IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 24th March, 2014
Decided on: 17th April, 2014

DEATH SENTENCE REF. No. 5 of 2012

STATE ..... Petitioner

Through: Mr. Lovkesh Sawhney, APP with Inspector Rajesh Kumar, PS Swaroop Nagar.

versus

OM PRAKASH AND OTHERS ..... Respondent

Through: Mr. Sumeet Verma, Advocate.

AND

CRL. APPEAL No. 288 of 2013

SURAJ ..... Appellant

Through: Mr. Sumeet Verma, Advocate.

versus

STATE ..... Respondent

Through: Mr. Lovkesh Sawhney, APP.

AND

CRL. APPEAL No. 274 of 2013

SANJEEV ..... Appellant

Through: Mr. Sumeet Verma, Advocate.

versus

STATE ..... Respondent

Through: Mr. Lovkesh Sawhney, APP.

AND

CRL. APPEAL No. 156 of 2013

MAYA ..... Appellant

Through: Mr. Joginder Tuli with Mr. Ashu Kumar Sharma, Mr. Tarun Nanda and

Mr. Vikhyat Bhagi, Advocates.

versus

STATE ..... Respondent

Through: Mr. Lovkesh Sawhney, APP.

AND

CRL. APPEAL No. 105 of 2013

KHUSHBOO @ INDERKALA ..... Appellant

Through: Mr. Sumeet Verma and Ms. Anu Narula, Advocates.

versus

STATE ..... Respondent

Through: Mr. Lovkesh Sawhney, APP.

AND

CRL. APPEAL No. 460 of 2013

OM PRAKASH ..... Appellant

Through: Mr. Sumeet Verma, Advocate.

versus

STATE (G.N.C.T. OF DELHI) ..... Respondent

Through: Mr. Lovkesh Sawhney, APP.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MS. JUSTICE MUKTA GUPTA

Mukta Gupta, J.

1. Criminal Appeals No. 105, 156, 274, 288 and 460 of 2013 arise out of the impugned judgment dated 1st October 2012 of the learned Additional Session Judge in Sessions Case No. 56 of 2010 whereby all the five Appellants were convicted for offences under Sections 302/323/34 IPC and the order on sentence dated 5th October, 2012 awarding each of the Appellants the death

sentence. By the Death Reference No. 5/2012 the State has sought confirmation of the death sentence.

2. The Appellants have been convicted for offence under Section 302 read with Section 34 IPC for having murdered Yogesh and Asha in furtherance of their common intention on the 14th June, 2010 between 1 and 5 am at House No. C-101, Gali No. 3 I.P. Colony, Delhi. The Appellants Suraj and Maya are the parents of the deceased Asha. Appellant Om Prakash and Khushboo are the uncle and aunt of Asha and Appellant Sanjeev, her cousin, son of Om Prakash.

The testimony of Rakesh PW 4

3. PW4 Rakesh is the Complainant, maker of the FIR, and the prosecution case unfolds from his complaint. He has stated that he was a tailor by profession and his brother-in-law Yogesh @ Bhopu, the deceased used to drive a Maruti Van No. DL 2CL 6133 which was owned by PW 4. Yogesh, whose parents had passed away, was living in a house adjoining that of PW 4. Yogesh was having an affair with Asha, daughter of Appellants Suraj and Maya, resident of C-409, 410, Gokul Puri. About 24-25 days prior to the day of alleged incident Asha along with her mother Maya and maternal aunt (*mausi*) was passing in front of Yogesh's house, when Asha stated that she would marry Yogesh @ Bhopu and live in his house. On this Maya is stated to have scolded Asha. In the meantime PW4 Rakesh came out. Suraj, Asha's father, also reached there. PW4 Rakesh also called Yogesh outside and asked Asha whether she wanted to marry Yogesh. Asha then stated in the presence of her parents and maternal aunt, "*Main Shaadi Karungi to Isi Se Karungi*".

On hearing this Suraj and Maya started beating Maya and the Appellant Suraj threatened Yogesh that if he talked with Asha he would be killed.

4. On 13th June, 2010 at around 10 to 10.30 pm when PW4 returned home from his workplace, Yogesh @ Bhopu told him that he had received a telephonic call from Asha asking him to come to the house of her uncle Om Prakash Saini situated at Indra Prastha Colony, Gali No. 3, C-Block, House No. 101 for talks of marriage. The two of them took dinner and thereafter at around 11 to 11.30 pm left in the Maruti Van No. DL 2CL 6133. They reached the house of Om Prakash at around 12 midnight to 12.30 am. The door was opened by Om Prakash who called both of them inside. Inside the house Suraj, Maya, Khushboo, Sanjeev s/o Om Prakash and Asha were also present. They started talking and during the said conversation the other side raised the issue of caste stating that they were Saini and Yogesh and PW4 were Jatavs. Thereafter, Om Prakash and Suraj started abusing and manhandling Rakesh and Yogesh. After hearing the noise some neighbours collected outside the house of Om Prakash. Thereafter, Yogesh and PW4 ran out of the house. PW4 ran in the direction in which the van was parked thinking that Yogesh would follow. However, Yogesh ran in the opposite direction. The keys of the van were with Yogesh and PW4 did not know how to drive. PW4 stopped at a distance from the van and waited for Yogesh. After waiting for a considerable amount of time, when Yogesh did not arrive, PW 4 thought that Yogesh might have returned home by another way. Therefore, Rakesh PW 4 came to the main road, hired a TSR and reached home. The next morning PW 4 woke up and went to Yogesh's house and called him. Yogesh's aunt, who used to reside on the ground floor, stated that Yogesh had not returned home the previous night. PW 4 noticed that

Yogesh's van was also not parked outside the house. He immediately went to the house of Om Prakash where he found a crowd in the street. He was informed that in the night a boy and a girl had been murdered there. PW 4 has proved his statement Ex. PW4/A on the basis of which FIR was registered.

5. Mr. Sumeet Verma, Mr. Joginder Tuli and Ms. Anu Narula, learned counsels for the Appellants, have assailed the testimony of PW4 on the ground that he was not an eye witness. If indeed PW 4 was with Yogesh it was not natural for him to have left Yogesh and run away. There was material improvement in the testimony of PW 4 in as much as in the FIR he had not stated that the issue of caste was raised. However, before the trial Court, PW 4 stated that during the conversation the other side had raised the issue of caste. Thus the testimony of PW 4 could not be relied upon.

