[2023] 16 S.C.R. 765 : 2023 INSC 990

CASE DETAILS

MADAN

v.

STATE OF UTTAR PRADESH

(Criminal Appeal Nos. 1381-1382 of 2017)

NOVEMBER 09, 2023

[B. R. GAVAI, B.V. NAGARATHNA AND PRASHANT KUMAR MISHRA, JJ.]

HEADNOTES

Issue for consideration: Six deaths were caused on account of brutal firing by the appellants and other accused persons. The trial court imposed sentence of capital punishment to the appellants ('M' and 'S') herein for the offence punishable u/s. 302 r/w. s.149 of IPC, while it sentenced accused 'I' to imprisonment for life for the same. (i) Whether the prosecution has proved beyond reasonable doubt the case for conviction u/s. 302 of IPC; (ii) Whether the present case falls in the category of rarest of rare cases; (ii) Whether on the facts of the present case, the capital punishment imposed on appellant- deserves to be maintained or not.

Penal Code, 1860 – s. 302 r/w. s.149 – The High Court, by the impugned judgment, while commuting the sentence of appellant 'S' from capital punishment to imprisonment for life, dismissed the appeals filed by appellant 'M' and accused 'I' and confirmed their conviction and sentence awarded by the trial court – The High Court further confirmed the Death Reference of the appellant 'M' – Propriety:

Held: The incident has taken place in two parts: The first place is near the house of 'R' – Appellant 'M' along with 'I' and other accused armed with licensed guns, rifles and country-made pistols came from behind and started firing indiscriminately – As a result of which, two fell down on the Khadanja and died on the spot – When 'MA', after hearing the sound of gunfire, came out of his house, the accused persons also fired shots at him – As a result of which, he also fell down – The second place is the house of Up-Pradhan-

'RN' – After indiscriminate firing by the accused persons, deceased 'RK' and PW-2 ran away to save their lives and RK entered the house of 'RN' – The accused persons followed them and entered into the house of 'RN' and fired shots at RK and two other persons – As a result of which, all three died – The prosecution has duly proved its case beyond reasonable doubt in view of the testimony of PW-1 being duly corroborated by the testimonies of PW-10 and PW-11 – This Court is of the considered view that the testimonies of these witnesses duly establish that these witnesses have witnessed the firing on three persons, who died on the spot – These witnesses have also seen the accused persons assaulting RK and PW-2 who had received the firearm injuries, who ran to the house of to take shelter – This Court is further of the considered view that though PW-7 is a sole witness insofar as the firing on deceased three persons is concerned, his testimony is cogent, reliable and trustworthy and can be made basis for coming to a conclusion that it is the present appellants along with other accused who have caused the death of deceased – In any case, his testimony is duly corroborated by the evidence of PW-1 who had immediately come to the second spot after the occurrence of the incident when PW-7 informed PW-1 about the incident occurring in his house – In the instant case, both the High Court and the trial court have meticulously scrutinized the evidence and found the testimony of the eye witnesses trustworthy and reliable – This Court after scrutinizing the evidence again find that merely because there are certain inconsistencies in the evidence of the witnesses, their evidence cannot be discarded – In totality of the circumstances, the prosecution has proved beyond reasonable doubt the case for conviction u/s. 302 of IPC and the appeals in that regard are liable to be rejected. [Paras 27, 39, 42, 43, 49]

Penal Code, 1860 – Whether the present case falls in the category of rarest of rare cases:

Held: Six deaths were caused on account of brutal firing by the appellants and other accused persons – The entire village and the people residing in the surrounding areas must have been shocked by such heinous and gruesome act – Not only that, one of the eye witnesses was also murdered during the pendency of the trial – The terror of the appellants and other accused persons was of such a high magnitude that even the witnesses who had received grievous injuries did not support the prosecution case and were

required to be declared hostile – As such, four innocent persons were shot from behind – Therefore, the act of the appellants and the other accused would certainly be the one which shocked the collective conscience of the society and fall in the category of rarest of rare cases. [Para 57]

Penal Code, 1860 – Whether on the facts of the present case, the capital punishment imposed on appellants deserves to be maintained or not.

Held: As per the Prison Conduct Report submitted by the Superintendent, District Jail, appellant 'M' is currently 64 years old – He has been in prison for 18 years 3 months – During this entire duration, he has no history of any kind of prison offence – The Report further shows that he has not been involved in any form of quarrels or fights in prison – The Report shows that he has cordial relations with other prisoners in his barrack and follows the prison rules – Taking into consideration all these factors, this Court finds that the present case is not a case wherein it can be held that imposition of death penalty is the only alternative – Another reason that weighs is that from the evidence of the witnesses, it is clear that the role attributed to all the accused persons has been similar – The evidence of witnesses would show that the role attributed is that all the accused persons including both the appellants herein had fired shots and indiscriminately indulged in the said firing – The role attributed in the evidence of the eye witnesses is identical to all the accused – In that view of the matter, the High Court was not justified in imposing death penalty on appellant 'M' while converting the death penalty imposed upon 'S' to life imprisonment – If the judgment of the High Court is maintained, it would lead to an anomalous situation – Whereas appellant 'S' would be entitled for consideration of his case for remission and pre-mature release on completion of a particular number of years in accordance with the relevant rules, appellant 'M' will have to face death penalty – Therefore, the interest of justice would be met by converting death penalty into life imprisonment i.e. actual imprisonment for a period of 20 years without remission – Appeal filed by 'S' dismissed and the appeal filed by appellant-'M'partly allowed by converting his death penalty into imprisonment for a fix term of 20 years.[Paras 69, 76-78]

LIST OF CITATIONS AND OTHER REFERENCES

Bachan Singh v. State of Punjab (1980) 2 SCC 684 – followed.

Piara Singh and Others v. State of Punjab [1978] 1 SCR 597 : (1977) 4 SCC 452; *State of Uttar Pradesh v. Krishna Master and Others* [2010] 9 SCR 563 : (2010)12 SCC 324; *State of Andhra Pradesh v. Bogam Chandraiah and Another* (1986) 3 SCC 637; *Darbara Singh v. State of Punjab* [2012] 7 SCR 541 : (2012) 10 SCC 476; *Subodh Nath and Another v. State of Tripura* [2013] 4 SCR 581 : (2013) 4 SCC 122; *Karnel Singh v. State of M.P.* [1995] 2 Suppl. SCR 629 : (1995) 5 SCC 518; *Machhi Singh and Others v. State of Punjab* [1983] 3 SCR 413 : (1983) 3 SCC 470; *Ramnaresh and Others v. State of Chhattisgarh* [2012] 3 SCR 630 : (2012) 4 SCC 257; *Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka* [2008] 11 SCR 93 : (2008) 13 SCC 767; *Mohinder Singh v. State of Punjab* [2013] 3 SCR 90 : (2013) 3 SCC 294 – relied on.

Jaikam Khan v. State of Uttar Pradesh (2021) 13 SCC 716; *Khema @ Khem Chandra v. State of Uttar Pradesh* 2022 SCC OnLine SC 991; *Acharaparambath Pradeepan and Another v. State of Kerala* [2006] 10 Suppl. SCR 1101 : (2006) 13 SCC 643; *Harjinder Singh alias Bhola v. State of Punjab* (2004) 11 SCC 253; *Waman and Others v. State of Maharashtra* [2011] 6 SCR 1072 : (2011) 7 SCC 295; *Shera Singh v. State of Punjab* (1996) 10 SCC 330; *Shankar Kisanrao Khade v. State of Maharashtra* [2013] 6 SCR 949 : (2013) 5 SCC 546; *Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka* (2017) 5 SCC 415 : [2017] 2 SCR 62; *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* (2002) 2 SCC 35 : [2001] 5 Suppl. SCR 612; *Sundar @ Sundarrajan v. State by Inspector of Police* 2023 SCC OnLine SC 310; *Rajendra Pralhadrao Wasnik v. State of Maharashtra* [2018] 14 SCR 585 : (2019) 12 SCC 460; *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498 : [2009] 9 SCR 90; *Chhannu Lal Verma v. State of Chhattisgarh* [2018] 14 SCR 355 : (2019) 12 SCC 438; *Manoj and Others v. State of Madhya Pradesh* (2023) 2 SCC 353; *Babasaheb Maruti Kamble v. State of Maharashtra* (2019) 13 SCC 640; *Irappa Siddappa Murgannavar v. State of Karnataka* (2022) 2 SCC 801 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1381-1382 of 2017.

From the Judgment and Order dated 22.02.2017 of the High Court of Judicature at Allahabad in CCN No. 3520 of 2015 and RN No. 09 of 2015.

With

Criminal Appeal No. 1790 of 2017.

Appearances:

Anand Grover, Sr. Adv., Aarif Ali, Mohd. Irshad Hanif, Ms. Shreya Rastogi, Mujahid Ahmed, Mohd. Ehatsham Rao, Kailesh U. More, Khalid Azeez, Bhavesh Seth, Aditya P. Rath, Ms. Harini Raghupathy, Manish Kumar Vikkey, Ms. Sunita Sharma, Himanshu Mehra, Ms. Kanchan Jha, Advs. for the Appellant.

