HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Criminal Death Reference No. 1/2019

State, Through PP

----Petitioner

Versus

1. Atmaram, S/o Norang Ram B/c Lakhara, R/o Anoopshahar PS Bhadra, Dist Hanumangarh
2. Omprakash, Anoopshahar, Hanumangarh
3. Liladhar, Anoopshahar, Hanumangarh
4. Sharwan, Anoopshahar, Hanumangarh

----Respondents

Connected With

D.B. Criminal Appeal No. 208/2019

1. Aatma Ram S/o Shri Norangram, Aged About 38 Years, By Caste Lakhara, R/o Anoop Shahar, PS Bhadra, Dist. Hanumangarh.
2. Omprakash S/o Shri Norangram, Aged About 27 Years, By Caste Lakhara, R/o Anoop Shahar, PS Bhadra, Dist. Hanumangarh.
3. Leeladhar S/o Shri Norangram, Aged About 50 Years, By Caste Lakhara, R/o Anoop Shahar, PS Bhadra, Dist. Hanumangarh.
4. Sharvan Kumar S/o Shri Leeladhar, Aged About 20 Years, By Caste Lakhara, R/o Anoop Shahar, PS Bhadra, Dist. Hanumangarh.

----Petitioners

Versus

State, Through P.P.

----Respondent

For Petitioner(s) : Mr. Moti Singh Rajpurohit

For Respondent(s) : Mr. R.R. Chhaparwal, P.P.
Mr. Suresh Kumbhat
Mr. Sheetal Kumbhat

HON'BLE MR. JUSTICE SANDEEP MEHTA
HON'BLE MR. JUSTICE VINOD KUMAR BHARWANI

Judgment

Date of pronouncement : 01/04/2022

Judgment reserved on : 23/02/2022

BY THE COURT : PER HON'BLE MEHTA, J.

D.B. Criminal Death Reference No.1/2019 has been instituted upon being forwarded by the learned Additional Sessions Judge, Bhadra under Section 366 CrPC for confirmation of the death sentence awarded to the accused-respondents Aatma Ram, Omprakash, Leeladhar and Sharvan Kumar vide judgment dated 01.06.2019 passed in Sessions Case No.14/2014, whereas D.B. Criminal Appeal No.208/2019 has been filed by these accused persons for assailing the above judgment, whereby the trial court convicted and sentenced them as below :-

Name of the accused-appellant	Offence for which convicted	Sentence and fine awarded
Aatma Ram Omprakash Leeladhar Sharvan Kumar	Section 302/149 IPC	Death penalty with a fine of Rs.50,000/- and in default of payment of fine, additional rigorous imprisonment of 1 year
	Section 147 IPC	2 years' simple imprisonment and a fine of Rs.1000/- and in default of payment of fine, 15 days' additional simple imprisonment
	Section 148 IPC	3 years' simple imprisonment and a fine of Rs.5000/- and in default of payment of fine, 3 month's additional simple imprisonment
	Section 452 IPC	7 years' simple imprisonment and a fine of Rs.10,000/- and in default of payment of fine, 6 month's additional simple imprisonment
	Section 447 IPC	3 months' simple imprisonment and a fine of Rs.500/- and in default of payment of fine, 7 days' additional simple imprisonment
	Section 323/149 IPC	1 year's simple imprisonment and a fine of Rs.1000/- and in default of payment of fine, 15 days' additional simple imprisonment

The present one is the second round of litigation. Earlier the trial court convicted and sentenced the accused in the same terms by judgment dated 03.11.2017, which was challenged by the accused appellants by filing D.B. Criminal Appeal No.33/2018 in this court, which was allowed vide judgment dated 13.12.2018 and the matter was remanded back to the trial court for de novo trial. A significant flaw was noticed by the court that the statements of material prosecution witnesses had been recorded by the trial court without securing presence of the accused in the dock. After remand, the material witnesses, whose statements were earlier recorded without securing presence of the accused in the proceedings contrary to the mandate of Section 273 CrPC, were examined afresh by the trial court while conducting '*de novo trial*'. The statements of the accused were recorded afresh under Section 313 CrPC and thereafter arguments were heard and the trial court proceeded to pass the judgment dated 01.06.2019 convicting and sentencing the appellant as above.

Brief facts relevant and essential for disposal of the reference and the appeal are noted hereinbelow.

Mr. Vikrant Sharma (P.W.12), the then SHO, Police Station Gogamedi, claims to have recorded Parcha Bayan (Ex.P/1) of Kailashchand S/o Bhanwar Lal, aged 16 years, resident of Anoopshahar, Police Station Bhadra, District Hanumangarh, at the Community Health Center, Bhadra on 13.10.2013 at 09.35 a.m., wherein it was alleged that family members of Kailash and the accused party consisting of Aatma Ram, Leeladhar, Omprakash

and Pawan, sons of Naurang Ram Lakhara, Sharvan son of Leeladhar and Rakesh son of Aatma ram were embroiled in an ongoing land dispute. In the morning of 13.10.2013 at about 05.30-06.00 a.m., Kailash, his father Bhanwar Lal and brother Pankaj were harvesting *Gwar* crop in their field. The accused Leeladhar, Aatma Ram, Omprakash, Pawan, Shravan, Rakesh and 2-3 unknown persons armed with lathis and axes arrived there on a tractor. Omprakash was holding an axe, whereas the other assailants were having lathis, on some of which pointed iron heads were fixed. Immediately on reaching the field, these assailants launched an assault and as a result, his father and his brother expired at the spot. The assailants assaulted Kailash and poured some strong irritant liquid substance in his eyes, due to which, he completely lost his vision. Thereafter, the assailants went away. After some time, Ex-Sarpanch Chandu Ram Varma, Kan Singh son of Sabal Singh, Illiyas son of Chiragdan and Surendra Singh S/o Bhanwar Singh took Kailash to his house, where he was informed that after committing the crime in the field, the assailants launched an attack at his residence, in which his grandfather Moman Ram and sister Chandrakala were beaten with lathis and axes, due to which, his grandfather expired and Chandrakala got injured. His mother Smt. Sushila locked herself inside the room; otherwise, she too would have been killed. Chandu Ram, Kan Singh, Illiyas and Surendra took Kailash, his sister Chandrakala and his grandfather Moman Ram to the Bhadra Hospital. He received injuries on his left hand, left arm and both legs and had lost vision of both eyes because of assault made by the accused persons. Right thumb impression of Kailash was appended on the

Parcha Bayan because his left thumb was bandaged. Mr. Vikrant Sharma claims that this statement was recorded in the presence of Chandu Ram Verma, who attested the same. The Parcha Bayan was forwarded to the Police Station Bhadra with Ramkaran, FC, where FIR No.493/2013 (Ex.P/57) came to be registered for the offences punishable under Sections 302, 307, 452, 447, 323, 147, 148, 149 IPC. The investigation was assigned to Mr. Rampratap (P.W.18), SHO, Police Station Bhadra. In the intervening period, upon receiving the information of the incident, Rampratap had already reached Anoopshahar. He inspected the field of Moman Ram and prepared the site inspection plan memo (Ex.P/9 and Ex.P/9-A). The dead bodies of Bhanwar Lal and Pankaj were lifted from the spot and were sent to the CHC, Bhadra. Blood stained soil, control soil and a black coloured polythene bag lying at the spot were lifted and sealed. A request was made to the CHC, Bhadra for conducting postmortem on the dead bodies of Bhanwar Lal, Pankaj Kumar and Moman Ram. Kailash and Chandrakala were referred to higher center for treatment and thus, they were shifted to a hospital at Sirsa. Kailash expired on the very same day while undergoing treatment at a private hospital in Sirsa and accordingly, his dead body was also brought back to Bhadra for autopsy. The medical board conducted autopsy and issued the postmortem reports of Moman Ram (aged 75 years) (Ex.P/43), Bhanwar Lal (aged 46 years) (Ex.P/44), Pankaj Kumar (aged 18 years) (Ex.P/45) and Kailash (aged 16 years) (Ex.P/46). Chandrakala was medically examined and MLC (Ex.P/42) was issued. The dead bodies were handed over to relative Yashwant for cremation. The accused appellants were arrested and their

informations were recorded under Section 27 of the Evidence Act and acting in furtherance thereof, the Investigating Officer claims to have effected recoveries. The sequence of arrest, informations and recoveries is noted hereinbelow in a consolidated chart form for the sake of convenience and ready reference.

Sr. No.	Name of the Appellant	Arrest Memo	Details of Arrest	Information Memo	Details of Information Memo	Recovery Memo	Details of Recovery Memo
1.	Aatma Ram	Ex. P33	13-10-2013 at 03:50 PM	Ex. P60	Pertaining to the place where a *lathi* (stick) and *barccha* were hidden	Ex. P19	One *barchha* and one 3ft. 2inch *lathi* (stick)
				Ex. P64	Pertaining to the blue powder thrown in the deceased's eyes and the plastic bag disposed off at the place of incident	Ex. P13	One empty polythene bag recovered from deceased Momanram's farm
				Ex. P65	Parked the Farm Tractor on the farm	Ex. P18	Farm tractor
						Ex. P15	Clothes worn by the Accused at the time of incident
2.	Shravan Kumar	Ex. P31	13-10-2013 at 04:37 PM	Ex. P62	Pertaining to the place where the *lathi* (stick) had been hidden	Ex. P21	Blood covered *lathi* (stick) with the length of 5ft. 8Inch recovered from the place

							where Aatma Ram had been arrested
						Ex. P17	Clothes worn by the Accused at the time of incident
3.	Liladhar	Ex. P35	13-10-2013 at 05:35 PM	Ex. P61	Pertaining to the place where the *lathi* (stick) had been hidden	Ex. P20	Worn clothes and *lathi* (stick)
4.	Omprakash	Ex. P34	13-10-2013 at 04:22 PM	Ex. P63	Pertaining to the place where the bamboo *lathi* (stick) and *theli* (bag) had been hidden	Ex. P22	Bamboo *lathi* and cloth *theli* (bag)

The clothes of the deceased as well the accused were recovered and preserved for serological examination. The statements of material witnesses were recorded under Section 161 CrPC. The medical papers of Chandrakala and Kailash were procured from the Aastha Multispeciality Hospital, Sirsa. After concluding investigation, charge-sheet came to be filed against the appellants herein for the offences punishable under Sections 302/149, 307, 452, 447, 323/149, 147, 148 IPC.