The testimony of Umesh PW 16

6. Besides PW4, another material prosecution witness is PW16 Umesh Kumar. PW 16 deposed before the trial Court that he was residing at C Block, Gali No. 3, Indraprastha Colony, Burari, Delhi along with his family and engaged in the business of motor parts. On the intervening night of 13th/14th April 2010, at around 12 midnight, PW 16 heard some noise coming from the neighbouring house occupied by Om Prakash and his family. A number of residents from the locality had gathered there and PW 16 also reached there. The main door of the house was closed but not locked. PW 16 entered the house and saw that the Appellant Sanjeev and Suraj were giving beatings to one boy. Sanjeev pushed PW 16 due to which his specs fell down. Appellant Om Prakash stated "*Yeh Hamara Ghar Ka Mamala Hai, Aap Log*

Jaayen". As PW 16 came out of the house of the Appellants, he found that two ladies, Khushboo and Maya, were sitting outside the house. PW 16 clarified that when he entered the house the said two ladies were standing outside and one girl was thrown by Om Prakash on the hand pump. The girl became unconscious. Nobody helped her and she remained lying there. The Appellant Om Prakash again asked PW 16 to leave. After some time the cries which were coming from that house subsided and PW 16 returned to his house. In the morning PW 16 found that the house of Om Prakash was locked from outside. His wife Satyawati (DW 8) informed him that all the five persons who were there on the previous night had gone somewhere on motorcycles and the whereabouts of that boy and girl were not known. PW 16 found an unclaimed red colour Maruti van parked outside the street on the road. Someone informed the police. When the police was inquiring one person named Rakesh (PW 4) met the police officials and informed them about the incident. From PW 4, PW 16 came to know the name of the boy who was beaten and that he was wearing black coloured clothes. When PW 16 entered the house with the police, in the internal room he found the dead bodies of the boy, whom he had seen being beaten by Appellants Sanjeev and Suraj, and of the girl whom he had seen being thrown on the hand pump by the Appellant Om Prakash. PW 16 also stated that in his presence the police lifted the electric wire, one *danda* in broken condition, one plastic pipe which was about three feet in length, one piece of floor. PW 16 also identified his signatures on the seizure memos.

Submissions of counsel for the Appellants

7. The testimony of PW 16 has been assailed by the Appellants on the ground that he is an introduced witness. Even though PW 16 was an eye

witness and available on the spot prior to Rakesh PW 4 reaching the spot, the FIR was not recorded on his statement but on the statement of PW4 Rakesh. Further, PW 16 was not a reliable witness as his wife DW8 has herself stated that PW 16 was a drunkard. Moreover in his cross-examination, PW16 admitted that he did not witness the seizure of the blood stained underwear and the keys of the Maruti van though he had signed the seizure memos.

8. Besides challenging the statements of PWs 4 and 16, learned counsel for the Appellants have submitted that the Appellants' plea of alibi which has not been duly considered by the learned trial Court. Their conviction was based entirely on the testimonies of PWs 4 and 16 who were not reliable witnesses. The weapons of offence were not recovered. The electric wires, sanitary pipe and *danda* recovered at the spot were all planted. It is stated that the Appellants Suraj and Om Prakash allegedly got recovered a pair of ropes from Ashram. However, the present case was not one of strangulation of either of the two deceased. Therefore, the said recovery did not relate to the offence committed.

9. As regards the precise role of Appellants Khushboo and Maya, learned counsel appearing for them pointed out that even according to PW16, they were standing outside and did not participate in the alleged offence and thus they could not been convicted with the aid of Section 34 IPC as no act in furtherance of a common intention was done by them. Reliance was placed on the decision in ***Rakesh v. State of U.P. 2001 SCC Crl. 601***. The finding of the learned trial Court that the two ladies were standing on vigil was unfounded as the two ladies did not make any effort to stop PW 16 or other persons from entering the house.

Submissions of the APP

10. Mr. Lovkesh Sawhney, learned Additional Public Prosecutor ('APP') for the State, on the other hand contended that the motive for the crime had been explained by PW4 in the FIR itself wherein it was stated that when 20-25 days prior to the incident Asha expressed her desire to marry Yogesh, she was beaten and Yogesh was threatened to be killed. The Appellant Om Prakash in his statement under Section 313 Cr PC admitted that after the incident Asha was shifted from Gokul Puri to his house at Swaroop Nagar. Mr. Sawhney submitted that there was no material improvement in the testimony of PW4. PW4 had narrated the events with reference to the approximate time of their occurrence. The time of death given in the two post-mortem reports, coincided with the time immediately after PW4 ran away from the Appellant Om Prakash's house and did not meet Yogesh thereafter.

11. Mr. Sawhney submitted that PW16 Umesh was a natural and reliable witness. His version was supported by DW8, his wife. Though DW8 was examined as a defence witness to discredit PW16, she corroborated the version of PW16 that there was a commotion in the house of Om Prakash at night and when PW16 entered the house of Appellant he was given a blow due to which his specs broke. The post-mortem report showed the brutal and barbaric manner in which both Yogesh and Asha were murdered. They were tied with putting electric wires around their arms and were electrocuted. Embedded electrical wires were found in the arms of both the deceased. PWs 14 and 19 also spoke about the commotion at the house of Appellant Om Prakash. PW14 had called the Police by making a call at 100 number. Relying upon the decision in ***Ratan Singh v. State of H.P. (1997) 4 SCC 161***

it was submitted by Mr. Sawhney that minor improvements in the testimony of the witnesses do not affect their credibility. Further, the version of eye-witness PW16 was corroborated by PW4 and DD No. 7A.

12. Commenting on the role of Maya and Khushboo, Mr. Sawhney submitted that even an illegal omission would attract Section 34 IPC. From the evidence on record it is apparent that Appellant Khushboo and Maya deliberately refrained from saving the deceased and thus there is no illegality in the order of learned Trial Court convicting both of them for offence under Section 302 IPC read with Section 34 IPC. The doctor who conducted post-mortem had given an opinion that the injuries were possible with the plastic rod recovered from the spot. The gruesome manner in which the murders were committed was evident from the fact that the accused tied a screw driver in the *salwar* of the deceased Asha. Mr. Sawhney submitted that the Appellants failed to discharge of proving their plea of alibi beyond reasonable doubt. The testimony of the defence witnesses speaking about the presence of Appellants Maya, Khushboo and Sanjeev at the sister-in-law's house in relation to her grandson's birthday was wholly unbelievable. The defence witness DW1 Jai Narain could not prove the alibi of Appellants Om Prakash and Suraj. An adverse inference was required to be drawn against the Appellants under Section 106 of the Evidence Act as the two dead bodies were found in their house which was found locked. The key of the house was recovered from Appellant Sanjeev.

Last Seen

13. In analyzing the evidence, the Court would first like to deal with the various circumstances as sought to be established by the prosecution. The

conduct of PW4 is assailed to be unnatural on the ground that he left his brother-in-law Yogesh at the spot, came back alone and slept without checking whether the deceased Yogesh had returned or not. It is stated that PW4 is a planted witness and was not a witness who had seen the deceased Yogesh and Asha last in the company of the Appellants.

