AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Reference No.2 of 2014

Judgment reserved on: 02/08/2016

Judgment delivered on: 30/08/2016

In reference of State of Chhattisgarh, Through PS Durg, Distt. Durg (C.G.)

---- Petitioner

Versus

1. Sunil @ Balikaran Sahu, S/o Kanchan Sahu, aged about 24 years, Occupation Agriculture, R/o Village Gopalpur, Police Station Chandpur, Fatehpur (Uttar Pradesh)

2. Amit Gupta, S/o Ramashray Gupta, aged about 24 years, R/o Village Sangaon, Police Station Fatehpur, Distt. Fatehpur (Uttar Pradesh)

---- Respondents

For Petitioner/State:
Mr. A.S. Kachhawaha, Additional Advocate General and Miss Pushpa Dwivedi, Advocate.
For Respondents: Mrs. Fouzia Mirza, Advocate.

AND

Criminal Appeal No.586 of 2014

1. Sunil @ Balikaran Sahu, S/o Kanchan Sahu, aged about 24 years, Occupation Agriculture, R/o Village Gopalpur, Police Station Chandpur, Fatehpur (Uttar Pradesh)

2. Amit Gupta, S/o Ramashray Gupta, aged about 24 years, R/o Village Sangaon, Police Station Fatehpur, Distt. Fatehpur (Uttar Pradesh)

---- Appellants

Versus

State of Chhattisgarh, Through Station House Officer, Police Station Durg, Distt. Durg (C.G.)

---- Respondent

For Appellants: Mrs. Fouzia Mirza, Advocate.
For Respondent/State:
Mr. A.S. Kachhawaha, Additional Advocate General and Miss Pushpa Dwivedi, Advocate.

Hon'ble the Chief Justice and
Hon'ble Mr. Justice Sanjay K. Agrawal

Judgment (*Curia Advisari Vult*)

The Judgment of the Court was delivered by

Sanjay K. Agrawal, J: -

1. The appellants herein namely Sunil @ Balikaran Sahu and Amit Gupta were awarded death sentence by the trial Court after having found them guilty for offences punishable under Sections 460 (three counts), 324 (three counts), 307 (three counts), 506 Part-II (ten counts), 397 (nine counts) and 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC'). They were sentenced to death by hanging under sub-section (5) of Section 354 of the Code of Criminal Procedure, 1973 (for short 'the CrPC'). Conviction and sentences imposed upon both the appellants are as follows: -

Conviction	**Sentence**
Sec. 460 of the IPC (three times)	RI for 10 years and fine of Rs.5,000/- each, in default additional SI for one year.
Sec. 324 of the IPC (three times)	RI for one year.
Sec. 307 of the IPC (three times)	RI for 10 years and fine of Rs.5,000/- each, in default additional SI for one year.
Sec. 506 Part-II of the IPC (ten times)	RI for 2 years.

Sec. 397 of the IPC (nine times)	RI for 7 years and fine of Rs.2,000/- each, in default additional SI for six months.
Sec. 302 read with Sec. 34 of the IPC	Death sentence and fine of Rs.5,000/-, in default additional SI for one year.

2. The learned Additional Sessions Judge (Fast Track Court), Durg, in exercise of power conferred under Section 366 of the CrPC after passing the sentence of death submitted the proceedings to this Court for confirmation and this is how this death reference is before us for consideration along with the appeal preferred by the two accused persons / appellants being Cr.A.No.586/2014.

3. The prosecution case as unfolded during the course of trial is as under: -

Admitted facts: -

3.1) First Information Report No.718/2010 for the offence punishable under Sections 458, 459, 460, 397 and 302 of the IPC was registered by Police Station Durg against unknown persons in connection with offence committed in the residential quarter of one Bhel Singh at Government Poultry Farm House, Durg in the intervening night of 6th & 7th October, 2010 in between midnight till 4 O' clock in the morning. Saloni Devi @ Deepa is wife of accused Sunil @ Balikaran Sahu.

3.2) The appellants along with their accomplice Faizan @ Anshu have been convicted with imprisonment for life by the

Court of Additional Sessions Judge, in S.T.No.120/2011 for committing loot having made house-trespass in the intervening night of 4th & 5th October, 2010 at Village Nagpura, Police Station Pulgaon, Distt. Durg.

3.3) Three criminal appeals (Cr.A.Nos.319/2013, 320/2013 and 654/2015) preferred by them against the judgment of conviction and order of sentence recorded by the learned Additional Sessions Judge in S.T.No.120/2011 have been dismissed by us by judgment dated 29-8-2016.

3.4) First Information Report / Crime No.124/2010, Criminal Case No.174/2010, for offence punishable under Section 307 of the IPC has been registered by Police Station Thariyaon, Distt. Fatehpur (UP) against Anshu @ Faizan, Sarvan Dhobi, Rakesh Chamar, Amit Gupta (absconded) and Balikaran Teli (absconded) as per Ex.D-5 in which the date of incident is mentioned as 6-10-2010 at about 17:30 hours. This place of incident is within the premises of Maya Dalda Factory at Police Station Thariyaon, Distt. Fatehpur (UP) and its Sessions Trial Number is 78/2011 instituted under Sections 147, 148 and 307 read with Section 149 of the IPC. In Criminal Case No.174/2010 bearing Crime No.124/2010, Police Station Thariyaon, Distt. Fatehpur (UP), accused Amit Kumar of the present case has surrendered before the Court of Additional Chief Judicial Magistrate No.10, Distt. Fatehpur (UP) on 13-10-

2010. On 8-8-2011, charges were framed against accused Amit Kumar in S.T.No.78/2011 which were denied by him. The Court of Additional Sessions Judge, Court No.6, Distt. Fatehpur (UP) vide judgment dated 31-8-2013 convicted Amit Kumar and sentenced him to undergo RI for two years with a fine of Rs.1,000/- under Section 147 of the IPC; RI for two years with a fine of Rs.2,000/- under Section 148 of the IPC; and RI for five years with a fine of Rs.2,000/- under Section 307 read with Section 149 of the IPC. It is pertinent to note here that accused Amit Gupta has admitted his guilt in S.T.No.78/2011 before the Court of Additional Sessions Judge, Court No.6, Fatehpur (UP) and on the basis of admission so made, the criminal court found them guilty of above-stated offences.

4. It is also an admitted fact that by filing an application under Section 315 of the CrPC and after grant of that application, accused Amit Gupta has examined himself as a defence witness. In his cross-examination, accused Amit Gupta has admitted that he is the gangster of loot and dacoity gang of Uttar Pradesh. On 23-9-2010, he along with his accomplice accused Sunil @ Balikaran Sahu and others had looted Dehuli Bus which was to move from Kanpur to Allahabad on 26-9-2010. Accused Amit Gupta has an organised group for committing loot and dacoity and therefore, he always encounters with the police of Fatehpur (UP).

Prosecution case in brief: -

5. The appellants Amit Gupta and Sunil @ Balikaran Sahu along with their accomplice Anshu @ Faizan committed loot in two passenger buses within the jurisdiction of Police Station Thariyaon, Distt. Fatehpur (UP). In order to escape their arrest, appellants Amit and Sunil along with Anshu came to Durg on 3-10-2010 on a red coloured Splendor motorcycle bearing registration No.UP-17/E-1820 owned by accused Amit Gupta. All three accused persons stayed at Sai Kripa Lodge in front of Bus Stand, Durg and appellant Amit Gupta made requisite entry in the register of the lodge in his own handwriting. On 4-10-2010, the present appellants along with Anshu @ Faizan roamed in the city and made a plan to commit loot of money in a liquor shop at Village Hirry and on their failure in the said attempt, they committed loot of gold and silver ornaments at Village Nagpura on the point of country-made pistol, knife and lathi in the intervening night of 4th & 5th October, 2010 at around 12.30 in the night and in the morning, they fled away to Rajnandgaon from where Anshu @ Faizan absconded with the looted articles. We have also considered and dismissed their criminal appeals which was the subject matter of S.T. No.120/2011 and in which they were convicted and sentenced. The appellants went to Dhamtari from Rajnandgaon and after staying there at Dhamtari in the night, they again came back to

Durg on 6-10-2010 and roamed in the entire city and in the intervening night of 6-10-2010 and 7-10-2010, they went in the secluded place behind the Government Poultry Farm (place of incident). On the date of incident, Santram Netam, Bhel Singh (deceased) and Chunnulal, were residing with their families in the Government quarter of the Poultry Farm. On 4-10-2010, at around 7 p.m., relatives of Santram Netam namely Ved Bai Halba Thakur and Budhiyarin Bai had come from Village Nara, District Kanker and after taking their dinner, all of them were sleeping at around 10 p.m. after closing the door. At around 12 mid night, after hearing the knock at the door when Chunnulal opened the door, at that moment, two unknown persons standing outside the door caught hold of Chunnulal (PW-3) and took him into the room of Santram. One of the accused persons namely Sunil @ Balikaran Sahu was having knife and Amit Gupta was armed with 315 bore country-made pistol. Both of them committed marpit with the family members of Chunnulal. They looted complainant Santram Netam's mobile of Spice company and jewelleries of Ved Bai Halba Thakur and Budhiyarin Bai. They also committed loot at Bhel Singh's house and assaulted Bhel Singh with a hammer resulting in his instantaneous death. From there, they went to the house of Chandradev and H.N. Verma and committed marpit with their family members and looted jewelleries and mobile. Thereafter,

at around 4 O' clock in the morning, the accused persons came to the house of Santram and informed them that they have committed loot of jewellery and mobile and have also shot daughter of their neighbour Anita Rani by which she suffered gunshot injury on her thigh, and they have also threatened that if they would not keep quite, they would be killed. Thereafter, they fled from there. After some time, H.N. Verma informed that some unknown persons have shot his daughter Anita Rani and have also committed loot. In this regard, Dehati Nalishi Ex.P-1 was lodged by Santram Netam. Investigating Officer B.D. Nand took action on the said Dehati Nalishi as per Ex.P-2 and thereafter, FIR Ex.P-1A was registered against unknown persons for the above-stated offences. Copy of the FIR was sent vide Ex.P-120 to the concerned jurisdictional Court and Ex.P-121 is its receipt.

