

PETITIONER:
SHRI RAM & SHIV RAM & ANR. ETC.

Vs.

RESPONDENT:
STATE OF U.P. & ORS.

DATE OF JUDGMENT: 21/10/1997

BENCH:
M.M. PUNCHHI, S.P. KURDUKAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T
THE 21ST DAY OF OCTOBER, 1997

Present:

Hon'ble Mr. Justice M.M. Punchhi
Hon'ble Mr. Justice S.P. Kurdukar
A.K. Ganguli, Sr. Adv.(A.C.), Sushil Kumar, Dr. N.M. Ghatate,
Sr. Advs., V. Krishnamurthy, Mrs. Rekha Pandey, P.R. Kovilan,
S.M. Rai, B.M. Sharma, T.N. Singh, Mrs. Sushila Shukla (A.C.),
Mukesh K. Giri, Shakil Ahmed Syed, C.D. Singh and A.S.
Pundir, Advs. with them for the appearing parties.

J U D G M E N T
The following Judgment of the Court was delivered:
WITH
CRIMINAL APPEAL NO.593 OF 1997

S.P. KURDUKAR, J.

A primitive theory of punishment, "limb for limb; eye for eye; ear for ear; etc., etc.," prevalent in the uncivilized society was put into action in letter and spirit in the present time. The magnitude of the present crime needs no elaboration. In the present crime five deaths were involved in which a boy of ten years had been assaulted and thrown into the fire and roasted alive; heads of three human bodies were severed and the 5th who sustained firearm injuries died in the hospital after about 17 days due to septicaemia. Such is the gravity of the crime. 24 persons were arranged at the trial as accused and at the conclusion of the trial, the trial court awarded death sentence to four accused, life imprisonment to twelve accused and acquitted seven accused. The trial court made a reference filed the Section 355 Cr.P.C.: the convicted accused filed the appeals including those who had been awarded capital punishment; the State of U.P. also filed two appeals; one against the order of acquittal of seven accused and another for enhancement of sentence in respect of other accused. The batch of criminal appeals was heard together by the High Court of Allahabad. The High Court confirmed the death sentences awarded to four accused and in addition thereto while allowing the State appeal for enhancement, awarded the death sentence to three accused. The State appeal filed against the order or acquittal had been allowed and they were convicted for

various offences including substantive offence under Section 302 with the aid of Section 149 IPC and sentenced each one of them to suffer life imprisonment. The particulars of the accused, the weapons used during the assault and details of the deceased will be referred to shortly. These criminal appeals have been filed in this Court by the accused/appellants challenging the judgment and order of conviction and sentence passed by the High Court on 28.1.1997. All these appeals were heard together. Since they arise out of a common judgment, they are, therefore, being disposed of by this judgment.

(2) Before we advert to the prosecution case we may set out the particulars of the accused/appellants since most of them come from the same family and some are close relatives. The accused/appellants will be referred to in these appeals by their original description as in the trial court:

x

.....	
Jodhey	Raghubar(A-9)
.....	
Chandrika Shayam Sheo Ram Lalla Pattu	
Passi (died) Manohar (A-1)	(A-7)
(A-2)	(A-3)

.....		
Harish Rajender Ravindra	Suresh	Prakash
(A-4) (A-6) (A-5)	(A-13)	(A-8)

Dhakan (A-18) is nephew of A-1, Nandlal (A-20) is uncle of A-1, Srikrishna (A-19) is son of Nandlal (A-20). Sriram (A-14) and Rajaram (A-15) are brothers and sons of Bhawan Passi. Rampal (A-16) and Itwari (A-17) are brothers and sons of Bharosey. Rakesh (A-11) and Rajesh (A-12) are brothers and sons of Prem Giri (A-10) who is now dead. Sankatta (A-22) and Mathura (A-21) are brothers. Dorey (A-23) is related to A-22; Rampal Verma is A-24.

(3) The deceased persons were also closely related to the complainant Mahendra Kumar (P.W.1) as shown below:

Bhuaneshwari
(deceased)

.....
Sukhdarshan
(deceased)

.....	
Mahendra Kumar	Sandeep
(P.W.1)	(deceased)

(4) In addition to the above list of deceased persons from one family, Surendra (since deceased) was cousin of P.W.1., Kamlesh (since deceased) was a relative of P.W.1. Sheo Pal and Ram Gulam are the relatives of Sukhdarshan (since deceased).

(5) The motive of the present crime was sought to be traced by the prosecution from the murder of Chandrika Passi, who was a brother of A-1 and resident of village Bजारकहा. This murder took place two and a half months prior to the present occurrence that took place on 23.6.1990. The murder of Chandrika was alleged to be brutal one as his head was severed. The family members of Chandrika were suspecting that Sheo Pal and Ram Gulam, the relatives of Sukhdarshan had committed the said murder and, therefore, the criminal case against both of them for an offence of murder is stated to be pending. The accused laboured under a belief that Sheo Pal, Ram Gulam and his relatives were responsible for the murder of Chandrika and it was this belief which gave cause to nurture enmity against the family members of Bhuaneshwari, Sheo Pal and Ram Gulam. The second reason for enmity sought to be alleged by the prosecution was that Prem

Giri (A-10) (since deceased) who was residing in an adjacent house to Bhuwaneshwari, had an axe to grind against the family of latter as a civil dispute in regard to the property belonging to "Thakurji Trust" was pending between them. Bhuwaneshwari obtained the decree against Prem Giri in the trial Court but we are told that the appeal filed by Prem Giri is pending in the higher court.