Two accused Pawan Kumar and Rakesh could not be apprehended and are still at large and hence, the investigation is still open to their extent.

The case was committed to the Court of Additional Sessions Judge, Bhadra, District Hanumangarh, where charges

were framed against the accused for the offences punishable under Sections 147, 148, 452, 447, 302/149, 323/149 IPC, who denied the charges and claimed trial. The prosecution examined as many as 23 witnesses, exhibited 73 documents and 27 articles to prove its case. The accused were questioned under Section 313 CrPC and were confronted with the prosecution allegations, which they denied and claimed to be innocent. Four documents were exhibited, but no oral evidence was led in defence. The trial court convicted and sentenced the appellants to death vide judgment dated 03.11.2017 and Reference No.2/2017 was registered for confirmation of death sentence. The accused preferred appeal No.33/2018 for challenging their conviction. This court decided both the matters by judgment dated 13.12.2018, whereby the reference was turned down and the appeal against conviction was allowed taking note of a significant lacuna in the procedure adopted by the trial court. The case was remanded to the trial court for re-examination of 12 prosecution witnesses and to pass a fresh judgment. Upon remand, *de novo* proceedings were conducted and 12 witnesses were examined afresh. The statements of the accused were again recorded under Section 313 CrPC. They denied the prosecution case and claimed to be innocent. 5 previous statements of witnesses were exhibited in defence. After hearing the arguments of the learned Public Prosecutor and the defence counsel, the trial court proceeded to convict and sentence the appellants as above vide judgment dated 01.06.2019. The reference No.2/2017 and Appeal No.33/2018 arise out of the above judgment.

At the outset, it may be noted here that counsel for the appellant Mr. Moti Singh Rajpurohit did not dispute the factum regarding homicidal killings of the four victims, but still for the sake of ready reference and as the entire evidence is required to be scrutinized at the appellate stage, we shall discuss the injuries caused to the four deceased persons and the injured Chandrakala while dealing with evidence of Dr. Deepak Gindoda (P.W.16).

Mr. Moti Singh Rajpurohit, Advocate, representing the appellants, opened the arguments and made the following submissions, craving acceptance of the appeal against conviction and for answering the reference in negative :-

1. That the Parcha Bayan (Ex.P/1) is a fabricated/unreliable document because :

(a) The same has been recorded in gross violation of the procedure provided under Rule 6.22 and 6.23 of the Rajasthan Police Rules.

(b) Mr. Vikrant Sharma (P.W.12) was not posted at the Police Station Bhadra and was rather posted as SHO, Police Station Gogamedi. He had no occasion to go to the Bhadra Hospital for recording the statement of Kailash. He was not authorized by any senior police official in this regard. The claim of the officer that he was given an oral authorization is not supported by corroborative evidence and is rather contradicted by the contemporaneous Roznamcha entries.

(c) The dying declaration does not bear any endorsement of the medical jurist regarding the injured Kailash being in a fit condition, either physical or mental to give such statement.

(d) Mr. Vikrant Sharma (P.W.12) got the dying declaration attested by the witness Chandu Ram (P.W.1), who admitted in his cross-examination that he was not available besides Kailash when Parcha Bayan was recorded. The doctors gave him a prescription slip and he went away to purchase medicines from the medical shop, located outside the hospital premises. He came back with the medicines and was asked to sign the Parcha Bayan. As per the learned defence counsel, Chandu Ram did not actually witness the Parcha Bayan being recorded and as a consequence, the mandatory requirement of attestation of Parcha Bayan by two witnesses has been flouted.

(e) Kailash was inflicted injuries in the field. He was taken to the village by Chandu Ram and a few more villagers and was immediately shifted into a 108 ambulance. Kailash had no information regarding the incident, which took place in the house. Despite that, a vivid description of the incident, which took place in the house of Moman Ram has been recorded in the Parcha Bayan, which clearly establishes that it is a totally fabricated document.

(f) The certificate of fitness Ex.P/71 was not filed alongwith the charge-sheet. The certificate Ex.P/71 allegedly issued by the doctor regarding Kailash being fit to give the statement has not

been proved in original and a carbon copy was taken on record by the trial court by treating it to be a primary evidence, whereas the prayer of the prosecution through application dated 15.12.2015 filed under Section 311 CrPC was to accept the carbon copy of the document by way of secondary evidence. The prosecution had filed the above application with specific prayers to recall Dr. Deepak Gindoda and for proving carbon copy of the certificate Ex.P/71 by way of secondary evidence. Dr. Deepak Gindoda (P.W.16) admitted in his evidence that the original of the document was available in the hospital, but neither the prosecution, nor the court made any effort whatsoever to procure and prove the original document and without following the procedure established by law, the carbon copy was accepted by way of primary evidence, whereas there is no corroborative evidence regarding the very existence of the document. The claim of the prosecution regarding Dr. Deepak Gindoda having issued the fitness certificate (Ex.P/71) is totally cooked up because the witness Ramniwas, who allegedly gave the requisition letter (Ex.P/71) for issuance of the certificate, was not examined by the prosecution to prove the same. Mr. Vikrant Sharma (P.W.12), scribe of the Parcha Bayan (Ex.P/1), did not depose that he took any such opinion from the medical jurist before recording the statement. Chandu Ram (P.W.1) also did not state in his evidence that any opinion was taken from the medical jurist regarding Kailash being in a fit condition to give the statement. Dr. Deepak Gindoda, who allegedly appended the note on Ex.P/71 regarding Kailash being in a fit condition to give a statement, did not give any such evidence when he was initially examined by the

prosecution and upon cross-examination by the defence, he admitted the police did not present any application seeking permission to record the Parcha Bayan of Kailash.

2. Mr. Rajpurohit further urged that the recoveries effected by the Investigating Officer are totally fabricated. The weapons were allegedly recovered from the house of Aatma Ram on 16.10.2013. Mr. Rampratap, Investigating Officer (P.W.18), admittedly visited and inspected the house of the accused Aatma Ram on the very day of the incident, i.e. 13.10.2013, and thus, it cannot be believed that the weapons, which the Investigating Officer claims to have recovered at the instance of the accused would have gone unnoticed. In this regard, he drew the court's attention to the evidence of Chandu Ram (P.W.1), the attesting witness of the seizure memos, who admitted in his cross-examination that he was made to sign all the documents at the police station between 13th and 15th October, 2013. Reference in this regard was also made to the statement of Surendra Singh (P.W.3), the other attesting witness of the seizure memos, who admitted in his cross-examination that on 13.10.2013, Mr. Rampratap, CI, went to the house of Aatma Ram in the evening at 05.00 p.m.. At that time, the witness was standing there. The CI was accompanied by 4 to 5 police officers, who went inside the house and brought out *lathis*, *Barcha*, axe and blood stained clothes and seized them and got him to sign the memorandums. It was argued that the recoveries are dubious because admittedly the articles were seized within a day or two of the incident and then were shown to have

been recovered on 16.10.2013 by planting the same on the accused persons.

3. It was also contended that the FSL report cannot be read in evidence because the prosecution did not give convincing evidence regarding safekeeping of the *Mudda Maal* articles. The weapons and other blood stained articles were forwarded to the FSL on 29.10.2015, i.e. after more than two years of the incident. Drawing the court's attention to the statement of Gopal Singh Dhaka (P.W.21), Mr. Moti Singh urged that the witness admitted in his cross-examination that these articles had been sent to the FSL about 10-15 months earlier. However, no corresponding evidence was given by the prosecution to explain the fate of these articles when they were sent to the FSL earlier. Mr. Moti Singh thus urged that the link evidence is breached and hence, FSL report cannot be read in evidence.

4. His fervent submission was that even if the prosecution case is to be believed as true on the face of the record, conviction of the accused appellants for the offence under Section 302 read with Section 149 IPC is totally unjustified because only four persons have been charge-sheeted in this case and thus, an unlawful assembly within the meaning of Section 143 of the IPC was not formed and consequently, conviction of the accused appellants with the aid of Section 149 IPC is totally unwarranted and they deserve to be acquitted.

5. He further contended that once the Parcha Bayan (Ex.P/1) is discarded, apparently, the entire prosecution case becomes doubtful. The statement of Chandrakala (P.W.2) is not reliable. She also made gross improvements in her evidence in order to corroborate the Parcha Bayan of Kailash and as such, her testimony also deserves to be discarded. Once, the Parcha Bayan is excluded from consideration and the statement of Chandrakala is held to be doubtful, there remains no evidence whatsoever on the record of the case so as to connect the appellants with the alleged crime and hence, their conviction is unsustainable.