6. The investigating officer thereafter prepared dehati merg intimation vide Ex.P-2 and sent information to the Sub Divisional Magistrate and recorded F.I.R. vide Ex.P-1A against unknown persons and sent a copy of F.I.R. to the jurisdictional Magistrate vide Ex.P-120. Receipt is Ex.P-121. The investigating officer recorded merg intimation vide Ex.P-2 under Section 175 of the CrPC. He issued notices to the witnesses for panchayatnama and prepared panchayatnama vide Ex.P-14. Postmortem of deceased Bhel Singh was conducted by

autopsy surgeon Dr. N.C. Rai (PW-13) vide his report Ex.P-36. Necessary seizure of articles were made regarding hammer, spit, apple and used cup & glass vide Exs.P-5, P-6 and P-7 and spot map was prepared vide Ex.P-4. On 25-10-2010 at 7.40 p.m. memorandum statement of accused Saloni Devi was recorded vide Ex.P-16A and vide Ex.P-16, silver anklet, gold ring, silver kardhan, mobile and pass-book of SBI Savings Bank Account were seized. Accused Saloni Devi was arrested vide Ex.P-16C. Accused Amit Gupta was arrested vide Ex.P-73 and accused Balikaran @ Sunil was arrested vide Ex.P-74. Memorandum statement of accused Amit Gupta was recorded vide Ex.P-75 and vide Ex.P-76, on his production, one 315 bore country-made pistol, one empty cartridge, one live cartridge and one receipt of LIC were recovered. Vide Ex.P-77 memorandum statement of accused Balikaran @ Sunil was recorded and vide Ex.P-78, on his production, pointed sharp edged knife, one old yellow colour T-shirt and one Hero Honda Deluxe Motor Cycle were seized. Specimen bite mark (B-1) was seized vide Ex.P-79. Accused Balikaran @ Sunil and Amit Gupta were put to test identification parade vide Exs.P-15, P-18 and P-18A by Executive Magistrate C.P. Mishra (PW-11) and they were identified by the injured witnesses. Injured witnesses were examined by the doctors of the District Hospital, Durg and Pt. Jawaharlal Nehru Research Centre, Bhilai and they gave

their reports. Clothes of deceased Bhel Singh were seized vide Ex.P-71. Report of fingerprint of cup and glass was sought from the Divisional Fingerprint Expert and reports were obtained vide Exs.P-20 and P-21. Seized apple was also sent for examination, which was examined and concerned scientist submitted report vide Ex.P-27. Photographs are Exs.P-28, P-29 and P-30. Register from Sai Kripa Lodge and letter of accused Amit Gupta were seized vide Ex.P-33. Likewise, register from Motel Dreamland, Bilaspur where accused had stayed was seized vide Ex.P-116. Letter was sent for DNA examination of spit of accused Amit Gupta vide Ex.P-82 and DNA profile report is Ex.P-87. Iron hammer and bamboo stick were sent to FSL for examination vide Ex.P-88 and report is Ex.P-89. Sanction for prosecution of the accused persons for offence under the Arms Act was also granted vide Ex.P-95 and after completion of investigation, charge-sheet was filed against the accused/appellants under Sections 458, 459, 460, 397, 302 and 412 of the IPC and Sections 25 & 27 of the Arms Act. Thereafter, charges were framed against the accused/ appellants particularly against accused Saloni Devi under Section 412, in alternate Section 413 of the IPC, against appellant Balikaran @ Sunil under Sections 460 (three counts), 324 (3 counts), 307 (3 counts), 302 read with Section 34, 506 Part-II (10 counts), 397 (9 counts) of the IPC and Section 27 of

the Arms Act and against appellant Amit Gupta under Sections 460 (3 counts), 324 (3 counts), 307 (3 counts), 302, 506 Part-II (10 counts), 397 (9 counts) of the IPC and Section 27 of the Arms Act.

7. In order to bring home the above-stated offences, the prosecution has examined as many as 34 witnesses and exhibited documents Exs.P-1 to P-124.

Defence of accused persons: -

8. The appellants/accused entered into defence and abjured their guilt, and pleaded innocence and false implication. Their defence was that they have not committed any offence and they have been falsely implicated. Accused Amit Gupta filed an application under Section 315 of the CrPC and after grant of that application, he was examined as defence witness. He took the plea of alibi and defence exhibited documents Exs.D-1 to D-12 to support their defence.

Judgment of trial Court: -

9. The learned Additional Sessions Judge upon appreciation of oral and documentary evidence on record by its impugned judgment, convicted the appellants for the above-stated offences, however, they were acquitted of the charge under Section 27 of the Arms Act and accused Saloni Devi @ Deepa was acquitted of the offences under Sections 412 and 413 of

the IPC but was convicted under Sections 411 and 414 of the IPC. Appellants Sunil @ Balikaran Sahu and Amit Gupta were awarded death sentence by the learned Additional Sessions Judge as required under Section 354(3) of the CrPC.

10. Following incriminating circumstances have been relied upon by the prosecution and accepted by the learned trial Court while convicting the two appellants: -

- Seizure of register at Sai Kripa Lodge vide Ex.P-31C, signature on the register opined to be of Amit Gupta, the appellant herein and seizure of ID card of the Election Commission of India Ex.P-32.
- Seizure of register from Dreamland Motel Ex.P-116, Ex.P-115 report dated 24-2-2011 and report of handwriting expert Ex.P-118 opining the handwriting to be of Amit Gupta – appellant No.2 herein.
- Opinion of handwriting expert that the handwriting in the diary of Aarti Ex.P-103 and Ex.P-97 is of Amit Gupta – appellant No.2 herein.
- Test identification parade Ex.P-15 by which Chunnulal (PW-3) and H.N. Verma (PW-2) identified the accused / appellants.
- Test identification parade Ex.P-18 by which B.R. Chandradev (PW-6) and Smt. Bedbai (PW-7) identified the appellants.
- Test identification parade Ex.P-18A by which Lokesh Kumar Chandradev and Padma Chandradev identified the accused/appellants.
- Memorandum of Saloni Bai vide Ex.P-16A and seizure of

articles vide Ex.P-16 namely, silver anklet, half kardhan, gold ring, mobile phone, savings bank passbook of SBI, jewelleries identified by Anita Rani (PW-4), mobile of Genex company handed-over to Lokesh Chandradev.

- Memorandum statement of appellant Amit Gupta Ex.P-75/24 and seizure of arms & passbook of SBI Ex.P-75/26.
- Memorandum statement of appellant Sunil @ Balikaran Ex.P-26/77 and seizure of motorcycle and driving licence of B.R. Chandradev (PW-6) Ex.P-78.
- Fingerprint of appellant Amit Gupta on a brown coloured cup, report of fingerprint expert dated 24-11-2010 opining the fingerprint to be of accused/appellant Amit Gupta Ex.P-21.
- Bite marks on apple and report of scientific expert Dr. B.P. Maithyle opining the bite mark to be of appellant Sunil @ Balikaran Ex.P-27 dated 24-12-2010.
- DNA test report Ex.P-87 and DNA profiling of cotton swab of the spit found at the place of incident.

11. Feeling aggrieved against the judgment of conviction recorded and sentence awarded, the afore-stated two appellants herein only have preferred this appeal under Section 374(2) of the CrPC. No criminal appeal of accused Saloni Bai against her conviction has been brought before us. However, the learned Additional Sessions Judge in accordance with the provisions contained in Section 366(1) of the CrPC, submitted the sentence of death to this Court for confirmation.

Submission of parties: -

12. Mrs. Fouzia Mirza, learned counsel appearing for the appellants, would vehemently submit that the prosecution has failed to bring home the offence beyond reasonable doubt and there is no sufficient material in shape of direct and indirect evidence to connect the two appellants herein in the aforesaid offences. Opening her submission, she would submit that the learned Additional Sessions Judge has committed grave legal error in holding that the present case falls within the category of rarest of rare case and failed to follow the legal proposition laid down by the Constitution Bench of the Supreme Court in the matter of **Bachan Singh v. State of Punjab**[1]. She would further submit that evidence of eyewitnesses suffers from various grave infirmities and they are not to be relied upon and to be acted upon in convicting the appellants. She would also submit that identity of accused persons has not been established beyond doubt and test identification parade has not been conducted in accordance with law. Test identification parade is only a weak piece of evidence and conviction cannot be based on the basis of test identification parade conducted by the prosecution. Identification of the appellants in participation of the commission of robbery has not been proved beyond all reasonable doubt and there is no conclusive evidence as to the

1 AIR 1980 SC 898

cause of death. Seizure of looted articles was not in accordance with law and none of the seized articles have been identified properly. DNA test report Ex.P-87 is not reliable report, as the saliva spit found at the place of incident was sent to the Forensic Science Laboratory with a delay of 25 days and there is no explanation for delay in sending the report for scientific examination and therefore the said report is not free from doubt. It has not been shown that it has been properly collected and sent for the chemical examination to the Forensic Science Laboratory. Report of the scientific expert opining the bite marks of accused Sunil Ex.P-27A is also not reliable. Fingerprint of accused Amit Gupta dated 24-11-2010 opining the same to be of Amit Gupta Ex.P-21 is also not reliable, as the fingerprint was taken by the person who was unauthorised to take and he was not examined, as it was taken by Constable Prabhat Verma who was not examined and there is no evidence that it was sealed and there is no evidence as to the manner in which the fingerprint was lifted. Concluding her submission, she would submit that the prosecution has miserably failed to connect the the appellants with the crime in question either by direct evidence or by circumstantial evidence and as such, the appellants be acquitted from all the charges and the appeal be allowed and the reference be not confirmed.

