *I seized this "Bhamfok (Chopper)" from in front of the house of Suk Bahadur Subba, being produced by the accused Padam Subba.*
>
> *This is the said Seizure List dated 3.9.17 with respect of "Bhamfok" as produced by the accused Padam Subba in presence of the witnesses. It is marked Ext.17.*
>
> *This is the seized "Bhamfok" so produced by Padam Subba to me (Identified Mat.Ext.I)."* (emphasis supplied)

58. A bare perusal of the extracted portion of the deposition of the Investigating Officer would reveal that he did not narrate the exact words spoken by the Accused at the time of making the disclosure statement. He also did not state that the Accused led him to the place where the articles were hidden and rather stated that he seized the offending weapon in front of the house of Suk Bahadur "being produced by the accused Padam Subba."

59. In the case of ***Ramanand alias Nandlal Bharti v. State of Uttar Pradesh,***[15] the Hon'ble Supreme Court has postulated that for proving a disclosure memo recorded Under Section 27 of the Indian Evidence Act, 1872 at the instance of the Accused, the Investigating Officer would be required to state about the contents of the disclosure memo and in absence thereof, the disclosure memo and the

[15] **2022: INSC: 1075: AIR 2022 SC 5273**

discovery of facts made in pursuance thereto would not be considered as admissible for want of proper proof.

60. Even if the prosecution has failed to prove the recovery of the offending weapon in accordance with Section 27 of the Indian Evidence act there are direct evidence to show the involvement of the accused in the commission of the offence. When direct evidence in the form of eye witnesses are available, even if the prosecution has failed to prove the other incriminating circumstances beyond reasonable doubt it would not have an effect on the prosecution case. The failure to prove the disclosure statement in accordance with Section 27 of the Indian Evidence Act is not fatal. The FIR fully corroborates the ocular evidence of the prosecution witnesses. I have already indicated the evidence of prosecution witnesses who have seen the accused coming out from the house of the victims with the torch in one hand and the offending weapon on the other hand and more particularly the evidence of the son-in-law of Maya clearly stating that he had seen the accused assaulting his mother-in-law. Each one of them had seen the assailant at the place of occurrence. The confessional statement made by the accused to Suraj Subba PW11 cannot also be discarded.

61. “Confession" is one of the species of genus "admission". Admission is the best piece of evidence so as direct evidence.

62. A confession made before a magistrate or in court is a judicial confession. The confessions made before anyone except magistrate or court are extra-judicial confessions, Sarkar on Evidence states: 'An extra-judicial confession may properly be made to any person or collection or body of persons. It is not even necessary that the statement should have been addressed to any definite individual...'. Further, an extra judicial confession is a weak form of evidence.

63. The broad ground for not admitting confessions made to a police officer under inducement, threat or promise is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by this section when the truth of confession is guaranteed by the discovery of facts in consequence of the information given. (see ***Bulaqi v. The Crown,***[16]). The law in regard to extra-judicial confession as appears from the judicial pronouncements appear to be that extra-judicial confession if made voluntarily, can be relied upon by court along with other evidence in convicting the accused. Though it cannot be laid down as inflexible rule of law that in no case will an extra-judicial confession be the sole basis for conviction, in cases of homicide and such other similar grave offences it would not be safe to convict a person on the confession alone unless corroborated by other evidence. This is a rule of prudence rather than law.

64. Extra-judicial confessions are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and circumstances tend to support his statement, should not be believed.

65. In a murder case, the extra judicial confession made by the accused to Police was believed and the accused were convicted under section 302 read with section 34, IPC. (***State of Maharashtra v. Arjun Dattaram Bhekare,***[17])

66. Corroboration of the extra-judicial confession in all cases as sine quo non is neither a just nor a reasonable proposition. If extra-judicial confession is found to be unbiased, untainted coming from the evidence of trustworthy and reliable witness who has stood the test of cross-examination against whom there is no remote suggestion or allegation of inimical terms, the same can be the basis for

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[16] **ILR (1928) Lah 671, 675: AIR 1928 Lah 476**
[17] **2005 Cr LJ 472**

holding the accused guilty. (***Jayesh kumar Parshottamdas Valand v. State of Gujarat***,[18]).

67. In fact, extra-judicial confession is like any other evidence if proved under Section 3 of the Evidence Act. If it is successfully proved by the prosecution that version stated by the witnesses was truthful and voluntary version of the accused referable to incriminating circumstances and his complicity, the same would form basis for conviction. It is not the quantity but quality which matters in evaluating the evidence of prosecution.

68. There is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The courts have considered the evidence of extra-judicial confession a weak piece of evidence. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. It has further been observed that in such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and

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[18] **(1998) Cr.L.J. 4260 (Guj) (DB)**

beyond reproach, the same can be relied upon and a conviction can be founded thereon. (***State of Uttar Pradesh v. MK Anthony,***[19]).

69. It is not being suggested that any of the witnesses have any enmity with the accused although a suggestion was put to the brother of the accused that he is deposing falsely as he has enmity with his brother. However, this could not be established at the trial. The evidence of PW2, PW5, PW7, PW11 and PW16 are required to be read as a whole. PW11 and PW16 independent witnesses who bear no amicus against the accused. Even if we discard the version of PW16 there is overwhelming oral evidence on record, the testimony whereof could not be impeached in cross examination to establish the guilt of the accused beyond any reasonable doubt. There is no reason for such witnesses to falsely implicate the accused, more so, when there is not even a whisper that any of the witnesses had an axe to grind against the accused.

70. The evidence of PW2 is corroborated by the evidence of Gouri PW5 and Sunil PW7. The confessional statement of the accused to Suraj also corroborates the evidence of the other two witnesses both with regard to the time and place of occurrence and that Padam the accused was seen with Bamphok (sharp cutting weapon) in one hand and the torch light on the other hand.

71. There is no material discrepancy in the evidence of these witnesses. Minor variations and/or contradictions would not affect the evidence which otherwise leads to the involvement of the accused in the commission of the offences. A witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that said witness has cause to bear such enmity against the accused so as to implicate him falsely. There is no absolute

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[19] **AIR 1985 SC 48 : (1985) Cr.L.J. 493 (SC)**

proposition in law that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence. Minor discrepancies on trivial matters which do not affect the core of the prosecution case, should not be a ground for the Court to reject such evidence in its entirety. Irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The Court is required to examine whether the evidence read as a whole appears to have a ring of truth. Not giving undue importance to omission, contradiction and discrepancies which do not go to the heart of the matter and shake the basic version of prosecution witness is the guideline to be followed for appreciation of evidence in a criminal trial. While we accept the submission made on behalf of the appellant that the recovery is not in accordance with the disclosure statement and hence the evidence of the IO, Suk Bahadur PW16 and Rabi Subba PW17 may not be admissible in evidence, the other evidence in no uncertain term has been able to establish a link between the accused and the commission of the offence. It was in such background necessary for the accused to make positive statement under Section 313 of the Cr.PC..

72. Before the learned Sessions Judge in the statement recorded under Section 313 Cr.P.C. while he denied the charge of murder he admitted that he used to help Maya in household work. Padam had a duty to explain his presence at the house between 10 and 10.30 p.m. as the incident occurred during that time and he was the only person seen at the place of occurrence by atleast three witnesses with the offending weapon in one hand and torch on the other hand.

73. The fact that what exactly happened during his presence at the place of occurrence are matters pre-eminently or exceptionally within the knowledge of the accused and very lucidly stated by Justice Vivian Bose in ***Shambu Nath Mehra v. The State of Ajmer,***[20] paragraph 11 which is reproduced below:

> "11. ……*The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the Section were to be interpreted otherwise, it would lead to the vry startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."*

74. The aforesaid decision has been recently relied upon by the Hon'ble Supreme Court in ***Nagendra Sah v. State of Bihar,***[21] in which the Apex Court has observed as under:

> *"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the Accused. When the Accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.*
>
> *23. When a case is resting on circumstantial evidence, if the Accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the Accused to discharge the burden Under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the Accused."*

75. The principles that emanate from the decide cases of interpretation of Section 106 of the Evidence Act is that the said section is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish

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[20] **1956 INSC 15; AIR 1956 SC 404**
[21] **2021:INSC:475: 2021 (10) SCC 725**

certain facts which are particularly within the knowledge of the accused. The said Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but it would apply to cases where the prosecution had succeeded in proving facts for which the reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such fact failed to offer any explanation which might persuade the court to arrive at a different inference.

76. In ***Tulshiram Sahadu Suryawanshi & Anr. v. State of Maharashtra***,[22] the Apex Court observed as under:

> *23. It is settled law that presumption of fact is a Rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this Section is not intended to relieve the prosecution of its burden to prove the guilt of the Accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the Accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar*

[22] **2012:INSC:401: (2012) 10 SCC 373**

and Ors. 2000:INSC:422 : (2000) 8 SCC 382: 2000 SCC (Cri) 1516]: (SCC p. 393, para 38):

> *38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the Accused. In Shambhu Nath Mehra v. The State of Ajmer: 1956:INSC:15 : AIR 1956 SC 404: 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:*
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> > *11. This lays down the general Rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the Accused and which he could prove without difficulty or inconvenience.*
>
> *The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.*" (Emphasis supplied)

77. In view of the evidence of PW2, PW5, PW7 PW11 and PW16 directly implicating the accused for the murder, the statement of the accused recorded under Section 313 Cr.P.C becomes relevant. The statement of the accused under Section 313 is assessed to find out that in view of the ocular evidence and circumstances strongly suggesting the involvement of the accused in the offence his silence or refusal to offer reasonable and proper explanation could be used against the accused. It is to be remembered that Section 313 provides an opportunity to the accused for his defence by making him aware fully of prosecution allegation against

him and to answer the same in support of the innocence but equally there cannot be a generalized presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately it will be a question to be considered in the facts and circumstances of each case, there will have to be a cumulative balancing of several factors. While rights of an accused to a fair trial are undoubtedly important, rights of victim and society at large for eviction of deviant behaviour cannot be made subservient to rights of an accused by placing the latter at a pedestal higher than necessary for a fair trial. (See ***Fainul Khan v. State of Jharkhand***[23]).