6. On the aspect of confirmation of death sentence awarded to the appellants, Mr. Moti Singh vehemently and fervently contended that the case at hand does not fall within the category of "rarest of the rare cases" so as to justify the capital punishment awarded to the accused by the trial court. The trial court did not summon any report regarding conduct of the accused in prison which is mandatory, as per the law laid down by the Hon'ble Supreme Court in various judgments dealing with the concept of capital punishment. The accused appellants have remained in custody for the last more than nine years without there being any adverse report regarding their behaviour in prison. All adult male members of the family are incarcerated in prison for almost ten years and consequently, the ladies and young children of the family have been left to fend for themselves in a state of abject poverty. They were compelled to abandon their homes after the

incident and are struggling to survive by doing labour jobs. He fervently urged that even if conviction of the accused appellants is affirmed, it is not a fit case warranting award of death sentence.

On the above grounds and submissions, the learned defence counsel implored the court to accept the appeal, set aside conviction of the appellants and to reject the reference.

Per contra, Learned Public Prosecutor and Mr. Suresh Kumbhat, learned counsel representing the complainant, vehemently and fervently opposed the submissions advanced by the appellant's counsel and supported the impugned judgment to the hilt. They urged that the first informant Kailash was a young boy of about 16 years of age. He himself, his father and brother were brutally assaulted by the accused persons in the field. There was no reason as to why the child would give a false statement for implicating the accused persons when he was himself in a critical condition. Law is well settled by a catena of judicial pronouncements that a dying person does not tell a lie and hence, the trial court was absolutely justified in placing reliance on the Parcha Bayan (Ex.P/1) and treating it to be a dying declaration within the meaning of Section 32 of the Evidence Act. The investigation of the case was hampered and delayed because two accused persons namely, Rakesh and Pawan, were absconding and the Investigating Officer by sheer oversight, could not collect the original fitness certificate corresponding to the carbon copy Ex.P/71 and hence, the same was not presented alongwith the charge-sheet. However, while the trial was proceeding, the learned public prosecutor was informed that the Parcha Bayan had

been recorded after procuring a certificate of fitness from the doctor concerned and immediately thereupon, a carbon copy of the certificate (Ex.P./71), which was available in the case diary, was filed on record with an application under Section 311 of the CrPC with two fold prayers:-

(1) To recall Dr. Deepak Gindoda, who had issued the certificate of fitness, appended with the application Ex.P./71 submitted by Ramniwas, Sub-Inspector; and

(2) To bring the document on record.

The trial court accepted the said application.

The statement of the Investigating Officer Rampratap (P.W.18) was recorded in the first round of proceedings of trial on 20.06.2016 and the document Ex.P/71 was presented and was proved during his evidence without any objection being raised by the defence to question the admissibility thereof.

Dr. Deepak Gindoda (P.W.16) was recalled to give additional evidence by order dated 23.06.2016. His supplementary statement was recorded afresh on 12.07.2016 and during the course of his testimony, carbon copy of the document (Ex.P/71) with endorsement of Dr. Deepak Gindoda, was fortified by the witness without any objection being raised by the defence. The objection regarding admissibility of this document Ex.P/71 was raised for the first time during the *de novo* proceedings, when the Investigating Officer Mr. Rampratap (P.W.18) was examined on

05.02.2019. The trial court permitted marking of exhibit on the document Ex.P/71, which was a carbon copy and rightly treated it to be primary evidence in light of Explanation (2) of Section 62 of the Evidence Act. They urged that graphic description was given by Kailash in the Parcha Bayan Ex.P/1 regarding the brutal assault made by the appellants and the absconding accused persons. Four innocent lives were extinguished by the accused persons who acted with rank perversion and extreme cruelty. Three members of the family were brutally assaulted in the field and some corrossive substance was poured in the eyes of Kailash after assaulting him. All four male members of the family who were aged between 16 and 75 years, were eliminated. Consorted effort was made by the heavily armed members of the unlawful assembly to completely obliterate the family by assaulting Chandrakala and Smt. Sushila as well, but they somehow survived the attack, which was fuelled with the motive/enmity arising from a land dispute. The evidence of Chandrakala establishes the fact that the accused persons came to the village after assaulting the victims in the agricultural field and were hurling exhortations that those in the field had been eliminated and Moman Ram and the female members would also be killed.

Learned Public Prosecutor and the learned counsel representing the complainant urged that this declaration made by the accused persons in presence of Chandrakala amounts to an extra-judicial confession and is a relevant fact which proves conduct of the accused as provided by Section 6 of the Evidence Act. They further urged that the learned defence counsel has cast

no aspersion whatsoever on the evidence of Chandrakala except on the aspect of alleged improvement regarding the Parcha Bayan (Ex.P/1). Her testimony regarding exhortations hurled by the accused and the declaration that they had killed Bhanwarlal, Pankaj and Kailash in the agricultural field as well as the assault made on the witness herself and Moman Ram was not controverted by putting any significant questions during cross-examination and hence, this part of her testimony remains unchallenged. They further urged that the contention of Mr. Moti Singh, learned counsel representing the appellants, that conviction of the accused appellants could not be recorded with the aid of Section 149 IPC, is totally frivolous because it is an admitted position that two accused are still absconding and hence, total number of assailants, is more than five and as a consequence, Section 149 IPC is clearly applicable to the case at hand. They urged that the conviction of the appellants as recorded by the trial court is based on thorough and apropos appreciation of evidence as available on record. The impugned judgment does not suffer from any infirmity whatsoever. The whole incident was perpetrated with extreme cruelty. Four innocent persons were hacked and clubbed to death and a young woman was brutally beaten. Hence, the case is covered under the rarest of rare category and as a consequence, the sentence of death awarded to the accused by the trial court deserves to be affirmed. On these submissions, they implored the Court to dismiss the appeal and confirm the death sentence awarded to the accused appellants.

We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material available on record and have carefully re-appreciated the evidence available on record.

Now we shall discuss and analyze the evidence in light of the submissions advanced at bar.

A. The appellant's counsel did not make any argument whatsoever regarding the evidence of the Medical Jurist, who proved the injury reports of Ms. Chandrakala and Kailash and the postmortem reports of the four deceased persons. However, as entire evidence is required to be appreciated at the appellate stage, gist of injuries noted by the Medical Jurist Dr. Deepak Gindoda in the injury reports (Ex.P/41 and Ex.P/42) and the postmortem reports (Ex.P/43, Ex.P/44, Ex.P/45 and Ex.P/46) is summarized hereinbelow:-

INJURY REPORTS :

Injury Report of Kailash: dated 13-10-2013: Ex. P/41

Sr. No.	Type of Injury/Wound	Dimensions of Wound	On what body part the injury had been caused	What type of weapon caused the said injury
1.	Lacerated Wound with visual Deformity	4cm x 2cm x 0.5cm	Middle 1/3 of Right Leg (anterior aspect)	Blunt
2.	Lacerated Wound	3cm x 1.5cm x 0.5cm	Middle 1/3 of Left Leg (anterior aspect)	Blunt
3.	Bruise	6cm x 2cm	Lateral aspect of upper 1/3 Left Arm	Blunt
4.	Abrasion and Mild Swelling	3cm x 0.6cm	Present between index finger and thumb at dorsal aspect of left hand	Blunt
5.	C/o swelling at right Right Arm, no external injury seen			Blunt
6.	Lacerated wound and	3cm x 2cm x 0.5cm	Dorsal aspect of	Blunt

	mild swelling		great toe of left foot	
7.	Bruise and Mild Swelling	4.5cm x 3cm	Left Temporal area of head	Blunt
8.	Bluish Conjunctiva and opaque cornea associated and bluish discoloration area of eye and bluish substance seen orbital and periorbital area and also impair vision in B/L eye			Chemical (Bluish Color)

Injury Report of Chandrakala: dated 13-10-2013: Ex. P/42

Sr. No.	**Type of Injury/Wound**	**Dimensions of Wound**	**On what body part the injury had been caused**	**What type of weapon caused the said injury**
1.	Lacerated Wound with visual Deformity	3cm x 1cm x 2.5cm	Left Frontal Area of forehead	Blunt
2.	C/o pain over the abdomen	No external injury seen		Blunt
3.	C/o pain at Left elbow joint	No external injury seen		Blunt
4.	Abrasion and Mild Swelling	3cm x 0.6cm	Present between index finger and thumb at dorsal aspect of left hand	Blunt

POST-MORTEM REPORTS:

1) MOMANRAM:

Date & Time: 13-10-2013 at 12:45 PM

Age: 75 yrs

Injuries :-

(1) lacerated wound 8cm x 2cm x deep bone seen at left parietal area of head associated and underlying fracture of left parietal bone, also a subdural haematoma 4cm x 1.5cm and 5mm partial thickness seen in left parietal area.

(2) Lacerated wound 10cm x 2cm x deep bone at right parietal area associated and underlying fracture of right parietal bone, on dissection a subdural haematoma 4.3cm x 2cm and 7mm partial thickness seen in right parietal area.

(3) Lacerated wound 3cm x 1.5cm x deep bone at left left occipital area of Head associated and underlying fracture of left occipital bone.