13. On the other hand, Mr. A.S. Kachhawaha, learned Additional

Advocate General, would submit that the prosecution has brought sufficient material in shape of ocular, medical and circumstantial evidence which justifies conviction of the appellants for above-stated offences. He would further submit that this is a case of rarest of rare case where the appellants have committed the offence of house-trespass, robbery and murder, and it will fall within the category of rarest of rare case as indicated by the Supreme Court in **Bachan Singh** (supra). As regards the question of imposing sentence, the appellants have mercilessly killed one Bhel Singh and also injured Chunnulal (PW-3) and one Anita Rani (PW-4) and other witnesses. They have committed robbery and not only caused death of Bhel Singh, but also attempted to cause death. Committing robbery in nine counts by itself is a case of rarest of rare case. The manner in which they have given effect to the loot and murder, it can be said to be rarest of rare case. There is no chance of their reformation. Therefore, imprisonment for life or other sentence is completely inadequate, only sentence of death would be appropriate and adequate punishment. In these circumstances, the trial Court has rightly imposed capital sentence of death upon the appellants. Learned Additional Advocate General has relied upon the decision of the Supreme Court in the matter of **Panchhi and others v. State of U.P.**[2] in

2 (1998) 7 SCC 177

which the Supreme Court has held that brutality in commission of offence is not the sole criterion for awarding capital punishment, Courts are required to consider entire evidence and circumstances in which the offence has been committed, and the prosecution is required to prove that it was a case of rarest of rare and therefore the appeal preferred by appellants Sunil @ Balikaran Sahu and Amit Gupta be dismissed and the death sentence awarded by the learned Additional Sessions Judge be confirmed.

14. We have heard learned counsel for the parties at length and considered their rival submissions made herein and also gone through the record of the trial Court thoroughly and extensively.

15. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.

16. As regards complicity of the appellants in the crime in question, conviction of the appellants is substantially based on ocular evidence to some extent, circumstantial evidence and scientific evidence.

17. We shall first deal with ocular evidence.

Ocular Evidence

18. There are seven eye witnesses who are also injured namely Santram Netam (PW-1), H.N. Verma (PW-2), Chunnulal Nag

(PW-3), Anita Rani Verma (PW-4), B.R. Chandradev (PW-6), Bedbai Halba Thakur (PW-7) and Sewakram (PW-34).

19. Chunnulal Nag (PW-3) is the person whom the accused persons on the date of occurrence, attacked when he came out of his house for urination. He has deposed that accused Sunil stabbed him by knife and took him to his house where Bhel Singh, his wife Bedbai (PW-7) and Santram (PW-1) were sleeping in separate rooms and robbed the mobile of Santram and looted one thousand rupees from him (Chunnulal Nag – PW-3) and also snatched gold articles of Bedbai (PW-7) and assaulted Bhel Singh by iron hammer on his head by which he died on the spot and also looted mobile & money of Bedbai (PW-7) and thereafter, took him (Chunnulal Nag – PW-3) to the house of Chandradev (PW-6) and there, they looted money from them. Accused Sunil ate apple and threw the half-eaten apple there and broken the TV installed in his house and locked him in the house of Chandradev and took the wife of Chandradev to the house of H.N. Verma (PW-2).

20. H.N. Verma (PW-2) has deposed before the Court that on 7-10-2010 at late night, upon being knocked by one Padma and on being called by her known voice, his daughter Anita Rani (PW-4) opened the door, then the appellants forcibly entered his house with Padma and the appellants introduced themselves as Sunil Sahu and Amit Gupta, when their unauthorized entry

was opposed by his daughter Anita Rani (PW-4), accused Amit Gupta made gunshot on his daughter Anita Rani by which she suffered gunshot injury on her thigh and fell on the spot and thereafter, when she was trying to getup, then another accused Sunil Sahu stabbed her by knife by which she suffered grievous injury and started bleeding severely, and they also assaulted his son Hemant and his wife Hemlata and looted one lakh rupees, one thousand five hundred rupees and locked all family members in the house of Hemant and fled away.

21. Anita Rani Verma (PW-4) in her statement before the Court has clearly stated that on knock made by her neighbour i.e. Padma Aunti, she opened the door of her house and on opposition made by her, accused Amit Gupta fired upon her by pistol and accused Sunil made assault by knife/lathi by which she suffered gunshot injury on her thigh and grievous injury on her head. She has further stated that the accused / appellants looted cash, jewellery, mobile and damaged the TV and mobile and threatened her of further dire consequence and also assaulted her mother, father and brother and she remained hospitalized for 13 days.

22. B.R. Chandradev (PW-6) has also deposed before the Court that in the intervening night of 6th and 7th October, 2010 at 2 a.m., hearing the knock made by Chunnulal, his neighbour, when his son Lokesh opened the door of his house, the

appellants armed with knife, danda and pistol entered his house and looted their cellphones (5 to 6), gold articles etc., and damaged the TV therein and looted all the cash from his house and spitted *gutkha* which was seized by police and also seized half-eaten apple.

23. Bedbai (PW-7) has also witnessed the incident and Sewakram (PW-34) – watchman has also deposed and supported the case of the prosecution though declared hostile.

24. We have gone through the testimonies of above-stated eyewitnesses. They are consistent with their statements. They are injured witnesses having suffered grievous injuries inflicted to them.

25. It is well settled law that testimony of injured witness is entitled to great weight and it is unlikely that they would spare the real culprit and implicate an innocent person though the evidence of injured witness should not be mechanically accepted, it should be in consonance with probabilities. (See **Mohd. Ishaque and others v. State of West Bengal and others**[3]). It has further been held by the Supreme Court that testimony of injured witness requires higher degree of credibility and there has to be strong reason for discarding the same. (See **Pargan Singh v. State of Punjab**[4]. It has also been held by the Supreme Court that convincing evidence is required to discredit an injured

3 (2013) 14 SCC 581
4 (2014) 14 SCC 619

witness. (See **Jodhan v. State of M.P.**[5])

26. Keeping in view the law laid down by the Supreme Court in above-stated judgments, we have examined the testimonies of injured eyewitnesses Santram Netam (PW-1), H.N.Verma (PW-2), Chunnulal Nag (PW-3), Anita Rani Verma (PW-4), B.R. Chandradev (PW-6), Bedbai Halba Thakur (PW-7) and Sewakram (PW-34). They have clearly stated the course of occurrence and have suffered serious injuries. We do not see any reason to disbelieve their version. We accept their testimonies.

Medical Evidence

27. It is a case of late night incident and the injuries on the persons of the said eye witnesses have been corroborated by medical evidence, which are as under:-

(i) Dr. Sumanta Mishra examined Chunnulal Nag (PW-3) and gave injury report as Ex.P-53.

(ii) Dr. Vishwamitra Dayal examined Anita Rani Verma (PW-4) and gave injury report as Ex.P-66 and also X-rayed and CT scanned by Dr. Dheeraj Kumar Gupta.

(iii) Dr. Manjusha Umredkar (PW-14) examined Sewakram (PW-34) and gave injury report as Ex.P-37.

(iv) Dr. Manjusha Umredkar (PW-14) also examined H.N. Verma (PW-2) and gave injury report as Ex.P-38.

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5 (2015) 11 SCC 52

(v) Dr. Manjusha Umredkar (PW-14) also examined Santram Netam (PW-1) and gave injury report as Ex.P-39.

(vi) Chunnulal Nag was also examined by Dr. Minakshi Dave (PW-15).

(vii) Dr. Minakshi Dave (PW-15) examined Hemlata Verma and gave injury report as Ex.P-41.

Thus, the injuries on the persons of the eye witnesses have duly been medically corroborated by Dr. Manjusha Umredkar (PW-14), Dr. Minakshi Dave (PW-15), Dr. Dheeraj Kumar Gupta (PW-16), Dr. Sumanta Mishra (PW-17), Dr. Pramod Binayke (PW-18) and Dr. Vishwamitra Dayal (PW-20). Therefore, the testimony of the eye witnesses particularly those are injured eye witnesses cannot be discarded lightly and we accept their testimonies.

28. Deceased Bhel Singh was assaulted by the appellants and Dr. N.C. Rai conducted post mortem on the person of deceased Bhel Singh and recorded following findings:-

1. शरीर ठंडा, राईगर मार्टिस था, ऑख खुली थी, जीभ अंदर थी, साईनोसिस; नीलापनद्ध था तथा आंतरिक एवं बाह्य चोटे मौजूद थी।

2. सिर में दायें पैराईटल बोन का फ्रैक्चर था जो 4 से.मी. लंबा था। मस्तिष्क तथा फेफड़े कंजेस्टेट थे, हृदय का दायां भाग खून से भरा था तथा बायां भाग खाली था।

3. पेट में अधपचा खाद्य पदार्थ था एवं अंतड़ियों में पचा हुआ पदार्थ था।

4. लीवर, तिल्ली एवं गुर्दा भी कंजेस्टेड थे एवं मुत्राशय खाली था।

5. सिर पर पीछे की ओर एक कंट्यूजन जो गोलाकार एवं 5 से.मी. व्यास वाला था।

सभी चोटे मृत्यु पूर्व की थी।

Homicidal death of the deceased Bhel Singh has not been seriously disputed on behalf of the appellants. Dr. N.C. Rai (PW-13) has conducted postmortem on the person of deceased Bhel Singh and proved postmortem report Ex.P-36 before the trial Court which clearly indicates that death of deceased Bhel Singh was homicidal in nature.

Circumstantial Evidence

29. The law with regard to circumstantial evidence is well settled. In a case where the prosecution relies upon the circumstantial evidence, it must not only prove the circumstances but should link them in such a fashion so as to form an unending chain i.e. the guilt of the accused. But if there is any chance of the accused being innocent or the crime has been committed by some other person, then the accused has to be given the benefit of doubt and on the basis of circumstantial evidence, he cannot be convicted.

30. The law laid down by Their Lordships of the Supreme Court in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**[6] is that the conditions which must be fulfilled before a case against an accused can be said to be fully

6 (1984) 4 SCC 116

established on circumstantial evidence are as under:-

(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established.

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

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

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

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

31. The Supreme Court in the matter of **Shivu and Anr. v. R.G., High Court of Karnataka & Anr.**[7] has reiterated that the condition precedent necessary before conviction could be based on circumstantial evidence must be established as laid down in the matter of **Sharad Birdhichand Sarda** (supra).

32. In the present case, following are the relevant circumstances

7 2007 Cr.L.J. 1806

which are required to be considered by us: -

1. Appellant Amit Gupta along with other accused stayed in Guru Kripa Lodge on 3-10-2010 and also stayed at Guru Kripal Hotel, Bilaspur on 7-10-2010.
2. The appellants were identified in test identification parade as well as in the court by the prosecution witnesses.
3. Fingerprint evidence.
4. Recovery of looted ornaments.
5. Bite-mark test.
6. DNA profiling.
7. Plea of alibi.