78. In ***Munna Kumar Upadhyay @ Munna Upadhyaya v. State of Andhra Pradesh,***[24] it was reiterated that if the Accused gave incorrect or false answers during the course of his statement Under Section 313 Code of Criminal Procedure, the Court can draw an adverse inference against him. In para 76 of the report, the Supreme Court observed as under:

> *"76. If the Accused gave incorrect or false answers during the course of his statement Under Section 313 Code of Criminal Procedure, the court can draw an adverse inference against him. In the present case, we are of the considered opinion that the Accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the Accused would also tilt the case in favour of the prosecution."*

79. The Hon'ble Supreme Court recently in ***Indrakunwar v. State of Chhattisgarh,***[25] on consideration of various judgments summarized the principles in

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[23] **2019 (9) SCC 549**
[24] **2012 INSC 211 : (2012) 6 SCC 174**

paragraph 35 with regard to the evidentiary value of a statement under Section 313 of CrPC as under:

> *"35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.*
>
> *35.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.*
>
> *35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.*
>
> *35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alterum partem.*
>
> *35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.*
>
> *35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.*
>
> *35.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.*
>
> *35.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.*
>
> *35.8 This statement is to be read as a whole. One part cannot be read in isolation.*
>
> *35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.*

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[25] **2023 SCC Online SC 1364**

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision."

80. It is well settled that the evidence of witnesses have to be read as a whole and the words and sentences cannot be truncated and read in isolation. Minor contradiction and/or inconsistencies regarding the recovery of the offending materials is also immaterial. In a fairly recent decision in ***Wazir Khan vs. State of Uttarakhand***,[26] the Hon'ble Supreme Court has clearly stated that when incriminating circumstance is put to the accused and the accused either offers no explanation or offers explanation which is found to be untrue then the same becomes an additional link in the chain of circumstances to make it complete.

81. When the attention of the convict is drawn to the incriminating circumstances that inculpate him in the crime he failed to offer appropriate explanation or gave a false answer the same can be counted as providing a missing link for completing a chain of circumstances. In the instant case his failure to offer appropriate explanation has cost him dearly. In any event, in the instant case there are ocular evidence clearly suggesting and implicating Padam in the Commission of the said offence.

82. Although the present penal law permits death penalty it has to be awarded in the rarest of the rare cases without the court being left with any residuary

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[26] **2023 (8) SCC 597**

doubt about the nature and commission of the crime perpetrated by the accused. In the instant case the murder of Pragya is based on circumstantial evidence and the residuary doubt remains about the involvement of the accused with regard to the murder of Pragya. Apart from the confessional statement we have not come across any evidence from the eye witnesses that they have seen the accused assaulting Pragya. The doubt with regard to the presence of another person as raised by the learned Advocate for the appellant cannot be completely ruled out. In India having regard to the social and economic condition and the frightful expense to engage an accomplished, competent and skilled advocate the undertrials by and large are unable to defend effectively at the trial notwithstanding avowed object of free legal access to undertrials under the Legal Services Act. It cannot be doubted that due to ineffective legal representation on behalf of the accused at the trial, at the sentencing stage, mitigating factors not being brought on record and a singular focus on the gravity of the offence would have more than often result in harsh sentencing.

83. When the murder is committed in an extremely brutal, grotesque, diabolical and dastardly manner the court is faced with the dilemma when it is found that the accused was in a dominating position and the victim was minor, innocent or helpless. The issue before the Judge is whether it should apply the test of “society-centric” or “Judge-centric”. The court is required to examine whether conscience of society is shocked or not and whether abhors such crime. The Court is required to look into various factors like society’s abhorrence, extreme indignation and antipathy where it is a case of sexual assault and murder of minors, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women to mention a few.

84. The Hon'ble Supreme Court was faced with such a situation in ***Anil Alias Anthony Arikswamy Joseph v. State of Maharashtra,***[27] and considering the gruesome nature of the murder and that the victim was an innocent boy and such type of crime shocks the moral fiber of society especially when the passive agent is a minor and both Indian and International society abhor pederasty commuted to the death sentence to a fixed term as the State had failed to discharge its responsibility of proving the impossibility of rehabilitation of the accused who was 42 years old. The court taking into consideration the legislative policy under Sections 235(2) and 354(3) CrP.C. which mandates reasoning for imposing sentences mentioned in Section 354(3) CrP.C. commuted the death sentence to a fixed term of 30 years without remission in addition to imprisonment already undergone by the appellant/accused.

85. In the instant case when we carefully analysis the balance-sheet of "aggravating and mitigating circumstances" and reminding ourselves that full weightage has to be given to the mitigating circumstances before a just balance is struck we are unable to pursued ourselves to hold that in the instant case the possibility of reformation and rehabilitation is not foreclosed. Sentencing in fact is an onerous duty which has to be exercised keeping in mind the settled and binding precedents including doctrine of proportionality for assigning justifiable reasons to award death penalty and also to keep in mind the doctrine of reform and rehabilitation (see ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***[28]***).*** The power of the High Court to pass a fixed term sentence has been elaborately discussed as under:

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[27] **2014 (4) SCC 69**
[28] **2009 (6) SCC 498**

"45. *Simultaneously, however, a parallel line of thought has strongly advocated that death be imposed to maintain proportionality of sentencing and to further the theories of deterrence effect and societal retribution. These people contend that sentencing should be society-centric instead of being judge-centric and make use of a cost-benefit analysis to contend that the miniscule possibility of putting to death an innocent man is more than justified in the face of the alternative of endangering the life of many more by setting a convict free after spending 14-20 years in imprisonment. This possibility, they further state, is already well safeguarded against by a 'beyond reasonable doubt' standard at the stage of conviction.*

46. Ostensibly to tackle such a conundrum between awarding death or mere 14-20 years of imprisonment, in Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka (2008) 13 SCC 767, a three-Judge Bench of this Court evolved a hybrid special category of sentence and ruled that the Court could commute the death sentence and substitute it with life imprisonment with the direction that the convict would not be released from prison for the rest of his life. After acknowledging that "the truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench", this Court went on to hold as follows:

> *"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an Appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a*

term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri.) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

47. The special sentencing theory evolved in Swamy Shraddananda (supra) has got the seal of approval of the Constitution Bench of this Court in Union of India v. Sriharan alias Murugan and Ors. (2016) 7 SCC 1, laying down as follows:

105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment

> *provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court.*
>
> *106. Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (2) [Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 : (2009) 3 SCC (Cri.) 113] that a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in Sangeet v. State of Haryana [Sangeet v. State of Haryana, (2013) 2 SCC 452: (2013) 2 SCC (Cri.) 611] that the deprival of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.*
>
> *48. Regardless of the suggestive middle path this Court has, when the occasion demanded, confirmed death sentences in many horrendous, barberic and superlative crimes especially which involve kidnapping, rape and cold blooded murder of tender age children."*

86. In ***Santosh Kumar Satishbhushan Bariyar*** *(supra)* the Hon'ble Supreme Court considering the nature of evidence and background of accused commuted the death sentence to life imprisonment as there was nothing to show that the appellant/ accused could not be reformed and rehabilitated and the mere manner of the disposal of the body of deceased howsoever abhorrent would not by itself sufficient to bring the case in the rarerest of the rare category thereby giving waitage

to the possibility and probability of reformation and rehabilitation. The Hon'ble Supreme Court held that death punishment qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability.

87. In view of its irrevocability exploring the alternative option by way of reformation was emphasized in the following words:

> *"Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution - all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end anything to do with the life. This is the big difference between two punishments. Before imposing death penalty, therefore, it is imperative to consider the same.*
>
> *The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigor when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh (supra) sets the bar very high by introduction of Rarest of rare doctrine."*

88. The imposing of death sentence only on the basis of the gravity of the crime and not the criminal, his state of mind, his socio economic background is not permissible as has been reiterated in ***Lochan Srivas v. State of Chattisgarh***,[29] and ***Bhagchandra v. State of Madhya Pradesh.***[30]

89. In the aforesaid decision the Court has also emphasized the need for collection of mitigation evidence at the time of sentencing. In two cases where materials relating to mitigating circumstances were not placed on record before the trial court, the Hon'ble Supreme Court called for reports from the probation officer, psychological evaluation reports and jail reports regarding conduct (***Manoj v. State of Madhya Pradesh,***[31] ; ***Mohd Firoz v. State of Madhya Pradesh***[32]. Taking this step forward, on one case, the Court also granted permission to mitigation experts to interview the prisoner and submit a mitigation report (***Irfan @ Bhayu Mevati v. State of Madhya Pradesh***, Criminal Appeal No. 1667-1668 of 2021, order dated 29th March, 2022 (SC).