(4) Abrasion 3cm x 1cm seen at root of nose

(5) lacerated wound 3cm x 1cm x 0.5cm dorasal aspect of right hand

(6) Bruise 5cm x 3cm seen posterior lateral aspect of right arm seen

(7) lacerated wound four in number (2cm x 1 cm x deep bone, 5cm x 1.5 cm x deep bone, 2 cm x 1.5 cm x deep bone)seen anterior aspect of right leg associated and crushing at all muscles and dried clotted blood and underlying fractures of both legs right bone seen

(8) lacerated wound 2cm x 1cm x deep bone associated and crushing of muscles and dried clotted blood and underlying fracture of left fibula bone

(9) Visual deformity of left foot, on dissection fracture of 2nd and 3rd bone of left foot.

(10) Abrasion of 3cm x 1cm posterior aspect of left forearm

All injuries were determined to be antemortem in nature.

Opinion of the Board:

"from the above mentioned finding Medical Board have opinion that cause of death is shock and haemorrhage due to multiple injuries to body including vital organ brain. All injuries and antemortem in nature."

2) BHANWARLAL:

Date and Time: 13-10-2013 at 01:40 PM

Age: 46 yrs

Injuries:-

(1) lacerated wound 6cm x 4cm x deep bone at left occipital area of head and fracture of left occipital bone underlying a subdural haematoma 3.5cm x 2.5cm and partial thickness seen.

(2) Lacerated wound 8cm x 4cm x deep bone at left parietal area of head and fracture of left parietal bone underlying a subdural haematoma 5cm x 3cm and 7mm partial thickness seen.

(3) Lacerated wound 3cm x 2cm x 0.5cm at apex of head.

(4) Bruise 6cm x 4cm seen on right shoulder.

(5) Lacerated wound 2.5cm x 1.5cm x 0.5 cm seen between index finger and thumb at dorsal aspect of left hand.

(6) Lacerated wound 3cm x 2cm x deep bone associated and crushing of muscles and dried clotted blood and fracture of lower 1/3rd of Ulna and radius both bone of left forearm.

(7) Lacerated wound 3cm x 2cm x deep bone seen at lateral aspect of right arm and dried clotted blood and fracture of humerus bone of right arm upper 1/3rd.

(8) Lacerated wound three in number- 2cm x 1cm x deep bone, 2.5cm x 1.5cm x deep bone, 3cm x 2cm x deep bone seen anterior aspect of right leg and fracture of tibia and fibula both bone of right leg.

(9) Lacerated wound six in number approximately 2.5cm x 1.5cm x deep bone (all) seen at anterior aspect of left leg and dried clotted blood and crushing of muscles and fracture of tibia bone of left leg.

(10) Abrasion 3cm x 1cm seen at left side of chest.

(11) Abrasion 3cm x 1.5cm seen at middle of forehead seen.

(12) Bruise three in number (5cm x 4cm, 4cm x 3cm, 6cm x 3cm) seen at upper and middle back region.

(13) Abrasion 3cm x 2cm lateral aspect of left thigh.

All injuries were determined to be antemortem in nature.

Opinion of the Board:

"From the above mentioned finding, medical board have opinion that the cause of death is shock and haemorrhage due to multiple injuries to body including vital organ, brain. All injuries are antemortem in nature."

3) PANKAJKUMAR:

Date and Time: 13-10-2013 at 01:40 PM

Age: 18 yrs

Injuries:-

(1) Lacerated wound 6cm x 4cm x deep bone at left occipital area of head and fracture of left occipital bone. Underlying a subdural haematoma 3cm x 2.5cm and partial thickness 5mm seen.

(2) Abrasion 3cm x 1cm at posterior aspect of right forearm and obvious deformity, on dissection both bone fracture of right forearm.

(3) Lacerated wound two: 3cm x 1.5cm x deep bone, 4cm x 2cm x deep bone and crushing of muscles and fracture of both bone of left forearm.

(4) Lacerated wound 3cm x 2cm x deep bone at lower 1/3rd of left arm of crushing of muscles and fracture of left humerus bone.

(5) Lacerated wound four in number: 3cm x 1.5cm x deep bone, 3.5cm x 2cm x deep bone, 3.5cm x 1.5cm x deep bone, 4cm x 2cm x deep bone seen anterior aspect of right leg and crushing of muscles and dried clotted blood and fracture of of both bone of right leg.

(6) Lacerated wound three in number: 2cm x 1.5cm x deep bone, 3cm x 1.5cm x 1.5cm x deep bone, 4cm x 2cm x deep bone seen at anterior aspect of left leg and crushed at muscles and dried clotted blood and fracture of tibia at left leg.

All injuries were determined to be antemortem in nature.

Opinion of the Board:

"From the above mentioned finding, medical board have opinion that the cause of death is shock and haemorrhage due to multiple injuries to body including vital organ, brain. All injuries are antemortem in nature."

4) **KAILASH:**

Date and Time: 14-10-2013 at 09:30 AM

Age: 16 yrs

Injuries:-

(1) Bruise:- 4.5cm x 3.0cm over left temporal region of the head. On dissection 4cm x 3.0cm parietal thickness subdural haematoma present.

(2) Lacerated wound- 4cm x 2cm x 0.5cm over middle 1/3 of right leg with fracture of both leg bones with crushed muscle.

(3) Lacerated wound- 3cm x 1.5cm x 0.5cm- middle 1/3 of left leg, anterior aspect with crushing of muscle.

(4) Bruise- 6cm x 2cm- left arm- upper 1/3 and over lateral aspect

(5) Lacerated wound- 3cm x 2cm x 0.5cm over left foot- dorsal aspect of right toe.

(6) Abrasion- 3cm x 0.5cm between index finger and thumb- dorsal aspect of left hand.

(7) All injuries were determined to be antemortem in nature.

Opinion of the Board:

"From the above mentioned finding, medical board have opinion that the cause of death is Haemorrhagic shock due to multiple injuries to body, including vital organ, Brain. All the injuries are antemortem in nature. However viscera are

taken for FSL examination and handed over to accompanying police person of PS Bhadra."

A perusal of the above injuries, clearly establishes the fact that the death of the victims was homicidal in nature and that the accused causing such injuries were definitely having knowledge that it may lead to death of the victims.

B. The first and foremost argument of the appellant's counsel to challenge the impugned judgment was regarding the admissibility/reliability of the Parcha Bayan (Ex.P/1). It is manifest that the offence was committed in the Anoopshahar town which falls in the jurisdiction of Police Station Bhadra. Mr. Vikrant Sharma (P.W.12), who recorded the Parcha Bayan (Ex.P/1), was admittedly posted as SHO Police Station, Gogamedi on the date of incident. The prosecution has led no tangible evidence whatsoever to satisfy the Court that Mr. Vikrant Sharma had been authorized for recording the Parcha Bayan even though the offence did not take place within jurisdiction of the Police Station, where the officer was posted. This fact assumes significance because admittedly, Mr. Rampratap (P.W.18), SHO, Police Station Bhadra had already received information regarding the incident and had reached the crime scene well before the Parcha Bayan came to be recorded. Learned Public Prosecutor tried to offer a semblance of an explanation for this discrepancy arguing that the incident was very gruesome in nature and thus, the Superintendent of Police, Hanumangarh, directed Mr. Rampratap to be at the crime scene whereas, Mr. Vikrant Sharma was sent to

the hospital for taking stock of the injured persons who had been brought there.

However, a perusal of the statements of Mr. Vikrant Sharma (P.W.12) and Mr. Rampratap (P.W.18), makes it clear that neither of them gave any satisfactory evidence to satisfy the court that Vikrant Sharma had been authorized to go to the hospital for tending to the victims of this case. Rather, Mr. Rampratap, SHO Police Station, Bhadra, did not utter a single word in his examination-in-chief as to why, he himself did not proceed to the hospital or authorize any police officer posted at Bhadra to go there for finding out the condition of the persons who had been taken there. On the contrary, the Roznamcha Entry, (Ex.P/72), does give an indication that Mr. Ramniwas, ASI and foot constables Mr. Ramkaran, Mr. Amarchand and Mr. Surajbhan, had been sent to the Government Hospital, Bhadra. However, none of these police officials were examined by the prosecution during the course of trial. Therefore, not a single Police Officer posted at the Police Station, Bhadra where the incident took place, was examined by the prosecution to prove the events which unfolded at the Government Hospital, Bhadra after the victims Kailash and Chandrakala were brought there.

The Parcha Bayan (Ex.P/1) does not bear any endorsement of the Medical Jurist regarding the fitness (mental and physical) of Mr. Kailash to give such statement. Mr. Vikrant Sharma (P.W.12) neither made any such endorsement nor did he record any satisfaction on the document regarding the victim Kailash being in a fit condition to give such a lengthy statement.

The Prosecution tried to make up for this serious lacuna by filing an application dated 15.12.2015, wherein, it was claimed that Mr. Vikrant Sharma had as a matter of fact, taken a certificate from the Medical Jurist regarding Kailash being in a fit condition to give the statement. However, this document which was proved as Ex.P/71 and admissibility whereof was seriously questioned by the learned defence counsel, was not proved by Mr. Vikrant Sharma during his evidence. Rather, Mr. Vikrant Sharma did not even utter a single word in his sworn testimony that he had given any requisition seeking opinion of the medical jurist for the fitness of the injured to give a statement. When cross-examined, Mr. Vikrant Sharma candidly admitted that he did not record presence of the doctors in the Parcha Bayan because, they were busy providing treatment to the injured. He did not make any application to the Magistrate to record the statement. He requested Kailash to sign the document but he could not do so and thus, his thumb impression were appended thereupon.