We shall discuss aforesaid relevant circumstances one by one.

Stay in Guru Kripa Lodge

33. It is the case of the prosecution that before committing the offence, the appellants stayed at Sai Kripa Lodge (Room No.137) on 3-10-2010 along with other accused persons. Witness relevant for the purpose is Naresh (PW-10). He has given evidence to the effect that the appellants stayed at his hotel on 3-10-2010 in Room No.137 where in the register Ex.P-31, appellant Amit Gupta has entered his signature after giving requisite particulars required for staying in hotel and mobile number has also been endorsed as identity proof. The voter identity card has been deposited and exhibited as Ex.P-32.

The statement of this witness remain uncontroverted with regard to the fact that on 3-10-2010, the appellants stayed in Guru Kripa Lodge. M.N. Pandey (PW-30), who is State Examiner of questioned documents Exs.P-14 & P-15, has opined that the signature found in the register of Sai Kripa Lodge Ex.P-31 and the specimen signature enclosed and marked as S-1 & S-30 are similar and same has been stamped and marked as Q-1 & Q-2. As per Ex.P-114, the signature found in the book seized at the instance of appellant Amit Gupta i.e. Ex.P-103 having "Aarti" in it and the specimen handwriting of Amit Gupta was found to be of common authorship, and this fact has rightly been found proved by the trial Court.

34. Vikas Murarka (PW-32) who is the owner of Dream Land Hotel, Raipur Road, High Court, Bilaspur, has proved the stay of the appellants on 7-10-2010 and their departure from the hotel on 8-10-2010. Photocopy of the register of the said hotel has been exhibited and proved as Ex.P-116 having signature of Amit Gupta which was marked as Q-3 and also the receipt book in the name of Amit Gupta as Ex.P-72 on the basis of which it was proved that appellant Amit Gupta along with his friends had stayed in this hotel. Vide Ex.P-117, it has been opined that the handwriting in the register of Dream Land Hotel is similar to the specimen signature of Amit Gupta and as such, stay of the

appellants on the relevant dates i.e. on 3-7-2010 and 7-10-2010 is proved and challenge to the aforesaid piece of evidence has no basis to stand and the learned trial Court has rightly relied upon the aforesaid circumstance as a relevant circumstance.

Test Identification Parade

35. C.P. Mishra (PW-11) – Naib Tahsildar conducted test identification parade and as per the prosecution case, vide Ex.P-15, Chunnulal (PW-3) and H.N. Verma (PW-2) identified the accused/appellants and vide Ex.P-18, B.R. Chandradev (PW-6) and Smt. Bedbai (PW-7) identified the appellants by putting their hands on the head of the appellants. Learned trial Court taking into consideration the test identification parade having been conducted by C.P. Mishra (PW-11) in accordance with law and identified by the eyewitnesses, relied upon the test identification parade as a relevant circumstance to convict the appellants.

36. Mrs. Fouzia Mirza, learned counsel for the appellants, would submit that test identification parade is a very weak piece of evidence and could not have been relied upon by the learned trial Court as a relevant circumstance, as H.N. Verma (PW-2) in paragraph 8 of his statement has clearly deposed that both the appellants were made to stand jointly along with other persons at the time of test identification parade. Likewise, Chunnulal (PW-3) in paragraph 7 of his statement has stated that the

appellants were shown to the identifying witnesses prior to the test identification parade. Anita Rani (PW-4) has specified the difference in height of the two miscreants and in paragraph 6, she has stated that the jewellery were not subjected to test identification parade. Smt. Bedbai (PW-7) has stated in paragraph 4 of her statement that she identified the appellants from amongst fifty persons.

37. The argument canvassed on behalf of the appellants that test identification parade was vitiated for holding the same jointly and it was vitiated on account of identity of accused having been already revealed before the test identification parade could be conducted, is answered extremely recently by Their Lordships of the Supreme Court in the matter of **Sheikh Sintha Madhar alias Jaffer alias Sintha., Etc. v. State by Inspector of Police**[8]. It was held succinctly as under: -

> "16. ..... Also, there is no invariable rule that two accused persons cannot be made part of the same TIP. Joint TIP would thus, in no manner, affect the validity of the TIP. The purpose of a TIP is to ensure that the investigation is going on the right track and it is merely a corroborative evidence. The actual identification must be done in the Court and that is the substantive evidence. ....."

38. Identification in Court i.e. dock identification is a substantive piece of evidence and admissible in evidence. Test identification attaches only corroborative value, it is not *sine qua non* in every case. Test identification is a rule of prudence

8 AIR 2016 SC 1844

and caution for accusation. If dock identification is otherwise reliable, then reliance can be placed upon the same.

39. In the matter of **Suraj Pal and others vs. State of Haryana**[9] while dealing with the same question, it has been held by the Supreme Court that the dock identification is accepted if otherwise found to be reliable. Relevant portion reads thus:-

> "Before dealing with the various contentions advanced by the learned counsel for the appellants as referred to above, we shall first state the object, purpose and importance of the test identification parade. It may be pointed out that the holding of identification parade has been in vogue since long in the past with a view to determine whether an unknown person accused of an offence is really the culprit or not, to be identified as such by those who claimed to be eyewitnesses of the occurrence so that they would be able to identify the culprit if produced before them by recalling the impressions of his features left on their mind. That being so, in the very nature of things, the identification parade in such cases serves a dual purpose. It enables the investigating agency to ascertain to correctness or otherwise of the claim of those witnesses who claimed to have seen the offender of the crime as well as their capacity to identify him and on the other hand it saves the suspect from the sudden risk of being identified in the dock by such witnesses during the course of the trial. Thus practice of test identification as a mode of identifying an unknown person charged of an offence is an age-old method and it has worked well for the past several decades as a satisfactory mode and a well-founded method of criminal jurisprudence. It may also be noted that the substantive evidence of identifying witness is his evidence made in the court but in cases where the accused person is not known to the witnesses from before who claimed to have seen the incident, in that event identification of the accused at the earliest possible opportunity after the occurrence by

9 (1995) 2 SCC 64

> such witnesses is of vital importance with a view to avoid the chance of his memory fading away by the time he is examined in the court after some lapse of time."

40. In the matter of **Daya Singh v. State of Haryana**[10], it has been held by the Supreme Court that delay in trial and identification of accused in Court after seven or eight years would not affect evidence of said witnesses and conviction of accused on the basis of their testimony even in the absence of test identification their statement relating to dock identification can be relied upon. Relevant portion is reproduced as under:-

> "It is to the borne in mind that purpose of test identification is to have corroboration to the evidence of the eyewitness in the form of earlier identification and that substantive evidence of a witness is the evidence in the court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identify on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion – what in present day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution."

41. In the matter of **Ramanbhai Naranbhai Patel and others v. State of Gujarat**[11], it has been held by the Supreme Court that identification of accused for the first time in court by eyewitnesses when they did not know him earlier and when no test identification parade was held, such identification is not irrelevant or inadmissible.

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10 AIR 2001 SC 1188
11 (2000) 1 SCC 358

42. In the matter of **Sampat Tatyada Shinde v. State of Maharashtra**[12] it has been held by the Supreme Court that the evidence of test identification is admissible under Section 9 of the Evidence Act. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification of the accused. Relevant portion reads as under:-

> "The evidence of test identification is admissible under Section 9 of the Evidence Act; it is, at best, supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification of the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, has no independent value. Nor is test identification the only type of evidence that can be tendered to confirm the evidence of a witness regarding identification of the accused in court, as the perpetrator of the crime. The identify of the culprit can be fixed by circumstantial evidence also."

43. In the matter of **R. Shaji v. State of Kerala**[13], the Supreme Court has held that the evidence from a test identification parade is admissible under Section 9 of the Evidence Act. It has further been held that mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. Holding a test

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12 AIR 1974 SC 791
13 (2013) 14 SCC 266

identification parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper direction.

44. Recently, in the matter of **Ashok Debbarama alias Achak Debbarama v. State of Tripura**[14], the Supreme Court has held that primary object of test identification parade is to enable witness to identify the persons involved in the commission of the offence if the offenders are not personally known to the witnesses. The whole object beyond test identification parade is really to find whether or not the suspect is really offender.

45. If the facts of the case are examined in the light of principles laid-down by the Supreme Court in the above-stated judgments, it is quite apparent that the injured eyewitness namely H.N. Verma (PW-2) and Chunnulal Nag (PW-3) identified the appellants in the proceeding recorded by Executive Magistrate C.P. Mishra (PW-11) vide Ex.P-15. Likewise, B.R. Chandradev (PW-6) and Bedbai Halba Thakur (PW-7) have also identified the appellants in the test identification parade vide Ex.P-18. Not only this, all the aforesaid eyewitnesses have duly identified the appellants herein during their examination in the Court. The aforesaid eyewitnesses, who have identified the appellants, were subjected to extensive cross-examination, but nothing could be

14 2014 (4) SCC 747

brought out to discredit their testimony with regard to the test identification parade as well as in the Court and as such, we are of the view that the eyewitnesses not only identified the appellants during the test identification parade but also in the court and that is the substantive evidence against the appellants.