Brijender Chahar, Sr. Adv., Vishwa Pal Singh, Dr. Vijendra Singh Mahndiyan, Mukesh Kumar, Bharpur Singh, Sandeep Kumar, Ashutosh Bhardwaj, Advs. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

B. R. GAVAI, J.

1. These appeals challenge the judgment and order dated 22nd February 2017, passed by the Division Bench of the High Court of Judicature at Allahabad in Capital Case Nos. 3359 and 3520 of 2015 with Reference No. 9 of 2015 and Criminal Appeal No. 3519 of 2015, thereby dismissing the appeals filed by appellant Madan and another accused Ishwar; whereas, it allowed in part, the appeal filed by appellant Sudesh Pal. By the said judgment, the High Court confirmed the judgment and order of conviction and sentence dated 31st July 2015 passed by the Court of Additional Sessions Judge, Court No. 3, Muzzaffarnagar (hereinafter referred to as "trial court") in Sessions Case No. 09/2005 with Sessions Case No. 838 of 2005 and 10/2005, in respect of appellant – Madan, while

commuting the sentence of capital punishment to life imprisonment in respect of appellant – Sudesh Pal.

2. Shorn of details, the facts leading to the present appeals are as under:

2.1 The First Information Report ("FIR" for short) was lodged on a written report given by informant Lokendra (PW-1), on 14th October 2003 at P.S. Babri, District Muzzafarnagar, which was registered as Crime No. 197 of 2003, for offences punishable under Sections 147, 148, 149, 302, 307, 323 and 452 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"). The incident took place at 5.30 PM and the FIR came to be registered on the same day at 7.40 PM.

2.2 The report was recorded by one, Naresh Pal s/o Vijay Pal r/o village Barwala, District Baghpat on the oral report of Lokendra (PW-1). According to the FIR, Smt. Vimla Devi, who was the mother of Ram Kishan, cousin of Lokendra (PW-1), was a candidate in the election for Gram Pradhan; whereas the wife of one Arshad was the opposing candidate. On the one hand, Lokendra (PW-1) supported the candidature of Vimla Devi; whereas, the family of appellant Madan and Ram Bhajan supported the candidature of the wife of Arshad. When Vimla Devi came to be elected as Gram Pradhan along with Lokendra (PW-1), who also came to be elected as a member of the Gram Panchayat, appellant Madan and his family members bore a grudge with Lokendra (PW-1) and others on account of the feeling of jealousy.

2.3 The FIR states that on 14th October 2003, at about 5.30 PM, when Satendra, the real brother of Lokendra (PW-1), his nephew Sunil s/o Chandrapal, cousin Ram Kishan s/o Narain Singh @ Lala, Sukhpal Singh (PW-2) s/o Lotan Singh and his father Jai Singh (PW-8) s/o Ganga Ram were going to the house of *Up-Pradhan* Rizwan s/o Irshad Khan (PW-7) for discussing problems of the village, and had reached the house of Rashid s/o Mustafa, appellant Madan along with Rajveer, Ram Bhajan, Ramveer, and Kanwar Pal who were the sons of Ishwar along with Ishwar himself, who was the brother-in-law (*sala*) of appellant Madan, also known as *Pahalwan,* appellant Sudesh Pal, who was the real brother-in-law (*sadu*) of appellant Madan along with Neetu, who was the nephew of appellant Madan, armed with licensed guns, rifles and country-made pistols came from behind and

started firing indiscriminately. As a result of the said firing, Satendra and Sunil fell down on '*Khadanja*'. When Masooq Ali s/o Abdul Gaffur came out of his house upon hearing the sound of gunfire, the accused persons shot fire at him due to which he also fell down. Following which, Ram Kishan and Sukhpal Singh (PW-2) ran away to save their lives. Ram Kishan thereafter entered into the house of the *Up-Pradhan* Rizwan.

2.4 It is further stated in the FIR that the accused persons thereafter entered the house of *Up-Pradhan* Rizwan and fired shots at Ram Kishan, Rizwan and Rihan. They also fired shots at Sukhpal Singh (PW-2). Ram Kishan, Sunil and Satendra died on the spot. When Mumtaz Khan (PW-5) s/o Imtyaz reached at the place of incident, the accused persons fired shots at him as well. The accused persons further assaulted Jai Singh (PW-8), father of Lokendra (PW-1) with the '*butt'* of the gun who then ran away to save his life. Following which, when the villagers were taking Rizwan, Rihan, Masooq Ali, Sukhpal Singh (PW-2) and Mumtaz Khan (PW-5) to the hospital; Rizwan, Rihan and Masooq Ali succumbed to their injuries and died on the way and their bodies were accordingly kept in their houses. When the accused persons were firing at the place of the incident, Ram Pal s/o Salet, Sudhir (PW-11) s/o Mahendra, Anil (PW-3) s/o Chandrapal, Mahesh Pal (PW-4) s/o Prahlad, Harpal Singh (PW-10) s/o Dhara, Mahipal s/o Atal Singh along with other villagers reached and saw the said incident. Lokendra (PW-1) also reached the place of the incident and witnessed the incident with his own eyes and requested to register the report and take legal action.

2.5 The FIR was registered and the investigation was subsequently taken over on 14th October 2003 by Mr. Raghunandan Singh Bhadauria (PW-24), who was the then Station House Officer (for short 'SHO'). He recorded the statement of Lokendra (PW-1) and proceeded to the place of the incident in front of the house of Rashid s/o Mustafa where he found the dead bodies of Satendra, Jai Singh (PW-8) and Sunil in a pool of blood. The dead body of Masooq Ali s/o Abdul Gafoor was on the cot in his house. When he reached the house of Rizwan, where he found the dead bodies of Rizwan and Rihan s/o Irshad Khan (PW-7) lying on the cot, whereas the body of Ram Kishan s/o Narain Singh was found lying in a pool of blood in the *veranda* of the said house. Upon inspection of the place of the incident, Raghunandan Singh

Bhadauria (PW-24) found empty cartridges near the dead body which were taken into possession. Three empty cartridges of 12 bore 9 mm were found and taken into possession in the presence of witnesses Anil Kumar (PW-3) s/o Chandrapal Jat and Sri Dheer Singh s/o Prahlad Singh. The recovery memo (Ext. Ka – 2) was accordingly prepared and signed. He then took plain and blood-stained mud from the spot in the presence of the said witnesses. The recovery memo for the same was prepared and kept sealed in two separate containers (Ext. Ka-3). He also collected plain and blood-stained mud from where the bodies of Rizwan, Rihan and Ram Kishan were lying and a recovery memo (Ext. Ka – 6) was prepared to that effect. Further, empty cartridges of 12 bore 9 mm, 5 bullets along with another such bullet were recovered and taken into custody which were then sealed in the presence of the witnesses. However, Raghunandan Singh Bhadauria (PW-24) could not recover the blood-stained mud from the place where Masooq Ali, Rizwan and Rihan fell down and were subsequently taken to the hospital due to the movement of persons at the place of occurrence.

2.6 The Investigating Officer then recorded the statement of other witnesses after which he inspected the place of the incident and prepared the site plan. After panchayatnama of the dead bodies, the same were sent for post-mortem examination through Head Constable Surendra Singh, Head Constable Ram Kumar, Constable Yashpal and Constable Satya Prakash. After Raghunandan Singh Bhadauria (PW-24) was transferred, the investigation was taken over by Surajpal Singh (PW-23), SHO on 18th October 2003. He took steps to execute non-bailable warrants issued against the accused persons and also took steps to initiate proceedings under Sections 82-83 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."). After the copies of the post-mortem report were obtained, the same were noted and enclosed with the C.D. of the deceased Ram Kishan, Masooq Ali, Rizwan, Rihan, Satendra and Sunil. Statements of witnesses Sudhir (PW-11), Harpal Singh (PW-10), Mahesh Pal (PW-4), and Mahipal were recorded at village Butrada. Surajpal Singh (PW-23) also recorded the statements of Rashid Sachdev and Ram Mehar, who were the witnesses of the panchayatnama. During investigation, Surajpal Singh (PW-23) received information that one co-accused, who was involved along with the accused persons named in the FIR had died in the same incident and his body was taken away by the accused persons and the same was found and recovered

from the *jungle* (agricultural field) of village Pinana regarding which, Case Crime No. 799 of 2003 was registered at P.S. Kotwali, for offences punishable under Sections 302 and 201 of IPC. Surajpal Singh (PW-23) thereafter recorded the statements of other witnesses and also raided the house of the accused persons.