The requisition Ex.P/71, (carbon copy which was proved by the prosecution), was purportedly presented to the Medical Jurist by Mr. Ramniwas, who was posted as an ASI at the Police Station, Bhadra. However, the endorsement where Mr. Ramniwas, ASI, signed the application is of SHO Police Station, Bhadra. If this seal is ignored, the prosecution has given no explanation whatsoever as to why Mr. Ramniwas, ASI himself was not examined to prove the document Ex.P/71. The Medical Jurist, Dr. Deepak Gindoda, (P.W.16), admitted in his statement that the police neither recorded the Parcha Bayan of Kailash in his

presence, nor was he asked to endorse the same after it had been recorded.

Mr. Rampratap, (P.W.18), exhibited a carbon copy of the document Ex.P/71 claiming that this copy had been handed over to him by Mr. Vikrant Sharma. However, as has been stated above, Mr. Vikrant Sharma, did not utter a single word regarding the document Ex.P/71. Mr. Rampratap also tried to offer an explanation that the carbon copy could not be filed alongwith the charge-sheet because of inadvertence and that the original was lying at the hospital. However, it is a matter of utter surprise that neither the prosecution nor the court made an effort by exercising powers under Section 91 CrPC read with Section 165 of the Evidence Act to procure the original document from the Government Hospital concerned. The application dated 15.12.2015, which was filed by the prosecution under Section 311 Cr.P.C. to recall Dr. Deepak Gindoda in evidence for proving fitness certificate (Ex.P/71A), contained a prayer to lead secondary evidence of the document. However, the trial court straight off allowed marking of exhibit on the document when Mr. Rampratap (P.W.18) was examined in evidence on 20.06.2016 in the first round of proceedings. It is true that at that stage, the defence counsel did not raise any objection against the marking of exhibit on the document. However, this is a legal objection and could be taken at any stage. This objection was raised when Mr. Rampratap was examined on oath in the de novo trial on 05.02.2019 post remand by this Court. Prima facie, we are satisfied with the reasoning given by the trial court in the note

dated 05.02.2019 appended in the statement of Mr. Rampratap that the document Ex.P/71 being a carbon copy prepared in the same uniform mechanical process qualifies to be considered as primary evidence as per Section 62 Explanation (2) of the Evidence Act. However, this conclusion would not for a moment dilute the substantial arguments advanced by the defence counsel to impeach the very credibility of the document.

Now, we proceed to discuss this important aspect of the case. Mr. Vikrant Sharma (P.W.12), claims to have got the Parcha Bayan (Ex.P/1), attested from Chandu Ram Verma (P.W.1), who upon being examined on oath, clearly stated that he was not present besides Kailash when the police officials recorded his statement. Chandu Ram claimed that he was informed of the incident by Daata Ram (P.W.8), who told him that Aatma Ram, Leeladhar, Om Prakash, Pawan, Rakesh and Shrawan were the assailants. However, Daata Ram (P.W.8) stated in his evidence that he actually saw the assault made on Moman Ram and Chandrakala in the residential premises. When Chandu Ram reached the house of the victims, Chandrakala told him that six accused persons had come there and assaulted Moman Ram and herself and had also hurled an insinuation that they had killed her father and two brothers in the agricultural field. Thereupon, Chandu Ram alongwith Kan Singh, Illiyas and Surendra took the Max vehicle of Chandu Khan and went to the field, where they saw Bhanwarlal and Pankaj lying dead whereas, Kailash was badly injured and was writhing in pain. Something had been put in his eyes because of which, they had turned blue. They picked up

Kailash and put him into the vehicle and brought him to the village. 108 Ambulance had reached there alongwith the police vehicles. Kailash and Moman Ram were boarded onto the 108 ambulance and were sent to Bhadra Hospital. Chandrakala was taken to the hospital for treatment in a separate vehicle. The witness stated in his examination-in-chief that the police recorded the statement of Kailash. At that time, he was present besides the victim for some duration and was also going out for bringing the medicines, etc. Shri Chandu Ram recollected as to what had been narrated by Kailash in the Parcha Bayan (Ex.P/1). When the witness was cross-examined, he admitted that Chandrakala and her mother did not come near the ambulance on which Kailash had been boarded. Kailash was speaking slowly and would black out periodically. When the police started recording the statement of Kailash, doctor gave him a prescription slip and he went out to purchase the medicines. When he came back with the medicines, he was asked to attest the Parcha Bayan. Apparently, thus, the witness was not present besides Kailash when the statement Ex.P/1 was recorded and hence, attestation of the statement by Mr. Chandu Ram becomes doubtful.

Chandrakala was examined as (P.W.2). She tried to make an improvement in her examination-in-chief, claiming that Kailash gave a statement to the police wherein, he narrated the entire incident. However, the witness was confronted with her previous police statement Ex.D/1, wherein there is no such disclosure that Kailash gave any such statement in her presence. Otherwise also, if the prosecution case is to be believed, then as

per the fitness certificate Ex.P/71, a clear opinion had been given by the Medical Jurist that Chandrakala was not fit to give a statement. Hence, possibility of Chandrakala having overheard and recollected the Parcha Bayan of Kailash is negligible. She admitted that when she reached the hospital, bandages had been applied to Kailash. He was conscious when she reached the hospital. The police officers asked her whether she was in a position to give the statement on which, she refused, saying that she was deeply perturbed. Kailash told her that their father and brother had expired.

Mr. Surendra Singh, (P.W.3), admitted in his cross-examination that while he was present with Kailash, the boy did not say anything to his mother or sister Chandrakala. Kailash had been boarded on to the 108 Ambulance for being sent to the hospital and he was not aware regarding the death of Bhanwarlal and Pankaj.

In addition thereto, there are inherent improbabilities which make the statement (Ex.P/1) doubtful.

Admittedly, thus, Chandrakala did not talk to Kailash before the statement Ex.P/1 had been recorded. Therefore, Kailash could not have had a faintest idea regarding the acts of violence, which the accused indulged into at the residence.

It is noted in the Parcha Bayan (Ex.P/1) of Kailash that his father and brothers were brutally assaulted by the assailants, whereafter he was beaten up and some corrosive substance was put into his eyes, whereby he lost his vision. In these circumstances, Kailash could not have had the faintest idea

regarding fate of his father and his brother. Surendra Singh (P.W.3) categorically stated that Kailash was not made aware of the fact that his father and brother had expired in the incident. Thus, when the Parcha Bayan (Ex.P/1) was being recorded, Kailash was unquestionably not aware of the fate which had befallen his father and brother. Hence, introduction of the fact that these two persons had expired and the minute details of the incident, which took place in the residence, in the Parcha Bayan, without the victim having any idea about the same makes it clear that the Parcha Bayan was not faithfully recorded and extraneous facts were introduced therein from other sources, which make the veracity of the statement doubtful. The defence has come out with a case that Yashwant (P.W.6), being the grandson of the deceased Moman Ram, is a Police Constable and the Parcha Bayan might have been manipulated at his instance. There is merit in this contention of the defence counsel because unquestionably there are many suspicious circumstances, as discussed *supra*, in the Parcha Bayan, which cast a doubt on its creditworthiness.

There are apparent lacunae in the statement Ex.P/1 which was not recorded in compliance of Rule 6.22 of the Police Rules, which reads as below:

> "***6.22 Dying declarations. -*** *(1) A dying declaration shall, whenever possible, be recorded by a Magistrate.*
>
> *(2) The person making the declaration shall, if possible, be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.*

(3) If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded, it shall be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

(4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.

(5) A dying declaration made to a police officer should, under section 162, Code of Criminal Procedure, be signed by the person making it."

Thus, the Parcha Byana (Ex.P/1) deserves to be discarded and the findings recorded by the trial court in the impugned judgment affirming its veracity are unsustainable.

With the exclusion of the Parcha Bayan (Ex.P/1), there remains no direct evidence on the record regarding the incident, which took place in the field. However, despite discarding a very important part of the prosecution case, significant direct as well as circumstantial evidence is available on the record, which conclusively establishes involvement of the accused in both parts of the incident. In this regard, we would like to refer to the evidence of Chandrakala (P.W.2). Presence of Chandrakala at the residence, where second part of the incident took place, was not very seriously disputed by the learned defence counsel. We have carefully perused the statement of injured witness Chandrakala (P.W.2). She narrated the sequence of events, which unfolded in

her presence and the assault, which was made on herself as well as her grandfather in the following manner :-