Fingerprint Evidence

46. The witness relevant for the purpose of fingerprint evidence, a relevant circumstance, is S.K. Jain (PW-8), a fingerprint expert. On 7-10-2010, S.K. Jain (PW-8) lifted a fingerprint on one white brown cup, handle of cup and glass as Arts. A, B & C which were seized vide Ex.P-7 and sealed, and sent for forensic science report. It was photographed by Prabhat Verma, Constable, Police Control Room, Durg and specimen signature of the appellants prepared by Constable Raj Kumar vide S-1 & S-2. Thus, the seized fingerprints Arts. A, B & C and specimen fingerprints of the appellants S-1 & S-2 were examined by S.K. Jain vide Ex.P-21. Relevant portion of the evidence of S.K. Jain (PW-8) reads thus: -

> ''03. उक्त प्राप्त संभावित अंगूली चिन्ह अंकित ए, बी एवं सी तथा आदर्श अंगूली चिन्ह परणीया अंकित एस 1 तथा एस 2 तक पर के सभी अंगूली चिन्हों का परीक्षण एवं मिलान करने पर निम्न निष्कर्ष प्राप्त हुआ।
>
> 1. संभावित अंगूली चिन्ह अंकित बी तथा सी अस्पष्ट, भद्दे एवं पर्याप्त बिंदुओं के अभाव में तुलना हेतु अनुपयुक्त

पाये।

2. संभावित अंगूली चिन्ह अंकित ए तुलना हेतु उपयुक्त है तथा आदर्श अंगूली चिन्ह परणी अंकित एस 1 जो अमित गुप्ता के नाम से है व दाहिने हाथ की मध्यिमा (Right Middle) अंकित एस 1 ए के साथ अभिन्न (Identical) है।

04. उक्त प्राप्त संभावित अंगूली चिन्ह अंकित ए तथा आदर्श अंकित चिन्ह एस 1 ए के तीन गुणा विस्तारित छायाचित्रों में पाये गये समबिंदुओं का विवरण निम्नानुसार है। मेरा मत निम्न बिंदुओं पर आधाररित है।

1. बिन्दु कं.1 रिजएण्ड है।

2. बिन्दु कं.2 रिजएण्ड है । जो बिन्दु कं.1 के दक्षिण–पूर्व में 2 मध्यवर्ती रघीनो के अन्तर पर स्थित है।

3. बिन्दु कं.3 शर्टरिज है। जो बिन्दु कं.2 के दक्षिण–पूर्व में बगैर किसी मध्यवर्ती रघीने के अन्तर पर स्थित है।

4. बिन्दु कं.4 रिजएण्ड है। जो बिन्दु कं.3 के दक्षिण–पूर्व में बगैर किसी मध्यवर्ती रघीरे के अन्तर पर स्थित है।

5. बिन्दु कं.5 रिजएण्ड है । जो बिन्दु कं.4 के दक्षिण–पूर्व में 1 मध्यवर्ती रघीने के अन्तर पर स्थित है।

6. बिन्दु कं.6 रिजएण्ड है। जो बिन्दु कं.5 के उत्तर–पूर्व में 5 मध्यवर्ती रघीनों के अन्तर पर स्थित है।

7. बिन्दु कं.7 रिजएण्ड है। जो बिन्दु कं.6 के उत्तर में 1 मध्यवर्ती रघीने के अन्तर पर स्थित है।

8. बिन्दु कं.8 रिजएण्ड हैं। जो बिन्दु कं.7 के उत्तर–पूर्व में 5 मध्यवर्ती रघीने के अन्तर पर स्थित है।

उक्त वर्णित आठ समबिन्दु अपने स्वभाव एवं स्थिति (nature and relative position) में एक रूपता रखते है। अतः मेरा एक निश्चित मत है कि संभावित अंगूली चिन्ह अंकित A एवं आदर्श अंगूली चिन्ह अंकित S-1-A एक ही व्यक्ति

की एक ही अंगूली के चिन्ह है। अर्थात् अमित गुप्ता पिता रामाश्रय गुप्ता के दाहिने हाथ की मध्यिमा (Right Middle) के ही है।''

47. This circumstance has been challenged on behalf of the appellants stating that the fingerprints were photographed by Prabhat Verma, but he has not been examined and the photographs were not sealed and further, the specimen fingerprints of the appellants were taken by Constable Raj Kumar, but Raj Kumar was also not examined which is in violation of Sections 4 and 5 of the Identification of Prisoners Act, 1920. Therefore, the testimony of S.K. Jain (PW-8) should not be accepted.

48. In the matter of **Mohd. Aman and another v. State of Rajasthan**[15], the Supreme Court while dealing with Sections 4 and 5 of the Identification of Prisoners Act, 1920 has held that "even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police officer is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate".

15 (1997) 10 SCC 44

Subsequently, placing reliance in **Mohd. Aman** (supra), the Supreme Court in the matter of **Prakash v. State of Karnataka**[16] has held thus,

> "The Karnataka High Court has taken the view[17] that it is not incumbent upon a police officer to take the assistance of a Magistrate to obtain the fingerprints of an accused and that the provisions of the Identification of Prisoners Act are not mandatory in this regard. However, the issue is not one of the provisions being mandatory or not—the issue is whether the manner of taking fingerprints is suspicious or not. In this case, we do not know if Prakash's fingerprint was taken on 7-11-1990 as alleged by him or later as contended by the investigating officer, or the circumstances in which it was taken or even the manner in which it was taken. It is to obviate any such suspicion that this Court has held it to be eminently desirable that fingerprints are taken before or under the order of a Magistrate. As far as this case is concerned, the entire exercise of Prakash's fingerprint identification is shrouded in mystery and we cannot give any credence to it."

49. It is to be noticed that in the present case, fingerprints were taken by the fingerprint expert on 7-10-2010 itself on the seized cup and glass and no orders of the Magistrate were obtained but in the cross-examination of B.R. Chandradev (PW-6) / or to Investigating Officer B.D. Nand (PW-28), no question was put to them regarding that it was not sealed, not packed and kept in safe custody. Even otherwise, though photographs and specimen fingerprints were taken by the Police Constable, but no prejudice appears to have been caused in non-compliance of the provisions of the Identification of Prisoners Act, 1920.

16 (2014) 12 SCC 133
17 State v. B.C. Manjunatha, ILR 2013 KAR 3156

Even witness S.K. Jain (PW-8) has not been questioned in this regard what has been argued by the appellants herein before us and therefore it cannot be held that on account of non-compliance of the provisions of the Identification of Prisoners Act, 1920, the appellants have suffered any prejudice which renders the report and testimony of the fingerprint expert to be discarded. Hence, the argument raised in this behalf deserves to be and is hereby rejected while accepting the fingerprint evidence.

Recovery of looted ornaments

50. The looted ornaments Art. P was seized at the instance of Saloni – co-accused on her memorandum vide Ex.P-16 which was duly identified by Anita Rani Verma (PW-4) and was marked as Art.Q. Likewise, the seized looted article which was subjected to dacoity was identified by Bedbai Halba Thakur (PW-7) vide Ex.P-17 and was marked as Art. R. Aforesaid recovery of looted articles at the instance of co-accused Saloni is a relevant circumstance and seizure and memorandum statements have duly been proved and seized articles have duly been identified by Anita Rani Verma (PW-4) and Bedbai Halba Thakur (PW-7) as such, it is a relevant circumstance to connect the appellants herein to the crime in question.

Bite-mark test

51. On 7-10-2010, from the house of B.R. Chandradev (PW-6)

(place of occurrence i.e. Government Poultry Farm, Residential Campus), an half-eaten apple (¼ in size), which is alleged to be eaten by accused Balikaran @ Sunil, was seized. On 7-10-2010, Dr. B.P. Maithyle (PW-9) took the specimen bite-mark of the said accused and photographed by the appropriate scale. Both the bite marks seized from the place of occurrence (A-1 to A-1) and specimen bite mark (B-1 to B-1) were examined by Dr. B.P. Maithyle (PW-9), Senior Scientific Officer and gave his report vide Ex.P-27.

52. Dr. B.P. Maithyle (PW-9), Senior Scientific Officer, was examined to prove the said report Ex.P-27 and the said witness made following statement before the Court: -

> ''02. घटना स्थल पर प्राप्त बाईट मार्क एवं आरोपी से प्राप्त बाईट मार्क के नमूने को क्रमशः ए1ए2 (घटना स्थल) तथा बी1बी2 (नमूना) मार्क किया गया। मेरे द्वारा प्रदर्श ए1 तथा बी1 पर उन्पन्न बाईट मार्क पर निम्न परीक्षण किये गये।

	ए1	बी1
1. ""बाईट मार्क" के आधार की अधिकतम	19.0 mm	19.0 mm
2. "बाईट मार्क" के मध्य भाग के दोनों ओर का फैलाव	9.50 mm	9.50 mm
3. आधार के मध्य भाग से दो दांतो के बीच अधिकतम चौडाई की उचांई	3.50 mm	3.50 mm
4. "बाईट मार्क" के मध्य उभार के दोनो ओर गहराईयों की संख्या	3+3=6mm	3+3=6mm

उपरोक्त आयामों (Dimensions) के आधार पर मैनें

अपनी राय व्यक्त की कि प्रदर्श ए1 एवं बी 1 पर उत्पन्न बाईट मार्क सामान है एवं साथ ही प्रदर्श ए2 एवं बी2 को सुरक्षित रखा गया। परीक्षण के संबंध में थाना प्रभारी दुर्ग का पत्र **प्र.पी.26** है तथा मेरे द्वारा दी गयी प्रतिवेदन **प्र.पी.27** है जो दो में है, प्र.पी. 27 के दूसरे पन्ने के अ से अ भाग पर मेरे हस्ताक्षर है। सेब फल पर पाये गये बाईट मार्क के फोटोग्राफ स्केल से साथ क्रमशः **प्र. पी. 28, प्र.पी.29** एवं **प्र.पी. 30** है जिसके अ से अ भाग पर मेरे हस्ताक्षर है एवं मेरा सील लगा हुआ है।''

53. Dr. B.P. Maithyle (PW-9) has clearly opined that the bite-marks seized from the spot and the specimen bite-marks of accused Balikaran @ Sunil are similar and matching to each other. Though he has been subjected to cross-examination at length, nothing has been elicited from the said witness to discredit his statement and the only argument raised on behalf of the appellants is that Ramgopal Patel who photographed the bite-marks was not examined by the prosecution before the Court. It was not sealed and kept in safe custody and therefore this piece of circumstantial evidence could not have been relied upon by the learned trial Court. This witness has been cross-examined but he has not been put to any cross-examination with regard to sealing and keeping the seized bite-marks in safe custody in accordance with Section 145 of the Evidence Act. Therefore, the argument raised in this behalf deserves to be rejected while accepting his testimony.

DNA Profiling

54. DNA profiling technique has now been expressly included among various forms of medical examination in amended Explanation to Section 53 of the CrPC. DNA profile is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. Matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. (See **Selvi v. State of Karnataka**[18].)