(6) The occurrence in question took place on 23.6.90 at about 5.00 p.m., Mahendra Kumar (P.W.1) lodged the FIR at about 9.05 p.m. at Mitauli Police Station situated at a distance of 15 km. from the place of incident. In his complaint Mahendra Kumar (P.W.1) had disclosed all the 24 named accused along with 8 to 10 unidentified persons who had come to the house of Bhuwaneshwari. He then stated that at that time he and Surendra (deceased) were sitting near the couldron and his father Sukhdarshan (deceased) was sitting near the Kolhoo. All the accused person, armed with deadly weapons, reached near the Kolhoo. A-1, A-2, A-4 and A-13 were armed with Bankas, A-10 was carrying a DBBL licensed gun, A-3 and A-16 were armed with SBBL guns, A-20 was carrying country made SBBL gun and the remaining accused were armed with country made pistols and guns. The accused persons when reached near the Kolhoo, started abusing Sukhdarshan and Bhuwaneshwari (both since deceased) and were also giving bad words on other members of their family. Then all the accused demanded show how both could remain alive. Saying so all the accused persons chased Sukhdarshan who out of fear entered into the house of Shambhudayal and raised an alarm. Kamlesh (since deceased) s/o Shambhudayal and Shakuntala after allowing Sukhdarshan inside the house tried to shut the door but the accused inserted the barrel of the gun through the door and fired which hit Kamlesh who fell down.

(7) The miscreants then opened the door and after entering into the house fired at Sukhdarshan, who fell down in the courtyard. A-2, A-4 and A-13 thereafter caught hold of the hands and feet of Sukhdarshan whereupon A-1 assaulted him with Banka and severed his head and kept it in a piece of cloth. The assailants then surrounded the house of Mahendra Kumar (P.W.1) the complainant, opened the door, demolished the walls and entered into his house. Family members of Mahendra Kumar (P.W.1), namely, Goura the grand mother of Surendra, and his wife Manorama, were inside the house, they requested them not to assault any of the family members. Surendra (since deceased) had a licensed gun. He immediately closed and bolted the door of his room from inside. Since the door could not be opened, A-1 told his associates to sprinkle the diesel on the house and set it on fire. The miscreants then took out the diesel from the drum and sprinkled it on the Chappar (roof) and also poured it into the room through a hole where Surendra was hiding and then lit the fire to chappar and asked Surendra to come out otherwise all his family members would be done to death. Sandeep (since deceased) a boy aged about 10 years, was the younger brother of the complainant, came out and started abusing the accused persons. A-6 then fired from his gun on Sandeep causing injuries to him and thereafter A-6 and A-8 lifted Sandeep and threw him into the fire. Sandeep was burnt alive and died in the said fire. This was the second casualty in the course of the attack levelled by the accused on the family members of the complainant. Surendra (since deceased) then came out of the room and tried to run away as by that time the fire had engulfed his house. When Surendra was running away he was fired at and because of the fire arm injuries he fell down in the kitchen. Thereafter A-2, A-4

and A-13 caught hold of the hands and legs of Surendra, facilitating A-1 to assault him with Banka. A-1 then severed the head of Surendra and kept it in the same piece of cloth where the head of Sukhdarshan was kept. It was then stated that in the meantime Bhuwaneshwari, the grand father of Mahendra Kumar (P.W.1) who was returning from Bajarkha market, on seeing the accused in action, tried to rush towards his house but he was also not spared and caused him fire arm injuries. A-2, A-4 and A-13 then caught hold of the hands and feet of Bhuwaneshwari and thereafter A-1 assaulted him with Banka and severed his head and kept it in the same piece of cloth where two heads were already kept. The accused persons thereafter went in search of Sheo Pal but he was not found in the house. The accused persons then stated that Sheo Pal was the person who had committed the murder of Chandrika Passi and, therefore, he must be traced. Seeing the ghastly murders of four persons and gun shot injuries on Kamlesh, the family members of Mahendra Kumar (P.W.1) requested the accused persons to spare other family members whereupon A-1 told his associates that let the remaining members of the family be spared to mourn the deaths of their dear ones. A-7 then took away the licensed gun of Sukhdarshan.

(8) It was then stated in the complaint that due to fire the house of Surendra and Articles therein were completely burnt and reduced to ashes. Such a ghastly attack continued for a period of one and a half hour. Although it was a weekly market day of village Bajarkha and so many persons had gathered in the market but nobody dared to come to the rescue. The brutality committed by the accused persons, according to the complainant did not rest at that but the accused persons then took out a victory procession and raised the slogans 'Shyam Manohar Zindabad', 'Nandlal and Prem Giri Zindabad'; Lakhpal Bhaiya Zindabad" and thereafter went towards the house of Chandrika Passi (since deceased).

(9) Mahendra Kumar (P.W.1) then immediately prepared a complaint containing aforesaid facts and took injured Kamlesh in a tractor to the police station which was at a distance of 15 kms. They handed over the complaint to SI Surendra Kumar Pandey who registered the FIR Ex.Ka-1 at about 9.05 p.m. on the same evening. After registering the crime SI proceeded to the place of occurrence but by that time it was too late in the night and, therefore, he could not hold the inquest on the dead bodies but, however recorded the statements of various persons during late night hours. On the next day in the early morning he held the inquest on the dead bodies of Sukhdarshan (Ex.Ka-15), Bhuwaneshwari (Ex.Ka-29), Sandeep (Ex.Ka-26) and Surendra (Ex.Ka-29). The dead bodies were then sent for post-mortem examination. Other formal panchnamas etc., were carried out on 24.6.90. Kamlesh, who had sustained the gun shot injuries was admitted in the hospital on 24.6.1990 at about 8.00 a.m., who later on succumbed to the injuries on 10.7.90. The inquest report is at Ex.Ka-23. Eight empty cartridges, empty drum of diesel and the ladder were seized from the place of occurrence. During investigation the accused persons came to be arrested and while in custody A-4 made a voluntary disclosure statement under Section 27 of the Evidence Act which came to be recorded and it led to the recovery of two severed heads of Sukhdarshan and Bhuwaneshwari. A-1 after his arrest also made a statement which led to the recovery of a gun from the well. After completing the necessary investigation a charge-sheet came to be filed against 24 accused persons for offences punishable under Sections 302, 147, 148, 307, 436, 452, 404 read with Section 149 IPC.

Shyam Manohar was separately charge-sheeted and tried under Section 25 of the Arms Act.