"मुख्य परीक्षा :– घटना के समय तीन चार साल से मैं अपने पीहर अनूपशहर में रह रही थी। अब मैं मेरे ससुराल रोल जिला नागौर में रहती हूं। करीब आज से सवा पांच साल पहले दिनांक 13.10.13 की बात है सुबह करीब साढे पांच छह बजे के लगभग मेरे पापा भंवरलाल व मेरे दो भाई पंकज व कैलाश हमारे आथूणे खेत में गवार काटने के लिए गये हुए थे। घर पर मेरे दादा मोमनराम, मेरी मां व मैं थी। मेरी मां खाना बना रही थी। मैं पडोस से छाछ लाने गई थी तब समय करीब सात बजे बीच रास्ते खेतों की ओर से टैक्टर पर आत्माराम, लीलाधर, पवन कुमार व ओमप्रकाश जो नोरंगराम के लड़के थे व एक श्रवण पुत्र लीलाधर व राकेश पुत्र आत्माराम थे जिनके कपडे खून से भरे हुए थे। इन्होने मेरे को देखते ही कहा कि तेरे पापा भंवरलाल व भाई पंकज व कैलाश को तो हम खेत में मार कर खत्म कर आये है अब तेरी व मोमनिया की बारी है और ये उतरकर मेरे पीछे दौडे और जिनके हाथों में लाठी कुल्हाडी व जैली थी फिर मैं वहां से दौड़कर घर आई व घर आकर मैंने गेट बंद किया और मैं मेरी मां के पास भाग कर गई तो मेरी मां ने पूछा कि ऐसे कैसे आई तो मैंने कहा कि आत्माराम, लीलाधर, पवन कुमार व ओमप्रकाश, श्रवण व राकेश छह जने पीछे आ रहे है जो तेरे को मारेंगे फिर मैंने मेरी मां को कमरे में बंद कर दिया। मेरे दादाजी बाहर बैठक के कमरे में बैठे थे जिसके दो गेट थे तथा बाहर के गेट को बंद कर दिया तथा आत्माराम वगैरह ने धक्का मुक्की कर बाहर का गेट खोल लिया और फिर आत्माराम वगैरह ने मेरे दादा को बुरी तरह से लाठी कुल्हाडी व जैली से मारपीट किया। पवन कुमार ने मेरे दादा के सिर में लाठी की मारी, मैंने बीच बचाव किया तो मेरे भी इन्होंने काफी चोटे मारी जो मेरे सिर में, पीछे की तरफ व हाथों, पैरों व पेट पर लगी। इस घटना को उस समय धर्मपाल जिलोईया ने देखा जो डरकर वहां से चला गया। फिर मेरे दादा कमरे में फर्श पर गिर गये। फर्श पर व दीवारों पर व छत के खून लगा हुआ था। पंखें की ताडियां टूट गई। फिर आत्माराम वगैरह छहों मुलजिमान अंदर आंगन में कमरे की तरफ मेरी मां की तरफ भागकर आये और मेरी मां को कहा कि रंडी किवाड खोल तुझे भी मारेंगे इस पर मेरी मां ने किवाड नही खोले। इसके बाद गांव के आदमी आ गये तब आत्माराम वगैरह भाग गये। हमारे गांव के चन्दूराम, सुरेन्द्रसिंह, कानसिंह

व इलियास आ गये। मैंने इनको सारी घटना बताई व मैंने इनको बताया कि खेत में ये मेरे पापा व भाईयों को मार कर आये है और उन्हें खेत में मेरे पापा व भाईयों को जाकर संभालने को कहा। इस पर चन्दूराम व सुरेन्द्रसिंह मैक्स गाडी लेकर हमारे खेत में गये और हमारे खेत से मेरे भाई कैलाश को लेकर घर आये तब कैलाश बुरी तरह से घायल था तथा मेरे भाई कैलाश के जगह जगह चोटे लगी हुई थी व हाथ पैर बुरी तरह से तोड रखे थे व उसकी आंखों में नीला नीला कुछ डाला हुआ था। फिर उस समय पुलिस व 108 की गाडिया वहां आ गई। फिर मेरे भाई कैलाश व मेरे दादा को गाडी में सरकारी अस्पताल भादरा में ले गये। मेरे दादा की सरकारी अस्पताल में मौत हो गई। फिर मैंने मेरे ताउ के बेटे भाई भंवरवत को सुरतगढ़ फोन किया और उसे सारी बातें बताई। फिर इसके बाद मुझे भी मैक्स गाडी में भादरा अस्पताल ले गये। अस्पताल में पुलिस ने मेरे भाई कैलाश के बयान लिये थे मैं उस समय मेरे भाई कैलाश के पास से ही थी। मेरे भाई कैलाश ने पुलिस को बयानों में बताया कि आत्माराम, लीलाधर, पवन कुमार व ओमप्रकाश, श्रवण व राकेश वगैरह सब अचानक खेत में आये और मेरे पिता भंवरलाल, भाई कैलाश व पंकज को जान से मारने की नियत से लाठी कुल्हाडी व जैली से जोरदार हमला कर दिया तथा मेरे पापा भंवरलाल व भाई पंकज की उस समय मौत हो गई थी। उसके बाद मुझे व मेरे भाई कैलाश को आस्था अस्पताल सिरसा में रैफर कर दिया वहां पर इलाज के दौरान उसी रात को मेरे भाई कैलाश की मौत हो गई थी। इस मारपीट का कारण जमीनी विवाद था जो काफी दिनों से चल रहा था। मुलजिमान मेरे छोटे दादा के लड़के व पौते है। मुलजिमान ने मुझे भी जान से मारने की नियत से चोटे मारी थी। मेरा मेडिकल मुआयना हुआ था। मेरी मां ने मुलजिमान को किवाडों के छेद (झीरी) में से देखा था।

The significant parts of cross-examination conducted from Chandrakala (P.W.3) are also extracted hereinbelow for the sake of ready reference :-

यह सही है कि मेरे पुलिस बयान प्रदर्श डी 1 में कैलाश के हाथ पैर तोड रखे थे ये बात नहीं लिखी हुई है मैंने तो पुलिस को बता दिया था क्यों नहीं लिखा मुझे पता नहीं है। यह सही है कि मेरे पुलिस बयान प्रदर्श डी 1 में मेरे भाई कैलाश ने पुलिस को बयानों में बताया कि आत्माराम, लीलाधर, पवन कुमार व ओमप्रकाश, श्रवण व राकेश वगैरह सब अचानक

खेत में आये और मेरे पिता भंवरलाल, भाई कैलाश व पंकज को जान से मारने की नियत से लाठी कुल्हाडी व जैली से जोरदार हमला कर दिया तथा मेरे पापा भंवरलाल व भाई पंकज की उस समय मौत हो गई थी ये नहीं लिखा हुआ है मैंने तो पुलिस को बता दिया था क्यों नहीं लिखा मुझे पता नहीं है। ..... यह सही है कि मैं आज ये नहीं बता सकती कि मेरे दादा के किस किस मुलजिम ने किस हथियार से शरीर पर कहां कहा चोटे मारी। यह सही है कि मैं आज ये नही बता सकती कि मेरे किस किस मुलजिम ने किस किस हथियार से कहां कहां मेरे शरीर पर चोटे मारी। ..... 108 हमारे घर के आगे ही रूकी हुई थी। कैलाश के खेत से लाने के कुछ देर बाद जब उसने घर आकर सारी बात बता दी थी उसके बाद मेरे दादा व कैलाश को 108 में लेटा दिया था तथा उन्हें भादरा ले गये वो ज्यादा सीरियस थे इसलिए उन्हें जल्दी ले गये थे और मेरे को भादरा मैक्स गाडी में बाद में लेकर गये थे। मुझे 108 के जाने के बाद तुरंत ही मैक्स गाडी में भादरा लेकर गये थे। मैं जब अस्पताल में गई थी तब कैलाश के पटटी कर रखी थी। ..... मैं बेहोश नहीं हुई थी। भादरा अस्पताल में मेरे पास पुलिस वाले आये थे और उन्होंने मुझे पूछा था कि क्या आप बयान देने की स्थिति में हो लेकिन मैं उस समय बयान देने की स्थिति में नहीं थी घबराई हुई थी। मैं जब अस्पताल में आई थी तब मेरे भाई कैलाश ने मुझे मेरे पिता व भाई के देहांत का बता दिया था। मैं जब अस्पताल में आई थी तब मुझे मेरे दादा के देहांत का पता चल गया था। ..... मुलजिमान जब टैक्टर लेकर आये थे तब इन्होंने टैक्टर को हमारे घर से 15–20 पांवडा दुरी पर रोका था। ..... हमारे घर के आगे चौक है। जैसे ही मैं रामलाल के घर के पास आई तो हमारे घर की दक्षिणी गली में पूर्व की ओर से मुलजिमान टैक्टर लेकर आये और मुलजिमान ने मेरे को देख कर धमकाया कि तेरे पिता और भाईयों को मार आये है अब तुम्हारे को नहीं छोडेगे इस पर मैं मेरे घर में भागकर आ गई। मुलजिमान ने टैक्टर को दक्षिणी गली में पूर्वी तरफ रोक लिया था। मुलजिमान मेरे से कितनी दूर पर थे निश्चित नहीं बता सकती लेकिन मुझे

दिखाई दे रहे थे। सभी मुलजिमान मुझे धमकी दे रहे थे। किस अभियुक्त ने अलग अलग क्या क्या कहा मैं आज नहीं बता सकती। ”

On going through the entire statement of Chandrakala, it becomes clear that the defence did not give a faintest of suggestion to the witness to impeach her testimony on the aspects that the accused came outside their house; hurled insinuations that they had killed Bhanwar Lal, Pankaj and Kailash in the field and that she and Moman Ram were next in line to face the same consequence. This blatant declaration made by the six assailants in presence of Chandrakala admitting the factum of murders committed in the field and threats of similar consequences to the witness Chandrakala and the deceased Moman Ram, are relevant facts constituting *res gestae* as per Section 6 of the Indian Evidence Act, and are admissible in evidence. Even though the incident occurred in two parts at different time and places, they are so connected with the main fact in issue that they form part of the same transaction. The facts of the case at hand are identical with illustration (a) of Section 6 of the Evidence Act, which reads as below.