2.7 Thereafter, investigation was transferred and taken over on 21st December 2003 by Inspector Adesh Kumar Sharma (PW-20), EOW, Meerut. Accused persons Ishwar and Kunwar Pal were taken in police remand. He then proceeded to the place of the incident along with police personnel for the recovery of weapon; whereupon, a country-made pistol and the gun used in the incident were recovered at the instance of accused persons Ishwar and Kanwar Pal. Further, one empty cartridge was found in the gun whereas one empty cartridge of 9 mm was found in the country-made pistol. Both the fire-arms were in operating condition and the Recovery Memo for the gun and the country-made pistol were prepared and sealed in two separate clothes. Following which, panchayatnama was prepared by Sub-Inspector Surendra Singh (PW-16) with regards to the three deceased, namely, Masooq Ali, Rihan and Rizwan. Additionally, panchayatnama and inquest reports with regards to the deceased, namely, Ram Kishan, Satendra and Sunil were prepared by another Sub-Inspector.

2.8 Subsequently, the investigation was transferred and handed over to Bahadur Singh Chauhan, the then C.B.C.I.D. (PW-17) on 13th January 2004 by the orders of higher authority. Bahadur Singh Chauhan (PW-17) recorded the statement of Lokendra (PW-1), inspected the place of the incident and accordingly prepared a site plan. The statements of other witnesses were also recorded. Bahadur Singh Chauhan (PW-17) thereafter recorded the statements of earlier investigating officers in C.D.

2.9 Subsequently, the investigation was again transferred from C.B.C.I.D. to the civil police. After the chargesheet was submitted by Bahadur Singh Chauhan (PW-17) against appellant Madan along with other accused persons, namely, Kanwar Pal and Ishwar; the investigation was taken over by the then S.H.O. P.S. Babri, Siddh Narayan Yadav on 18th October 2004 who was examined as PW-19. Siddh Narayan Yadav (PW-19) submitted the chargesheet against appellant Sudesh Pal and another accused person who was absconding at the time. Siddh Narayan Yadav (PW-19) was

the fifth IO of this case and he also submitted a chargesheet against accused Rajvir along with other accused persons.

2.10 The post-mortem of deceased Ram Kishan was conducted by Dr. Arvind Kumar Aggarwal (PW-14) on 15th October 2013 at 12.50 PM. The injuries sustained by deceased Ram Kishan are thus:

1. Wound of firearm 4 cm X 1.5 cm in depth of the muscle in the right side off ace and aside of the nose. Around the wound there were tattooing in the area of 20 cm x 7 cm.
2. Wound of entering of 8 firearms 20 cm X 19 cm towards left side of chest which was in deep ranging from ½ cm X ½ cm from the surface of the chest. Around the wound no blacking and tattooing were present. One metal pellet was taken out from the cavity of the chest.
3. Wound of entering of firearm ½ cm X ½ cm X till the cavity of abdomen, towards left of abdomen and 1 cm above of tunica crest.
4. Wound of entering of firearms towards right side of the chest, 5 m away from the right side nipple. As per position of 2 hrs. 1.5 cm X 1 cm in deep in the cavity of the chest.
5. Wound of entering of firearm ½ cm X ½ cm in deep of cavity of the abdomen, around 5 cm away from the right side navel, in the position of 8 hrs.
6. Mark of bruises towards the opposite of chest in the area of 1.4 cm X 7 cm in right side of the chest.
7. Wound of exit of firearm in the area of 33 cm X 21 cm, towards back side of the chest and was in deep from 2 cm X 1.5 cm to 1cm X 1 cm in the cavity of the chest.
8. Wound of entering of firearm 1.5 cm X 1 cm in depth of the muscle, beneath knee on right forearm.
9. Wound of exit of firearm 3.5 cm to 3 cm in depth of the muscle in the mid of right side arm in the correspondence of injury No. 8 which is wound of entering of firearm.

10. Wound of entering of firearm in depth of muscle from 1 cm X ½ cm, in the inner portion of left upper side arm but 5 cm beneath from armpit. Around the wound the tattooing was present.

11. Wound of exit of firearm in depth of the muscle 1 cm X 1.5 cm, corresponding the injury No. 10.

12. Brusted wound in the area of 1.5 cm X 6 cm to 2.5 cm X 1 cm deep in the muscle.

2.11 The post-mortem of deceased Masooq Ali was conducted by Dr. Arvind Kumar Aggarwal (PW-14) on 15th October 2013 at 1.30 PM. The injuries sustained by deceased Masooq Ali are thus:

1. Wound of entering of firearm measuring ½ cm X ½ cm deep in the cavity of the chest and 8 cm away from left side nipple in the position of 11.00 hrs.

2. Wound of exit of firearm measuring 2 cm X 1.5 cm in deep in the cavity of chest, towards right side of chest beneath 11 cm of armpit and 14 cm away from the nipple in the position of 9 hrs.

2.12 The post-mortem of deceased Rizwan was conducted by Dr. Arvind Kumar Aggarwal (PW-14) on 15th October 2013 at 1.45 PM. The injuries sustained by deceased Rizwan are thus:

1. Wound of entering of firearm in deep of cavity of chest measuring ½ cm X ½ cm towards left side of chest, 2 cm beneath the outer portion of clavicle.

2. Wound of entering of firearm in deep of cavity of chest measuring 1 cm X 1 cm in front of the left side of chest 4 cm away from left nipple in the position of 7.00 hrs.

3. Wound of exit of firearm 2 cm X 1.5 cm in deep of the cavity of the chest towards back side of the chest 3 cm away from the middle line in right side and 7 cm beneath the neck corresponding the injury No. 2.

2.13 The post-mortem of deceased Rihan was conducted by Dr. Arvind Kumar Aggarwal (PW-14) on 15th October 2013 at 2.10 PM. The injuries sustained by deceased Rihan are thus:

1. Wound of entering of firearm 1.2 cm X 1.2 cm in deep of the bone, on upper side of the left shoulder. Around the wound tattooing was present. The bone beneath the injury was fractured.

2. Wound of exit of firearm 1 cm X 1 cm in deep of the cavity of the chest towards right side of the chest, 12 cm beneath of imprear angle of Scapula and 15 cm away from the middle line.

2.14 The post-mortem of deceased Satendra was conducted by Dr. Arvind Kumar Aggarwal (PW-14) on 15th October 2013 at 2.30 PM. The injuries sustained by deceased Satendra are thus:

1. Wound of entering of firearm ½ cm X ½ cm in deep of the bone towards the back side of the right shoulder and 7 cm beneath the upper portion. The bone beneath the injury was fractured.

2. Wound of exit of firearm 1.5 cm X 1 cm corresponding the injury No. 1 and on outer portion of right side collarbone.

3. Wound of exit of firearm ½ cm X ½ cm in deep of cavity of chest, towards left side of chest and 7 cm beneath the left nipple in the position of 7.00 hrs.

4. Wound of exit of firearm 2 cm X 1 cm in deep of cavity of the chest towards back side of left side chest, 16 cm beneath the scapula corresponding the injury.

2.15 The post-mortem of deceased Sunil was conducted by Dr. Arvind Kumar Aggarwal (PW-14) on 15th October 2013 at 3.00 PM. The injuries sustained by deceased Sunil are thus:

1. Wound of entering of firearm 4 cm x 3 cm in the deep of the cavity of the chest towards left side of the chest and 11 cm away from nipple in the position of 11.00 hrs.

2. Second and third rib beneath the injury were fractured.

3. The small four metal pellet and a bending piece of plastic in cylindrical shape was taken out from the cavity of the chest.

2.16 After completing the investigation, chargesheet came to be submitted against the arrested accused persons along with absconding ones in the court of jurisdictional Magistrate. Since the case was exclusively triable

by the Sessions Court, the same came to be committed to the Sessions Judge, Muzaffarnagar. Following which, charges were framed against appellants Madan and Sudesh Pal and other accused persons, namely, Kunwar Pal and Ishwar for offences punishable under Sections 148 and 449, Section 302 read with Section 149, Section 307 read with Section 149, Section 323 read with Section 149 of IPC by the trial court; whereas, an additional charge for offence punishable under Section 25 of the Arms Act, 1959 was framed against accused Ishwar.

2.17 Subsequently, accused Kunwar Pal absconded and the trial commenced against appellant Madan and co-accused Ishwar in Sessions Trial No. 09 of 2005, against appellant Sudesh Pal in Sessions Trial No. 838 of 2005 and against accused Ishwar in Sessions Trial No. 10 of 2005 for the charge under Section 25 of the Arms Act, 1959 arising out of Case Crime No. 204 of 2003. The accused persons denied the charges and pleaded to be tried.

2.18 The prosecution examined as many as 25 witnesses to prove the guilt of the accused persons. In the present case, three out of the six deceased persons, namely, Ram Kishan, Satendra and Sunil were related with Lokendra (PW-1) as his cousin, real brother, and nephew respectively. They were also related with Jai Singh (PW-8) and Anil (PW-3). The statements of the accused persons were recorded under Section 313 of Cr.P.C. wherein they denied the allegations against them and stated that they were not involved in the incident and were thus innocent. However, due to village election rivalry, they were being falsely implicated in this case but did not examine any witness in defence.