(10) The accused persons denied the charges levelled against them. They pleaded that they have been falsely implicated in the present crime due to enmity with the witnesses as well as the police. A-1 further pleaded that he was living separate from Chandrika who had a quarrel with him. He was not doing any pairvi in the murder case of Chandrika. According to him Lakhpatri and Sripal were leading the gange of dacoits and the present crime might have been the handy work of this gange. A-11 pleaded that he had no grudge against the family members of the complainant on account of civil dispute. Bhuwandeshwari had obtained a decree against his father Prem Giri but the appeal against the said judgment and decree is still pending in the High Court. He has no concern with this dispute. He and his brother A-12 were living at Gola where their children were studying and they were not present at the time when the incident took place. A-1 in his defence examined Sher Ali (D.W.1). The other three defence witnesses were examined on behalf of A-11 and A-12. The appellants pleaded that they were innocent and they be acquitted. The charge-sheet was submitted against 24 accused persons but however Prem Giri (A-10) died during the pendency of trial and, therefore, trial abated against him.

(11) In order to bring home the guilt, the prosecution mainly relied upon the evidence of two star witnesses who claimed to have seen the entire occurrence. The eye witnesses were Mahendra Kumar s/o Sukhdarshan (P.W.1) and Lallu Ram (P.W.2) who was residing in the adjacent house of Shambhu Dayal, brother of Kamlesh (since deceased). Dr. S.K. Shukla (P.W.3) conducted the post mortem examination on the headless dead body of Surendra and also on his severed head (Ex.K-3). Dr. A.K. Gupta (P.W.8) held the autopsy on the skulls of deceased Bhuwaneshwari and Sukhdarshan (Ex.K-6 and K-7 respectively). Dr. S.K. Tiwari (P.W.9) conducted the autopsy on the dead bodies of Sandeep, Bhuwaneshwari and Sukhdarshan. Post Mortem reports are Exs.8, 9 and 10 respectively. Dr. A.K. Srivastava conducted the autopsy on the dead body of kamlesh. Dr. A.K. Patni (P.W.10) examined Kamlesh when he was brought in an injured condition on 24.6.90 at 8.45 p.m. SI Surendra Kumar Pandey (P.W.14), the Investigating Officer with the assistance of two other SIs completed the entire investigation, in addition to the above ocular evidence the prosecution also relied upon the evidence relating to the recovery of various incriminating articles including the recoveries of three heads of Bhuwaneshwari, Sukhdarshan and Surendra. As already indicated above the defence also examined four witnesses.

(12) The First Additional Sessions Judge, Kheri on careful scrutiny of oral and documentary evidence on record convicted A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-11, A-12, A-13, A-20, A-21, A-22, A-23 and A-24 for the offences punishable under Sections 302, 302/149, 404, 148, 436, 449 and 201 IPC. A-1 was also convicted under Section 25 of the Arms Act. After hearing the parties and their respective counsel the trial court considered the complicity and culpability of A-1, A-2, A-4 and A-13 and the common object shared by them under Section 149 IPC. Shyam Manohar (A-1) was held responsible for committing the murders of Surendra, Sukhdarshan, Bhuwaneshwari and for murders of Kamlesh and Sandeep with the aid of Section 149 IPC. Suresh (A-13), Shivram (A-2) and Harish (A-4) were held liable for committing murders of Surendra, Sukhdarshan, Bhuwaneshwari and Sandeep under Section 302/149 IPC, and accordingly each

one of them was awarded the extreme penalty of death sentence. For other offences they were awarded various terms of sentences. As regards A-03, A-5, A-6, A-7, A-8, A-11, A-20, A-21, A-22, A-23, A-24 the trial Court inflicted sentence of life imprisonment on each of these accused under Section 302/149 IPC and also various terms of sentences on other counts. Substantive sentences were ordered to run concurrently. The Additional Sessions Judge accordingly made a reference under Section 366 Cr.P.C. to the High Court for confirmation of the death sentences. The trial court however acquitted A-9, A-14, A-15, A-16, A-17, A-18 and A-19 of all the charges. The convicts including the condemned prisoners [referred appeals to the High Court. The State Government also preferred appeals to the High Court for enhancement of sentences as also against the order of acquittal in respect of seven accused persons. All these appeals were heard together by the High Court of Allahabad Bench at Lucknow and vide its impugned judgment dated 28.1.1997 dismissed the appeals filed by the convicts and the condemned prisoners and partly allowed the appeal filed by the State and enhanced the sentence of life imprisonment to death sentence in respect of Prakash (A-8), Rajendra (A-6) and Ravinder (A-5); the order of acquittal in respect of A-14, A-15, A-16, A-17, A-18 and A-19 was reversed and they were convicted under Sections 148, 436, 449, 201, 302/149 IPC and each of them has been sentenced to life imprisonment and various other terms of sentences on other counts. The order of acquittal of Raghubar (A-9) has been upheld. The net result, therefore, is out of 24 charge sheeted accused Prem Girdi, Raghubar (A-9) stood acquitted, 7 accused have been awarded extreme penalty of death and remaining 15 accused have been awarded life imprisonment for committing five murders. The sentences awarded to other accused persons were upheld by the High Court vide its judgment and order dated 28.1.1997. It is against this judgment and order passed by the High Court, the appellants have preferred these criminal appeals to this Court. Since 7 accused persons have been awarded death sentence and they have filed the appeals through jail, we thought it fit in the interest of justice to appoint a Senior counsel to assist the court. Accordingly Mr. A.K. Ganguli, Sr. Counsel was appointed as an amicus curiae to represent by Shri Sushil Kumar, Learned Sr. Counsel. Shri Shakil Ahmed Syed, Learned Counsel also filed Criminal Appeal No.593/97 on behalf of some of the accused/appellants other than the condemned prisoners. The State was represented by Dr. N.M. Ghatate, Learned Senior Counsel. All these appeals were heard together, since they arise out of a common judgment.

(13) At the outset it needs to be stated that counsel for the parties were given full opportunity to represent their respective cases since seven accused persons have been awarded capital sentence and other 15 accused/appellants have been awarded sentence of life imprisonment. We have carefully scrutinized the oral evidence and other materials placed on record with the assistance of the learned counsel for the parties and have also gone through the judgments of the courts below.