14. A perusal of the testimony of PW4 demonstrates that while Om Prakash and Suraj were abusing Rakesh and Yogesh, they started manhandling them as well. On this, Rakesh and Yogesh ran out of the house. However, the two ran in opposite directions. PW4 ran in the direction where the van was parked and stopped at a distance from the van. However, Yogesh ran in a different direction. Having waited for Yogesh for a considerable time, and when he did not come, PW4 went home after reaching the main road and taking a TSR as he thought that Yogesh would have reached his house from another direction. PW 4 witness has given the sequence of events along with the approximate time which would show that PW4 and the deceased Yogesh reached the house of the Appellant Om Prakash at around 12 to 12.30 am and thereafter had a discussion. It is thus apparent that PW4 reached his house a few hours past midnight and obviously went off to sleep. He got up in the morning at around 8 am. PW 4 has clarified that he slept till late. On waking up he found that Yogesh had not reached his house. So PW 4 went to the house of Om Prakash at Swaroop Nagar. It will be recalled that neither the keys of the van were with PW 4, nor did he know driving. Therefore, in order to save himself, PW 4 went outside and waited at a distance. There was nothing unnatural or unbelievable in this conduct of PW4. Rather his version that he was present at night with Yogesh at the house of Om Prakash is reinforced by the fact that on coming to know that Yogesh had not reached home at night

and finding that the van was also not there, PW 4 immediately rushed to Swaroop Nagar to the house of Om Prakash where he found a crowd and the dead bodies in the house of Om Prakash. Had PW 4 not gone to the house of Om Prakash the previous night there was no way it would have occurred to him to go the house of Om Prakash to find out about Yogesh. Nothing has been elicited from PW 4 in his cross-examination that would throw any doubt on the veracity of his version. The Court is of the view that evidence of PW 4 fully proves beyond reasonable doubt that on the night of the occurrence, the deceased Asha and Yogesh were last seen in the company of the accused till the time PW 4 left the spot.

Eye witnesses' evidence

15. The evidence of last seen is also in the form of the eye witness PW16. He has stated that in the mid night of 13th /14th June 2010, there was noise in the house of Om Prakash and on hearing this many people collected at the spot. PW 16 found Maya and Khushboo standing outside. The door was closed but not locked. He went inside and saw Om Prakash hitting Asha and throwing her on the hand pump. He saw Suraj and Sanjeev beating Yogesh. PW16 is a neighbor of Appellant Om Prakash, residing in the vicinity. It is but natural that on hearing the noise in the house of Om Prakash, he was one of the persons who reached Om Prakash's house.

16. Though the defence examined DW8, the wife of PW16, to discredit him she, in fact, corroborated his version. In her testimony DW8 has stated that her husband was a habitual drunkard and on the date of murder he had consumed liquor at about 4 pm. He was kept inside the house. In the night when PW 16 heard loud noise coming from the house of Om Prakash, he

went outside and entered the house of Om Prakash along with 4-5 other persons, but she did not know the names of those 4-5 persons. Somebody hit PW 16 due to which his spectacles broke. Thereafter DW 8 took PW 16 from the house of Om Prakash, bolted the door and went to sleep. Thus DW8 confirmed the presence of PW16 inside the house of Om Prakash after the noise started coming.

17. The testimony of PW16 is also assailed on the ground that despite the fact he was an alleged eye witness no FIR was registered at his instance. PW14 on whose call to PCR DD No. 7B was recorded has stated that in the morning of 14th June, 2010 he was told by PW 16 and some other public persons that a quarrel took place at night in the house of Om Prakash wherein a boy and a girl were beaten. So PW14 informed the police by making a call on the 100 number from his mobile No. 9582556631. While the police were making inquiries, two witnesses i.e. PW4 Rakesh and PW16 Umesh were available to them. PW16 Umesh was a witness to the beating of the girl and boy at night whereas PW4 Rakesh knew about all the preceding facts. Thus when two witnesses were available to the police, no error can be said to be committed by the police in registering the FIR on the statement of one of them, i.e., Rakesh and recording the statement of Umesh immediately thereafter under Section 161 Cr PC. Further, the purpose of recording FIR is only to set the investigation into motion. The non-recording of the FIR on the statement of Umesh cannot lead to the inference that he was not an eye-witness as his statement under Section 161 Cr PC was recorded on the same date, that is, 14th June, 2010. Further PW16 is also a witness to the seizures done from the spot.

18. PW16 has stated that he saw Om Prakash throwing the girl at the hand pump. During the seizures done at the spot a bunch of hair were seized from the hand pump and as per the FSL report the said bunch of hair matched with the hair of deceased Asha thereby corroborating the version of PW16 that girl Asha was thrown on the hand pump. Hence from the evidence on record the prosecution has proved beyond reasonable doubt that the Appellants Om Prakash, Suraj and Sanjeev were beating both the deceased Yogesh and Asha on the intervening night of 13th/14thJune, 2010 when Maya and Khushboo were standing outside.

Scene of Occurrence

19. SI PW19 ASI Krishan Kumar has stated that on 14th June, 2010 at about 8.00 AM he received DD No. 7B to the effect that "IP Colony, Gali No. 20, C Block, Kathia Baba Ashram *Ke Paas Kal Raat Jhagda Huwa Tha. Makaan Band Hai. Ghar Ke Saamne Ek Gaadi No. DL 2C M 6133 Laawaris Khadi Hai*". He reached at the spot, found a crowd there and was informed that there was quarrel at House No. C-101, Gali No. 3, IP Colony. PW 19 was also informed that all the residents had gone to some unknown place early morning after putting a lock on the house. A red colour Maruti van was found parked at the junction of Gali No. 3 and Gali No. 20. The residents stated that it did not belong to that area. PW 19 then called the SHO. On the SHO reaching the spot, PW 19 was instructed to enter the house through the roof. When he reached inside the House No. 101, in the last room he found two dead bodies, one of a boy and other of a girl lying on the floor. Thereafter, the lock of the house was broken open and the lock was seized. Besides the two dead bodies, the police found some electrical wires lying underneath the bed, one mobile phone near the dead body, one mobile phone

on the top of the fridge, and one key ring having two keys was lying near the male dead body. When they came outside Umesh met them and told them about the scuffle on the previous night. In the meantime, Rakesh also came and informed them about the entire incident of the previous night, of how he had come with his brother-in-law Yogesh who had not reached home and thus he had come back again to find out about Yogesh. Rakesh was taken inside; he identified the body of the boy as that of Yogesh and the body of girl as that of Asha.