2.19 At the conclusion of trial, the trial court *vide* judgment dated 31st July 2015 held the accused persons guilty of committing the murder of six persons and accordingly convicted the appellants herein along with accused Ishwar for offences punishable under Sections 148 and 449, Section 302 read with Section 149, Section 307 read with Section 149, Section 323 read with Section 149 of IPC, while accused Ishwar was also additionally convicted for the offence punishable under Section 25 of the Arms Act, 1959. The trial court, observing the offences committed by the appellants herein to have been falling in the ambit of the rarest of the rare case, imposed sentence of capital punishment to the appellants herein for the offence punishable under

Section 302 read with Section 149 of IPC, while it sentenced accused Ishwar to imprisonment for life for the same. The trial court sentenced each of the three accused persons 3 years rigorous imprisonment under Section 148 of IPC; life imprisonment under Section 449 and Section 307 read with Section 149 of IPC and one year rigorous imprisonment under Section 323 read with Section 149 of IPC. The trial court further sentenced accused Ishwar to five years rigorous imprisonment under Section 25 of the Arms Act.

2.20 Being aggrieved thereby, the accused persons preferred their respective appeals before the High Court with regards to the conviction and sentence awarded by the trial court. The High Court, by the impugned judgment, while commuting the sentence of appellant Sudesh Pal from capital punishment to imprisonment for life, dismissed the appeals filed by appellant Madan and accused Ishwar and confirmed their conviction and sentence awarded by the trial court. The High Court further confirmed the Death Reference insofar as appellant Madan is concerned; whereas insofar as appellant Sudesh Pal is concerned, his appeal was partly allowed and the sentence of capital punishment imposed on him was converted to life imprisonment.

2.21 Being aggrieved thereby, the present appeals.

3. We have heard Shri Anand Grover, learned Senior Counsel appearing for appellant Madan in Criminal Appeal Nos. 1381-82 of 2017, Shri Manish Kumar Vikkey, learned counsel appearing for appellant Sudesh Pal in Criminal Appeal No. 1790 of 2017 and Shri Brijender Chahar, learned Senior Counsel appearing for respondent-State of Uttar Pradesh.

4. Shri Grover, learned Senior Counsel appearing for appellant Madan firstly, addressed us on merits of the matter. He submitted that the order of conviction as passed by the trial court and confirmed by the High Court is not at all sustainable. He submitted that initially 11 witnesses were cited as eye witnesses. However, 7 of them have turned hostile. The prosecution case is therefore left with only 4 alleged eye witnesses i.e. Lokendra (PW-1), Irshad Khan (PW-7), Harpal Singh (PW-10) and Sudhir (PW-11).

5. Shri Grover submitted that, from the testimony of Lokendra (PW-1) itself, it can be seen that his presence at the scene of crime is doubtful. It is submitted that the evidence of this witness is contradictory to his

original statement recorded under Section 161 Cr.P.C. There are substantial improvements in his evidence. Though in his statement recorded under Section 161 Cr.P.C., he stated that he was with a group of people, but in cross-examination he admitted that he was not walking along with the group, but was behind them by around 10 yards from the cross roads (towards the north) when the group of people reached Rashid's house. He submitted that Lokendra (PW-1) admitted that he could not clearly see the place of incident or the group of people from where he was standing. He further submitted that the said witness has admitted that on hearing the sound of firing, he ran further northwards from the cross-roads from Rashid's house and could not see the site.

6. Shri Grover submitted that there are also substantial contradictions in the testimony of Lokendra (PW-1) which casts doubt with regard to his presence at Rizwan's house. He submitted that, in the chief-examination, this witness has stated that on witnessing the shooting at Rashid's house, he ran towards Rizwan and Rihan's house and took cover there and witnessed the incident at Rizwan's house. However, in cross-examination, he contrarily stated that on hearing the sounds of firing, he ran further northwards from the cross-roads and stayed there for 15-20 minutes. From the evidence of Jai Singh (PW-8) and Sukhpal Singh (PW-2), father and uncle of Lokendra (PW-1) respectively, it is clear that Lokendra (PW-1) was not present at the place of incident. Even in the case registered by Lokendra (PW-1), he does not show himself to be an eye witness. It is submitted that there are contradictions in his testimony about the authorship of *Tehrir*.

7. Shri Grover submitted that if Lokendra (PW-1) had really accompanied the group, then certainly he would also have received some injuries. The learned Senior Counsel, relying on the judgments of this Court in the cases of ***Jaikam Khan v. State of Uttar Pradesh***[1] and ***Khema @ Khem Chandra v. State of Uttar Pradesh***[2]**,** submitted that the testimony of this witness, being totally contradictory, cannot be relied upon for convicting the appellant Madan.

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1 **(2021) 13 SCC 716**
2 **2022 SCC OnLine SC 991**

8. Shri Grover further submitted that Irshad Khan (PW-7) is the father of deceased Rizwan and Rihan, who were allegedly shot at their own house. He submitted that there are material contradictions in the evidence of Irshad Khan (PW-7) also. It is submitted that, in his statement recorded under Section 161 Cr.P.C., Irshad Khan (PW-7) stated that he was present on the roof of the adjoining house and not inside the room in his house and hence, could not have witnessed the incident at his house. It is submitted that these contradictions have been put to him in cross-examination. It is submitted that non-examination of Mehmoona Begum, mother of deceased Rizwan and Rihan, who was present at the place of incident, also casts doubt about the presence of Irshad Khan (PW-7) at the place of incident. He submitted that if Irshad Khan (PW-7) was really present at the place of incident, then there was no reason as to why he did not receive any injury. The learned Senior Counsel submitted that the presence of this witness is not supported from his deposition given in *Tehrir*. It is submitted that the conduct of Irshad Khan (PW-7) in not informing the police about the incident also casts doubt about his presence.

9. Shri Grover submitted that the presence of Harpal Singh (PW-10) at the place of incident is also doubtful. In his deposition, Harpal Singh (PW-10) has stated that he was at the village main road, 4-5 steps ahead of the victims at Rashid's house. On hearing the sound of firing, he allegedly hid near Amanullah's house at the time of incident. However, in his statement recorded under Section 161 Cr.P.C., he has stated that at the time of incident, he was near the private school rickshaw stand which was about 600 metres away from the place of incident. The learned Senior Counsel submitted that a perusal of the spot map would show that the private school is not near the place of incident. The learned Senior Counsel submitted that further the evidence of this witness is not corroborated by the injured witness or other eye witnesses including Sudhir (PW-11). It is further submitted that there are material contradictions with regard to time of incident in the deposition of the said witness and as such, the testimony of this witness is not credible.

10. Insofar as Lokendra (PW-1) is concerned, Shri Grover submitted that the testimony of the said witness suffers from material omissions with regard to involvement of appellant Madan in the incident. In his statement

recorded under Section 161 Cr.P.C., Lokendra (PW-1) had stated that there were 2-3 unknown people involved in the crime. Further in his testimony, there were material omissions in this regard. In his testimony, Lokendra (PW-1) vaguely mentioned that the appellant Madan and his family members were involved in the crime. However, he has not given any details with regard to the same.

11. Shri Grover further submitted that there is improvement in the evidence of Sudhir (PW-11) with regard to the cause of his presence at the place of incident. In his statement recorded under Section 161 Cr.P.C., Sudhir (PW-11) did not give any reason for his presence at the place of incident. It was for the first time in court that he deposed about being in the locality in search of labourers to work in his field. He submitted that there are serious lapses in the prosecution case inasmuch as though Sudhir (PW-11) is alleged to have accompanied Lokendra (PW-1) to Police Station Babri to register the *Tehrir*, he did not permit Sudhir (PW-11) to go inside the police station while registering the *Tehrir.* He submitted that such a conduct is not consistent with human nature. The learned Senior counsel therefore submitted that Sudhir (PW-11) would fall in the category of a chance witness and the testimony of such a witness cannot be relied upon without there being corroboration from any independent testimony. The learned Senior Counsel relies on the judgments of this Court in the cases of ***Acharaparambath Pradeepan and Another v. State of Kerala***[3] and ***Harjinder Singh alias Bhola v. State of Punjab***[4]**.**

12. Shri Grover further submitted that there are material contradictions regarding the place where deceased Masooq Ali was shot. According to Lokendra (PW-1) and Harpal Singh (PW-10), Masooq Ali was shot and killed in front of his own house. However, this version is not supported by the testimony of Irshad Khan (PW-7).

13. Shri Grover submitted that all the aforesaid witnesses are related to the deceased and they or their relatives held posts in the village panchayat. He submitted that Lokendra (PW-1) is the brother of deceased Satendra, son of injured Jai Singh (PW-8) and cousin of deceased Ram Kishan. Sudhir

3 **(2006) 13 SCC 643**
4 **(2004) 11 SCC 253**

(PW-11) is an immediate cousin of Ram Kishan and related to Lokendra (PW-1). Irshad Khan (PW-7) is the father of deceased Rizwan and Rihan. It is submitted that these witnesses also supported Vimla Devi, the then sarpanch and Ram Kishan's mother. Lokendra (PW-1) and Sudhir (PW-11) are related witnesses of deceased Ram Kishan and Satendra. It is submitted that all these witnesses have falsely implicated appellant Madan so as to ensure the conviction of appellant Madan and his family members.