> *"**6. Relevancy of facts forming part of same transaction.-** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.*
>
> *Illustrations*
>
> *(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-*

standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

Chandrakala is an injured witness and even though, her version regarding the Parcha Bayan of Kailash cannot be believed, as being a sheer improvement, despite that, her testimony to the extent of the insinuation made by the accused in her presence that they had killed her three family members in the field and their subsequent offensive acts causing injuries to Chandrakala and Moman Ram at their is unimpeachable.

In addition to Chandrakala (P.W.2), the prosecution also examined Dharmpal (P.W.4), who stated in his sworn testimony that he heard fervent cries coming from towards the house of Moman Ram and proceed there. He saw that the accused appellants herein and the two absconding accused Pawan and Rakesh were trying to force their way inside the house of Moman Ram. They were hitting the doors with lathis hurling insinuations that "मोमनिया किवाड खोल तुझे मारेंगे तेरा डलाज करने आये हैं तथा हम तेरे लडके भंवरलाल व पोते पंकज तथा कैलाश को खत्म कर आये है अब तेरी बारी है।". The witness tried to pacify the accused persons. They did not relent and threatened him as well. The accused forced open the gate of Moman Ram's house, went inside and assaulted Moman Ram and Chandrakala. A little while later, the assailants went towards their homes. The witness mustered courage and went to the house of Moman Ram, where he saw Chandrakala and her mother crying, while Moman Ram was lying on the floor and was writhing in pain. On seeing the gory scene, he became terrified

and went back to his home. Nothing significant was elicited in the cross-examination conducted from the witness. It may be stated here that Chandrakala also corroborated the fact that Dharmpal had seen the incident, but he fled from the spot out of fear.

Hence, we have no hesitation in holding that by virtue of statements of Chandrakala (P.W.3) and Dharmpal (P.W.4), the prosecution has been able to prove beyond all manner of doubt the fact that the accused appellants and the two absconding accused were the assailants, who assaulted the victims Bhanwar Lal, Pankaj and Kailash in the agricultural field and Chandrakala and Moman Ram at the residential premises.

Medical Evidence :-

The prosecution examined Dr. Deepak Gindoda (P.W.16), who proved the injury reports and postmortem reports in the manner described *supra*.

Though the learned defence counsel did not advance any serious arguments regarding the availability of ample medical evidence to bring home the charge of murder and attempt to murder, despite that, we have carefully re-appreciated the evidence of the medical jurist Mr. Deepak Gindoda (P.W.16) and find that the medical evidence establishes beyond all manner of doubt that four deceased persons, namely, Bhanwar Lal, Pankaj, Moman Ram and Kailash, were inflicted multiple injuries by blunt and sharp weapons (possibly by reverse side as well) on the vital body parts. The resultant injuries were very grave and the individual effect of some injuries and the cumulative effect of all

combined was sufficient in the ordinary nature to cause death of the four victims. Thus, we have no hesitation in holding that necessary ingredients required to bring home the charge for the offence punishable under Section 302 IPC are proved beyond all manner of doubt.

Charge for the offence punishable under Section 149 IPC :-

It was the fervent contention of the learned counsel Mr. Moti Singh Rajpurohit that the trial court committed gross illegality by invoking Section 149 IPC for convicting the accused appellants for the offences punishable under Sections 302 and 323 IPC. He asserted that only four persons have been convicted by the trial court. The mandatory requirement of assembly of 5 persons so as to constitute an unlawful assembly, as per Section 141 IPC, is not satisfied. This argument has no legs to stand whatsoever. In this regard, we may note here that witness Chandrakala (P.W.3) has categorically stated that six assailants, i.e. the four appellants herein and Rakesh and Pawan, launched an assault on the victims. Apparently, investigation qua accused Rakesh and Pawan is still kept open because these two assailants are absconding and are at large. Thus, without any doubt the prosecution has given unimpeachable evidence establishing active participation of more than five persons in the assault and hence, the argument regarding non-applicability of Section 149 IPC on account of number of accused persons being less than five is totally frivolous and is turned down.

Unfair investigation, lacunae in investigation and unreliable recoveries :-

Mr. Moti Singh, learned counsel representing the appellants, questioned the bonafides of the investigating agency primarily on the ground that the entire investigation was influenced by Yashwant (P.W.6), who being closely related to the family of the accused was working as a Police Constable. We are to some extent convinced by this argument advanced by the defence. As a matter of fact, the Investigating Officer Mr. Rampratap (P.W.18) acted in a most casual manner while conducting investigation of this case. He claimed to have effected numerous recoveries during the course of investigation, but failed to give proper evidence to prove their sanctity. The date on which recoveries were shown to have been effected, i.e. 16.10.2013, is not convincing as the recoveries were definitely made earlier. He also claims to have collected the carbon copy of the requisition (Ex.P/71) from Ramniwas, but the same was not filed alongwith the charge-sheet. No effort was made by the prosecution to examine Ramniwas, ASI to prove the requisition (Ex.P/71). The prosecution tried to link the incriminating recoveries effected at the instance of the accused through the testimony of Investigating Officer Rampratap (P.W.18) The incident took place in the year 2013. Ram Pratap, SHO, Police Station Bhadra (P.W.18), did not give any plausible evidence as to when the recovered articles/weapons were deposited in the Malkhana. He gave a bald and unconvincing statement that the seized articles were deposited in Malkhana in a sealed condition. When the testimony

of the Head Constable Sahab Singh (P.W.20) is seen, it becomes clear that he gave evidence regarding receipt of articles on 13.10.2013, 15.10.2013 and 16.10.2013. These Malkhana articles were surprisingly forwarded to the FSL as late as on 29.10.2015. The Constable admitted in cross-examination that the samples had been sent to the FSL earlier, but they were received back with objections. The Constable could not elaborate or explain what precisely was the nature of objections. On the contrary, he stated that when the Malkhana articles were received back from the FSL with objections, he was not posted as Malkhana Incharge at the Police Station. The Malkhana Register, which was proved by the prosecution was of the year 2015 but the Malkhana registers of the year 2013 and 2014 were not exhibited in evidence. Thus, it is clear as day light that the prosecution has failed to lead proper evidence to prove the sanctity and safekeeping of the *Mudda Maal* articles. In addition thereto, we have perused the entries made in the Malkhana register, which was proved as Ex.P/89. A bare perusal of the entries made therein convinces us that there have been serious bungling in the manner in which the Malkhana articles were handled by the concerned police officials. Thus, the FSL report (Ex.P/68) loses significance and cannot be read in evidence against the accused persons.

Plea of alibi :-

Regarding the defence theory of alibi qua the accused Leeladhar and Sharwan Kumar, learned counsel Mr. Moti Singh

advanced fervent arguments that these two accused persons were not present at the spot and were arrested from Gharsana, where they were living to pursue their respective occupations. However, this argument is on the face of it nothing but an afterthought. On a perusal of the statements of Chandrakala (P.W.2) and Dharmpal (P.W.4), it becomes apparent that both the witnesses gave wholesome testimony regarding presence and participation of both these accused persons in the incident. The defence did not give a semblance of suggestion to either of these two witnesses regarding the plea of alibi taken by these two accused. Even if we see the statement of Sharwan recorded under Section 313 CrPC, it becomes clear that he did not utter a word that he was living at Gharsana at the time of the incident. The accused Leeladhar and Aatma Ram took a plea of being at Gharsana at the time of incident. However, this plea is nothing but an afterthought, which has been put forth for the first time when cross-examination was carried out from the Investigating Officer after many years of incident. Furthermore, it is a well-settled proposition of law that a plea of alibi is a very weak plea and has to be proved by leading unimpeachable evidence. However, other than a bald suggstion to the Investigating Officer and a weak belated plea in the statement under Section 313 CrPC, the defence did not lead any evidence whatsoever to prove this apparently frivolous plea of alibi. Hence, in face of positive convincing evidence of the witnesses Chandrakala (P.W.2) and Dharmpal (P.W.4), the cooked up plea of alibi has no legs to stand whatsoever and is fit to be discarded.

Consequently, we are of the firm opinion that the prosecution has proved by unimpeachable reliable testimony, the factum of the assault made by the four accused appellants and two absconding accused Rakesh and Pawan in the field, where Bhanwar Lal and Pankaj were murdered and Kailash was seriously injured and later on died and in the residential premises, where Moman Ram was murdered and Chandrakala was caused numerous injuries. Even if the Parcha Bayan of Kailash is excluded from zone of consideration as being unreliable, the prosecution has been able to bring home the guilt of the accused appellants by leading cogent, convincing and unimpeachable evidence of injured witness Chandrakala (P.W.2) and the independent witness Dharmpal (P.W.4).

As an upshot of the above discussion, we have no hesitation in holding that the accused appellants are liable to be and were rightly convicted by the trial court for the offences punishable under Sections 302/149, 147, 148, 452, 447 and 323/149 IPC.

Having held so, we now consider the case regarding affirmation of penalty of death sentence imposed by the trial court upon the accused appellants.

The Hon'ble Supreme Court considered various facets of capital punishment to the accused in the case of ***Chhannu Lal Verma Vs. The State of Chhattisgarh*** **[AIR 2019 SC 243]** wherein the entire concept of death penalty was discussed in detail. The Hon'ble Supreme Court evaluated numerous cases in which the capital punishment awarded to the accused was

affirmed as well as those cases in which death penalty was commuted to life sentence. It was held :-

> *8. In Bachan Singh (supra) while upholding the constitutional validity of death penalty in India, it was held that under Section 354(3) of the CrPC, imprisonment for life is the rule and death sentence is the exception. The Court emphasized the need for principled sentencing without completely trammeling the discretionary powers of the judges. It also held that the "special reasons" that are required to be recorded while awarding death sentence means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Some of the aggravating and mitigating circumstances indicated in Bachan Singh (supra) are: -*
>
> > *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."