(14) The very narration of facts given in the preceding paragraphs would indicate the magnitude of the crime in question. The two eye witnesses to the occurrence are the close relatives of the deceased. The prosecution sought to prove the motive against the accused in committing the present crime. It is on this background we are required to scrutinize and appreciate the evidence of the eye witnesses with utmost care and caution.

(15) The prosecution case substantially rested on the evidence of two eye witnesses, namely, Mahendra Kumar (P.W.1) and Lallu Ram (P.W.2). Mahendra Kumar (P.W.1) is the son of Sukhdarshan (since deceased) and grand son of Bhuwaneshwari (since deceased). Sandeep (since deceased) was his brother and Surendra, another deceased was his cousin, Kamlesh (since deceased) was a close relative.

Coming to the evidence of actual occurrence which took place on June 23, 1990 at about 5.00 p.m. it needs to be stated that a complaint was lodged on the very same evening at about 9.05 p.m. in the police station at Mitauli at a distance of 15 kms. from Bajarkha village. Mahendra Kumar (P.W.1) in his evidence testified that at about 5.00 p.m. all the 24 accused along with 8 to 10 unidentified persons came in the direction of Kamlesh's house. At that time Mahendra Kumar (P.W.1) and Surendra were sitting near the couldron and Sukhdarshan was sitting towards the north of the kolhoo. A-1, A-2, A-4 and A-13 were armed with bankas, Prem Giri (A-10) (now dead) was armed with a DBBL gun, A-3 to A-16 were armed with SBBL guns, A-20 was armed with a country made SBBL gun and the remaining accused persons were armed with country made pistols and guns. He then stated that the accused persons demanded that Ram Gulam and Sheo Pal be called and they wanted to see how they would remain alive. The accused persons then chased Sukhdarshan who ran and entered into the house of Shambhu Dayal and raised an alarm. Shambhu Dayal and Shakuntala Devi (complainant's mother) took Sukhdarshan inside the house and tried to shut the door but one of the accused inserted the barrel of the gun through door and fired which hit Kamlesh Kumar. The accused then opened the door and fired at Sukhdarshan who fell down in the courtyard. A-2, A-4 and A-13 then caught hold of the legs and hands of Sukhdarshan and thereafter A-1 assaulted him with Banka and severed his head which he kept in a piece of cloth. The accused persons then surrounded the house of P.W.1 and started demolishing the walls. They asked Surendra to come out as he bolted the door of his room from inside. A-1 asked his associates to sprinkle the diesel on the chappar and also pour it into the room and set it on fire. Accordingly some of the accused took the diesel from the drum and one of them climbed up the chappar with the help of a ladder, sprinkled the diesel on the chappar and also poured the same into the room and thereafter the house was set on fire. Sandeep, the brother of the complainant, aged about 10 years, came out and abused the accused whereupon A-6 fired at him as a result of which he fell down. A-5 and A-8 then lifted Sandeep and threw him into the fire. Sandeep was roasted alive. The witness further testified that the house, wherein Surindra was hiding, when caught fire, he came out of the said house and tried to run away but he was gun down. He fell down in the kitchen. A-4, A-2 and A-13 then overpowered him by catching hold of his arms, feet and thereafter A-1 assaulted him with Banka and severed his head and kept it in the same piece of cloth with the other head. The witness then stated that Bhuwaneshwari (since deceased), his grand father, who was returning from the weekly market, when saw the accused persons in action came near and requested them not to kill the family members whereupon he was fired and thereafter A-4, A-2 and A-13 overpowered him. A-1 then assaulted Bhuwaneshwari with Banka and severed his head and kept it in the same piece of cloth where two heads were already kept. He then stated that the accused persons made a search for Sheo Pal who was alleged to have taken part in committing the murder of Chandrika, the brother of A-1, by severing his head but Sheo Pal could

not be traced. P.W.1 further stated that the accused persons were using the firearms freely and created a terror. The incident continued for one and a half hour. The accused persons then carried the three heads with them in a procession celebrating their victory and were shouting slogans "Shyam Manohar Zindabad, Nandlal and Prem Giri Zindabad and Lakhapat Zindabad". Then they went to the house of Chandrika. The witness was cross-examined at great length but the defence could hardly bring on record any material which would discredit his credibility. The evidence of P.W.1 finds corroboration from the first Information Report which was lodged at 9.05 p.m. (within four hours of the occurrence) at Mitauli police station. The complaint was written after the incident was over. Mahendra Kumar (P.W.1), Lallu Ram (P.W.2) and Kamlesh then went in a tractor to lodge the First Information Report. The FIR came to be registered against 24 accused persons. It needs to be noted that Mahendra Kumar (P.W.1) in his complaint had named the accused persons with the weapons which they were carrying and the manner in which they assaulted five persons who lost their lives in the present crime. The FIR fully corroborates the evidence of P.W.1. The evidence of Mahendra Kumar (P.W.1) does not suffer from any infirmity. We have also scrutinized the evidence of Lallu Ram (P.W.2) and it corroborates in all material particulars the evidence of Mahendra Kumar (P.W.1). The trial court as well as the High Court had scrutinized their evidence very carefully and accepted the same as truthful. We concur with the courts below as regards appreciation of the evidence of these two witnesses.