14. Shri Grover submitted that the injured eye witnesses Sukhpal Singh (PW-2), Mumtaz Khan (PW-5) and Jai Singh (PW-8) have not supported the prosecution story alleging the involvement of the present accused. It is submitted that though Mumtaz Khan (PW-5) has stated in his statement recorded under Section 161 Cr.P.C. that the appellant Madan along with other accused was involved in the shooting, in his examination-in-chief, he has stated that when he came out on hearing the sound of firing, he saw 3-4 persons who had covered their faces with masks and these persons were involved in shooting. Mumtaz Khan (PW-5) does not specifically name the appellant Madan. He submitted that even there are contradictions in the evidence of Sukhpal Singh (PW-2). It is submitted that even Jai Singh (PW-8), father of Lokendra (PW-1) has not supported the prosecution case and was declared hostile. It is therefore submitted that in the absence of the independent witnesses supporting the prosecution case, the conviction could not have been based on the basis of testimony of interested witnesses. He further submitted that the deposition of Bahadur Singh Chauhan (PW-17) would show that 2-3 unknown persons from outside the village were also involved in the crime. However, the police has failed to investigate the matter with regard to involvement of persons from other villages. It is submitted that only on account of political rivalry, appellant Madan has been implicated in the present crime. The learned Senior counsel further submitted that the recoveries of the weapons alleged to have been used in the crime are farcical and in any case not supported by the Ballistic Report.

15. Shri Grover submitted that there are serious lacunae in the investigation. It is submitted that as per the evidence of Lokendra (PW-1), Irshad Khan (PW-7) and Harpal Singh (PW-10), the police were present at the scene prior to the report being lodged at the police station i.e. before

07.40 P.M. However, Raghunandan Singh Bhadauria (PW-24) stated that he arrived at the location at around 08.30 P.M. i.e. after the report was lodged at 07.40 P.M. It is submitted that there is no certainty as to when the Special Report under Section 174 Cr.P.C. was sent to the Magistrate. He submitted that the timing of investigation becomes particularly important in view of the opinion of Dr. Arvind Kumar Aggarwal (PW-14) who conducted the post-mortem stating that the death of the deceased could have been between 8-9 P.M. i.e. after the investigation had started. He submitted that the lapses in the investigation are further apparent from the fact that there are inconsistencies with regard to the presence of bodies of the deceased and the place of inquest. It is submitted that from the evidence of some of the witnesses, it appears that the bodies were moved from the site of shooting prior to the starting of inquest. However, the inquest report records the presence of bodies at the site of shooting i.e., at the village main road, Masooq Ali's house and Deputy Pradhan's house. It is submitted that all these factors will cumulatively raise substantial doubt on the fairness of investigation and reporting.

16. Shri Grover submitted that, though independent witnesses were available, for the reasons best known to the prosecution, they have not been examined. It is submitted that uptill now, Mehmoona Begum, wife of Irshad Khan (PW-7), who was present inside the kitchen during the killing of Rizwan, Rihan and Ram Kishan, was not presented as a witness. It is submitted that if this witness could have been examined, the real genesis of the incident would come forth. It is further submitted that since the occurrence has taken place on the main street, many independent witnesses must have witnessed the incident. They have also not been examined. Even Rashid, in front of whose house, one of the shootings occurred, was not produced as a witness. It is further submitted that Amanullah, in whose house Harpal Singh (PW-10) allegedly hid during the shooting, was not examined as a witness.

17. Shri Grover therefore submitted that the prosecution has failed to prove the case beyond reasonable doubt and as such, the judgment and order of conviction as recorded by the trial court and confirmed by the High Court is liable to be set aside.

18. Shri Grover, in the alternative, submitted that even if this Court does not interfere with the conviction, the capital punishment awarded to appellant Madan is not sustainable. He submitted that the trial court and the High Court have failed to draw a balance-sheet of mitigating and aggravating circumstances. It is submitted that the prosecution has to discharge the burden to place the material on record to establish that there is no possibility of reforming a convict before capital sentence could be awarded. Shri Grover submitted that in the present case, the State was directed to produce three Reports i.e. Probation Officers Report, Prison Conduct Report and Psychological Assessment Report. He submitted that, from the conduct of appellant Madan in jail, it is evident that appellant Madan has shown positive signs of reformation and poses no continuing threat to society. Appellant Madan is currently 64 years old and he has been in prison for 18 years and 3 months. It is submitted that during the entire duration, he has had no history of any kind of offence in prison.

19. Shri Grover submitted that even from the Psychological Evaluation Report conducted by Institute of Human Behaviour & Allied Sciences (IHBAS), Dilshad Garden, Delhi, it could be seen that the said Report shows that the socio-occupational functioning is unaffected. It further shows that appellant Madan has voluntarily taken up tasks in prison to keep himself occupied and also taken up responsibilities to help younger prisoners to lead a better life in prison. It is submitted that, taking into consideration all these factors, the capital punishment needs to be commuted to life imprisonment.

20. Shri Grover submitted that even the alleged motive is far-fetched. He submitted that the political rivalry which is attributed as motive is remote inasmuch as the elections were held for the period prior to more than two and half years of the incident. The learned Senior Counsel therefore requested for allowing the appeals.

21. Shri Grover further submitted that the present case does not fall in the category of rarest of rare cases to warrant capital punishment. He submitted that the finding recorded by the trial court and the High Court with regard to the present case being rarest of rare cases is without basis and as such, even if the conviction is confirmed, capital punishment would not be sustainable.

22. Shri Grover fairly submitted that though there are certain criminal antecedents against the appellant, the same cannot be a ground to deny his commutation. The learned Senior Counsel submitted that in the event this Court does not interfere with the order of conviction, the capital punishment deserves to be commuted to life imprisonment.

23. Shri Manish Kumar Vikkey, learned counsel appearing for appellant Sudesh Pal has adopted the arguments as advanced by Shri Grover.

24. Shri Chahar, learned Senior Counsel appearing on behalf of the State submitted that no interference would be warranted with the concurrent orders of trial court and the High Court.

25. Shri Chahar submitted that the appellants have brutally killed six innocent persons only on account of political rivalry. It is submitted that the appellants who have committed such a heinous and gruesome crime, are not entitled to any leniency. It is submitted that appellant Madan was already a hardened criminal. He submitted that he was also awarded life imprisonment in another case and under his leadership, the accused persons killed six persons. It is submitted that the incident was such which caused terror in the society and the High Court and the trial court have rightly held the present case to be the rarest of rare cases so as to award death penalty to the accused. He therefore submitted that no interference would be warranted in the present case.

26. With the assistance of the learned counsel for both the parties, we have examined the entire evidence and perused the material placed on record.

27. The incident has taken place in two parts as under:

(i) The first place is near the house of Rashid son of Mustafa. Appellant Madan along with Rajveer, Ram Bhajan, Ramveer, Kanwar Pal and Ishwar armed with licensed guns, rifles and country-made pistols came from behind and started firing indiscriminately. As a result of which, Satendra and Sunil fell down on the *Khadanja* and died on the spot. When Masooq Ali, after hearing the sound of gunfire, came out of his house, the accused persons also fired shots at him. As a result of which, he also fell down.

(ii) The second place is the house of *Up-Pradhan* Rizwan. After indiscriminate firing by the accused persons, Ram Kishan and Sukhpal Singh (PW-2) ran away to save their lives and Ram Kishan entered the house of Rizwan. The accused persons followed them and entered into the house of Rizwan and fired shots at Ram Kishan, Rizwan and Rihan. As a result of which, Ram Kishan died on the spot. Masooq Ali, Rizwan and Rihan were taken to the hospital by the villagers. However, on the way to hospital, they succumbed to their injuries.

28. Though the prosecution has examined 11 witnesses, only 4 of them supported the prosecution case. PW-1 is Lokendra. He has deposed in his evidence that, on 14th October 2003 at around 05.30 in the evening, he and his brother Satendra, Sukhpal Singh (PW-2), Ram Kishan, his father Jai Singh (PW-8) and Sunil were going to the Deputy Pradhan Rizwan's house for discussing the problems of the village. He has stated that when they reached near the house of Rashid son of Mustafa, the accused persons including the present appellants carrying rifles, guns etc. in their hands, came behind them. They shouted that they would kill these people today. After saying this, all the people started firing indiscriminately with their weapons. Due to those injuries, Satendra and Sunil fell down on the spot. He stated that Ram Kishan and Sukhpal Singh (PW-2) were also shot but they fled away to save their lives. He further stated that in the meantime, Masooq Ali came out of his house near the spot. The accused persons also shot him and he also fell down.

29. Lokendra (PW-1) further stated that Ram Kishan entered into Rizwan's house to save his life and the accused persons also entered Rizwan's house after him. When Rizwan and Rihan were trying to stop them from entering their house, they also fired shots at both of them. The said witness cannot be said to be an eye witness as to what has happened inside the house of Rizwan. However, insofar as the first incident is concerned, he is an eye witness to the same.