Seizures from the Spot

20. PW14 ACP Pankaj Kumar Singh and PW19 ASI Krishan Kumar have both stated that when they went inside the house they found two dead bodies lying with their faces downwards, heads towards the wall and feet towards bed. On inspection of dead bodies of the boy and the girl they found round burnt marks above the left arm and above the ankle of the left leg. They also found marks from beating on the bodies. At the spot two black coloured and two yellow and red coloured electric wires, with some part of the rubber insulation peeled off from the black wires, were seized. A Nokia mobile phone was also lying near the dead body of Yogesh which was in a switched off condition. It was identified by Rakesh to be that of Yogesh. One key ring with two keys was also found near the dead body of Yogesh which Rakesh identified to be the keys of Maruti van bearing No. DL 2C L-6133. One blood soaked underwear was also lying at the spot. One screw driver having a U shape bent on one side with yellow insulation was found entangled with the string of the *Salwar* of Asha which was also seized. About 8-10 broken pieces of *dandas* were lying in the gallery, which were also seized. Some plastic sanitary pipes fitted with metallic sanitary fitting were also found

lying in the gallery and were also seized. Some hair found entangled in the base of hand pump installed just outside the house was also seized.

Medical Evidence

21. The postmortem of the body of the deceased Yogesh was conducted by PW12 Dr. Sudesh Kumar. As per the postmortem report Ex.PW12/A injuries 1 to 3 were caused by electric current, injury no. 4 was caused by a blunt cylindrical weapon and injuries No. 5 to 7 were caused by the impact of blunt force. It was opined that electro thermal injuries were sufficient to cause death in the ordinary course of nature. All injuries were consistent with the beatings/assault. The cause of death was opined to be cardiac fibrillation and respiratory failure, as a result of electrocution. All the injuries were *ante mortem* in nature and the death was homicidal. PW12 also opined that the time since death was 38 hours. The postmortem on the body of Yogesh was conducted on 15th June, 2010 at 4 pm. Thus as per this opinion, Yogesh died around 2 am on 14th June, 2010.

22. PW12 also opined that the injuries 1 and 2 could have been caused by black wire in packet no. 2 and was consistent with fastening. Injury 3 could have been caused by the yellow and red electric wire. Injury 4 was possible by the PVC pipe in packet no. 3 or a similar such object. Injuries 5, 6 and 7 were possibly caused by the wooden pieces in Packet No. 1 or similar such things. He exhibited his subsequent opinion as PW12/B.

23. In his cross-examination PW12 also stated that when a naked wire came in contact with skin and is used for electrocution, the same would turn black and in the present case he found that open ends of the wire which were in

touch with the skin were black. During the postmortem he found the wire wrapped on the right arm of the deceased. They were all black wires and one double core wire of red and yellow with exposed ends which were removed from the body before the postmortem.

24. Dr. V.K. Jha PW17 conducted the post-mortem on deceased Asha and exhibited his report as Ex. PW17/A. He found the following injuries on Asha:

1. Lacerated punctured wound over inner aspect of right forearm just below the elbow joint of size 1 CM X 1 CM, margins were blackened and hard to palpate with dept of wound was 0.5 CM creating a crater of grayish colour. No blood was oozing from the wound (electric burn marks and entry wound of the current).

2. Rail road pattern bruise 6 CM X 2 CM with two parallel reddish line and intermediate skin was pale, placed over left arm lower outer aspect. Two parallel reddish lines were raised.

3. Lacerated perforated electric burn mark, margin were irregular and everted 1.5 CM X 1 CM, colour brownish black (exit wound of electric current). The injuries located above outer aspect of left arm, just above the elbow joint.

4. Brownish coloured defused bruise over left thigh and left leg.

5. Brownish coloured diffuse wound over right thigh and right leg.

6. Circular bruise 1 CM in width surrounding the upper part of wrist joint of left side.

7. Semicircular bruise with abrasion on outer aspect of right forearm, just above the writ joint.

8. Circular bruise abrasion encircling the lower end of leg, just above the ankle joint 1 CM in width and similar bruise

with abrasion on right lower end of right leg, just above the ankle joint.

9. Both lips were contused at muco-cutaneous junction.

25. PW 17 opined that the cause of death of Asha was a sudden cardiac arrest and the cessation of respiration due to respiratory muscle paralysis consequent to electric current, passing through the chest. He also opined that Injuries 2, 4 and 5 were caused by a hard blunt object, in particular a straight circular object like a *lathi* and *danda*. Injuries 6, 7 and 8 were caused by the fastening of hand and feet with the help of a rope and wire. PW 17 further opined that the injuries were *ante mortem* in nature and the time since death was approximately 38 hours. Vide Ex.PW17/B he gave the subsequent opinion that the injury 1 could have been caused by yellow colour electric wire, injuries 2, 4 and 5 could have been caused by wooden piece in packet No. 1, PVC pipe in packet no. 3 or similar such thing and injuries 6, 7 and 8 could have been caused by black wire in packet no. 2 and was consistent with fastening.

26. It is thus evident from the testimony of these witnesses that Yogesh and Asha died due to electrocution and were given blunt injuries before electrocution. The time since death was 38 hours. Thus the death took place at around 2 am on 14th June, 2010. This also corroborates the version of PW4 that the incident happened after he left and the version of PW16 on the night he saw Yogesh and Asha being beaten.

Recovery at the instance of the accused

27. PW13 ACP Pankaj Kumar Singh, the investigating officer has stated that

he along with Inspector Satender Dhull PW24, SI Suresh PW26 and the complainant Rakesh left for the search of the accused. On the pointing of Rakesh at Swaroop Nagar, Burari Road, Suraj and Om Prakash were arrested. After their arrest they made disclosure statements. On the pointing of both the accused towards the bushes, beneath the Keekar tree, outside the Ashram, a yellow polythene lying was taken out. The polythene contained a rope made of jute measuring 13 meters. The same was seized, however this rope was not shown to the post-mortem doctors and no opinion qua the same has been taken whether any of the injuries was possible by the said rope. Thus, the recovery of rope at the instance of the Appellant Suraj and Om Prakash cannot be used in evidence as the same is not connected with the injuries received by the two deceased.

Plea of Alibi of Maya, Khushboo and Sanjeev

28. All the 5 Appellants have pleaded alibi. The plea of alibi of Maya is based on the evidence of DWs 4, 5 and 6 i.e. Shakuntala, Lokesh and Naresh. DW4 Shakuntala has stated that Suraj and Om Prakash are her brothers and Maya and Khushboo their wives. Sanjeev is the son of Om Prakash and her nephew. She celebrated the birthday of her grandson on 13th June, 2010 when Khushboo, Sanjeev and the children of Khushboo came to her residence on 12th June, 2010 and remained there till 16th June, 2010. She further stated that on 16th June, 2010 at about 12 Noon or 1pm she received a call from Ramwati telling that Asha had died and asked Khushboo and Sanjeev to reach there. According to DW 4, Maya had already left DW 4's house on 13th June, 2010 at about 7 pm after giving clothes to her grandson. Maya is stated to have gone from there to Aurangabad to the house of her brother. This fact is also reiterated by the DW5 Lokesh, nephew of Shakuntala and DW6

Naresh, son of Shakuntala. Both have stated that she left within 10 to 15 minutes. No defense witness has been brought from Aurangabad, to show that Maya went there from the house of Shakuntala. Even as per these witnesses Maya had left at about 7 pm on 13th June, 2010. Thus there was sufficient time for Maya to have reached Delhi, when the alleged incident occurred after 12.30 am on 14th June, 2010. Thus, the plea of alibi of Maya has not been proved.