(16) Mr. A.K. Ganguli, Learned Senior Counsel appearing for the condemned prisoners, Mr. Sushil Kumar, Learned Senior Counsel and Mr. Shakil Ahmed Syed, Learned Counsel appearing for the life convicts urged that the conviction of the accused is based on the evidence of interested witnesses and the same be not accepted as truthful inasmuch as the presence of these witnesses at the time of occurrence was extremely doubtful. It was contended that 23.6.90 was a market day of Bajarkha village and these witnesses also admitted that the market is at a distance of a furlong where many villagers had come for purchases. The witnesses further admitted that many persons had gathered at the place of occurrence, if this be so it was very much necessary for the prosecution to examine some independent witnesses to lend assurance to the credibility of the evidence of these two eye witnesses. These submissions do not impress us at all. Now a days it is a common tendency that so outsider would like to get involved into criminal case much less in the crime of present magnitude and, therefore, it was quite natural that no independent witness would come forward to assist the prosecution. It is well settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased persons. All that is required in such a situation is that the court must scrutinize the evidence of such witnesses with utmost care and caution. The magnanimity of the present crime and nature of prosecution evidence has put us on guard to appreciate the evidence of these two eye witnesses with utmost care and caution. We have done this exercise and we are unable to be persuaded to discard the evidence of these two witnesses on the grounds urged before us. The evidence of both these witnesses in our considered view is absolutely straightforward, unblemished and without any infirmity. The First Information Report which was lodged within four hours, naming all the accused also lends assurance to our

conviction that the evidence of these two witnesses is trustworthy and cannot be discarded. The contentions of the learned counsel for the accused, therefore, stand rejected.

(17) It was then contended by Mr. Sushil Kumar that the claim of the complainant that he lodged the FIR at 9.05 p.m. is false. According to him if the FIR was registered as alleged there was no reason whatsoever why the copy thereof was not sent to the Illaqa Magistrate at the earliest opportunity. As regards the contents of the FIR he urged that it was impossible for any human being to write down the complaint with such details when four dead bodies were lying of which three were without heads in the house. The contents of the complaint manifestly suggest that it was an after thought exercise with the help of police or somebody to spread a wide net and involve as many accused as possible to take revenge. He, therefore, urged that the complaint lodged by Mahendra Kumar (P.W.1) be treated a false document and be not accepted for the purpose of seeking corroboration to the evidence of P.W.1. He also urged that the complainant at the relevant time was serving at a different place and his claim that he had come on leave for two days was totally a concocted plea. According to him the complainant was brought to the village at a later point of time and the police had manipulated entire prosecution story. We see no substance in any of these contentions for the simple reason that the police machinery reached the place of incident within a short time i.e. at about 11 p.m. and in fact the evidence of SI Pandey (P.W.14) would show that the wheels of investigating machinery started moving during the same night. The statements of some of the persons were recorded during the same night. The inquest on the dead bodies were carried out early in the morning of June 24, 1990. There is nothing in the evidence of SI Pandey (P.W.14) to indicate that he had ante dated all these documents to suit to the complainant's version. There was no earthly reason for SI Pandey (P.W.14) to implicate and spread the net so wide as contended for the accused to arraign 24 accused persons in the present crime. To our mind it is only a figment of imagination to contend that the investigation carried out by the investigating machinery was ante dated at the instance of the complainant. It is true that the complainant at the relevant time was posted at a far of place but he testified that he had come to the village Bajarkha on two days' leave as he had not come till then to his village after he joined the service. This explanation given by the witness is quite plausible and the courts below were right in accepting his presence at the time of occurrence. It is also true that there was a delay in forwarding the copy of the FIR to the Illaqa Magistrate but that circumstance would not demolish the other positive and credible evidence on record. This would only show how in such a serious crime the investigating agency was not careful and prompt as it ought to be.

(18) It was then contended for the appellants that if really the incident was reported at 9.05 p.m. then surely the inquest reports which were prepared on the following day must mention the title of the crime. But it was left blank and, therefore, this omission was a serious infirmity and demolishes the very substratum of the prosecution based on the first Information Report which is a concocted document. At the first flush the argument appeared to us attractive but on scrutiny and consideration of the materials on record we are unable to accept this submission. If really the complaint was not lodged at 9.05 p.m. then the police could not have reached at the place of occurrence at 11.00 p.m.

Such minor omission is nothing but a bonafide error or casual approach on the part of the investigating agency which does not affect the substratum of the prosecution story. It was then urged that Kamlesh was taken to the police station in an injured condition but he was not sent to the hospital for treatment. In fact Kamlesh was not traced for the whole night and only on the following day he appeared and was admitted in the hospital where he died after 17 days due to septicaemia. It was, therefore, urged that neither Kamlesh nor the complainant ever went to the police station to lodge a complaint at 9.05 p.m. and this complaint was manufactured at a later stage with the connivance of police. We see no substance in this contention also because the fact remains that Kamlesh was injured during the incident in question. If he was not sent to the hospital for medical examination and treatment by the investigating agency no fault could be found with the complainant's evidence and the FIR (Ex. Ka-1). In these circumstances we see no merit in all these contentions raised on behalf of the appellants.

(19) No serious arguments were advanced before us as regards the cause of death of any of these five deceased persons. It was also not seriously challenged that the finding of the courts below that Bhuwaneshwari, Sukhdarshan, Surendra and Sandeep met with homicidal death during the incident in question. Suffice it to mention that Bhuwaneshwari, Sukhdarshan and Surendra had sustained many incised injuries due to assault by Banka on their vital parts in addition to the prosecution was first fired at by A-6 and then he was thrown into the smouldering fire. The injuries caused on his dead body either by fire arm or by banka could not be detected in the post-mortem report for the obvious reason that his body was completely charred. The autopsy report of Sandeep also did not indicate that any pellet was found embedded in the body or any pellet could be recovered from the place where he was burnt to death. This fact has got a relevance when we consider the death sentence awarded to Rajendra (A-6). After going through the medical evidence on record we have no manner of doubt that these four persons met with the homicidal deaths. They were brutally murdered. As far as Kamlesh (since deceased) was concerned it was proved beyond any pale of doubt that he was the first person to sustain gun shot injuries and died in the hospital due to septicaemia which was the result of injuries on his person during occurrence in question.