90. It has been reiterated in the aforesaid judgments that the onus is on the state to lead evidence to the effect that the offender is beyond reformation is one of the important factors to be taken into consideration. There should be an attempt to produce materials relating to mitigating circumstances and before the trial court proceeds to pronounce death sentence the court is required to call for the reports from the Probation Officer, Psychological Evaluation Reports and Jail Reports regarding conduct (see ***Manoj v. State of M.P.*** *(supra),* ***Mohd Firoz v. State of M.P.*** *(supra)*.

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[29] **2022 (15) SCC 401: 2021 SCC Online 1249**
[30] **2021 SCC Online SC 1209: 2021 (18) SCC 274**
[31] **2021 SCC Online SC 3219**
[32] **[2021] SCC Online SC 3221**

91. The Hon'ble Supreme Court granted permission to experts to interview the prisoner and submit a mitigating report. The subject matter has now been converted into a suo motu writ petition. The Apex Court took note of the difference in approach in the interpretation of Section 235(2) of Cr.P.C. and referred the question for consideration by a larger bench. This has been noted in a fairly recent decision of the Hon'ble Supreme Court in **Review Petition (Crl.) Nos. 159-160 of 2013** in **Criminal Appeal Nos. 300-301 of 2011** ***Sundar @ Sundarrajan v. State by Inspector of Police*** [33], presided over by the Hon'ble Chief Justice of India Dr. Dhananjaya Y. Chandrachud.

92. The importance of probability and possibility of reform and rehabilitation of the convicted accused before sentencing has been reiterated in ***Sundar @ Sundarrajan*** *(supra)*. It has emphasized the need for meaningful, real and effective hearing to the accused with the opportunity to adduce material relevant for the question of sentence. The aforesaid decision has taken into consideration the earlier decisions in paragraphs 76 to 80 delineating the duty of the court before an accused is sentenced to death. For brevity and convenience the said paragraphs are reproduced below:

> *"76. In Rajendra Pralhadrao Wasnik v State of Maharashtra (2019) 12 SCC 460, a three judge bench of this Court took note of the line of cases of this Court which underline the importance of considering the probability of reform and rehabilitation of the convicted accused before sentencing him to death. The court observed:*
>
> *43. At this stage, we must hark back to Bachan Singh and differentiate between possibility, probability and impossibility of reform and rehabilitation. Bachan Singh requires us to consider the probability of reform and rehabilitation and not its possibility or its impossibility.*

[33] **2023 INSC 264: 2023 (5) SCR 1016**

[…]

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. If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the trial court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh, 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, some of which have been pointed out in Bariyar and in Sangeet v. State of Haryana where there is a tendency to give primacy to the crime and consider the criminal in a somewhat

secondary manner. As observed in Sangeet "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 analyse 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. (emphasis supplied)

77. The law laid down in Bachan Singh requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme. As noted in Santosh Kumar Satishbhushan Bariyar v State of Maharashtra , this requires looking beyond the crime at the criminal as well: 66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be

deciphered, but Bachan Singh sets the bar very high by introduction of the rarest of rare doctrine. 2009 (6) SCC 498 (emphasis supplied)

78 A similar point was underlined by this Court in Anil v State of Maharashtra where the Court noted that:

33. In Bachan Singh this Court has categorically stated, 'the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society', is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar. Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case. (emphasis supplied)

79. No such inquiry has been conducted for enabling a consideration of the factors mentioned above in case of the petitioner. Neither the trial court, nor the appellate courts have looked into any factors to conclusively state that the petitioner cannot be reformed or rehabilitated. In the present case, the Courts have reiterated the gruesome nature of crime to award the death penalty. In appeal, this Court merely noted that the counsel for the petitioner could not point towards mitigating circumstances and upheld the death penalty. The state must equally place all material and circumstances on the record bearing on the probability of reform. Many such materials and aspects are within the knowledge of the state which has had custody

of the accused both before and after the conviction. Moreover, the court cannot be an indifferent by-stander in the process. The process and powers of the court may be utilised to ensure that such material is made available to it to form a just sentencing decision bearing on the probability of reform.

80. In Mofil Khan, a three judge bench of this Court was also dealing with a review petition which was re-opened in view of the decision in Mohd. Arif v Registrar, Supreme Court of India. While commuting the death sentence to life imprisonment, the Court reiterated the importance of looking at the possibility of reformation and rehabilitation. Notably, it pointed out that it was the Court's duty to look into possible mitigating circumstances even if the accused was silent. The Court held that: 9. It would be profitable to refer to a judgment of this Court in Mohd. Mannan v. State of Bihar in which it was held that before imposing the extreme penalty of death sentence, the Court should satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to the society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing material. The hearing of sentence should be effective and even if the accused remains silent, the Court would be obliged and duty-bound to elicit relevant factors. 10. It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating 2014 (4) SCC 69 circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent. A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime. There is no reference to the possibility of reformation of the Petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the Petitioners. We have

examined the socioeconomic background of the Petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the above, it cannot be said that there is no possibility of reformation of the Petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative.

93. On consideration of the aforesaid decisions in paragraph 81 it has been observed:

"81. *The duty of the court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty has been highlighted in multiple judgments of this Court. Despite this, in the present case, no such enquiry was conducted and the grievous nature of the crime was the only factor that was considered while awarding the death penalty."*

94. It appears that during the hearing of the review petition the Hon'ble Apex Court passed an order directing the Counsel for the State to get instructions from jail authorities on the following aspects: (i) the conduct of the petitioner in jail; (ii) information on petitioner's involvement in any other case; (iii) details of the petitioner acquiring education in jail; (iv) details of petitioner's medical records; and (v) any other relevant information.

95. In the instant case, we have also called for a report from the Superintendent Jalpaiguri Central Correctional Home with regard to the conduct and other necessary details during incarceration. We have also separately called for a report from the psychologist Jalpaiguri, Central Correctional Home. The Ld. APP on 30th April, 2024 submitted two reports upon intimation to Mr. Arjun Chowdhury. The

information provided by the Superintendent, Jalpaiguri Central Correctional Home shows that the accused has spent Six years Seven months and Twenty six days as on 30th April, 2024 on the date of the report. The Superintendent in his report has made the following remarks:

> "His conduct is good with staff and inmates of this correctional home. He is agile and obedient to administration. No adverse report recorded against him."

96. The report of the psychologist dated April 30, 2024 with recommendation is as under:

> "*Padam Subba is a condemned prisoner.*
> *On the basis of Mental Status Examination (MSE) and observation, it is obtained that he is having coherent speech, goal directed behavior, oriented to time, person and place, manifested by intact cognitive functioning with presence of insight. Therefore, he is psychologically fit at present."*

97. His dress is "appropriate", speech "emotional" and mood "Ethylic". He is 'critical' in his judgment and possesses "Intellectual insight."

98. The accused has no criminal antecedent and it cannot be said that he is beyond reformation and rehabilitation. It cannot be said that he would be menace or threat to the society. We also find that sufficient time was not given to the accused between the date of pronouncement of the judgment and sentencing to ponder over the issue. Moreover the mitigating circumstances have not been produced before the learned Trial Court.

99. Ernest Barker in his celebrated book Principles of Social and Political Theory has said: "Punishment is reformatory in the sense that it is intended to revive in the mind of person punished, the mental rule which he has neglected or rejected,

and, along with it, the whole of the system of such rules. In other words, punishment is a reformation of the wrongdoer only in the sense of being intended he prevent him (as well as other, and along with others) from neglecting or rejecting the particular mental rule he has broken and with it the whole system of such rules. It follows that the reformation intended is simply a consequence, or by-product, of prevention, and that it therefore affects, as such, other besides the wrongdoer, and others along with the wrongdoer. So far, therefore, as punishment is reformatory, it is reformatory of all, and not of the criminal only, though it may, and should, be particularly and especially reformatory in his case".

100. It reminds me of a well known play I read in School: "The Bishop's Candlesticks" by Norman McKinnel. It was based on three main themes: love, kindness and redemption that can change a man rather than violence. The play is about convict who was arrested because he stole for his starving and dying wife. He was put in jail where he was tortured and treated like an animal. He ran away from the prison and broke into the Bishop's house. Bishop provided him shelters, food and clothes. Bishop's kind and soft behavior brought about a charge in the convict but he could not resist himself from stealing his silver candlesticks. He was arrested and produced before the Bishop. The Bishop saved him by informing the police that it was a gift for him which touched his soul and transformed him. While leaving the Bishop said to the convict that 'Human Body is Temple of Living God' which means that God resides in the heart of every human being. The play is based on a scene from Victor Hugo's Les Miserables. It is all about how a small act of kindness can transform a condemned criminal into a man. The play depicts how criminals are not born, but rather become criminals as a result of their surroundings. Tagore's Valmiki Pratibha although set in a different background and context nonetheless is relevant

as Ratnakar starts with destruction and ends with creation and becomes the famous poet Valmiki. A journey from darkness to light is what reformation aims at and seeks to achieve. The prisons are now correctional homes.