29. DW4 has stated that Khushboo and Sanjeev along with the children of Khushboo stayed at her residence from 12th June, 2010 to 16th June, 2010. It is highly unnatural that though Asha had died and the dead body was received by the brother of Maya and Ramwati, the sister of Suraj and Om Prakash on 15th June 2010, however the near relatives i.e. Khushboo and Sanjeev were not informed on the same day and were informed only on 16th June, 2010. The families are close enough to be celebrating the birthday of the outstation grandchildren together. It is inconceivable that they would not get to know about the death of Asha. Further, none of the photographs show the presence of Khushboo and even the presence of Sanjeev in the photograph does not prove that the birthday of the child was celebrated on the 13th June, 2010 as no birth certificate of the child was produced. Moreover, the photographs have not been proved in accordance with law. They do not have any date and time. Thus, there is no substance in the plea of alibi of Appellants Khushboo and Sanjeev.

Plea of alibi of Om Prakash and Suraj

30. Om Prakash and Suraj have produced DW2 Satpal who stated that Om Prakash and Suraj were working with him for the last 4 to 5 years. He sowed

Pudina, Beetroot and radish. The work used to start at 10 pm or 10.30 pm and used to continue up to 8 am. According to this witness on 14th June, 2010 in the morning, the police came to enquire about Om Prakash and took them saying that some inquiry was to be conducted. DW 2 further stated that on 13th June, 2010 Om Prakash and Suraj came to him at 11 pm. DW 2 is not the seller of vegetables in the *mandi* but sows Pudina, Beetroot and Radish. On cross-examination, DW 2 has stated that he has no license to sell vegetables in the *subzi mandi* and according to him he started maintaining the diary of the attendance of the workers from April 2010. In answer to the Court's question DW 2 stated that Suraj and Om Prakash did not come to their work place in the *subzi mandi* after he started maintaining the diary. After seeing the diary this witness also stated that the diary was started from May 2011. DW 2 has failed to prove the plea of Suraj and Om Prakash that they were not present at the place of occurrence on the night of 13th /14th June 2010. Though DW2 states that on 13th June, 2010 they came about 11 pm, DW1 Jai Narain has stated that on 13th June, 2010 at 10 pm he had given money to Suraj to buy potatoes for him which he brought. Thus, the Appellants Suraj and Om Prakash have also not been able to prove the plea of alibi.

Section 106 Evidence Act

31. Section 106 Evidence Act provides that if certain facts are established to be in the knowledge of a party, the said party is required to prove the same. In the present case two dead bodies were found lying in the house of Om Prakash, Khushboo and Sanjeev. The house was locked from outside and the lock was broken open by the police. The key of the house was got recovered from the Appellant Sanjeev. Once the house was locked from outside and the

keys were in possession of one of the Appellants, how two dead bodies were there in the house has to be explained by the Appellants. In the statement under Section 313 Cr PC, the Appellants have failed to give any explanation. The plea of alibi set up by the defence has not been proved and hence the non-explanation by the Appellants as to how the two dead bodies were found in their house is an additional link in the chain of circumstances.

32. It has been proved beyond reasonable doubt by the prosecution that the dead bodies of Yogesh and Asha were found in the house of Appellant Om Prakash and Sanjeev and the house was locked from outside. The prosecution has discharged its initial burden and since the incident happened in the house at night and the house was locked from outside, the Appellants are required to furnish an explanation under Section 106 of the Evidence Act. In ***Tulshiram Sahadu Wanshi v. State of Maharashtra (2012) 10 SCC 373*** while dealing with Section 106 of the Evidence Act, the Supreme Court observed:

> "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 to 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 utilized. Section 106 however 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, has offered an explanation which might drive the Court to draw a different inference."

Motive

33. PW4 has deposed about the incident which occurred 20-25 days ago prior to 14th June, 2010 when Asha expressed her desire to marry Yogesh by stating "*Main Shaadi Karungi to Isi Se Karungi*" and how for saying that she was beaten by her parents. The Appellant Suraj also threatened Yogesh that he would kill him in case he talked to Asha. PW4 has deposed that on the fateful night when he reached his home at around 10 to 10.30 pm his brother-in-law Yogesh told Rakesh that he had been called by parents of Asha for his marriage and after having dinner they left at around 11.30 pm and reached the place of occurrence at around 12 to 12.30 am, i.e., past midnight. When they reached there and were talking, the Appellants raised the issue of caste that they were Sainis and the family of Yogesh was Jatav. The only objection to this testimony by the defence is that in the FIR, PW4 did not mention that the Appellants raised the issue of caste and thus the motive has been introduced for the first time in the testimony before Court, which is a material improvement. The fact regarding issue of caste being raised stated by PW4 in his testimony before the Court is neither a contradiction nor a material improvement. It is only an explanation of what transpired during the course of conversation that took place at the residence of the Appellant Om Prakash on the late night hours of 13th and 14th June, 2010. In ***Ratan Singh*** (supra), the Supreme Court held that the criminal Courts should not be fastidious with mere omissions in the FIR. Such statements cannot be expected to be a chronicle of every detail of what happened, or to contain an exhaustive catalogue of the events that took place. The person who furnishes the first

information report to authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story. An FIR is a voluntary narrative of the informant without interrogation. Hence any omission therein has to be considered along with the other elements to determine whether the fact so omitted never happened at all.

34. The contention of learned counsel for the Appellants that in case of a circumstantial evidence, motive assumes importance and since the issue of caste is a material improvement which has been stated for the first time by PW4 in the witness box, no motive could be attributed to the Appellants for having murdered Asha and Yogesh deserves to be rejected. As noted above, the issue of caste as stated by PW4 in his testimony before the Court is not a material improvement but only an embellishment of what was stated in the FIR. He was not required to state in the FIR each and every detail of the discussion that took place. He has, however, stated that there were discussions and thereafter Om Prakash and Suraj started abusing and manhandling them and they ran away.

35. Further, the motive in the present case is that the Appellants were against the marriage alliance between Yogesh and Asha, which fact has been elucidated by the complainant in detail in the FIR itself. The different castes of the two families was only a reason for their being opposed to the marriage. Thus the issue of caste being stated for the first time in the Court is neither a material improvement nor the introduction of the motive for the first time. Hence, it cannot be stated that the prosecution has failed to prove the motive behind the offence.

Abscondence

36. The prosecution has proved beyond reasonable doubt that there was a commotion in the house of Appellant on the intervening night of 13th/14th June, 2010 and two dead bodies were lying in their house. The plea of alibi set up by the Appellants has not been proved even on a preponderance of probabilities. Rather the factum of abscondence has been proved. The Appellants took no step to report the unnatural death of at least their daughter Asha. It is highly unnatural that PW5 Smt. Ramwati, the aunt of deceased Asha would take her dead body and inform her parents and cousin about the death only on 16th June. The irresistible and inescapable conclusion from the evidence proved by the prosecution is that the Appellants after committing the offence of murder absconded from the place of occurrence.