30. In his examination-in-chief, Lokendra (PW-1) has stated about Vimla Devi, mother of deceased Ram Kishan contesting the election of village Pradhan in the previous election. Lokendra (PW-1) was also a member of the Gram Panchayat and he supported Vimla Devi. He stated

that because of this, appellant Madan and others started keeping internal enmity with them.

31. Lokendra (PW-1) also deposed that Mahipal, a witness to this incident, was also murdered about two and half months ago in the vicinity of the Jwalapur Police Station, Haridwar, in which, Rajveer, Ramvir, Rambhajan, sons of Ishwar and Ishwar were made the accused persons. He further stated that because Rambhajan, Rajveer, Ramveer, Ompal and Devendra alias Neetu were absconding from their homes since the incident, they could not be caught. In his cross-examination, it was put to him that in his *Tehrir*, it was not mentioned that he was going with the other persons to the place of Rizwan. However, the FIR is not an encyclopaedia of the entire incident. There are certain omissions in his evidence but they are not material.

32. Irshad Khan (PW-7) is the father of deceased Rizwan and Rihan. Rizwan was Deputy Pradhan of the village at that time. Irshad Khan (PW-7), in his deposition, has stated that, on the date of the incident, when he along with his wife Mehmoona Begum and his sons Rizwan and Rihan were present in his house, suddenly Ram Kishan entered his house in an injured condition. He stated that Ram Kishan was followed by Ishwar, Madan, Rajveer, Ramveer, Rambhajan, Kunwar Pal. He further stated that Madan's brother-in-law (*sala*) Ompal, Madan's brother-in-law (*Sadhu*) Neetu, along with Madan's nephew had also entered in his house. He stated that these people were carrying rifles, guns and pistols in their hands. He further stated that the accused started shooting at Ram Kishan inside the house. His sons Rizwan and Rihan tried to defend Ram Kishan. However, they also shot at his sons Rizwan and Rihan, who were trying to protect Ram Kishan. He stated that Ram Kishan fell down on the spot. He stated that he took Rizwan and Rihan to Dr. Bora's hospital in Shamli. However, after seeing them, the doctor declared them dead. He also narrates somewhat about the first incident. But he cannot be said to be an eye witness with regard to the first incident. His evidence was sought to be attacked on the ground that after such a gruesome incident had happened, he had not lodged any report with the police. However, in his cross-examination itself, he has explained thus:

> "Lokendra of my village told me that he would lodge the report at the Police Station. There is no need for you to go, so I did not feel the need

> to go to the Police Station and for lodging Report. When I reached the village, by that time the Police had not come to the village. When I was going to Shamli, then Lokendra went to the Police Station Babri to lodge the Report."

33. Irshad Khan (PW-7) has specifically denied in his cross-examination that at the time of incident, he had stayed upstairs on the terrace.

34. It is further to be noted that the testimony of Lokendra (PW-1) and Irshad Khan (PW-7) is consistent inasmuch as even Lokendra (PW-1) stated that he had gone to the house of Rizwan after Ram Kishan followed by the accused persons went to the house of Rizwan. This is corroborated by the testimony of Irshad Khan (PW-7) who stated thus:

> "In our house, Lokendra came after the incident. I told Lokendra about the incident. I told Lokendra that these people have killed my sons in front of me."

35. PW-10 is Harpal Singh. He stated that on the day of incident, he was on his way from his house towards the crime scene to look for labourers. He stated that Rashid's son was going towards Mustafa's house. He further stated that Ram Kishan and Lokendra (PW-1), Sunil, Satendra, Sukhpal Singh (PW-2), Jai Singh (PW-8) were coming 4-5 steps behind him. He stated that all of a sudden, accused persons started firing. He stated that Rambhajan, Ramveer, Kawarpal, Madan, Rajveer, Ompal, Neetu, Sudesh were among those who fired. He fairly admitted that he cannot attribute which weapon was used by which accused. He stated that Satendra, Sunil and Sukhpal Singh (PW-2) were shot when the accused opened fire. He further stated that after going ahead, when Masooq Ali came out of his house, he was also shot. He stated that thereafter Ram Kishan ran towards the house of Deputy Pradhan Rizwan. However, he cannot be an eye witness to the second incident. He stated that he had taken cover of a wall. He further stated that Sunil, Satendra and Masooq Ali died due to firearm injuries. He stated that Sukhpal Singh (PW-2) and Jai Singh (PW-8) have also received injuries. He fairly stated that Ram Kishan, Rizwan and Rihan were also killed in the incident but he did not see them being murdered with his own eyes. In the cross-examination, he has stated that he loved his life and therefore, he ran forward and took cover of a wall, hiding behind the wall of Amanullah's

house. He stated that the doors of Amanullah's house were open and by entering through the doors, he had taken cover of the wall. He stated that he was behind the wall as long as the firing went on. He stated that when the miscreants left the street, he came out.

36. PW-11 is Sudhir. He stated that on the day of incident, he had gone from his house towards the locality of the Pathans. He stated that he saw Ram Kishan, Sukhpal Singh (PW-2), Satendra, Sunil, Jai Singh (PW-8) going in the street in front of him, in front of Mustafa's house. At that time, the accused persons who were having rifles and pistols in their hands, opened fire at Ram Kishan, Sunil, Satendra and Sukhpal Singh (PW-2). Satendra and Sunil fell on the spot as soon as a shot was fired and Sukhpal Singh (PW-2) also fell as soon as he was shot. Ram Kishan was shot in the legs and he ran towards Rizwan's house to escape. All the accused persons ran after him. He stated that he also came to know that Ram Kishan, Rizwan and Rihan had also been killed by the accused persons. Though this witness is also cross-examined at length, nothing damaging insofar as the main incident is concerned, could be elicited in his testimony.

37. The testimony of these witnesses is sought to be attacked on the ground that they are interested witnesses and there are inconsistencies in their evidence.

38. We may gainfully refer to the observations of this Court in the case of ***Piara Singh and Others v. State of Punjab***[5], which read thus:

> **"4.** …….It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the court is satisfied that the evidence is credit-worthy there is no bar in the Court relying on the said evidence. The High Court was fully alive to these principles and has in fact found that the evidence of these three witnesses has a ring of truth. After having perused the evidence ourselves also we fully agree with the view taken by the High Court……..."

5 **(1977) 4 SCC 452**

39. It can thus be seen that merely because some of the witnesses are interested or inimical witnesses, their evidence cannot be totally discarded. The only requirement is that their evidence has to be scrutinized with greater care and circumspection. In the present case, both the High Court and the trial court have meticulously scrutinized the evidence and found the testimony of the eye witnesses trustworthy and reliable. We have ourselves scrutinized their evidence as discussed hereinabove. We find that merely because there are certain inconsistencies in the evidence of the witnesses, their evidence cannot be discarded.

40. It will also be gainful to refer to the observations of this Court in the case of ***Waman and Others v. State of Maharashtra***[6], wherein this Court has surveyed the earlier judgments on the issue and held that if the evidence of interested witnesses is found to be consistent and true, the fact of being a relative, cannot by itself discredit their evidence.

41. It is further to be noted that all these witnesses are rustic villagers. In this respect, it will be relevant to refer to the observations of this Court in the case of ***State of Uttar Pradesh v. Krishna Master and Others***[7], which read thus:

> **"24.** The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness."

42. We are of the considered view that insofar as the first incident is concerned, the prosecution has duly proved its case beyond reasonable doubt in view of the testimony of Lokendra (PW-1) being duly corroborated by

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6 **(2011) 7 SCC 295**
7 **(2010) 12 SCC 324**

the testimonies of Harpal Singh (PW-10) and Sudhir (PW-11). We are of the considered view that the testimonies of these witnesses duly establish that these witnesses have witnessed the firing on Satendra, Sunil and Masooq Ali, who died on the spot. These witnesses have also seen the accused persons assaulting Ram Kishan and Sukhpal Singh (PW-2) who had received the firearm injuries, who ran to the house of Rizwan to take shelter.

43. We are further of the considered view that though Irshad Khan (PW-7) is a sole witness insofar as the firing on deceased Ram Kishan, Rizwan and Rihan is concerned, his testimony is cogent, reliable and trustworthy and can be made basis for coming to a conclusion that it is the present appellants along with other accused who have caused the death of deceased Ram Kishan, Rizwan and Rihan. In any case, his testimony is duly corroborated by the evidence of Lokendra (PW-1) who had immediately come to the second spot after the occurrence of the incident when Irshad Khan (PW-7) informed Lokendra (PW-1) about the incident occurring in his house.