101. On consideration of the report of the superintendent of the correctional home, the psychologist, the nature of the crime, the residual doubt with regard to the death of Pragya by the accused and probability and possibility of reformation and rehabilitation we commuted the death sentence to a fixed term of 21 years from the date of incarceration without remission.

102. The order of the Learned Sessions Judge is modified to the aforesaid extent.

103. The appeal is allowed in part.

(***Soumen Sen, J.)***

Partha Sarathi Sen, J.:

104. I have read the judgment prepared by my esteemed brother Justice Soumen Sen and I fully concur with the view expressed by His Lordship. However, I wish to give a separate concurring judgment which is set forth hereunder.

105. This death reference case and the instant criminal appeal arise out of the judgement dated October 12, 2020 and order of sentence dated October 14, 2020 as passed by Learned Sessions Judge, Darjeeling in Sessions Trial No. 02 of

2017/ Sessions Case No. 33 of 2017 whereby and whereunder the said Court found the present appellant guilty of the charge under section 302 IPC for the commission of murder of one Maya Subba and one Pragya Suba and thus sentenced him to suffer death penalty by hanging till his death.

106. Since death penalty has been awarded by the trial court, the case record of the proceeding of the aforesaid trial has been submitted before this Court under section 366(1) of the Code of Criminal Procedure(herein after referred to as the 'said Code' in short) for confirmation.

107. The appellant has also felt aggrieved with the said judgement and order sentence and has thus assailed the same by filling a jail appeal through the Superintendent of Jalpaiguri Central Correctional Home.

108. For effective disposal of the instant appeal and death reference, the facts leading to the initiation of the aforesaid Sessions Trial before the Court of Sessions Judge, Darjeeling are required to be dealt with in a nut shell.

109. One Sumit Limbu son of late Raj Kumar Limbu and deceased Maya Subba and brother of Pragya Subba lodged a written complaint dated September 02, 2017 with the Officer-in-charge of Pulbazar P.S. , District-Darjeeling stating inter alia that he being an army personnel after availing his leave was on the way to his place of posting at the relevant time and on account of scarcity of public vehicle he stayed in his brother-in-law's house at Merry Villa in the night where on September 01.2017 at 11 P.M. he got information over phone from his uncle that his mother and his said sister Pragya Subba was murdered by the present appellant who was a domestic help to the said Maya Subba, since deceased. After reaching at the spot on the self same night, the informant came to learn from one Damdar Subba that the said Damdar Subba and his wife Gauri Subba who happened to be his uncle and aunt

respectively, that on the relevant night at about 10.30 P.M. heard a screaming sound of Pragya Subba from her home and when they rushed to the home of the deceased persons, on the way they noticed that the appellant was coming out of the house of the deceased persons. It was the further version of the informant that the said Damdar Subba and his wife Gauri Subba enquired from the appellant as to what happened to which the appellant was stated to be mum. The said Damdar Subba and his wife Gauri Subba thereafter entered into the house of the deceased persons and they noticed the said Maya Subba was lying dead in a pool of blood in her kitchen(herein after referred as the P.O.1 in short). It was the further version of the informant that after seeing the incident, the said Gauri Subba became senseless and after regaining her sense, both of them rushed to the house of a nearby resident Sudip Gurung before whom they narrated the entire incident. Thereafter the villagers came to learn about the incident and they made search for his sister Pragya Subba and on search they found the dead body of Pragya with bleeding injury on the ground adjacent to the latrine (herein after referred as the P.O.2 in short) of the said house. The villagers also made search of the assailant who however at that time fled away from the said village.

110. On the basis of such written complaint Pulbazar P.S Case no. 59 of 2017 dated 02.09.2017 was started. Investigation was taken up and on completion of the same charge sheet under Section 302 was submitted as against the present appellant. After commitment the learned trial court framed the charge against the present appellant in the following manner :-

“(1) Shri Uttam Kumar Shaw,

Sessions Judge,District Darjeeling

hereby charge you….(1)Padam subba Son of Late Maitahang Subba Upper Gairigawn, NaNore G.P. P.S Pulbazar,District Darjeeling.

Firstly,

That you on or about 01.09.2017, at about 10:30 p.m. assaulted your mother Maya Subba and sister Pragya Subba with sharp cutting weapon at their home as a result of which both of them succumbed to their injury and you, thereby committed an offence punishable u/s 302IPC and within cognizance of this court.

And I hereby direct that you be tried by the said Court on the said charge.

Charge is read over and explained to the accused person to which he pleaded "Not Guilty" and claimed to be tried.

Dated this, the 5th day of December, 2018.

Shri Uttam Kumar Shaw,

Sessions Judge,District Darjeeling"

111. On a cursory perusal of the charge as framed by the trial court it thus appears that the charge is framed under one head but such charge under Section 302 IPC has practically been framed on two counts i.e. in one count for the murder of Maya Subba and in another count for the murder of Pragya Subba.

112. At the time of consideration of charge as framed above the appellant denied the charge as framed against him and claimed to be tried and thus the aforesaid trial proceeded.

113. From the trial court record it reveals that in order to bring home the charge as framed against the appellant the prosecution examined 18 witnesses in all and some documents and materials have been exhibited on their behalf.

114. From the trial court record it reveals further that though on behalf of the appellant no evidence was adduced but from the trend of cross examination of the prosecution witnesses as well as from the answers as given by the accused under Section 313 of the said Code it appears that the defence case is based on clear denial and false implication.

115. In course of hearing of the instant appeal and the death reference Mr. Chowdhury, learned Counsel, for the appellant appointed through Calcutta High Court Legal Services Committee, Jalpaiguri Circuit Bench at the very outset, draws our attention to the written complain as lodged by the informant. Attention of ours is also drawn to the evidence of PW1 that is the informant.

116. It is submitted by Mr. Chowdhury, learned advocate for the appellant that on comparative study of the written complaint and the testimony of PW1 it would reveal that PW1 in course his deposition had developed his version inasmuch as in his written complaint the said PW1 did not state anything as to how and by which weapon the alleged offence was committed while in his deposition he gave vivid description with regard to the commission of crime as well as with regard to the alleged possession of Bhamphok (a sharp cut weapon) by the accused.

117. It is further argued on behalf of the appellant that on conjoint perusal of the evidence of PW2 and PW5 it would reveal that they are not truthful witnesses and there are material contradiction in their respective depositions which materially affects the prosecution case.

118. It is further submitted that though PW2 and PW5 claimed that immediately after hearing the screaming sound of the deceased Pragya Subba they rushed to the P.O.1 but in their respective depositions they have not explained as to why they rushed to the house of PW2 (Sudip Gurung) after seeing the dead body of

Maya Subba though according to them the house of PW11 Suraj Subba is situated near to the P.O.1 and P.O.2.

119. Drawing further attention of this court to the evidence of PW11 it is further submitted on behalf of the appellant that though a wooden cover of Bhamfok was claimed to have been seized by the I.O in presence of PW11 from the P.O.1 that is the Kitchen Room of deceased Maya Subba but no evidence has been adduced on behalf of the prosecution that such wooden cover is the cover of the alleged weapon of offence which according to the prosecution has been recovered as per showing of the accused in course of investigation.

120. It is further argued by Mr. Chowdhury, learned Advocate for the appellant that in absence of proof of any disclosure statement of the accused while in police custody, it cannot be said that weapon of offence was seized as per showing of the accused.

121. It is further argued by Mr. Chowdhury that the mode of proving RFSL reports are faulty in as much as the scientific officer who had prepared such report has not been tendered in the witness box as prosecution witness.

122. Mr. Chowdhury further draws our attention of this Court to the evidence of PW17 that is the Autopsy Surgeon who performed post mortem examination over the dead bodies of the deceased persons. It is argued that from the cross-examination of PW17 it would reveal that the said Doctor opined that apart from the alleged weapon of offence that is Bhamfok, some other sharp cut weapons might have been used in the alleged crime. It is thus, submitted that such evidence suggests the possibility of the presence of any other person other than the accused who might have murdered the deceased persons and not the appellant.

123. It is further submitted by Mr. Chowdhury that since the murder of deceased Maya Subba and Pragya Subba are based on circumstantial evidence, learned Trial Court ought to have been held that a complete break of chain occurred in the chain of circumstances which materially affects the prosecution case.

124. It is thus, submitted by Mr. Chowdhury that this is a fit case for allowing the instant appeal by setting aside the impugned judgment of conviction and order of sentence.

125. While arguing on the point of sentence Mr. Chowdhury learned advocate placed his reliance upon the following six reported decisions:

a. Bachan Singh v. State of Punjab reported in 1980 (2) SCC 684;

b. Sundar @ Sundarrajan v. State by Inspector of Police, 2023 Live Law (SC) 217;

c. Rajendra Pralhadrao Wasnik v. State of Maharashtra, 2019 (12) SCC 460;

d. Santosh Kumar Satishbhushan Bariya v. State of Maharashtra,2009 (6) SCC 498;

e. Anil v. State of Maharashtra, 2014 (4) SCC 69;

f. Surjey Bhujel v. State of West Bengal, 2023 SCC Online Cal 1877.

126. It is submitted by Mr. Chowdhury that the aforementioned reported decisions makes it obligatory for the trial court to come to a finding with regard to the possibility of rehabilitation and reforms of the present appellant which the learned Trial Judge had not done.