Role of Maya and Khushboo

37. PW16 has already been held to be a trustworthy and reliable witness by this Court. He has stated that when he entered the house Maya and Khushboo were standing outside. When he came out of the house after being beaten by Sanjeev and admonished by Om Prakash, he found Maya and Khushboo sitting outside. However, PW 16 did not attribute any overt act to them.

38. PW4 Rakesh in his testimony has stated that when he went to the house, all the 5 Appellants were present. However, he too has also not attributed any overt act to Maya and Khushboo. It is, therefore, contended by the learned counsel for the Appellants that in the absence of an overt act being attributed to them, Khushboo and Maya cannot be convicted for offence under Section 302 IPC with the aid of Section 34 IPC.

39. Section 34 IPC provides that when a criminal act is done by several persons in furtherance of common intention, each such person is liable for the act in the same manner as if it were done by him alone. However, an act includes an illegal omission as well, as per Sections 32 and 33 IPC. The omission has to be illegal denoting a participative role of the person.

40. In the present case the Appellants Khushboo and Maya cannot be said to be standing outside the house to guard the same, as when PW16 and other persons entered the house they made no efforts to stop them. The two ladies could be thus at best be said to be spectators to what was being done by the three men in the house. No doubt, as a mother and aunt there was an omission on their part to have not saved at least Asha their daughter, however the said omission does not qualify the test that they shared the common intention with the three men to commit the murder of Yogesh and Asha, thus attracting Section 34 IPC.

41. In ***Sumitra Banik v. State of West Bengal AIR 1999 SC 2594***, the Supreme Court acquitted the Appellant therein as the only evidence against her was that she was standing near the door of the room wherein the deceased was killed. It was held that no inference of common intention could be drawn only on the ground that she did not prevent other accused from beating her in view of the relationship with her. In ***Kakko v. State of Haryana 1997 SCC (Crl) 835***, the allegations against the Appellant therein were of being at the spot armed with an axe. Since there was no evidence that she actually participated in the crime, she was acquitted of the charge of murder with the aid of Section 34 IPC.

Conclusion as regards the guilt of the Appellants

42. From the evidence on record the prosecution has been able to prove beyond reasonable doubt that Appellants Om Prakash, Suraj and Sanjeev committed the murder of Yogesh and Asha in furtherance of their common intention and caused injuries to Rakesh by manhandling him and thus the judgment of conviction of the learned Trial Court to the extent it convicts the Appellants Om Prakash, Suraj and Sanjeev for offences under Sections 302/323/34 IPC is upheld.

43. However, Appellants Maya and Khushboo they are entitled to the benefit of doubt. Hence, the conviction of Appellants Maya and Khushboo for offences under Section 302/323/34 IPC is set aside.

Sentence

44. The Appellants Om Prakash, Suraj and Sanjeev have been sentenced to death by the learned trial Court subject to confirmation by this Court. The learned trial Court relying on the decisions in ***Bachan Singh v. State of Punjab AIR 1982 SC 1325; Machhi Singh v. State of Punjab AIR 1983 SC 957, Sushil Murmu v. State of Jharkhand AIR 2004 SC 394; Arumugam Servai v. State of Tamil Nadu (2011) 6 SCC 405; Lata Singh v. State of U.P. (2006) 5 SCC 475*** and ***Bhagwan Das v. State of NCT Delhi (2011) 6 SCC 396*** held that in view of the medical evidence and the state in which the bodies of the deceased persons were found, it was obvious that most heinous type of murders were committed in the present case. Both the deceased were electrocuted after being tied with ropes. The offence was not only inhumane and barbaric but was committed in a very cruel and brutal manner. The savage nature of the crime had shocked the judicial conscience. According to

the learned trial Court, there were no extenuating or mitigating circumstances, whatsoever. Cold blooded, preplanned brutal murders, through electrocution had been committed without provocation. The manner in which the deceased Yogesh and Asha were electrocuted by the convicts made the present case fall in the category of 'rarest of rare' case which called for no punishment other than the capital punishment.

45. Mr. Sawhney has relied upon the decisions in ***Bhagwan Dass v. State of NCT Delhi*** *(supra)* and ***Arumugam Servai v. State of Tamil Nadu*** *(supra*). Relying upon ***Deepak Rai v. State of Bihar (2013) 10 SCC 421*** he submits that even if special reasons have not been adumbrated by the learned trial Court and need further elaboration, this Court while confirming the sentence can elaborate the same. It is submitted in the alternative that in case this Court comes to the conclusion that the present is not a case for awarding then death sentence, then as laid down in ***Sahib Hussain v. State of Rajasthan (2013) 9 SCC 778*** and ***Gurvail Singh v. State of Punjab (2013) 2 SCC 713*** this Court should award the sentence of life imprisonment for a period beyond 14 years actual, so that the same has a deterrent effect on the Appellants.

46. Learned counsels for the Appellants on the other hand contend that in ***Mahesh Dhanaji Shinde v. State of Maharashtra 2014 (3) SCALE 96*** a three Judge Bench of the Supreme Court, reaffirmed the decision in ***Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546*** wherein it was held that while awarding death sentence the 'crime test' has to be fully satisfied i.e. 100% and 'criminal test' should be 0%. In other words, there ought to be no mitigating circumstances favouring the accused. If there was

any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of accused, not being a menace to the society, no previous track record etc., then the 'criminal test' may favour the accused to avoid capital punishment. Even if both the tests were satisfied i.e. aggravating circumstance to the fullest and no mitigating circumstance favouring the accused, still the Court had to apply the Rarest of Rare test (RR Test). The RR test depended upon the perception of the society i.e. it is "Society centric" and not "Judge centric". Thus the test is whether the society will approve awarding of the death sentence for certain types of crimes or not. Reliance is also placed on the decision in ***Ashok Debbarma @ Achak Debbarma v. State of Tripura 2014 (3) SCALE 344***. Referring to ***Gurvail Singh v. State of Punjab (2013) 2 SCC 713***, it is submitted that a sentence of life imprisonment beyond 14 years can be awarded only when the death sentence is commuted and not while awarding the death sentence. Hence it is pleaded that the three Appellants be awarded the sentence of life imprisonment.

47. Having heard learned counsel for the parties, before adverting to the aggravating and mitigating circumstances, the legal position in regard to award of capital punishment is required to be noted. In ***Machhi Singh*** *(supra*) the Supreme Court noted the principles culled out in ***Bachan Singh's*** case for awarding death sentence. It was held that the following propositions emerged from ***Bachan Singh's*** case:

> "(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

48. The three-Judge Bench in ***Machhi Singh*** further laid down that the Court may award the extreme penalty of death sentence in the rarest of rare cases when society's collective conscience is so shocked that it will expect the holders of the judicial power to inflict the death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty. The following instances were noted:

"I Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for Commission of murder

When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold

blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, (c) a murder is committed in the course for betrayal of the motherland.