(20) Shri Sushil Kumar, Learned Senior Counsel appearing for the life convicts/appellants urged that they were roped-in in the present crime with the aid of Section 149 IPC. According to him the common object of the unlawful assembly as alleged by the prosecution was to take revenge against Ram Gulam and Sheo Pal who alleged to have committed the murder of Chandrika by severing his head. If this was the common object of the unlawful assembly it could not be said that these life convicts/appellants assuming to be the members of such an unlawful assembly shared the same common object which the assailants of five victims had and in pursuance thereof committed the murders in question. He urged that these convicts/appellants had nothing to do with the murder of Chandrika and, therefore, theory of revenge against any of the members of the complainant's family had no basis. In the absence of specific proof of common object of the unlawful assembly to commit the murders in question he urged that life the convicts/appellants cannot be convicted with the aid of Section 149 IPC. In support of this contention he drew our attention to three decisions of this Court: (i) Shambhu Nath Singh and Others vs. State of

Bihar AIR (1960) SC 725 (ii) Bhudeo Mandal and Others vs. State of Bihar (1981) 2 SCC 755; and (iii) Raghubir Singh vs. State of Punjab (1996) 9 SCC 233. We have very carefully gone through these decisions and in our considered view in the facts and circumstances of this case, the ratio laid down in any of these decisions will have no application. Taking the prosecution case as it is if the object of the unlawful assembly was to take revenge upon Ram Gulam and Sheo Pal and after coming to know that they were not available at the house of Bhuwaneshwari and Surendra (both since deceased), there was no reason for these accused persons to continue to fire on these victims indiscriminately; to catch hold of the four victims one by one; severe the heads of three persons and keep them together in a piece of cloth; and threw Sandeep into then smouldering fire. What sin the young boy of 10 years, Sandeep had committed so that he also could not have been spared from the assault? He was totally innocent and was hardly of an age to understand the rivalry between the parties to take side of one or the other. He was thrown into the fire and roasted alive. Injuries sustained by the deceased persons unmistakably indicated that it could not be the job of handful of persons. It was pre-planned and well thought of design to commit genocide. It is in this context if we read the evidence of P.W.1 and P.W.2 we have no manner of doubt that the accused persons formed an unlawful assembly and the object of that assembly was not only to take revenge against Ram Gulam and Sheo Pal but also to take revenge upon the family members of Bhuwaneshwari as Ram Gulam and Sheo Pal were related to Sukhdarshan (since deceased) and the accused persons were under the belief that the victims were giving shelter to them, All the appellants in our considered view formed an unlawful assembly with an object to take revenge against Ram Gulam and Sheo Pal and also to commit mass murders in that process to prove the supremacy and create a terror in the minds of the family members of Bhuwaneshwari. The occurrence in question was full of revenge which was deep-rooted in the minds and action of the accused persons and they were determined to take revenge in the same manner in which Chandrika was murdered. Apart from this we see no difficulty holding that the unlawful assembly could develop a common object on the spur of moment to commit the massacre of the family members of Bhuwaneshwari. We, therefore, see no reason whatsoever to differ from the findings of the courts below that the common object of the unlawful assembly was to commit the mass murders of the family members of Bhuwaneshwari. There is also another angle to judge the common object of the unlawful assembly in the present crime and that is the mode of brutality. Chandrika was alleged to have been murdered by Ram Gulam and Sheo Pal (trial of both is pending). The manner in which Chandrika was done to death and his head was severed the accused wanted to take revenge in the same manner and for this reason the modus operandi adopted by them was to cause firearm injuries to these three persons on a non-vital part of the bodies so that they would be immobilized and then cause Banka injuries and at the end to severe their heads. Only one gun shot would have been sufficient to cause the death of four victims as the assailants were standing at a close range but that could not have satisfied the ego and vengeance because they wanted to severe the heads of these three victims when they were lying immobilized due to injuries. It is for this reason we have started out judgment by saying that the accused persons had in the letter and spirit followed the primitive theory of

punishment.

(21) Learned counsel appearing for the appellants then contended that there is no material on record to hold that the accused persons had any enmity with the family of the deceased. The prosecution came forward with two fold notice (i) civil litigation between Prem Giri and Bhuwaneshwari as regards the "Thakurji's Trust" and its property; and (ii) the accused persons belonged to the party of Shyam Manohar. The first part of motive, the civil litigation between Prem Giri and Bhuwaneshwari ended in favour of Bhuwaneshwari in the first court and the appeal of Prem Giri is pending before the Orissa High Court. In a village such dispute of ten assume importance out of proportion. It is, therefore, not surprising that Prem Giri joined the party of A-1 to settle his ego and score also. As far as the second limb of the motive is concerned it is the case of the prosecution that the accused persons belonged to the party of Shyam Manohar (A-1) who wanted to take revenge against the victims in a most brutal and befitting manner for murder of his brother Chandrika. The two suspects, namely, Ram Gulam and Sheo Pal happened to be the close relations of Sukhdarshan. The appellants/accused were under the belief that Sukhdarshan and his other family members were giving protection to these two suspects and it was for that reason the accused persons formed an unlawful assembly and marched towards the house of victims to teach a lesson in the same manner in which Chandrika was done to death and commit mass murders. The issue of motive in our considered view is well proved in the facts and circumstances of the case in favour of the prosecution.

(22) It was then contended for the accused/appellants that the evidence of P.W.1 was totally artificial and unbelievable. To support his contention our attention was drawn to his evidence wherein he had stated that when accused persons were assaulting Kamlesh, Sandeep, Surendra and Sukhdarshan he was standing in front of them requesting them to spare his family members. If the accused had gone with the common object of committing the mass murders and if Mahendra Kumar (P.W.1) was available so easily yet it was surprising that not even a scratch was found on his person. It was almost easy for the accused persons to finish Mahendra Kumar (P.W.1) as well as (P.W.2) but in fact they did not do so. Relying upon this circumstance it was contended that though these witnesses claimed to be the eye witnesses but their presence was extremely doubtful and police with the connivance of Mahendra Kumar (P.W.1) contrived a false story by spreading a wide net. We are not impressed by this argument at all as the materials on record prove otherwise. It was then contended that almost all the accused persons except A-10 (now dead), A-11 and A-12 are from the same family of Jodhey and Raghubar and the list of accused was further inflated by adding relatives who even did not stay in the village. In this context it was strenuously urged before us that the investigating agency had widened the net at the instance of P.W.1 to involve as many accused as possible. This argument against does not detain us for any longer because the evidence of two eye witnesses was found to be acceptable and trustworthy and we do not see any scope to give even any benefit of doubt to any one of these accused persons for the offences for which they have been convicted.