127. It is further argued that while passing the order of sentence learned Trial Judge was persuaded only with regard to the grievousness of the offence and in doing so, he had failed to consider the mandate of the Hon'ble Apex Court in

doing enquiry with regard to the mitigating circumstances in coming to a conclusion that the probability of reform and rehabilitation of the convict is next to impossible.

128. It is thus, submitted by Mr. Chowdhury that for the sake of argument even if this Court finds that the appellant is guilty of the charge under Section 302 IPC for the murder of Maya Subba and Pragya Subba, the death sentence may be converted into any other punishment as prescribed by law.

129. Per contra, Mr. Aditi Shankar Chakraborty, learned Additional Public Prosecutor for the State submits before this Court that there is no reason to disbelieve the ocular testimony of PW7 who is the son in law of the deceased Maya Subba.

130. It is further submitted that such ocular testimony of PW7 gets due corroboration from the evidence of PW2 and PW5 who had seen the accused coming out from the place of occurrence immediately after the occurrence of the incident of twin murder and thereafter fled away from the said spot without giving any answer or explanation with regard to the incident of the said murder which is a relevant fact under Section 8 of the Evidence Act.

131. It is thus argued on behalf of the State that while appreciating the evidence of the prosecution witnesses, learned Trial Court has rightly come to a finding with regard to the involvement of the present appellant in the alleged twin murder.

132. Mr. Chakraborty in course of his submission also submits before this Court that learned Trial Court is equally justified in placing reliance upon the evidence of PW11 before whom the present appellant made extra judicial confession with regard to the commission of crime.

133. It is further submitted by Mr. Chakraborty that from the depositions of the PWs, the five golden principles of proof regarding circumstantial evidence have been satisfied and thus the learned Trial Court is very much justified in passing the impugned judgment of conviction and order of sentence.

134. In course of his argument Mr. Chakraborty learned APP further submits that the quantum of punishment as awarded by the learned Trial Court ought not to be altered in view of the magnitude of cruelty of the present appellant and merciless nature of act upon the deceased in whose residence the appellant used to work as a domestic help.

135. It is further submitted that considering the aggravated circumstances as available from the Trial Court record there cannot be any reason to alter the punishment as awarded by the trial court.

136. It is thus, submitted on behalf of the State that it is a fit case for dismissal of the instant appeal and for answering the death reference in the affirmative.

137. On behalf of the State reliance has been placed upon the following reported decisions:-

i. ***Machi Singh vs. State of Punjab*** *reported in* ***1983 (3)SCC 470;***

ii. ***Devender Pal Singh vs. State of NCT of Delhi*** *reported in* ***(2002) 5 SCC 234***.

138. For the sake of brevity I propose to categorize the prosecution witnesses under the following heads:-

Private individuals	**Govt. officials**	**Police Personnels.**
1. PW1- The informant and son of deceased Maya Subba and brother of deceased Praggya	1. PW17- Autopsy Surgeon who performed autopsy over the dead body of the deceased	1. PW8-A constable of police.

Subba.	Maya Subba and deceased Praggya Subba as well as on the cut index finger of deceased Pragga Subba.	
2. PW2- Husband of the sister of Maya Subba, a local resident.		2. PW9- The then O/C of Pulbazar P.S
3. PW3-The son-in-law of Maya Subba.		3. PW10- R.O.
PW4- A neighbour of Maya Subba and a seizure witness.		4. PW14- The driver of police vehicle.
PW5- Wife of PW2 and sister of deceased Maya Subba.		5. PW18- Investigating Officer.
6. PW6- Daughter of Maya Subba, since deceased.		
7. PW7- Another son-in-law of Maya Subba and husband of PW6.		
8. PW11- A co-villager of the deceased persons.		
9. PW12- A nearby resident of the deceased persons.		
10. PW13- Scribe of the written complaint.		

11. PW15- A co-villager of the deceased persons.		
12. PW16- Brother-in-law of the accused.		

139. The factual matrix in which the appellant came to be prosecuted has been dealt with in the impugned judgement in detail. Therefore, I do not recapitulate the same all over again except to the extent it is necessary to do so for the purpose of the instant appeal and death reference. In order to assess as to whether the death of the aforesaid Maya Subba, since deceased and Pragya Subba, since deceased are homicidal in nature, I propose to look to the evidence of PW17 who performed autopsy over the dead body of the aforementioned two deceased persons. From the examination-in-chief of PW17 it reveals that while conducting post mortem over the dead body of Maya Subba the said Autopsy Surgeon found the following wounds which are reproduced hereunder in verbatim:-

"The details of the wound noticed by me are:

i. Deep gaping wound over the frontal area of the scalp that caused exposure of the brain matter with haemmorhage.

ii. Deep gaping wound over the occipital area of the scalp as well.

iii. In the forearm there is a fractured bone namely Radius and Ulna along with cut of bold vessels.

iv. Left upper arm below shoulder joint very deep gaping wound involving two third of the arm with fractured humerus. All the muscle and bold vessels were cut through. Margin was sharp.

v. Left side behind the shoulder, there was a deep gaping cut would with the sharp margin.

vi. On the back below the scapula, there was a deep cut would with sharp margin."

On the basis of such finding the said PW17 testified in the following manner:-

"After holding the autopsy of the dead body I came to the conclusion that the death is caused due to severe head injury with intracranial haemmorhage as well as haemmoragic shock due to injury of the major blood vessels around the neck which is ante mortem in nature and indicative of homicide."

In course of his deposition PW17 testified the following in respect of the wounds as noticed by him in course of post mortem of Pragya Subba namely :-

"The details of wound"

i. Large deep wide open wound seen behind the neck involving the occipital bone causing the fracture of the same with exposure of the brain matter. Margin of the wound was sharp. There was evidence of haemorrhage from the brain.

ii. Right hand- sharp cut wound involving the dorsal aspect of all the fingers of the right hand and there was a sharp cut deep wound in the dorsum of the right hand.

iii. Index finger of the right hand was cut through the middle

phalanx exposing the bone.

iv. In the left hand there was a very deep sharp cutting gaping

wound below the wrist between the thumb and the dorsum of the hand.

v. On the left side behind the back of the shoulder, there was a sharp cutting deep wound."

In course of his deposition PW 17 further testified in the following

manner:-

> *"My opinion regarding cause of death is due to severe head injury causing intra cranial haemorrhage as well as due to haemorrhage and shock due to injury to the major blood vessels which is ante mortem in nature and indicative of homicide."*

It is pertinent to mention herein that PW17 in course of his deposition duly proved the post mortem reports of the dead bodies which have been marked as Exhibit 18 and 19 respectively.

140. On a cursory perusal of the evidence of PW17 vis-à-vis Exhibit 18 and 19 it appears to me that the learned trial court is very much justified in coming to a conclusion that the death of the aforementioned deceased persons are homicidal in nature.

141. It further appears to me that though PW17 was extensively cross-examined on behalf of the accused but the said PW17 cannot be shaken and therefore this Court finds no reason to disbelieve the unchallenged testimony of the PW17 which has also been relied upon by the learned trial court while passing the impugned judgement.

142. At this juncture, I propose to look to the evidence of PW7 who according to the prosecution is an ocular witness to the alleged incident of murder of Maya Subba. On perusal of the examination-in-chief of PW7 it reveals to me that it is the version of PW7 that on September 1, 2017 at about 10 p.m his said new born baby became ill and as there was no one in his home to take care of his baby except his wife he rushed to the house of his mother-in-law (Maya Subba) and when he reached to the house of the deceased Maya Subba he found the appellant was assaulting his mother-in- law (Maya Subba) with a 'bhamfok' (a sharp cutting weapon) on her person. It has been further testified by PW7 that seeing such incident he became terrified and ran away towards his house and thereafter narrated

the entire incident to his wife (PW6). It is his further version that thereafter he went to the house of one Sudip Gurung (PW12) where he found Dambar Subba (PW2) and Gauri Subba (PW5) and before whom he narrated the entire incident. It is the further version of PW7 that thereafter he along with the said PW2 and other co-villagers went back to the house of Maya Subba and found that Maya Subba was lying in a pool of blood with multiple injuries on her body. They also made search for his sister-in-law, Pragya Subba and ultimately found her dead body also in a pool of blood near the toilet of the said house.

PW7 was also cross-examined at length but no incriminating material came out from the mouth of PW7 from which an inference can be drawn that the deposition of PW7 is either false or exaggerated.

143. At this juncture I propose to look to the evidence of PW2 namely; Dambar Subba. In course of his examination-in-chief the said PW2 testified that on the relevant night at about 10:30 p.m he and his wife, PW5 (Gauri Subba) heard a screaming sound of Pragya Subba, since deceased from her house and immediately thereafter they rushed to the house of the said deceased persons which took 4-5 minutes from his house and when both PW2 and PW5 reached near the house of the deceased persons, PW2 noticed that the appellant was coming out from the said house and at that time he was holding a torch light in his one hand. It is the further version of PW2 that at that time his wife, PW5 asked the appellant as to what happened to which he replied by saying *'han'* and thereafter he fled away. It has been further testified by PW2 that thereafter he and his wife (PW5) entered into the house of the deceased persons and found the dead body of Maya Subba in her kitchen(P.O.1) and at that time the said Maya Subba was lying in a pool of blood. It has further been testified by PW2 that seeing such gruesome incident his wife (PW5)

lost her sense and after regaining her sense both of them ran towards the house of Sudip Tamang (PW12) where they narrated the entire incident to PW12 and thereafter the said witness along with other co-villagers again went back to the house of Maya Subba and at that time all of them found the dead body of Pragya Subba with bleeding injuries on her person. He further testified that his submission was recorded under Section 164 CrPC.