III Anti Social or socially abhorrent nature of the crime

(a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry-deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV Magnitude of Crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V Personality of Victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity. (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust. (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

49. A two-Judge Bench in ***Sangeet v. State of Haryana (2013) 2 SCC 452***

held that despite ***Bachan Singh***, primacy still appeared to be given to the nature of crime. The circumstances of the criminal, referred to in ***Bachan Singh*** appeared to have taken a bit of a backseat in the sentencing process. It was observed:

> "34. Despite *Bachan Singh*, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process. This was noticed in *Bariyar* with reference to *Ravji v. State of Rajasthan (1996) 2 SCC 175*. It was observed that "curiously" only characteristics relating to the crime, to the exclusion of the criminal were found relevant to sentencing. It was noted that *Ravji* has been followed in several decisions of this Court where primacy has been given to the crime and circumstances concerning the criminal have not been considered. In paragraph 63 of the Report it is noted that *Ravji* was rendered per incuriam and then it was observed that:
>
> > "It is apparent that *Ravji* has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to [the] criminal are not pertinent."
>
> 35. It is now generally accepted that *Ravji* was rendered *per incuriam* (see, for example, *Dilip Premnarayan Tiwari v. State of Maharashtra (2010) 1 SCC 775*). Unfortunately, however, it seems that in some cases cited by learned Counsel the circumstances pertaining to the criminal are still not given the importance they deserve."

50. While considering the standardization and the categorization of the crime, the Supreme Court in ***Sangeet*** further held:

> "52. Despite *Bachan Singh*, the "particular crime" continues to play a more important role than the "crime and criminal" as is apparent from some of the cases mentioned above. Standardization and categorization of crimes was attempted in *Machhi Singh* for the practical application of the rarest of rare cases principle. This was discussed in *Swamy Shraddananda*. It was pointed out in paragraph 33 of the Report that

the Constitution Bench in *Jagmohan Singh* and *Bachan Singh* "had firmly declined to be drawn into making any standardization or categorization of cases for awarding death penalty". In fact, in *Bachan Singh* the Constitution Bench gave over half a dozen reasons against the argument for standardization or categorization of cases. *Swamy Shraddananda* observed that *Machhi Singh* overlooked the fact that the Constitution Bench in *Jagmohan Singh* and *Bachan Singh* had "resolutely refrained" from such an attempt. Accordingly, it was held that even though the five categories of crime (manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder) delineated in *Machhi Singh* provide very useful guidelines, nonetheless they could not be taken as inflexible, absolute or immutable.

53. Indeed, in *Swamy Shraddananda* this Court went so far as to note in paragraph 48 of the Report that in attempting to standardize and categorize crimes, *Machhi Singh* "considerably enlarged the scope for imposing death penalty" that was greatly restricted by *Bachan Singh*.

54. It appears to us that the standardization and categorization of crimes in Machhi Singh has not received further importance from this Court, although it is referred to from time to time. This only demonstrates that though Phase II in the development of a sound sentencing policy is still alive, it is a little unsteady in its application, despite Bachan Singh."

51. These principles were again reiterated by a two Judge Bench in ***Shankar Kisanrao Khade v. State of Maharashtra*** *(supra)* wherein the Supreme Court held that while awarding the death sentence, the crime test, the criminal test and the RR test have to be looked into and not the 'balancing test'. It was held:

"28. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view the tests that we have to apply, while awarding death sentence,

are "**crime test**", "**criminal test**" and the **R-R Test** and not "**balancing test**". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R lest). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges."

52. A three-Judge Bench in ***Mahesh Dhanaji Shinde v. State of Maharashtra*** *(supra)* held that the 100 % crime test and the 0% criminal test may create situations which may go well beyond what was laid down in ***Bachan Singh*** (supra). It was observed:

"21. Death penalty jurisprudence in India has been widely debated and differently perceived. To us, the essential principles in this sphere of jurisprudence have been laid down by two Constitution Benches of this Court in *Jagmohan Singh v. The State of U.P. (1973) 1 SCC 20* which dealt with the law after deletion of Section 367(5) of the old Code but prior to the enactment of Section 354(3) of the present Code and the decision in *Bachan Singh* (supra). Subsequent opinions on the subject indicate attempts to elaborate the principles of law laid down in the aforesaid two decisions and to discern an objective basis to guide

sentencing decisions so as to ensure that the same do not become judge centric.

22. The impossibility of laying down standards to administer the sentencing law in India was noted in *Jagmohan Singh* (supra) in the following terms:

> The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judge with a very wide discretion in the manner of fixing the degree of punishment. ... The exercise of judicial discretion on well-recognized principles is, in the final analysis, the safest possible safeguards for the accused. (Para 26)

23. *Bachan Singh* (supra) contained a reiteration of the aforesaid principle which is to be found in para 197 of the report. The same was made in the context of the need, expressed in the opinion of the Constitution Bench, to balance the aggravating and mitigating circumstances in any given case, an illustrative reference of which circumstances are to be found in the report. *Bachan Singh* (supra), it may be noted, saw a shift; from balancing the aggravating and mitigating circumstances of the crime as laid down in *Jagmohan Singh* (supra) to consideration of all relevant circumstances relating to the crime as well as the criminal. The expanse of the death penalty jurisprudence was clearly but firmly laid down in *Bachan Singh* (supra) which can be summarized by culling out the following which appear to be the core principles emerging therefrom.

> (1) Life imprisonment is the rule and death penalty is the exception. (para 209)
>
> (2) Death sentence must be imposed only in the gravest cases of extreme culpability, namely, in the "rarest of rare" where the alternative option of life imprisonment is "unquestionably foreclosed". (para 209)
>
> (3) The sentence is a matter of judicial discretion to be exercised by giving due consideration to the circumstances of the crime as well as the offender. (para 197)

24. A reference to several other pronouncements made by this Court at different points of time with regard to what could be considered as

mitigating and aggravating circumstances and how they are to be reconciled has already been detailed hereinabove. All that would be necessary to say is that the Constitution Bench in *Bachan Singh* (supra) had sounded a note of caution against treating the aggravating and mitigating circumstances in separate water-tight compartments as in many situations it may be impossible to isolate them and both sets of circumstances will have to be considered to cull out the cumulative effect thereof. Viewed in the aforesaid context the observations contained in para 52 of *Shankar Kisanrao Khade* (supra) noted above, namely, 100% crime test and 0% criminal test may create situations which may well go beyond what was laid down in *Bachan Singh* (supra).

25. We may also take note of the separate but concurring judgment in *Shankar Kisanrao Khade* (supra) enumerating the circumstances that had weighed in favour of commutation (Para 106) as well as the principal reasons for confirming the death penalty (Para 122).