44. The next contention raised on behalf of the appellants is that the motive attributed by the prosecution is a very weak motive. It is submitted that the motive attributed is on account of political enmity due to elections which were held two and half years prior to the date of incident. The motive is specifically brought on record in the evidence of Lokendra (PW-1) and Irshad Khan (PW-7). Harpal Singh (PW-10) also deposed about the enmity between the families of Ishwar and Ram Kishan. In any case, the present case is a case of direct evidence. It is a settled law that though motive could be an important aspect in a case based on circumstantial evidence, in the case of direct evidence, the motive would not be that relevant. In this respect, we may gainfully refer to the judgment of this Court in the case of ***State of Andhra Pradesh v. Bogam Chandraiah and Another***[8], which reads thus:

> **"11.** …..Another failing in the judgment is that the High Court has held that the prosecution has failed to prove adequate motive for the commission of the offence without bearing in mind the well settled rule that when there is direct evidence of an acceptable nature regarding the

8 **(1986) 3 SCC 637**

commission of an offence the question of motive cannot loom large in the mind of the court. ……"

45. This Court, in the case of ***Darbara Singh v. State of Punjab***[9], has observed thus:

> **"15.** So far as the issue of motive is concerned, it is a settled legal proposition that motive has great significance in a case involving circumstantial evidence, but where direct evidence is available, which is worth relying upon, motive loses its significance……."

46. Again in the case of ***Subodh Nath and Another v. State of Tripura***[10]**,** this Court has observed thus:

> **"16.** …….The learned counsel for the appellants is right that the prosecution has not been able to establish the motive of Appellant 1 to kill the deceased but as there is direct evidence of the accused having committed the offence, motive becomes irrelevant. Motive becomes relevant as an additional circumstance in a case where the prosecution seeks to prove the guilt by circumstantial evidence only."

47. Another submission on behalf of the appellants is with regard to faulty investigation. No doubt that there have been certain lacunae in the police investigation. However, the evidence of eye witnesses is consistent, reliable, trustworthy and cogent. Merely because there are certain lacunae in the investigation, it cannot be a ground to disbelieve the testimony of eye-witnesses. In this respect, we may refer to the observations of this Court in the case of ***Karnel Singh v. State of M.P.***[11], which read thus:

> **"5.** Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the

9 **(2012) 10 SCC 476**
10 **(2013) 4 SCC 122**
11 **(1995) 5 SCC 518**

hands of the investigating officer if the investigation is designedly defective. ……"

48. A similar view has been taken by this Court in the case of ***Shera Singh v. State of Punjab***[12].

49. In totality of the circumstances, we are of the considered view that the prosecution has proved beyond reasonable doubt the case for conviction under Section 302 of IPC and the appeals in that regard are liable to be rejected.

50. The next questions that we are called upon to consider are, as to whether the present case falls in the category of rarest of rare cases, and as to whether on the facts of the present case, the capital punishment imposed on appellant-Madan deserves to be maintained or not?

51. The Constitution Bench in the case of ***Bachan Singh v. State of Punjab***[13]**,** observed thus:

"164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (*iv*)(*a*) and (*v*)(*b*) in *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] shall have to be recast and may be stated as below:

> "(*a*) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (*b*) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave

12 **(1996) 10 SCC 330**
13 **(1980) 2 SCC 684**

danger to the society at large, the court may impose the death sentence.""

52. It can thus be seen that the Constitution Bench held that the normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons are required to be recorded in writing before imposing the death sentence. While considering such a question, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

53. It may further be relevant to refer to the following observations of this Court in the case of ***Bachan Singh*** (supra):

"202. Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia* [33 L Ed 2d 346 : 408 US 238 (1972)], in general, and clauses 2 (*a*), (*b*), (*c*) and (*d*) of the Penal Code, 1860 (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr Chitale has suggested these "aggravating circumstances":

"*Aggravating circumstances*: A court may, however, in the following cases impose the penalty of death in its discretion:

(*a*) if the murder has been committed after previous planning and involves extreme brutality; or

(*b*) if the murder involves exceptional depravity; or

(*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(*i*) while such member or public servant was on duty; or

(*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at

the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(*d*) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.""

54. In the case of ***Machhi Singh and Others v. State of Punjab***[14], this Court laid down certain propositions which are required to be taken into consideration. The Court observed thus:

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death

14 **(1983) 3 SCC 470**

penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. *Manner of commission of murder*

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

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

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

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

II. *Motive for commission of murder*

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. *Anti-social or socially abhorrent nature of the crime*

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

IV. *Magnitude of crime*

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

V. *Personality of victim of murder*

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

55. This Court, in the case of ***Machhi Singh*** (supra), after referring to the Constitution Bench judgment in the case of ***Bachan Singh*** (supra), observed thus:

"38. In this background the guidelines indicated in *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :

"(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the

crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

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

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

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

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

56. This Court, in the case of ***Ramnaresh and Others v. State of Chhattisgarh***[15], observed thus:

"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* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681]. 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

15 **(2012) 4 SCC 257**

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 behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(*6*) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and

that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

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

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(*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."

57. Applying the aforesaid principles, as laid down by this Court in the aforesaid judgments, it can be seen that in the present case, the appellants along with other accused came behind the innocent persons and exhorted and started firing indiscriminately, firstly, in front of the house of Rashid. As a result of which two persons namely Satendra and Sunil fell down and died on the spot. When Masooq Ali, after hearing the sound of firing, came out from his house, the accused persons shot fire at him also. As a result, he also fell down. Ram Kishan and Sukhpal Singh (PW-2) were also injured. The injured Ram Kishan and Sukhpal Singh (PW-2) went towards the house

of Rizwan to save their lives. However, the appellants and the other accused followed them and went inside the house of Rizwan and fired shot at Ram Kishan. As a result, Ram Kishan died on the spot. The accused persons also fired shot at Rizwan and Rihan who tried to protect Ram Kishan. On their way to hospital, injured Masooq Ali, Rizwan and Rihan also died. It could thus be clear that, six deaths were caused on account of brutal firing by the appellants and other accused persons. The entire village and the people residing in the surrounding areas must have been shocked by such heinous and gruesome act. Not only that, one of the eye witnesses was also murdered during the pendency of the trial. The terror of the appellants and other accused persons was of such a high magnitude that even the witnesses who had received grievous injuries did not support the prosecution case and were required to be declared hostile. As such, we find that four innocent persons were shot from behind. Two of them succumbed on the spot and two, who received serious injuries, tried to rush to the house of Rizwan to protect themselves. One innocent person, after hearing the sound of firing, came out and he was also brutally shot. Ram Kishan, who sought shelter in Rizwan's house and Rizwan and Rihan who tried to protect Ram Kishan were also brutally killed. We are therefore of the considered view that the act of the appellants and the other accused would certainly be the one which shocked the collective conscience of the society and fall in the category of rarest of rare cases.

58. The next question that we will be called upon to answer is that, whether in the facts and circumstances of the case, imposition of death penalty on the appellants, would be warranted or not?

59. This Court, in the case of ***Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka***[16], has observed thus:

> **"90.** Earlier in this judgment it was noted that in the decision in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] there is a useful discussion on the legality of remission in the case of life convicts. The judgment in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095], in SCC para 22, refers to and quotes from

16 **(2008) 13 SCC 767**

the earlier decision in *State of M.P. v. Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] which in turn quotes a passage from the Constitution Bench decision in *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440]. It will be profitable to reproduce here the extract from *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] : (SCC pp. 473-74, para 4)

> *"4.* As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer res integra and stands concluded by a decision of this Court in *Gopal Vinayak Godse v. State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] , where the Court, following a decision of the Privy Counsel in *Pandit Kishori Lal v. King Emperor* [(1944-45) 72 IA 1 : AIR 1945 PC 64] observed as follows: (AIR pp. 602-03, paras 4-5)
>
> > *'4.* … Under that section a person transported for life or any other terms before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.
> >
> > *5.* If so the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Penal Code, Code of Criminal Procedure or the Prisons Act. … A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.'
>
> The Court further observed thus: (AIR pp. 603-04, paras 7-8)
>
> > *'7. ... But the Prisons Act does not confer on any authority a power to commute or remit sentences; it* provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a

> power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act. … Under the said rules the order of an appropriate Government under Section 401, Criminal Procedure Code, are a prerequisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.
>
> *8.* … The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.'

It is, therefore, manifest from the decision of this Court that the Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Penal Code. In other words, this Court has clearly held that a sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period the prisoner's death and remissions given under the Rules could

not be regarded as a substitute for a sentence of transportation for life."

(emphasis supplied)

Further, in para 23, the judgment in *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] observed as follows: (SCC pp. 306-07)

> *"23. In Maru Ram v. Union of India* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] a Constitution Bench of this Court reiterated the aforesaid position and observed that the inevitable conclusion is that since in Section 433-A we deal only with life sentences, *remissions lead nowhere and cannot entitle a prisoner to release.* Further, in *Laxman Naskar v. State of W.B.* [(2000) 7 SCC 626 : 2000 SCC (Cri) 1431] , after referring to the decision of *Gopal Vinayak Godse v. State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440], the Court reiterated that sentence for 'imprisonment for life' ordinarily means imprisonment for the whole of the remaining period of the convicted person›s natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term if served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose."