(23) At this stage we deem it necessary to refer to the defence evidence. A-1 examined Sher Ali (D.W.1) to support his plea of alibi. Sher Ali (D.W.1) stated that A-1 used to stay in the orchard situated in between Mekhnabar and Limra

which is away from the place of occurrence. This evidence in our considered view does not on preponderance of probability establish the plea of alibi. In this view of the matter this evidence was rightly not accepted by the courts below. A-11 and A-12 also pleaded alibi and in support thereof examined Maniram Verma (D.W.2) and Surendra Pal (D.W.3) who were then working as clerks in Krishak College Gola. They testified that during 1987-88 children of both the accused were studying in the said college. A-11 and A-12 in their statements recorded under Section 313 Cr. P.C. gave an explanation that at the time of occurrence they were residing at Village Gola where their children were schooling. Sri Ram (D.W.4) who was the teacher at village Piperva stated that Bajarkha village is situated at a distance of one km. but admitted that he was not teaching the children of A-11 and A-12. We have gone through their evidence and we are satisfied that their evidence does not prove the plea of alibi set up by both the accused. It cannot be assumed that merely because the children were studying at village Gola, the parents were also residing at that village. Except this evidence to prove the plea of alibi no other evidence was led on behalf of these accused persons. We are afraid that this evidence even on test of probability can prove the plea of alibi set up by A-1, A-11 and A-12. Both the courts below committed no error in rejecting the plea of alibi set up by A-1, A-11 and A-12.

(24) Coming to the question of sentence we have heard the learned counsel for the parties at great length and considered the facts and circumstances of the case very carefully; the manner in which the incident took place; the role played by each of the accused and most importantly the extreme brutality with which the members of the unlawful assembly acted. The question, therefore, is does the conscience of an ordinary human being not shocked to see the extreme brutality and disregard to the human dignity? As indicated earlier A-1, A-2, A-4, A-5, A-6, A-8 and A-13 have been awarded death penalty by the High Court. Of these we will take the case of Rajendra (A-6) first. The trial court awarded him the life imprisonment whereas in an appeal filed by the State the High Court enhanced the sentence of life imprisonment to death. The reason given by the High Court is that some of the accused persons who have been awarded death sentence formed one group which must include A-6 who had played an identical role and, therefore, there was no justification to award this accused lesser sentence. With respect we are unable to agree with the reasoning of the High Court as regards the death sentence awarded to A-6. The role attributed to Rajendra as stated by both the eye witnesses was that he fired from his gun which hit Sandeep whereupon he fell down. Thereafter Prakash (A-8) and Ravinder (A-5) threw him into the smouldering fire. No other role was attributed to A-6 as far as Sandeep is concerned. Dr. S.K. Tewari (P.W.9) who performed the autopsy on the dead body of Sandeep could not find any pellet in his body. The prosecution also could not collect the evidence to show that any pellet was recovered from the ashes. The dead body of Sandeep was totally charred and, therefore, doctor could not find any injury on his dead body. It is in these circumstances A-6 could not be bracketed with accused persons who have been awarded death sentence. A-6, in our considered view is entitled to a differential treatment for want of conclusive evidence that he had caused fire arm injuries to Sandeep. We must make it clear that this finding by itself would not absolve A-6 from his culpability in the present crime with the aid of Section 149 IPC as regards

other murders. His presence was proved beyond every reasonable doubt at the time of occurrence. He was a member of an unlawful assembly having a common object to commit the murders in question and in prosecution thereof used his fire arm along with other accused who were armed with fire arms. In view of these proved facts we are of the considered view that the death sentence awarded to Rajendra (A-6) was not proper and instead he must fall in the group comprising of accused/appellants who used the fire arms and have been awarded life imprisonment. We accordingly convert the death sentence awarded to Rajendra (A-6) to a life imprisonment without upsetting his convictions on this count as also convictions and sentences on other counts.

(25) The next important question that needs our consideration is whether the death sentence awarded to the six accused persons, namely, A-1, A-2, A-4, A-5, A-8 and A-13 is in accordance with law and the guidelines laid by this court. The earliest decision rendered by the Constitutional bench of this Court is in Bachan Singh Vs. State of Punjab (1980) 2 SCC 684 this Court observed that in a case of death sentence the facts and circumstances must indicate that it is a rarest of the rare case where extreme penalty is called for. The court must pay due regard both to the crime and the criminals. What is the relevant weight to be given to the aggravating and mitigating factors depends upon the facts and circumstances of the particular case. The Court then observed: "More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and, therefore, all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist". "Life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed". This Court has culled out certain mitigating circumstances to be considered at the time of exercising the discretion while awarding the extreme penalty.

(26) The next two decisions on the topic of death sentence are (i) Machhi Singh and Others vs. State of Punjab (1983) 3 SCC 470 (ii) Allauddin Mian and Others vs. State of Bihar (1989) 3 SCC 5. We have very carefully gone through these decisions. In the light of these decisions we may now advert to the question of sentence.

(27) Mr. A.K. Ganguli, Learned Senior Counsel contended that life imprisonment is the rule and death sentence is an exception. There is no reason to deviate from this rule. He relied upon the above decisions of this Court on this topic. He urged that the High Court had committed a serious error while accepting reference and confirming the death sentence awarded to A-1, A-2, A-4 and A-13 and further enhancing the sentence of A-5, A-6 and A-8 from life imprisonment to death sentence to each one of them. He urged that there are several mitigating circumstances which militate against the death sentence awarded to these accused and, therefore, it would be appropriate to award life imprisonment to these