In para 123 of the aforesaid concurring opinion the cases/instances where the principles earlier applied to the sentencing decision have been departed from are also noticed. Though such departures may appear to give the sentencing jurisprudence in the country a subjective colour it is necessary to note that standardisation of cases for the purposes of imposition of sentence was disapproved in *Bachan Singh* (supra) holding that "it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards".(Para 195) In this regard, the observations with regard to the impossibility of laying down standards to regulate the exercise of the very wide discretion in matters of sentencing made in *Jagmohan Singh* (supra), (Para 22 hereinabove) may also be usefully recalled. In fact, the absence of any discretion in the matter of sentencing has been the prime reason for the indictment of Section 303 Indian Penal Code in *Mithu v. State of Punjab* AIR 1983 SC 473. The view of Justice Chinnappa Reddy in para 25 of the report would be apt for reproduction hereinbelow:

> ‘25. Judged in the light shed by *Maneka Gandhi and Bachan Singh*, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge as soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so

irresistible is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional.'

26. In a recent pronouncement in *Sunil Dutt Sharma v: State (Govt. of NCT of Delhi)* 2013 (12) SCALE 473 it has been observed by this Court that the principles of sentencing in our country are fairly well settled-the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question--whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the judge to reach the 'truth'."

53. Turning to the case on hand, the Court finds that the aggravating circumstances could be stated to be as under:

(i) the lives of two innocent and young persons have been taken away in a barbaric, inhuman and cruel manner by mercilessly beating them and thereafter electrocuting
(ii) the offence was preplanned and committed in furtherance of a common intention shared by the three convicted Appellants.
iii) there was no provocation by the deceased.
iv) both the deceased persons were in the clutches of the three convicted Appellants.
v) The convicted Appellants had a fiduciary relationship with deceased Asha

54. In the considered view of the Court, the mitigating circumstances could be stated to be as under:

i) there is no earlier criminal history of the convicted Appellants.
ii) the convicted Appellants belong to the lower middle class families.

iii) the Appellant Sanjeev is of a young age.

55. Thus in view of the larger Bench decisions of the Supreme Court discussed hereinbefore, this Court is required to apply the 'crime test, the criminal test and the R-R test and determine whether in the present case the option of life sentence is "unquestionably foreclosed". Although there are aggravating circumstances as noted above, there is no material placed on record by the State to show that the Appellants Om Prakash, Suraj and Sanjeev are persons who cannot be reformed or are a menace to the society.

56. Indubitably, even if no such material had been placed during the trial the same could have been placed in the present proceedings. In ***Deepak Rai v. State of Bihar*** (supra) the Supreme Court expressly held that it cannot be accepted that the failure on the part of the Court which has convicted an accused and heard on the question of sentence but failed to express the "special reasons" in so many words must necessarily entail remand to that Court for elaboration upon its conclusion in awarding the death sentence for the reason that while exercising appellate jurisdiction, the superior Court could have dealt into such reasons. Further the proceedings before this Court are a continuation of the trial as the death sentence can be awarded only if this Court answers the reference positively and confirms the death sentence. Thus, even at this stage, the State or the accused is at liberty to place on record material to show if any of the aggravating or mitigating factor has been ignored. However, we find that there is no additional material on record placed by the State in the present proceedings. In case the State fails to produce any material, the Court could ascertain from the material on record if there are any mitigating factors favouring the accused. From the material

already on record in the form of the nominal rolls of the convicted Appellants, it is evident that they are not a menace to the society. The nominal rolls of the convicted Appellants Om Prakash, Suraj and Sanjeev show that their overall conduct in jail is satisfactory and there are no complaints against them. Thus, this Court is of the considered opinion that the penalty to death cannot be awarded to the convicted Appellants, Om Prakash, Suraj and Sanjeev.

57. The alternative submission of the learned APP is that in case the sentence of death is not awarded, then this Court should award a sentence of imprisonment without remission beyond a period of 14 years actual. In ***Swamy Shraddananda (2) v. State of Karnataka (2008) 13 SCC 767*** a three-Judge Bench of the Supreme Court discussed the power of the Court to direct that an actual period of incarceration be undergone by the convict without remissions/ commutations by the executive so that the convict serves out imprisonment for the remainder of the natural term of his life. This alternative was held to be a substitute for the death sentence and viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice. It was further held that formalization 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 was held to be only a reassertion of the Constitution Bench decision in ***Bachan Singh*** *(supra*).

58. The observations in ***Sangeet v. State of Haryana*** *(supra)*, a two-Judge Bench of the Supreme Court doubting the correctness of ***Swamy***

Shraddananda (2) (*supra*) have be held by a later Bench in ***Gurvail Singh v. State of Punjab (2013) 10 SCALE 671*** to be *per incuriam.* In ***Sahib Hussain v. State of Rajasthan*** *(supra)* Supreme Court was called upon to decide, *inter alia,* whether the High Court was justified in ordering that the Appellant should be sentenced to twenty years of actual imprisonment without remissions. Answering the said question in the affirmative, the Supreme Court noted the earlier decisions on the point of alternative sentence and observed that over a decade in many cases whenever death sentence has been converted to life imprisonment where the offence alleged is serious in nature while awarding life imprisonment, the Supreme Court has awarded minimum years of imprisonment of 20, 25, 30 or 35 years. The Supreme Court in ***Sahib Hussain*** took judicial notice of the fact that remission is allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the earlier release of a particular convict on the society. The Supreme Court further noted:

> *"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* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684: 1980 SCC (Cri) 580] 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."

59. In ***Birju v. State of M.P. 2014 (2) SCALE 301*** and ***Ashok Debbarma v. State of Tripura*** *(supra)* though the Supreme Court reiterated the triple test, i.e. the crime test, the criminal test and the R-R test, it followed the principle laid down in ***Swamy Shraddananda*** and awarded the Appellants therein imprisonment for a period of 20 years.

60. In light of the legal position discussed above, the Court is of the considered opinion that the ends of justice would be met if the convicted Appellants Om Prakash and Suraj are awarded the sentence of imprisonment for life which will not be less than 20 years actual. Since Appellant Sanjeev

is a young man who was not married, the Court considers it fit to sentence him to imprisonment of life subject to remissions as available.

61. As a result, the death reference is declined and Criminal Appeal Nos. 288 of 2013, 274 of 2013 and 460 of 2013 are disposed off while upholding the conviction of the concerned three Appellants Suraj, Om Prakash and Sanjeev but modifying their sentences in the manner indicated in para 60 above. Criminal Appeals Nos. 156 of 2013 and 105 of 2013 are allowed and Appellants Maya and Khushboo are acquitted of the offences with which they were charged.

(MUKTA GUPTA)
JUDGE

(S.MURALIDHAR)
JUDGE

APRIL 17, 2014
'vn'