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

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

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

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

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

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

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

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

9. The Court also clarified that while determining the punishment, due regard must be given to the crime as well as the criminal. The aggravating and mitigating circumstances would have to be viewed from the perspective of both the crime and the criminal. The relevant discussion reads thus:

"201. …As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

(Emphasis supplied)

However, the Court has emphasised that the list of aggravating and mitigating circumstances provided above are not exhaustive and the scope of mitigating factors in

death penalty must receive a liberal and expansive construction by the courts. Paragraph 209 reads as follows:

> *"209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. **That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.**"*
>
> *(Emphasis supplied)*

10. In ***Machhi Singh v. State of Punjab, (1983) 3 SCC 470*** *the Court summarized the findings in Bachan Singh (supra) and held as follows:*

> *"38. In this background the guidelines indicated in Bachan Singhcasewill 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:*
>
> *(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."

(Emphasis supplied)

11. It is evident that the Court in Bachan Singh (supra) has set a very high threshold of "rarest of rare cases when the alternative option is unquestionably foreclosed" for the grant of death penalty.

The meaning and ambit of this expression has been discussed in Santosh Bariyar (supra). The Court also emphasised the need for a bifurcated hearing for the purpose of conviction and sentencing. The relevant portion reads:

> *"56. At this stage, Bachan Singh in forms the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of*

convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socioeconomic background of the offender. This issue was also raised in the 48th Report of the Law Commission.

57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this context, Guideline 4 in the list of mitigating circumstances as borne out by Bachan Singh is relevant. The Court held: (SCC p. 750, para 206)

"206. (4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above."

In fine, Bachan Singh mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

58. The rarest of rare dictum breathes life in "special reasons" under Section 354(3). In this context, Bachan Singh laid down a fundamental threshold in the following terms: (SCC p. 751, para 209)

"209. … A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save

in the rarest of rare cases when the alternative option is unquestionably foreclosed."

(emphasis supplied)

An analytical reading of this formulation would reveal it to be an authoritative negative precept. The "rarest of rare cases" is an exceptionally narrow opening provided in the domain of this negative precept. This opening is also qualified by another condition in the form of "when the alternative option is unquestionably foreclosed".

59. Thus, in essence, the rarest of rare dictum imposes a wide-ranging embargo on award of death punishment, which can only be revoked if the facts of the case success fully satisfy double qualification enumerated below:

1. that the case belongs to the rarest of rare category,

2. and the alternative option of life imprisonment will just not suffice in the facts of the case.

60. The rarest of rare dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the rarest of rare dictum places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum.

61. The background analysis leading to the conclusion that the case belongs to the rarest of rare category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the

rarest of rare aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted: (Bachan Singh case, SCC p. 738, para 161

"161. … The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.""

(Emphasis supplied)

12. In ***Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546*** *this Court looked at the manner in which the aggravating and mitigating circumstances are to be weighed and how the rarest of rare test is to be applied while awarding death sentence and held thus:*

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to applyfinally the rarest of the rare case test (R-R test). R-R test

depends upon the perception of the society that is "societycentric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

(Emphasis supplied)

13. In our opinion, the High Court has erroneously confirmed death penalty without correctly applying the law laid down in Bachan Singh (supra), Machhi Singh (supra), Santosh Bariyar (supra) and Shankar Kisanrao Khade (supra). The decision to impose the highest punishment of death sentence in this case does not fulfil the test of "rarest of rare case where the alternative option is unquestionably foreclosed". The questions laid down in paragraph 39 of Machhi Singh (supra) have not been answered in the particular case. No evidence as to the uncommon nature of the offence or the improbability of reformation or rehabilitation of the appellant has been adduced. Bachan Singh (supra) unambiguously sets out that death penalty shall be awarded only in the rarest of rare cases where life imprisonment shall be wholly inadequate or futile owing to the nature of the crime and the circumstances relating to the criminal. Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty. As laid down in Shankar Kisanrao Khade (supra), whether the person would be a threat to society or whether not granting death penalty would send a wrong message to society are

additional factors to be looked at. No such analysis was undertaken by the High Court. The High Court has also failed to look at the aggravating and mitigating circumstances regarding the criminal as warranted by Bachan Singh (supra). The fact that the appellant had no previous criminal record apart from the acquittal in the Section 376, IPC, which was a false implication and the alleged motive did not weigh with the High Court as an important mitigating circumstance with respect to the criminal.

14. In the past four decades or so, this Court has been consistently echoing its concern on the constitutional ethos on value and dignity of life, when it said in Bachan Singh (supra) that 'extreme depravity' (paragraph 201), 'it is the duty of the State to adduce evidence that there is no probability that the accused can be reformed' (paragraph 206), 'liberal and expansive connotation' (paragraph 209), 'alternative option is unquestionably foreclosed' (paragraph 209) 'humane concern' (paragraph 209), 'real and abiding concern for dignity of human life' (paragraph 209), in Machhi Singh (supra) that 'gravest case of extreme culpability' (paragraph 38), 'only when life appears to be an altogether inadequate punishment' (paragraph 28), 'mitigating circumstances should be given full weightage' (paragraph 38), in Santosh Bariyar (supra) that 'probability that the accused can be reformed and rehabilitated' (paragraph 57), 'the rarest of rare case is a negative precept' (paragraph 58), 'death is an exceptionally narrow opening' (paragraph 58), 'extraordinary burden on the Court to impose death' (paragraph 60), 'maximum weightage to mitigating circumstances and yet no alternative except death' (paragraph 39), 'highest standards of judicial rigor and thoroughness' (paragraph 61), and in Shankar Kisanrao Khade (supra) that 'possibility of reformation, young age of the accused, not a menace to the society, no previous track record'(paragraph 52) etc. These factors have not received due consideration by either the High Court or the Trial Court.

15. The appeal has been pending before this Court for the past four years. Since the appellant has been in jail, we wanted to know whether there was any attempt on his part for reformation. The superintendent of the jail has given a certificate that his conduct in jail has been good. Thus, there is a clear indication that despite having lost all hope, yet no frustration has set on the appellant. On the contrary, there was a conscious effort on his part to lead a good life for the remaining period. A convict is sent to jail with the hope and expectation that he would make amends and get reformed. That there is such a positive change on a death row convict, in our view, should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed. As held by the Constitution Bench in Bachan Singh (supra) it was the duty of the State to prove by evidence that the convict cannot be reformed or rehabilitated. That information not having been furnished by the State at the relevant time, the information now furnished by the State becomes all the more relevant. The standard set by the 'rarest of rare' test in Bachan Singh (supra) is a high standard. The conduct of the convict in prison cannot be lost sight of. The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform.

16. In the matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such a psychological/psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform. The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated.

17. Another aspect that has been overlooked by the High Court is the procedural impropriety of not having a separate

hearing for sentencing at the stage of trial. A bifurcated hearing for conviction and sentencing was a necessary condition laid down in Santosh Bariyar (supra). By conducting the hearing for sentencing on the same day, the Trial court has failed to provide necessary time to the appellant to furnish evidence relevant to sentencing and mitigation.

18. For the abovementioned reasons, we hold that the imposition of death sentence was not the only option and hence the same needs to be commuted to imprisonment for life."

The accused appellants have suffered incarceration in prison since the year 2013. True it is that the conduct of the accused while launching the pre-planned assault on the three victims in the field and on Moman Ram and Chandrakala at their residence was heinous as well as brutal. However, it is a universally acceptable proposition that reformative theory has to be given precedence over capital punishment, which should be considered a last resort. In the present case, the accused appellants have remained in custody for nearly 9 years. For affirming the death sentence, the court would be required to collect material regarding conduct of the accused while in prison to assess whether they have displayed behaviour indicating signs of reformation. Award of extreme penalty of death without undertaking such exercise is impermissible as held by Hon'ble Supreme Court while laying down the guidelines reproduced *supra*.

Though the trial court has undertaken a superficial exercise of trying to assess the mitigating and aggravating circumstances, but ex facie, we are of the view that the case at

hand does not satisfy the requirements for awarding the extreme death penalty.

As a consequence, we hereby turn down the Reference No.1/2019 and partly accept the Appeal No.208/2019. Conviction of the accused appellants as recorded by the trial court for the offences punishable under Sections 302/149, 147, 148, 452, 447 and 323/149 IPC is confirmed, but the reference for confirmation of death sentence is turned down. However, the conduct of the accused, who attacked the entire family of Mr. Moman Ram with clear intention of eliminating them owing to the long-standing land dispute requires appropriate directions on the aspect of sentence of imprisonment. If the accused are permitted to roam at large without suffering the "imprisonment for life" in its literal meaning, they would in all likelihood eliminate the remaining family members as well if set at liberty. Hence, the capital punishment awarded to the accused appellants by the trial court is commuted to life imprisonment, which shall enure till the natural life of the accused appellants without any possibility of permanent parole/premature release. The fine imposed and the default sentence awarded by the trial court on each count is maintained. The appeal of the accused appellants is partly allowed in these terms. The record be returned to the trial court.

(VINOD KUMAR BHARWANI),J **(SANDEEP MEHTA),J**

Pramod/Devesh/-