From the cross-examination of PW2 it has been found that it is the version of PW2 that the deceased persons, PW2, PW5 as well as the appellant are the residents of the same locality and it has been further testified by PW2 that the present appellant used to work in the house of the deceased persons and after taking food there, the accused used to come back to his home at night. He denied that since there is an enmity between him and the appellant, he had deposed falsely.

144. PW 5, being the wife of PW2 also deposed in the same line as has been testified by PW2. In course of her examination-in-chief it has been testified by her that on September 01, 2017 at about 10:30 p.m. she and her husband PW2 heard a screaming sound from the house of the deceased persons and thereafter both of them hurriedly came to the house of the deceased persons where she saw the present appellant coming out from the house of Maya Subba and at that time he was carrying a torch light in his left hand and one ‘bhamfok’ in his right hand. It has also been testified that on being asked as to what happened, the appellant said nothing and proceeded towards his house.

PW5 further testified that when she and her husband (PW2) entered into the house of Maya Subba they found the dead body of the said Maya Subba at her kitchen who was lying there in a pool of blood and after seeing the dead body of Maya Subba, since deceased she became senseless due to nervousness and

immediately thereafter she and PW2 rushed to towards the house of PW12 where they narrated the entire incident to PW12. It is her further version that thereafter PW2, PW12 and other co-villagers went to the house of the deceased Maya Subba and at that time the dead body of Pragya Subba was found near the toilet of their house. PW5 was also extensively cross-examined on behalf of the defence but nothing could be elicited from her mouth in order to come to a finding that PW5 deposed falsely as against the present appellant.

145. According to the prosecution PW11 is another vital witness for them. On perusal of the evidence of PW11 it reveals to me that in course of his examination-in -chief PW11 testified that on September 01, 2017 at about 10:30p.m-11p.m he suddenly heard a knocking sound on his door while he was sleeping. It is his further version that on opening a window of his house to ascertain as to who was knocking he found the present appellant who was at that time carrying a 'bhamfok' (a sharp cutting weapon) in his one hand and a torch light in his other hand. PW11 inquired from the appellant as to what happened to which the appellant disclosed to him that he murdered Pragya Subba and Maya Subba. It has been testified by PW11 further that after hearing this he became panicked and shocked and then and there he shut the window of his house and ran away. He further testified that his statement was recorded under Section 164 CrPC. He further testified that in his presence the Investigating Officer seized blood stained earth and controlled earth from both the P.Os including one blue coloured rubber slipper of deceased Pragya Subba. He further testified that one wooden cover of the chopper 'bhamfok' having length 11 inches and breadth 5 inches was also seized by the I.O from the kitchen room of Maya Subba.

PW11 was also cross-examined on behalf of the accused. He stated in course of his cross-examination that prior to the incident of murder he had a cordial relationship with the appellant. He further deposed that the accused used to work in the house of Maya Subba.

146. The evidence of PW1 i.e.; the informant in considered view of me is not of much relevance inasmuch as in his examination-in-chief he has practically echoed the version of his written complaint and further he is a post occurrence witness to the alleged incident of murder. It further reveals from the evidence of PW1 that he had witnessed the seizure as made by the I.O as well as he was the witness to the inquests as conducted over the dead bodies of Pragya Subba and Maya Subba.

147. At this juncture, if I make an overall assessment of the evidence adduced by PW7,PW2, PW5 and PW11 it appears to me that the learned trial court is very much justified in coming to the conclusion that it is none but the appellant who committed the murder of deceased Maya Subba for the reasons stated hereunder:-

I. There is no reason to disbelieve the unchallenged testimony of PW7 who had personally seen the assassination of his mother-in-law, Maya Subba at the hands of the present appellant by using a ‘bhamfok’ (a sharp cutting weapon).

II. There cannot be any reason to disbelieve the unchallenged testimony of PW2 and PW5 who are the husband and wife who in course of their respective depositions have categorically stated that immediately after hearing the screaming sound of Pragya Subba (deceased) they rushed to the house of deceased persons within 4-5 minutes and at that time both of them found that the present appellant being the accused was coming out

from the house of the deceased Maya Subba and at that time as per the version of PW2 the accused was carrying a torch light in his hand and as per the version of PW5 he was carrying a torch light in his one hand and a 'bhamfok' (a sharp cutting weapon) in his other hand.

III. It has also been found from the deposition of PW2 and PW5 that on being asked as to what happened the accused gave either no reply and/or evasive reply and ran away from the said spot which is a relevant fact under section 8 of Evidence Act.

IV. The evidence of PW1 vis-a-vis PW 2 and PW5 gets strengthened from the deposition of PW11 before whom the accused made extrajudicial confession.

148. In order to come to a logical conclusion as to whether it would be prudent to place reliance upon the extra judicial confession as made by the appellant before PW11, this Court intends to place reliance upon a reported decision of ***Sanar Chand vs. State of Rajasthan*** *reported in* ***(2011) 1 C Cr LR (SC) 45*** wherein the Hon'ble Apex Court while dealing with a case based upon extra judicial confession expressed the following view:-

> *"There is no rule that an extra judicial confession can never be the basis of a conviction, although an extra judicial confession should be corroborated by some other materials*."

149. On perusal of the judgement impugned before us it appears to me that while reaching a conclusion with regard to the involvement of the present appellant in the murder of Maya Subba learned trial judge did not solely rely upon the alleged extra judicial confession as made by the appellant before PW11 but the said Court considered such extrajudicial in the perspective of the evidence of PW7, PW2 and

PW5. This Court thus finds no reason to interfere with such finding of the trial court at least with regard to the involvement of the present appellant in the murder of Maya Subba.

150. In course of his argument Mr. Chowdhury, learned advocate appearing on behalf of the appellant contended that the evidence of PW2, PW5 and PW11 cannot be relied upon since the alleged incident of two murders took place in the dark night that too in a hilly area where there were no street lights and therefore the chance of identification of the accused by PW11, PW2 and PW5 are very much bleak. However, I am not in agreement with such argument as advanced by Mr. Chowdhury inasmuch as I find no such suggestions have been given to the aforesaid PWs in course of cross- examination of these aforesaid three witnesses.

151. Though Mr. Chowdhury, learned advocate appearing on behalf of the appellant submits before this Court that in absence of any disclosure statement under Section 27 of the Evidence Act the alleged seizure of the offending weapon being 'bhamfok' has become doubtful however, in my considered view such lacuna is also no way helpful to the appellant inasmuch as there is direct and ocular evidence by PW7 who in course of his examination-in-chief categorically stated that on the relevant night and hour when he reached the house of his mother-in-law Maya Subba he found the accused assaulting his mother-in-law by a 'bhamfok' (a sharp cutting weapon).

The evidentiary value of the aforesaid eye witness i.e. PW7 in considered view of this Court must have a great significance in absence of any material contradiction in his deposition.

152. In view of the discussion made hereinabove this Court thus find no reason to interfere with the finding of the learned trial court with regard to the

involvement of the present appellant in the murder of the deceased Maya Subba (deceased) and I, therefore hold that the finding of the learned trial court that the present appellant has committed the murder of Maya Subba is absolutely justified.

153. In order to come to a logical conclusion as to whether the learned trial court is also justified in holding that the present appellant is guilty of committing murder of Pragya Subba or not it appears to this Court that though the murder of Maya Subba is based on ocular evidence vis-a-vis the extrajudicial confession as made by the accused before PW11 and considering the subsequent conduct of the appellant as envisaged under Section 8 of the Evidence Act which have become prominent from the evidence of PW2 and PW5 but the murder of deceased Pragya Subba is purely based on circumstantial evidence.

154. Coming to the factual aspects of the case which has been appealed before us it appears to me that it is neither the evidence of PW2 nor the evidence of PW5 that immediately after hearing the screaming sound of Pragya Subba when they reached the house of the deceased persons they found the dead body of Pragya Subba. On the contrary it has been found from the evidence of PW2 and PW5 that after entering into the house of the deceased persons they found the dead body of Maya Subba in kitchen and after seeing the blood stained dead body of Maya Subba PW5 fainted and after regaining her sense both PW2 and PW5 rushed to the house of PW12 Sudip Gurung and thereafter they narrated the entire incident to him. On collective assessment of the entire evidence of the prosecution witnesses especially who are the private individuals and co-villagers of the deceased persons it reveals that immediately after reporting the death of Maya Subba before PW12, the co-villagers have been informed and thereafter they proceeded to the house of Maya

Subba and on search the dead body of Pragga Subba was recovered near the toilet of the said house.