55. In the instant case, saliva spit of accused Amit Gupta was taken on a cotton swab from the place of occurrence {house of B.R. Chandradev (PW-6)} on 7-10-2010 and thereafter, accused Amit Gupta was arrested vide Ex.P-73 on 4-11-2010 but the saliva spit was not sent for DNA examination till then and it was only sent on 16-11-2010 vide Ex.P-82 to the Forensic Science Laboratory and thereafter, on 27-11-2010 vide Ex.P-83, the Forensic Science Laboratory sought blood sample of the accused for submitting the DNA profiling report and which was sent vide Ex.P-85, and ultimately, the DNA profiling report was

18 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1 : AIR 2010 SC 1974

received by the Superintendent of Police, Durg vide Ex.P-87 on 4-12-2010 in which saliva spit taken on the cotton swab and the source of blood of accused Amit Gupta, the identical male DNA profiling was found which has been contended to be of the result of manipulation holding that there was no explanation for delay in sending the DNA profile especially when it was taken on 7-10-2010 and sent only on 16-11-2010, particularly after the arrest of accused Amit Gupta on 4-11-2010. Therefore, the DNA test is shrouded with suspicion and chances of manipulation cannot be ruled out and this cannot be the incriminating circumstance against accused / appellant Amit Gupta.

56. It is true that after arrest of the accused, saliva spit was seized on 7-10-2010, the accused was arrested on 4-11-2010 and saliva spit was sent for DNA profiling only on 16-11-2010 and thereafter, blood sample was sent and thereafter, report was sent by the Forensic Science Laboratory vide Ex.P-87 on 4-12-2010. It is also true that there is delay in sending the saliva spit for examination on the part of the prosecution, as it was sent only after the arrest of the accused on 4-11-2010 which was sent on 16-11-2010, but such a lapse on the part of the prosecution cannot be a ground for acquittal of the appellants herein. In a very recently pronounced judgment of the Supreme Court in the matter of **Ajay Kumar Singh v. Flag**

Officer, Commanding-In-Chief and others[19], in a robbery case, chance fingerprints were lifted from the entrance glass doors of bank, but neither the photographer was examined nor negatives of photographs of chance fingerprints were produced. Their Lordships of the Supreme Court have held that such a lapse on the part of the prosecution cannot result in acquittal of accused person. It was succinctly held as under: -

> "This lapse in the prosecution, in our view, cannot result in acquittal of the appellants. The evidence adduced by the prosecution must be scrutinized independently of such lapses either in the investigation or by the prosecution or otherwise, the result of the criminal trial would depend upon the level of investigation or the conduct of the prosecution. Criminal trials should not be made casualty for such lapses in the investigation or prosecution."

57. The above-stated binding observation of Their Lordships squarely applies to the facts of the present case. We are fully satisfied after going through the record that such a lapse would not result in acquittal of the appellants herein.

Plea of alibi

58. In order to take the plea of alibi, accused Amit Gupta has filed an application under Section 315 of the CrPC and that application was allowed and he was examined as a competent defence witness. The trial Court has not accepted the plea of alibi taken by appellant Amit Gupta finding such a plea to be unacceptable.

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19 AIR 2016 SC 3528

59. Plea of alibi has recently been considered by the Supreme Court in the matter of **Darshan Singh v. State of Punjab**[20] and it has been held as under: -

> "The word alibi means "elsewhere". The plea of alibi is not one of the General Exceptions contained in Chapter IV of IPC. It is a rule of evidence recognized under Section 11 of the Evidence Act. However, plea of alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused. In the present case said condition is fulfilled."

60. It is well settled that strict proof is required for establishing plea of alibi and finding of fact disbelieving the plea of alibi based on weight and sturdy reasons should not be interfered with. (See **Binay Kumar Singh v. State of Bihar**[21].)

61. It is well settled that a plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence. (See **State of Maharashtra v. Narsingrao Gangaram Pimple**[22].)

62. Following the law laid down by the Supreme Court and taking into account the evidence available on record, it appears that appellant Amit Gupta was convicted by the criminal court at Fatehpur (U.P.) only on the basis of his admission. No evidence was brought on record to prove beyond doubt that in the intervening night of 6th & 7th October, 2010, he was involved

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20 (2016) 3 SCC 37
21 AIR 1997 SC 322
22 AIR 1984 SC 63

in the said offence and merely on the basis of admission, appellant Amit Gupta was convicted whereas in the present case, the prosecution has proved the offence against Amit Gupta beyond doubt by not only adducing ocular evidence but also by circumstantial evidence and scientific evidence, as such, appellant Amit Gupta has failed to establish his plea of alibi and his plea of alibi is vacillating, which has rightly been not accepted by the trial Court and is based on sturdy reasons which we are not inclined to interfere. In the matter of **Sahabuddin and another v. State of Assam**[23], Their Lordships of the Supreme Court have held that once the Court disbelieves the plea of alibi and the accused does not give any explanation in his statement under Section 313 of the CrPC, the Court is entitled to draw adverse inference against the accused taking the plea of alibi.

63. Thus, after appreciating the entire evidence on record, we do not find any illegality in appreciation of oral, medical and circumstantial evidence or arriving at a conclusion as to the guilt of the present appellants, by the trial Court warranting interference by this Court.

Death sentence

64. This would bring us to the question of death sentence awarded by the learned Additional Sessions Judge.

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23 (2012) 13 SCC 213

65. Now, the only question is that whether this case falls under the category of rarest of rare case justifying capital punishment. Their Lordships of the Supreme Court in umpteen number of judgments have laid down principles for awarding capital punishment for which the balance between aggravating circumstances and mitigating circumstances has to struck. Seven other factors like, age of the accused, possibility of reformation and lack of intention of murder have also to be gone into the judicial mind.

66. Death penalty or imprisonment for life for the commission of murder under Section 302 of the IPC has been provided. In case of conviction under Section 302 of the IPC or any conviction for an offence punishable with death or in the alternative the imprisonment for life, the Court is required to assign special reasons for awarding such penalty and the special reason for awarding death sentence in accordance with sub-section (3) of Section 354 of the CrPC. Sub-section (3) of Section 354 of the CrPC reads as under:-

> **"S.354 (3)**: When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

67. The language of Section 354 (3) of the CrPC demonstrates the legislative concern and the conditions which need to be

satisfied prior to imposition of death penalty. The words, 'in the case of sentence of death, the special reasons for such sentence' unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence i.e. the Court is required to hold that it is a case of rarest of rare warranting imposition of only death sentence.

68. While dealing with the question of imposing death penalty, in the case of **Sushil Murmu v. State of Jharkhand**[24], the Supreme Court after relying **Bachan Singh v. State of Punjab**[25] case, has summarized the law with regard to imposition of death sentence on the basis of guidelines emerges from the case of **Bachan Singh** (supra). Brutal, grotesque, diabolical, revolting or dastardly manner in which murder committed has been considered as rarest of rare case for imposition of death penalty. Multiple murders of almost all the members of a family or a member of particular caste, community or locality has also been considered as rarest of rare case for imposing death penalty. While dealing with the imposition of death penalty in the aforesaid cases, the Supreme Court has also considered it to be a rarest of rare case in case of murder of a innocent child or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a

24 2003 AIR SCW 6782
25 AIR 1980 SC 898

dominating position or a public figure general loved and respected by the community and for such commission of murders, death penalty can be imposed.

69. While dealing with the question of imposition of death penalty for commission of murder, the Supreme Court in the case of **Bachan Singh** (supra) held that provision of death penalty as an alternative punishment for murder is not violative of Article 19 of the Constitution of India. Paragraph 132 is relevant and reads as under:

> "132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death

> penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilized countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19."

70. While dealing with the circumstances in which the death sentence may be imposed, the Supreme Court has summarized the circumstances and following guidelines have been issued for imposition of death sentence. Paragraph 179 of the report reads thus:-

> "179. Soon after the decision in Furman, the Georgia Legislature amended its statutory scheme. The amended statute retains the death penalty for six categories of crime: murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statutory aggravating circumstances, the existence of any of which may justify the imposition of the extreme penalty of death, as provided in that statute, are:
>
> (1) The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions).

(2) The offence of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offence of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offences of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offences of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offence of murder was committed by a person in, or who has escaped from, the lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

The Supreme Court has further considered the mitigating circumstances in paragraph 204 of the said judgment as under:

"204. Dr Chitale has suggested these mitigating factors:

Mitigating circumstances. In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

1. That the offence was committed under the influence of extreme mental or emotional disturbance.

2. The age of the accused. If the accused is young or old, he shall not be sentenced to death.

3. The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

4. The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

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

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

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

71. After considering the case of **Bachhan Singh** (supra), in the matter of **Machhi Singh v. State of Punjab**[26] the Supreme Court has summarized the instances of imposition of death sentence in paragraph 38 which reads thus:

"38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh'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

26 (1983) 3 SCC 470

> 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 has 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."

72. As held in **Panchhi** (supra), **Munna Choubey's** case (supra), **Jai Kumar** (supra) and **Satish's** case (supra), imposition of life imprisonment is normal rule and imposition of death sentence is exception. In case of imposing death sentence, the prosecution is required to prove that it was a case of rarest of rare and no other sentence except death sentence was adequate.

73. While dealing with the question of imposition of death penalty, the Supreme Court has held that in case of imposing death penalty, capital punishment provided by law is proper award in rarest of the rare cases and not as a normal rule and in the case of **Sushil Murmu** (supra) the Supreme Court has summarized the law with regard to imposition of death sentence. Paragraphs 15 and 16 read as under:

> "15. The following guidelines which emerge from *Bachan Singh case* will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p.

489, para 38)

(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. 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.

16. In rarest of rare cases when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

1. 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.

2. When the murder is committed for a motive which evinces total depravity and meanness e.g. murder by a hired assassin for money or reward or a cold-blooded murder for gains of a person vis-à-vis

whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.

3. When murder of a member of Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of “bride-burning” or “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.

4. 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.

5. When the victim of the murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-à-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.”

74. While dealing with the question of brutality in the matter of **Ashrafi Lal and Sons v. State of U.P.**[27], the Supreme Court has held that it is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. In case of gruesome murder of two innocent girls to wreak their personal vengeance over the dispute, the death sentence awarded to the appellants was confirmed. Paragraph 3 reads as under:

> “3. We have heard learned counsel for the appellants mainly on the question of sentence but we are not impressed with his submission.