accused persons. The Learned counsel then pointed out the mitigating circumstances: (i) Chandrika, the brother of A-1 was murdered by Sheo Pal and Ram Gulam who belonged to the party of Sukhdarshan (since deceased); (ii) it was a brutal murder wherein Chandrika's head was severed; (iii) no common object could be attributed to the unlawful assembly to commit the murders in question; (iv) the deceased persons and other family members failed to disclose the whereabouts of Sheo Pal and Ram Gulam which caused grave and sudden provocation and by reason of such provocation the incident in question might have happened; (v) six accused persons belonging to one family have been sentenced to death; (vi) the sentence of death awarded to six accused persons would be a serious calamity on the surviving members of the said family; (vii) all these condemned prisoners belonged to the age group of 20 and 35 years except A-1, A-2 who were aged about 45 and 40 years respectively at the time of occurrence; (viii) they do not belong to the type of hardened criminals and, therefore, they deserve an opportunity to reform themselves in their future life. While supporting the death sentence of six above named accused persons, learned counsel for the State urged that none of these circumstances could be considered as mitigating circumstances to commute the death sentence to life imprisonment in facts and circumstances of this case. He enumerated the circumstances warranting an extreme penalty and they are (i) after finding that Ram Gulam and Sheo Pal were not hiding in the house of P.W.1, the unlawful assembly formed by the accused persons ought to have left the scene of occurrence; (ii) in Chandrika's murder, none of the deceased was involved; (iii) there was no provocation from the side of deceased; (iv) the manner in which four persons were done to death was most brutal, heinous, ghastly and in total disregard to the human dignity; (v) the murders were pre-planned; (vi) the modus operandi was well thought of in advance; (vii) of five four murders were committed in a most barbaric manner. Three heads were severed and an innocent boy of ten years was roasted alive in the smouldring fire; (viii) victory procession with three heads raising slogans "Shyam Manohar Zindabad" etc. etc., and thereafter they went towards the house of Chandrika; (ix) impact of terror upon the minds of surviving members of the family of the deceased persons; (x) motive coupled with vengeance and revenge against innocent persons to satisfy the ego.

(28) We have already analysed the evidence of the prosecution as well as the defence. Look at the modus operandi adopted by the accused persons who formed an unlawful assembly and its common object was not only to commit the murders of Sheo Pal and Ram Gulam but also to commit the mass murders of family members of Sukhdarshan (since deceased) as they were under the belief that Sheo Pal and Ram Gulam were hiding and taking shelter in the house of Sukhdarshan. The accused persons first fired at Kamlesh, injured him and thereafter opened the door and searched for Ram Gulam and Sheo Pal. Kamlesh was immobilised by causing a gun shot injury. Sukhdarshan (since deceased) came out of his room. He was fired at on a non-vital part by immobilizing him and thereafter the accused persons assaulted him with Banka; A-2, A-4 and A-13 held him facilitating A-1 to sever his head. The accused did not stop there but thereafter the accused persons assaulted him with Banka; A-2, A-4 and A-13 held him facilitating A-1 to sever his head. The accused did not stop there but thereafter they fired at Surendra and assaulted him by Bankas. A-2, A-4 and A-13 caught hold of him and A-1 severed his head. Sandeep a young boy of 10

years when came out of the room which was then set on fire was bodily lifted by and A-5 and A-8 who threw him into the smouldering fire. He was roasted alive. Bhuwaneshwari who was returning from the market was fired at and was given the same cruel treatment by severing his head. This only shows that they were thirsty to severe the heads from the alive but injured bodies in order to take revenge of the murder of Chandrika. All the three heads were put together in a piece of cloth and a victory procession was taken out by accused giving slogans "Shyam Manohar Zindabad; Nandlal and Premgiri Zindabad etc., etc.", and then they went to the house of Chandrika. A Simple question which requires to be considered is as to whether the conscience of a society was not shocked to see such ghastly and burtal murders? The accused persons had shown scant regard for the human dignity. Upon taking overall view of the circumstances in the light of the ratio laid down by this Court in the aforesaid judgments and taking into account the manner of commission of crime, motive for commission of crime and criminals, magnitude of the crime and little regard for the human dignity and in particular a young boy of 10 years.

(29) Now let us draw a final balance sheet of the aggravating and mitigating circumstances after giving due consideration to the rival contentions putforth before us as regards six condemned prisoners. In our considered view justification clearly leans in favour of death sentence to each of the six condemned prisoners. Totality of circumstances outweighed the mitigating circumstances as pointed out by Mr. Ganguli. Sentence of life imprisonment to these six accused persons would be totally inadequate in the facts and circumstances of this case. The proved facts of this case unmistakably indicate that the present case squarely falls within the ambit of "rarest of rare" case. Five murders were committed in an extremely brutal, grosteque, diabolical, revolting or dastardly manner which would arouse intense and extreme indignation of the community. Award of lesser punishment to these six accused persons would disintegrate the rule of law upon which the edifice of our civilized society stands.

(30) Having regard to the facts and circumstances of this case we are of the considered view that the High Court had committed no error whatsoever in awarding the death sentence to A-1, A-2, A-4, A-5, A-8 and A-13. None of the mitigating circumstances placed before us could persuade us to apply the normal rule of life imprisonment in respect of these accused persons. It is in these circumstances we are of the considered view that Criminal Appeal Nos. 715-716 of 1997 filed by Sheo Ram (A-2) and Harish (a-4) as well as Criminal appeal Nos. 717-720 of 1997 filed by Shyam Manohar (A-1), Suresh (A-13), Prakash (A-8) and Ravindra (A-5) are without any merit and they are consequently dismissed. The death sentence awarded to each of these accused/appellants is upheld. We, however confirm the convictions of Rajendra (A-6) under Section 302/149 IPC and also as regards other offences but we convert his death sentence to life imprisonment, subject to this modification of sentence his appeal to stand dismissed. Criminal Appeal Nos. 721-24 of 1997 filed by Ram Pal Verma (A-24), Sankata (A-22), Mathura Prasad (A-21), Dorey (A-23) and Lalla (A-3) are dismissed. Criminal Appeal No.725 of 1997 filed by Rakesh Giri (A-11) and Rajesh Giri (A-12) to stand dismissed. Criminal Appeal No. 593 of 1997 filed by Sriram (A-14), Rajaram (A-15), Rampal (A-16), Itwari (A-17), Dhakan (A-18) and Srikrishna (A-19) to stand dismissed. If any of the accused/appellants is on bail shall surrender to his bail bond forthwith to

serve out the remaining part of his sentence.

JUDIS