155. At this stage if we look to the evidence of PW7 who according to the prosecution is an ocular witness to the murder of the deceased Maya Subba, I find that in his deposition he made no whisper with regard to the involvement of the present appellant in the murder of the said Pragya Subba. As rightly pointed out by Mr. Chowdhury, learned advocate appearing for the appellant that since the murder of Pragya Subba is based on circumstantial evidence, the alleged recovery of the weapon of offence became very vital. On perusal of then evidence of PW15 and PW16 who according to the prosecution are the witnesses to the seizure of the alleged weapon of offence vis-à-vis the evidence of PW18 (I.O), I find that it is their oral versions that the alleged weapon of offence was recovered and seized as per showing of the accused. On perusal of the exhibited documents I however find no statement of the accused as recorded under Section 161 CrPC leading to the discovery of the alleged weapon of offence has been marked under Section 27 of the Evidence Act. In view of such, this Court is constrained to hold that the alleged recovery of weapon of offence has really cast a shadow of doubt.

156. In course of his argument Mr. Chowdhury, learned advocate for the appellant was very vocal with regard to the mode and manner of exhibiting the RFSL Report in view of the fact that such report namely; Exhibit 25 (collectively) have been marked on being tendered by the I.O which according to Mr. Chowdhury is not a correct procedure for admitting the said document into evidence inasmuch as the makers of the said report have not been called for as witnesses to appear before the trial Court. I am in agreement with the version of Mr. Chowdhury, learned advocate that the learned trial court ought not to have exhibited Exhibit 25(collectively) on

being tendered by the I.O. and trial court ought to have summoned the Senior Scientific Assistant of RFSL who had prepared such reports. In further considered view of me a serious miscarriage of justice has been caused since while exhibiting the said two reports of RFSL the accused person has been deprived of his valuable right of cross-examination of the maker of the said report namely; Senior Scientific Assistant of RFSL. It is pertinent to mention herein that on perusal of the aforesaid two RFSL reports being Exhibit 25(collectively) it reveals that though blood was detected on the alleged weapon of offence but no report is submitted that such blood matches with the blood group of the deceased Pragya Subba. In view of such, I hold that the prosecution is not at all successful atleast in proving that the seized alleged weapon of offence has been used in the murder of deceased Pragya Subba.

157. As discussed above admittedly there occurred a long delay in between the time when the accused was coming out from the house of the deceased persons and the recovery of the dead body of Pragya Subba. It is found from the evidence of PW2 and PW5 that immediately after seeing the dead body of Maya Subba they fled away from the P.O.1 and therefore none of the prosecution witnesses could give any satisfactory answers in course of their depositions as to what happened with Pragya Subba during such intermediate period and/or as to whether there are more than one assailants in the alleged crime scene i.e. P.O.2. Admittedly from the evidence of PW11, I find extra judicial confession of the present appellant in respect of commission of murder of Pragya Subba but it would be too risky to act upon such extra judicial confession only in absence of any substantive evidence to rope the present appellant with the alleged murder of deceased Pragga Subba.

158. At this juncture I propose to look to the reported decisions of ***Babu -vs-State of Kerala*** *reported in* ***2010 (3) CCrLR(SC) 657*** wherein the Supreme court

has dealt with the tests to be applied in a case rests upon circumstantial evidence. The relevant portion of the reported decision of **Babu** *(supra)* is reproduced herein below in verbatim :-

- *"The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.*
- *These circumstances should be of definite tendency unerringly pointing towards the guilt of the appellant.*
- *The circumstances, taken cumulatively , should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*
- *The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should, not only be consistent with the guilt of the accused but should be in consistence with his innocence."*

159. A similar view was taken by the Hon'ble Supreme Court in the reported decision of ***Ram Niwas -vs- State of Haryana*** *reported in* ***2022(15) SCC 306*** wherein it was held thus *:*

> ***"24.*** *The prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystallised in the judgment of this Court in Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , wherein this Court held thus : (SCC pp. 184-85, paras 152-54)*
>
> *"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of M.P. [Hanumant v. State of M.P., (1952) 2 SCC 71] This case has been uniformly followed and applied by this*

Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of U.P. [Tufail v. State of U.P., (1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ram Gopal v. State of Maharashtra [Ram Gopal v. State of Maharashtra, (1972) 4 SCC 625] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [Hanumant v. State of M.P., (1952) 2 SCC 71] : (Hanumant case [Hanumant v. State of M.P., (1952) 2 SCC 71] , SCC pp. 76-77, para 12)

'12. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] where the observations were made : [SCC p. 807, para 19 : SCC (Cri) p. 1047]

'19. … Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

160. On appraisal of the evidence of the PWs as discussed supra, it appears to me a complete break of chain occurred in the chain of evidence from which no inference of the guilt of the present appellant is said to be fully established.

161. In view of the discussion made hereinabove I am of the considered view that the learned trial court is not justified in convicting the present appellant in the commission of murder of the deceased Pragya Subba for the offence under Section 302 IPC. Accordingly, I hold that appellant Padam Subba is held not guilty of commission of a murder of Pragya Subba.

162. Since in the discussion as made supra I have come to a conclusion that the learned trial court is justified in convicting the accused under Section 302 IPC for the murder of Maya Subba, the next question which arises for our consideration as to

whether in the facts and circumstances of the case, the learned trial court is at all justified in awarding capital punishment i.e. death sentence upon the present appellant.

163. I have minutely gone through the version of the learned trial judge while sentencing the present appellant. In his impugned order of sentence dated 14.10.2020 the trial court has basically assigned some reasons for which he had awarded death penalty to the present appellant and those reasons are narrated hereunder in the following manner:-

I. Absence of reasonable explanation or compulsion on the part of the appellant to commit murder of the two deceased persons;

II. Evidence of the prosecution witnesses are suggestive of pre-planned murder by the appellant;

III. Magnitude of violence and brutality of the murder of the two deceased persons.

IV. The case falls under the category of 'rarest of rare cases'.

V. Detection of so much hatredness in the mind of the accused.

VI. Life imprisonment would be inadequate.

164. In order to arrive at a logical conclusion I propose to look to the provision of Section 302 IPC and the same is reproduced in verbatim:-

"302. Punishment for murder.—Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

165. On perusal of the provision of Section 302 IPC it thus appears to me that it is the legislative intent that the punishment of murder is either death or imprisonment for life and the legislature has consciously used the word 'or' i.e.; in a disjunctive manner giving discretion to the court either to award death sentence or to award imprisonment for life considering the gravity of the case. At this juncture I also feel obligatory to look to the provision of Section 354 Cr.PC.. and the same is reproduced herein below in verbatim:-

> *"354. Language and contents of judgment.*
>
> *(1)……..*
>
> *(2)…..*
>
> *(3)When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.*
>
> *(4)……..*
>
> *(5)When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.*
>
> *(6)……..."*

166. On perusal of the aforesaid section it appears to me that it is also the intention of the legislature that when the court passes sentence of death penalty a duty is cast upon the said court to assign special reason for such capital sentence. As discussed supra, learned trial judge in his order of sentence has elaborately discussed the involvement of the present appellant in the gruesome murder of two deceased persons and assigned the aforementioned reasons while passing the order of sentence of death of the present appellant. While dealing with the instant

criminal appeal as well as with the death reference I also feel it obligatory that a duty is cast upon me as to whether the reasons as has been assigned by the learned trial judge while awarding sentence of death to the present appellant are sufficient in the context of the facts and circumstances as involved in the said sessions trial or not.

167. Admittedly the trial court while passing the order of sentence had taken into consideration again the versions of the prosecution witnesses upon which he relied in coming to the conclusion of guilt of the present appellant in the murder of Maya Subba and Pragya Subba and at the same time the said trial court also considered the replies given by the present appellant in his examination under Section 313 CrPC and the submission made by the appellant when he was heard on the point of sentence. In order to assess as to whether the reasons as have been assigned by the trial court are sufficient in awarding sentence of death and/or whether the trial court is at all duty bound to look at any other mitigating circumstances bearing on the petitioner, this court proposes to look to the reported decision of ***Sundar Rajan vs. State by Inspector of Police*** reported in ***(2023) Livelaw (SC) 217: 2023 IN SC 264*** wherein the Hon'ble Supreme Court while disposing Review Petition (Cri Nos. 159-160/2013 in CRA 300-301 of 2011) expressed the following view:-

> *"72. The High Court took into account the gruesome and merciless nature of the act. It reiterated the precedents stating that the death penalty is to be awarded only in the rarest of rare cases. However, it did not specifically look at any mitigating circumstances bearing on the petitioner. It merely held that: 28. In a given case like this, it is an inhuman and a merciless act of gruesome murder which would shock the conscience of the society. Under the circumstance, showing mercy or leniency to such accused would be misplacing the mercy. That apart, showing leniency would be mockery on the criminal system. Therefore, the death penalty imposed by the trial Judge, has got to be affirmed, and accordingly, it is affirmed.*

73. This Court examined the aggravating circumstances of the crime in detail. However, as regards the mitigating circumstances, it noted that: 25 1977 (3) SCC 68 26 1977 (3) SCC 218 27 2001 (5) SCC 714 22 31. As against the aforesaid aggravating circumstances, learned counsel for the accused appellant could not point to us even a single mitigating circumstance. Thus viewed, even on the parameters laid down by this Court, in the decisions relied upon by the learned counsel for the accused-appellant, we have no choice, but to affirm the death penalty imposed upon the accused appellant by the High Court. In fact, we have to record the aforesaid conclusion in view of the judgment rendered by this Court in Vikram Singh & Ors. Vs. State of Punjab, (2010) 3 SCC 56, wherein in the like circumstances (certainly, the circumstances herein are much graver than the ones in the said case), this Court had upheld the death penalty awarded by the High Court.