27 AIR 1987 SC 1721

> The two appellants Ashrafi Lal and Babu were guilty of a heinous crime out of greed and personal vengeance and deserve the extreme penalty. This case falls within the test 'rarest of of rare cases' as laid down by this Court in Bachan Singh v. State of Punjab (1980) 2 SCC 684 : (AIR 1980 SC 898) as elaborated in the later case of Machhi Singh v. State of Punjab (1983) 3 SCC 470 : (AIR 1983 SC 957). The punishment must fit the crime. These were cold-blooded brutal murders in which two innocent girls lost their lives. The extreme brutality with which the appellants acted shocks the judicial conscience. Failure to impose a death sentence in such grave cases where it is a crime against the society particularly in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by S. 302 of the Penal Code. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellants deserve for having committed the reprehensible and gruesome murders of the two innocent girls to wreak their personal vengeance over the dispute they had with regard to property with their mother Smt. Bulakan is nothing but death. As a measure of social necessity and also as a means of deterring other potential offenders the sentence of death on the two appellants Asharfi Lal and Babu is confirmed."

75. While dealing with the question of brutality, in the case of **Subhash Ramkumar Bind @ Vakil and another v. State of Maharashtra**[28], the Supreme Court has held that in every incident of murder brutality is involved but that brutality by itself will not bring it within the ambit of rarest of rare cases for imposition of death penalty. The requirement to prove the fact that brutality in the present case was exceptional and rarest of rare also to show that there is something uncommon about the

28 AIR 2003 SC 269

crime which renders the sentence of imprisonment of life inadequate and called for death sentence.

76. In the case of **Dhananjoy Chatterjee v. State of W.B.**[29], the Supreme Court while dealing with the question of penology for imposing death penalty, has held that Courts are required to impose proper punishment in the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. Paragraphs 14 and 15 are relevant and read as under:

> "14. In recent years, the rising crime rate – particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot

29 (1994) 2 SCC 220 : 1994 SCC (Cri) 358

> be ignored and similarly mitigating circumstances have also to be taken into consideration.
>
> 15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

77. While dealing with the question of imposition of death sentence affirmed by the Supreme Court, the Supreme Court in the matter of **Sonu Sardar v. State of Chhattisgarh**[30], in which case death sentence upon young male has been imposed, has held that the appellant though young but having no consideration for human lives and his criminal propensities being beyond reform, is a menace to the society, death sentence is proper being a case of rarest of rare, and observed in paragraphs 18 to 22 as follows: -

> "18. As against these aggravating circumstances, the trial court did not find any mitigating circumstance in favour of the appellant to avoid the death penalty. This is, therefore, not one of those cases in which the trial court has not recorded elaborate reasons for awarding death sentence to the appellant as contended by the learned counsel for the appellant.
>
> 19. Regarding the role of the appellant in the

30 (2012) 4 SCC 97

commission of the offence of dacoity and murder, we have already found that the turban and T-shirt of the appellant, which were seized and sent for examination to the Forensic Science Laboratory, had presence of human blood. We have also found that the axe and the iron rod, which were recovered pursuant to the statement of the appellant, had also bloodstains. We have also found from the evidence of PW-1 that when her mother was cooking food and came out on hearing the commotion, the appellant was demanding money from her father and her father gave to the appellant all the money which he was having in his pocket.

20. There is, therefore, clear and definite evidence in this case to show that the appellant not only participated in the crime, but also played the lead role in the offence under Section 396 IPC. This is, therefore, not a case where it can be held that the role of the appellant was not such as to warrant death sentence under Section 396 IPC.

21. In a recent judgment in Sunder Singh v. State of Uttaranchal[31] this Court found that the accused had poured petrol in the room and set it to fire and closed the door of the room when all the members of the family were having their food inside the room and, as a result, five members of the family lost their lives and the sixth member of the family, a helpless lady, survived. This Court held that the accused had committed the crime with premeditation and in a cold-blooded manner without any immediate provocation from the deceased and all this was done on account of enmity going on in respect of the family lands and this was one of those rarest of rare cases in which death sentence should be imposed.

22. The facts in the present case are no different. Five members of a family including two minor children and the driver were ruthlessly killed by the use of a knife, an axe and an iron rod and with the help of four others. The crime was obviously committed after premeditation with absolutely no consideration for human lives and for money. Even though the appellant is young, his criminal propensities are beyond reform and he is a menace to the society. The trial court and the High Court

31 (2010) 10 SCC 611

were therefore right in coming to the conclusion that this is one of those rarest of rare cases in which death sentence is the appropriate punishment."

78. While dealing with serious consideration relating to imposing of death sentence, the Supreme Court in the matter of **Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra**[32], in paragraph 135, has observed as follows: -

> "135. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently, a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realise the absolute nature of this right, in the sense that is a source of all other rights. Other rights may be limited, and may even be withdrawn and then grated again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away, all other rights cease to exist."

79. On the basis of law enunciated by the Supreme Court on the subject i.e. for imposition of death sentence, the Supreme Court in the matter of **Ramnaresh and others v. State of Chhattisgarh**[33] has summarized the instances for imposition of death sentence in which the sentence other than death sentence would not be adequate or meaningful, and has observed in paragraph 76 as follows: -

> "76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh (supra) and thereafter, in Machhi Singh (supra).

32 (2009) 6 SCC 498
33 (2012) 4 SCC 257

The aforesaid judgments, primarily dissect these principles into two different compartments—one being the “aggravating circumstances” while the other being the “mitigating circumstances”. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) CrPC.

Aggravating Circumstances:

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

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

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

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

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

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

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of

himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

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

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

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

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

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

Mitigating Circumstances:

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

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

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

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

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of

> evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
>
> (7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."
>
> The Supreme Court has summarized following principles for consideration for imposition of capital sentence: -
>
> (1) The Court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.
>
> (2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.
>
> (3) Life imprisonment is the rule and death sentence is an exception.
>
> (4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.
>
> (5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

80. In order to decide whether death sentence would be the only meaningful and adequate sentence, the courts are required to draw a balance sheet of aggravating and mitigating circumstances. The Supreme Court in **Ramnaresh** (supra) has further observed in paragraph 79 as follows: -

> "The Court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective

> weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of "just deserts" that serves as the foundation of every criminal sentence that is justifiable. In other words, the "doctrine of proportionality" has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large."

81. The Supreme Court in the matter of **Shankar Kisanrao Khade v. State of Maharashtra**[34] (Hon'ble Mr. Justice Madan B. Lokur in a separate but concurring judgment) reiterated the law laid down in **Bachan Singh** (supra) and **Machhi Singh** (supra) and quoted paragraph 33 of **Rajendra Pralhadrao Wasnik v. State of Maharashtra**[35] with approval which laid down various principles for awarding sentence viz., Aggravating circumstances – (Crime test) and Mitigating circumstances – (Criminal test), and ultimately in paragraph 52, the Supreme Court has held that the tests which have to be applied while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". Paragraph 52 of the report states as under (SCC p. 576, para 52): -

> "52. 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

34 (2013) 5 SCC 546
35 (2012) 4 SCC 37 : (2012) 2 SCC (Cri) 30

> 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 the rare case test (R-R test). 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 intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The 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."

In paragraph 106, Their Lordships also considered and suggested several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. Paragraph 106 of the said report states as under: -

> "106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:
>
> (1) the young age of the accused (Amit v. State of Maharashtra[36] aged 20 years, Rahul[37] aged 24

36 (2003) 8 SCC 93 : 2003 SCC (Cri) 1959
37 Rahul v. State of Maharashtra, (2005) 10 SCC 322 : 2005 SCC (Cri) 1516

years, Santosh Kumar Singh[38] aged 24 years, Rameshbhai Chandubhai Rathod (2)[39] aged 28 years and Amit v. State of U.P.[40] aged 28 years);

(2) the possibility of reforming and rehabilitating the accused in Santosh Kumar Singh[38] and Amit v. State of U.P.[40] the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (Nirmal Singh[41], Raju[42], Bantu[43], Amit v. State of Maharashtra[36], Surendra Pal Shivbalakpal[44], Rahul[37] and Amit v. State of U.P.[40]);

(4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh[41], Mohd. Chaman[45], Raju[42], Bantu[43], Surendra Pal Shivbalakpal[44], Rahul[37] and Amit v. State of U.P.[40]).

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one the courts (State of T.N. v. Suresh[46], State of Maharashtra v. Suresh[47], Bharat Fakira Dhiwar[48], Mansingh[49] and Santosh Kumar Singh[38]);

(6) the crime was not premeditated (Kumudi Lal[50], Akhtar[51], Raju[42] and Amrit Singh[52]);

(7) the case was one of circumstantial evidence (Mansingh[49] and Bishnu Prasad Sinha[53]).

38 Santosh Kumar Singh v. State, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469
39 Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764 : (2011) 1 SCC (Cri) 883
40 (2012) 4 SCC 107 : (2012) 2 SCC (Cri) 590
41 Nirmal Singh v. State of Haryana, (1999) 3 SCC 670 : 1999 SCC (Cri) 472
42 Raju v. State of Haryana. (2001) 9 SCC 50 : 2002 SCC (Cri) 408
43 Bantu v. State of M.P., (2001) 9 SCC 615 : 2002 SCC (Cri) 777
44 Surendra Pal Shivbalakpal v. State of Gujarat, (2005) 3 SCC 127 : 2005 SCC (Cri) 653
45 Mohd. Chaman v. State (NCT of Delhi), (2001) 2 SCC 28 : 2001 SCC (Cri) 278
46 (1998) 2 SCC 372 : 1998 SCC (Cri) 751
47 (2000) 1 SCC 471 : 2000 SCC (Cri) 263
48 State of Maharashtra v. Bharat Fakira Dhiwar, (2002) 1 SCC 622 : 2002 SCC (Cri) 217
49 State of Maharashtra v. Mansingh, (2005) 3 SCC 131 : 2005 SCC (Cri) 657
50 Kumudi Lal v. State of U.P., (1999) 4 SCC 108 : 1999 SCC (Cri) 491
51 Akhtar v. State of U.P., (1999) 6 SCC 60 : 1999 SCC (Cri) 1058
52 Amrit Singh v. State of Punjab, (2006) 12 SCC 79 : (2007) 2 SCC (Cri) 397
53 Bishnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467 : (2008) 1 SCC (Cri) 766

> In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (Kumudi Lal[50]) and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput[54])."