(emphasis supplied)

91. The legal position as enunciated in *Pandit Kishori Lal* [(1944-45) 72 IA 1 : AIR 1945 PC 64], *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440], *Maru Ram* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112], *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428] and *Shri Bhagwan* [(2001) 6 SCC 296 : 2001 SCC (Cri) 1095] and the

unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate.* When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

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

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

60. It can thus be seen that the Court found that there might be certain cases wherein the Court may feel that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission which normally works out to a term of 14 years would be grossly disproportionate and inadequate. The Court held that the Court cannot be limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death. It has been held that a far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It has been held that the Court would be entitled to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order.

61. This Court, in the case of ***Shankar Kisanrao Khade v. State of Maharashtra***[17], after referring to various cases, adopted the middle path and commuted the death penalty into sentence for the rest of the life without remission. Further, in some of the cases, it was directed that only after the convict undertook sentence for a fixed period as directed without remission, his case for premature release could be considered.

62. This Court, in the case of ***Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka***[18], wherein the accused had committed murder of his daughter, who was in the advanced stage of pregnancy, though

17 **(2013) 5 SCC 546**
18 **(2017) 5 SCC 415**

upheld the conviction of the accused under Section 302 IPC, nevertheless commuted the sentence from capital punishment to imprisonment for life.

63. In the case of ***Prakash Dhawal Khairnar (Patil) v. State of Maharashtra***[19], the appellant was a Senior Scientific Assistant. He wiped out his brother's entire family. This Court found that this was done by him on account of frustration as his brother was not partitioning the alleged joint property. Though this Court held that the crime was heinous and brutal, but it could not be considered to be 'rarest of rare' case. This Court held that, it is difficult to hold that appellant is a menace to the society and that there is no reason to believe that he cannot be reformed or rehabilitated. The Court, considering the facts and circumstances of the case, set aside the death sentence and directed that he shall suffer imprisonment for life but shall not be released unless he served at least 20 years of imprisonment including the period already undergone by him.

64. In the case of ***Mohinder Singh v. State of Punjab***[20], this Court observed thus:

> **"25.** It is well-settled law that awarding of life sentence is a rule and death is an exception. The application of the "rarest of rare" cases principle is dependent upon and differs from case to case. However, the principles laid down and reiterated in various decisions of this Court show that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fibre of the society, would call for imposition of the capital punishment in order to ensure that it acts as a deterrent. While we are convinced that the case of the prosecution based on the evidence adduced confirms the commission of offence by the appellant, however, we are of the considered opinion that still the case does not fall within the four corners of the "rarest of rare" cases."

65. In the said case, the accused had committed murder of his wife and daughter. However, this Court observed that in the facts and circumstances,

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19 **(2002) 2 SCC 35**
20 **(2013) 3 SCC 294**

it could not be said that imposition of death penalty was the only alternative and commuted the order of death sentence confirmed by the High Court to life imprisonment.

66. Recently, this Court, in the case of ***Sundar @ Sundarrajan v. State by Inspector of Police***[21], held that 'rarest of rare' doctrine does not require that in such a case only death sentence has to be imposed. This Court held that, while considering as to whether the death sentence is to be inflicted or not, the Court will have to consider not only the grave nature of crime but also as to whether there was a possibility of reformation of a criminal.

67. It is a settled position of law that, while sentencing, the Court is not required to apply only the 'crime test' but also the 'criminal test'.

68. This Court, in the present case, vide order dated 16th March 2023, had called for the Probation Officer's Report, Prison Conduct Report and Psychological Assessment Report.

69. As per the Prison Conduct Report submitted by the Superintendent, District Jail, Baghpat, appellant Madan is currently 64 years old. He has been in prison for 18 years 3 months. During this entire duration, he has no history of any kind of prison offence. The Report further shows that he has not been involved in any form of quarrels or fights in prison. The Report shows that he has cordial relations with other prisoners in his barrack and follows the prison rules. The Report shows that he spends his time engaging in constructive activities, such as playing games and reading books. He observes the prison timings and assists the prison administration as well.

70. The IHBAS has also submitted appellant Madan's Psychological Assessment Report. As per the said Report, appellant Madan is maintaining his daily activities adequately and his socio-occupational functioning is unaffected except occasional forgetfulness which could be age related. As per the said Report, appellant Madan has voluntarily taken up tasks in prison to keep himself occupied. He has also taken up responsibilities to help younger prisoners to lead a better life in prison.

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21 **2023 SCC OnLine SC 310**

71. This Court, in the case of ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***[22]**,** after referring to various earlier judgments, has held that in awarding death penalty, it is mandatory that the probability that the convict can be reformed and rehabilitated in the society, must be seriously and earnestly considered. It has been held that it is one of the mandates of the "special reasons" requirement of Section 354(3) Cr.P.C. This Court, in the cases of ***Bachan Singh*** (supra), ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***[23]**, *Chhannu Lal Verma v. State of Chhattisgarh***[24]**, *Rajendra Pralhadrao Wasnik*** (supra) and ***Manoj and Others v. State of Madhya Pradesh***[25], consistently held that it is the obligation of the prosecution to prove to the Court through evidence that there is a probability that the convict cannot be reformed or rehabilitated. Undisputedly, the prosecution has not placed any material in that regard either before the trial court or the Appellate Court. Per contra, the Reports by the Jail Authorities and IHBAS would show that there is a possibility of the appellant being reformed.

72. No doubt that there is a history of previous conviction insofar as appellant Madan is concerned. However, this Court, in the case of ***Rajendra Pralhadrao Wasnik*** (supra), has held that the history of the convict by itself cannot be a ground for awarding him death penalty.

73. As discussed hereinabove, the appellant is of an advanced age. This Court, in the case of ***Babasaheb Maruti Kamble v. State of Maharashtra***[26]**,** has held that advance age is one of the mitigating circumstances in favour of the convict.

74. This Court, in the case of ***Irappa Siddappa Murgannavar v. State of Karnataka***[27]**,** has held that the period of incarceration while sitting in a death row is also one of the mitigating circumstances. In the present case, convict Madan has been incarcerated for a period of 18 years 3 months.

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22 **(2019) 12 SCC 460**
23 **(2009) 6 SCC 498**
24 **(2019) 12 SCC 438**
25 **(2023) 2 SCC 353**
26 **(2019) 13 SCC 640**
27 **(2022) 2 SCC 801**

75. This Court, in the case of ***Mohinder Singh*** (supra), has held that the fact that the prisoner has displayed good behaviour in prison, certainly goes on to show that he is not beyond reform.

76. Taking into consideration all these factors, we find that the present case is not a case wherein it can be held that imposition of death penalty is the only alternative. Another reason that weighs with us is that from the evidence of the witnesses, it is clear that the role attributed to all the accused persons has been similar. The evidence of witnesses would show that the role attributed is that all the accused persons including both the appellants herein had fired shots and indiscriminately indulged in the said firing. The trial court imposed capital sentence on appellants Madan and Sudesh Pal. However, insofar as accused Ishwar is concerned, though the evidence against him is on similar lines, he was sentenced to life imprisonment. The High Court, on the basis of the same evidence, though confirmed the death penalty insofar as appellant Madan is concerned, partly allowed the appeal of Sudesh Pal and sentenced him to undergo life imprisonment. A perusal of the judgment of the High Court would reveal that the only distinction drawn by the High Court between the cases of Sudesh Pal and Madan is the additional factor that Madan was already awarded life imprisonment in another case. As already observed hereinabove, this Court, in the case of ***Rajendra Pralhadrao Wasnik*** (supra), has held that past conduct does not necessarily have to be taken into consideration while imposing death penalty. At the cost of repetition, the role attributed in the evidence of the eye witnesses is identical to all the accused. In that view of the matter, we find that the High Court was not justified in imposing death penalty on appellant Madan while converting the death penalty imposed upon Sudesh Pal to life imprisonment. If the judgment of the High Court is maintained, it would lead to an anomalous situation. Whereas appellant Sudesh Pal would be entitled for consideration of his case for remission and pre-mature release on completion of a particular number of years in accordance with the relevant rules, appellant Madan will have to face death penalty.

77. We are of the considered view that the present case would fall in the middle path as laid down in the case of ***Swamy Shraddananda (2) alias Murali Manohar Mishra*** (supra), followed by this Court in various judgments. We find that the interest of justice would be met by converting

death penalty into life imprisonment i.e. actual imprisonment for a period of 20 years without remission.

78. In the result, the appeals are disposed with the following directions:

(i) Criminal Appeal No.1790 of 2017 filed by appellant Sudesh Pal is dismissed;

(ii) Criminal Appeal Nos. 1381-1382 of 2017 filed by appellant Madan are partly allowed. Conviction under Section 302 of IPC is confirmed insofar as appellant Madan is concerned. However, death penalty imposed on him is converted into imprisonment for a fixed term of 20 years, including the period already undergone, without remission;

(iii) In other words, the case of appellant Madan would not be considered for pre-mature release unless he completes the actual sentence of 20 years.

79. Pending application(s), if any, shall stand disposed of in the above terms.

Headnotes prepared by:
Ankit Gyan

Appeals disposed of.