74. The above sequence indicates that no mitigating circumstances of the petitioner were taken into account at any stage of the trial or the appellate process even though the petitioner was sentenced to capital punishment.

75. In terms of the aggravating circumstances that were taken note of by this Court in appeal, our attention has been drawn to the following circumstance: 30. […] (vii) The choice of kidnapping the particular child for ransom, was well planned and consciously motivated. The parents of the deceased had four children – three daughters and one son. Kidnapping the only male child was to induce maximum fear in the mind of his parents. Purposefully killing the sole male child, has grave repercussions for the parents of the deceased. Agony for parents for the loss of their only male child, who would have carried further the family lineage, and is expected to see them through their old age, is unfathomable. Extreme misery caused to the aggrieved party, certainly adds to the aggravating circumstances. We wish to note that the sex of the child cannot be in itself considered as an aggravating circumstance by a constitutional court. The murder of a young child is unquestionably a grievous crime and the young age of such a victim as well as the

trauma that it causes for the entire family is in itself, undoubtedly, an aggravating circumstance. In such a circumstance, it does not and should not matter for a constitutional court whether the young child was a male child or a female child. The murder remains equally tragic. Courts should also not indulge in furthering the notion that only a male child furthers family lineage or is able to assist the parents in old age. Such remarks involuntarily further patriarchal value judgements that courts should avoid regardless of the context.

76. In Rajendra Pralhadrao Wasnik v State of Maharashtra {2019 (12) SCC 460} , a three judge bench of this Court took note of the line of cases of this Court which underline the importance of considering the probability of reform and rehabilitation of the convicted accused before sentencing him to death. The court observed:

43. At this stage, we must hark back to Bachan Singh and differentiate between possibility, probability and impossibility of reform and rehabilitation. Bachan Singh requires us to consider the probability of reform and rehabilitation and not its possibility or its impossibility.

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. If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the trial court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh, 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, some of which have been pointed out in Bariyar and in Sangeet v. State of Haryana where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet "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 analyse 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. (emphasis supplied)

77. The law laid down in Bachan Singh requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme. As noted in Santosh Kumar Satishbhushan Bariyar v State of Maharashtra [2009(6) SCC 498], this requires looking beyond the crime at the criminal as well:

66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh sets the bar very high by introduction of the rarest of rare doctrine. (emphasis supplied).

78. A similar point was underlined by this Court in Anil v State of Maharashtra [2014(4) SCC 69] where the Court noted that: 33. In Bachan Singh this Court has categorically stated, 'the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society', is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar. Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the

possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case. (emphasis supplied)

79. No such inquiry has been conducted for enabling a consideration of the factors mentioned above in case of the petitioner. Neither the trial court, nor the appellate courts have looked into any factors to conclusively state that the petitioner cannot be reformed or rehabilitated. In the present case, the Courts have reiterated the gruesome nature of crime to award the death penalty. In appeal, this Court merely noted that the counsel for the petitioner could not point towards mitigating circumstances and upheld the death penalty. The state must equally place all material and circumstances on the record bearing on the probability of reform. Many such materials and aspects are within the knowledge of the state which has had custody of the accused both before and after the conviction. Moreover, the court cannot be an indifferent by-stander in the process. The process and powers of the court may be utilised to ensure that such material is made available to it to form a just sentencing decision bearing on the probability of reform.

80. In Mofil Khan, a three judge bench of this Court was also dealing with a review petition which was re-opened in view of the decision in Mohd. Arif v Registrar, Supreme Court of India. While commuting the death sentence to life imprisonment, the Court reiterated the importance of looking at the possibility of reformation and rehabilitation. Notably, it pointed out that it was the Court's duty to look into possible mitigating circumstances even if the accused was silent. The Court held that:

9. It would be profitable to refer to a judgment of this Court in Mohd. Mannan v. State of Bihar in which it was held that before imposing the extreme penalty of death sentence, the Court should satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to the society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing material. The hearing of sentence should be effective and even if the accused remains silent, the Court would be obliged and duty-bound to elicit relevant factors.

10. It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent. A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime. There is no reference to the possibility of reformation of the Petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the Petitioners. We have examined the socioeconomic background of the Petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the above, it cannot be said that there is no possibility of reformation of the Petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative. (emphasis supplied) 81. The duty of the court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty has been highlighted in multiple judgments of this Court. Despite this, in the present case, no

such enquiry was conducted and the grievous nature of the crime was the only factor that was considered while awarding the death penalty."

168. On careful scrutiny of the reported decision of **Sundar** (*Supra*) it appears to me that in the reported decision of ***Anil Vs. State of Maharashtra*** *reported in* ***(2014) 4 SCC 69*** a direction was passed by the Supreme Court to all criminal courts while dealing with offences like Section 302 IPC, after conviction, may in appropriate cases call for a report to determine whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case. Admittedly, while passing the impugned order of sentence though the trial court considered various aspects as discussed supra but I find no endeavour of the trial court to make an enquiry and come to a logical finding as to whether even after commission of murder of Maya Subba only (since I hold that charge of murder of Pragya Subba by the present appellant has not been proved) by multiple assaults by a sharp cutting weapon there are at all any possibility of reformation and rehabilitation of the convict and that as to whether the convict would be heinous to the society.

169. On perusal of the reported decision of **Sundar (supra**) it appears to me that placing reliance upon the decision of ***Mofil Khan -vs- State of Jharkhand*** *reported in* ***2021 SCC Online SC 1136 and Md. Arif vs. Registrar of Supreme Court of India*** *reported in* ***2014 (9) SCC 737*** the Hon'ble Apex Court in express words opined that possibility of reformation and rehabilitation of the convict must be considered to be an important factor and the same has to be taken into account as a mitigating circumstance before sentencing him to death. It was further held that it is the incumbent duty of the State to produce material to prove that there is no such possibility with respect to the convict.

170. Keeping in mind the proposition of law as discussed (supra) and as has been enunciated with the decision of **Sundar** (supra) it appears to me that while passing the order of sentence learned trial judge has made no venture to make such enquiry as mandated by the Hon'ble Supreme Court not only with regard to the possibility of reformation and rehabilitation of the convict but also with regard to the presence of any criminal antecedents, socio- economic background of the convict as well as the conduct of the convict while he was in judicial custody. It further appears to me that the learned trial judge was practically persuaded with the gruesome nature of the offence and the conduct of the appellant in course of his examination under Section 313 CrPC since the convict in such examination made no venture to explain the incriminating circumstances which have been found in the deposition of the prosecution witnesses and while doing so learned trial judge has miserably failed to consider the parameters as have been made mandatorily to be followed by the said court.

171. The view taken by the Hon'ble Suprme Court in the reported decision of **Sundar** (supra) has also been considered in the reported decision of ***Ranjendra Prasad Rao Wasnik vs. State of Maharashtra*** *reported in* ***(2019) 12 SCC 460*** wherein the Hon'ble Supreme Court expressed the following:-

> ***"40.*** *In Anil v. State of Maharashtra [Anil v. State of Maharashtra, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] this Court implemented the reform and rehabilitation theory. In fact, in para 33 of the Report a direction was issued that while dealing with offences like Section 302 IPC, the criminal courts may call for a report to determine whether the convict could be reformed or rehabilitated. This Court noted the duty of the criminal courts to ascertain whether the convict can be reformed and rehabilitated and it is the obligation of the State to furnish materials for and against the possibility of reform and rehabilitation. It was held as follows: (SCC p. 86)*

"33. In Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] this Court has categorically stated, 'the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society', is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar [Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] . Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case."

172. In view of the discussion made hereinabove and in view of the failure of the learned trial court in making an enquiry with regard to the possibility of reformation and rehabilitation of the present appellant and also coming to a conclusion whether the accused/appellant would be heinous to the society I am of the considered view that a serious miscarriage of justice had occurred in awarding death sentence to the present appellant especially when the charge of murder of Pragya Subba in my considered view has not been proved as against the present appellant.

173. As a result the instant Criminal Appeal is allowed in part and the death reference is answered in negative.

(Partha Sarathi Sen, J.)

Conclusion:

1. In view of the alteration of sentence it is ordered that the present appellant Padam Subba is thus sentenced to suffer punishment for a fixed term of 21 years for commission of offence under Section 302 of the IPC for the murder of Maya Subba without remission and he is further sentenced to pay a fine of Rs.50,000/- in default to suffer further R.I of one year more. It is further ordered that the period already undergone in judicial custody shall be set off from the substantive sentence as has been awarded by this Court.

2. Department is hereby directed to forward a copy of this judgement to the present appellant through the Superintendent of Jalpaiguri Correctional Home.

3. Department is further directed to forward a copy of this judgment along with the LCR to the learned trial court positively within a week from the day of pronouncement of the judgement.

4. Department is also directed to forward a copy of this judgement to the Secretary, Calcutta High Court Legal Aid Services Committee, Jalpaiguri Circuit Bench who on receipt of the same shall disburse the admissible amount of honourium to Mr. Arjun Chowdhury, learned advocate at the earliest.

5. We record our appreciation for the assistance received from Mr. Arjun Chakraborty Advocate who was appointed by the Calcutta High Court, Legal Services Committee to represent the accused appellant.

6. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on completion of the usual formalities.

(Soumen Sen, J.)

(Partha Sarathi Sen, J.)