Further, Their Lordships also laid down the principal reasons for confirming death penalty in paragraph 122 which are as under:-

> "(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan[55], Dhananjoy Chatterjee[29], Laxman Naik[56], Kamta Tewari[57], Nirmal Singh[41], Jai Kumar[58], Satish[59], Bantu[43], Ankush Maruti Shinde[60], B.A. Umesh[61], Mohd. Mannan[62] and Rajendra Pralhadrao Wasnik[35]);
>
> (2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee[29], Jai Kumar[58], Ankush Maruti Shinde[60] and Mohd. Mannan[62]);
>
> (3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar[58], B.A. Umesh[61] and Mohd. Mannan[62]);
>
> (4) the victims were defenceless (Dhananjoy Chatterjee[29], Laxman Naik[56], Kamta Tewari[57], Ankush Maruti Shinde[60], Mohd. Mannan[62] and Rajendra Pralhadrao Wasnik[35]);
>
> (5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee[29], Laxman Naik[56], Kamta Tewari[57], Nirmal Singh[41], Jai Kumar[58], Ankush Maruti Shinde[60], B.A. Umesh[61] and Mohd. Mannan[62]) and in three cases the antecedents or

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54 Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56 : (2012) 1 SCC (Cri) 359
55 Jumman Khan v. State of U.P., (1991) 1 SCC 752 : 1991 SCC (Cri) 283
56 Laxman Naik v. State of Orissa, (1994) 3 SCC 381 : 1994 SCC (Cri) 656
57 Kamta Tiwari v. State of M.P., (1996) 6 SCC 250 : 1996 SCC (Cri) 1298
58 Jai Kumar v. State of M.P., (1999) 5 SCC 1 : 1999 SCC (Cri) 638
59 State of U.P. v. Satish, (2005) 3 SCC 114 : 2005 SCC (Cri) 642
60 Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667 : (2009) 3 SCC (Cri) 308
61 B.A. Umesh v. State of Karnataka, (2011) 3 SCC 85 : (2011) 1 SCC (Cri) 801
62 Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317 : (2011) 2 SCC (Cri) 626

> the prior history of the convict was taken into consideration (Shivu[7]; B.A. Umesh[61] and Rajendra Pralhadrao Wasnik[35]).”

82. In the light of aforesaid proposition of law, we are required to scrutinize the case in hand minutely in the light of aggravating circumstances and mitigating circumstances of the present case and to draw a balance-sheet to decide whether present case falls within the category of rarest of rare, whether there is no chance of reformation of the appellants, whether imprisonment for life which is the rule would not be adequate and would not meet the ends of justice and whether imposition of death penalty would be the only appropriate and meaningful sentence.

83. In case of imposing of capital sentence, the law requires the court to record special reasons for awarding such sentence. Therefore, we have to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances (crime test) at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attending circumstances, though these factors may not be similar or identical in all cases.

84. Before we proceed further, it would be appropriate to notice the

special reasons recorded by the trial Court while awarding death sentence to the appellants in paragraph 92 of its judgment which is as under: -

> आरोपीगण ने जब भेल सिंह एवं अन्य प्रार्थीगण सो रहे थे, तब उनके निवास स्थान में घातक आयुध से सज्जित होकर, रात्रौ गृह भेदन कारित किया, भेल सिंह की हत्या करने के पश्चात उसकी हत्या के तथ्य को बाकी प्रार्थीगण को बताकर भयाक्रान्त किया, घटना स्थल पर बर्बतापूर्वक अथवा पैशाचिक रूप से ठण्डे दिमाग से अपराध कायरता पूर्ण ढंग से कारित किया, अपराध कारित करने के पश्चात घटना स्थल पर उनके द्वारा चाय बनवाकर पी गई, सेब फल खाया गया । आरोपीगण के उक्त कृत्य से निःसन्देह समुदाय में सघन और घोर रोष को अत्पन्न किया है और समुदाय की सामूहिक अन्तष्चेतना को विनष्ट किया है। आरोपीगण द्वारा लगभग मात्र चार घण्टे के भीतर ही जिस प्रकार इन घटनाओं को कारित किया, वह यह दर्शाता है कि यह विरल से विरलतम मामला है। प्रहारों की संख्या, उनके स्थान और उनमें उपयोग की गई शक्ति आरोपीगण सुनील उर्फ बलीकरण एवं अमित की बर्बर मानसिकता को दर्शाते है। आरोपीगण सुनील एवं अमित के उक्त कृत्य से यह पाया जाता है कि इन आरोपीगण ने अत्यंत गंभीर अपराध को अपनी जीविकोपार्जन का साधन बना लिया है। आरोपीगण सुनील एवं अमित समाज के लिए एक अभिशाप है।, इन आरोपीगण का सुधार या पुर्नवास नहीं किया जा सकता है और वे लगातार अपना आपराधिक कार्य करते ही रहेंगे।

85. We are of the view that the special reasons recorded by the learned Additional Sessions Judge not at all satisfy any of the tests including R-R test. We have to apply all three tests in the present case to decide whether the learned Additional Sessions

Judge is justified in awarding death sentence to the appellants and for confirmation of death sentence.

Crime test

86. In the present case, the appellants firstly attacked Sewakram (PW-34) – watchman and thereafter, attacked Chunnulal (PW-3) with deadly weapons and took him to his house and attacked his family members and murdered Bhel Singh by causing hammer blow and also attacked and injured his family members. Thereafter, the appellants committed the offence of house-trespassing into the house of H.N. Verma (PW-2) and seriously injured his daughter Anita Rani (PW-4) by gunshot injury and thereafter they trespassed into the house of to B.R. Chandradev (PW-6) and committed robbery by looting cash, jewelleries and ornaments. Thus, the offences of murder, attempt to cause death (three counts), robbery with deadly weapons (nine counts) and house-trespass (three counts) were committed by the appellants in one go. The statements of injured eyewitnesses duly supported by medical evidence clearly state the ghostly manner in which the crime was executed. The action of the appellants in our view, was not only inhuman but barbaric also. The manner in which the commission of offence of murder, robbery and attempt to murder was so meticulously and carefully planned coupled with sheer brutality and apathy for humanity in the execution of the

offence, is an aggravating circumstance which goes against the appellants herein and it satisfies the crime test.

Criminal test

87. Now, let us examine whether "criminal test" has been satisfied. The accused persons were aged about 24 years at the time of incident. This is a mitigating factor favouring the accused persons. But they have criminal antecedents. They have been convicted for offence under Sections 460, 394 read with Section 397 & 307 read with Section 34 of the IPC in the intervening night of 4th & 5th October, 2010 – one day prior to present crime and sentenced for life imprisonment in S.T. No.120/2011, and the above-stated conviction & sentence were subject matter of Cr.A.No.319/2013 (Amit Gupta v. State of Chhattisgarh) and Cr.A.No.320/2013 (Sunil Sahu v. State of Chhattisgarh), and those appeals against that judgment were dismissed by us on 29-8-2016. It is also on record that accused / appellant herein Amit Gupta, who is a gangster of loot & dacoity, has an organized group for committing loot & dacoity at Fatehpur (U.P.), and they have committed the instant offences against innocent & defence-less persons in late nights by inflicting grievous injuries by deadly weapons. Therefore, we do not find any mitigating circumstance against the appellants except they are young persons aged about 30 years now.

R-R test

88. This brings us to the ultimate and final test i.e. R-R test (Rarest of Rare). After considering the entire material on record and after having held that though the crime test has been satisfied fully against the appellants and so also the criminal test except the age of the appellants, they were only 24 years of age when the crime was executed, we are of the view that this is not the rarest of rare case in which death sentence should be awarded to the appellants herein particularly keeping in view their young age, their chances of not indulging in commission of crime again, possibility of the appellants herein being reformed and rehabilitated cannot be ruled out as they were young when they committed the offence and they are not likely to be a menace or threat or danger to society or the community, there is nothing to suggest that they are likely to repeat similar crimes in future and following the law laid down by Their Lordships of the Supreme Court in **Amit v. State of Maharashtra** (supra), **Santosh Kumar Singh** (supra), **Rameshbhai Chandubhai Rathod** and **Amit v. State of U.P.** (supra) in which considering young age of the accused persons, Their Lordships were pleased to convert the death sentence into that of imprisonment for life. Upon thoughtful consideration, we are of the view that extreme sentence of death penalty is not warranted in the facts and circumstances of the case. In our view, imprisonment for

life would be completely adequate and would meet the ends of justice. Accordingly, we direct commutation of death sentence into imprisonment for life. We further direct that the life sentence must extend to the full life of the appellants subject to any remission or commutation at the instance of the Government for good and sufficient reasons.

Conclusion

89. Consequently, Cr.Ref.No.2/2014 made by the Additional Sessions Judge (FTC), Durg for confirmation of imposition of death sentence to appellants – Sunil @ Balikaran Sahu and Amit Gupta is answered accordingly.

90. Cr.A.No.586/2014 filed on behalf of Sunil @ Balikaran Sahu and Amit Gupta is partly allowed. Conviction of the appellants under Section 302 read with Section 34 of the IPC is maintained, but, sentence of death is converted into life imprisonment by maintaining the fine amount. Their conviction and sentences under Sections 460, 324, 307, 506 Part-II & 397 of the IPC are also maintained. However, all the sentences awarded will run consecutively.

Compliance

91. The Registrar (Judicial) is directed to send a duly attested copy of this judgment / order to the concerned Court of Session as mandated under Section 371 of the CrPC for needful.

Sd/-
(Deepak Gupta)
Chief Justice

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Reference No.2 of 2014

In reference of State of Chhattisgarh

Versus

Sunil @ Balikaran Sahu and another

AND

Criminal Appeal No.586 of 2014

Sunil @ Balikaran Sahu and another

Versus

State of Chhattisgarh

HEAD NOTE

Death sentence awarded by the Additional Sessions Judge is commuted to imprisonment for life finding that it is not the rarest of rare case.

मामले को विरल से विरलतम नहीं पाते हुए, अतिरिक्त सत्र न्यायाधीश द्वारा दी गई मृत्यु दण्ड की सजा का आजीवन कारावास में लघुकरण किया गया।