(2013) 05 AHC CK 0415

Allahabad High Court

Case No: Criminal (Capital) Appeal No. 6632 of 2011

Ali Mohd.	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision: May 3, 2013

Acts Referred:

- Arms Act, 1959 - Section 27
- Criminal Procedure Code, 1973 (CrPC) - Section 129, 313, 354(3), 37, 43
- Penal Code, 1860 (IPC) - Section 302, 304, 307, 326, 327

Citation: (2013) 3 ACR 2780 : (2013) 5 ALJ 205 : (2013) 82 ALLCC 241

Hon'ble Judges: Amar Saran, J; Aditya Nath Mittal, J

Bench: Division Bench

Advocate: Shabbir, Ali Mohd., Arun Kumar Tiwari, V.M. Sharma and Raja Ullah Khan, for the Appellant; R.K. Singh, Km. Meena and Anand Tewari, for the Respondent

Judgement

Aditya Nath Mittal, J.

This criminal appeal has been filed against the judgment and order dated 24.10.2011 passed by Additional Sessions Judge (E.C.P.) Court No. 26, District Shahjahanpur in Session Trial No. 305 of 2007, under Sections 302, 449 I.P.C. and Section 27 Arms Act by which the appellant has been convicted and has been awarded death sentence along with fine for the offence punishable u/s 302 I.P.C. As per prosecution case, on 8.1.2007, when the father of the complainant Mohd. Noor, real uncle Mohd. Asfaq, younger brother Mohd. Nairn and maternal uncle Sajeed Ali and Mubarak Ali were engaged in talks upon an open plot then at about 03:30 in the evening, family uncle Ali Mohd. (the appellant) came with his licensee revolver and due to quarrel in between the children, fired on Noor Mohd on his skull. The uncle of the complainant namely Mohd. Asfaq tried to run away from the spot upon whom also the fire was opened and both of them fell down on the earth. After it the appellant tried to kill the complainant and his brother who tried to run away towards their home and then by entering into the home the appellant shot down his

mother namely Zubeda. After the incident, the accused terrorised the area and had climbed over the water tank. The complainant while taking his mother and father to the hospital, his mother expired on the way. The father was admitted to District Hospital and uncle was admitted to the hospital of Dr. Waseem. The F.I.R. was lodged on the same day at 17:30 O''clock upon which a case at Crime No. 17 of 2007, under Sections 302, 452, 307 I.P.C., Section 27 of Arms Act and Section 7 of Criminal Law Amendment Act was registered at Police Station Kotwali, District Shahjahanpur.

2. After investigation, the charge-sheet was filed for the offences punishable under Sections 452, 302, 307, 327 I.P.C. and Section 27 Arms Act. After committal proceedings, the charges for the offences punishable under Sections 302, 307, 449, 326, 304 I.P.C. and Section 27 Arms Act were framed and upon death of Mohd. Asfaq, the charge was altered to Section 302 I.P.C. The appellant had denied all the charges and claimed trial.

3. The prosecution has examined Mohd. Mobin (P.W.-1) who is complainant, Mubarak Ali (P.W.-2) who is eye witness, Dr. K.V. Jain (P.W.-3) who has conducted post-mortem of Mohd. Noor and Smt. Zubeda Bano, Dr. M.P. Gangwar, who has conducted post-mortem of Asfaq (P.W.-4), Dr. Waseem Khan (P.W.-5) who had treated Asfaq, S.I. Om Prakash Pathak (P.W.-6) who had prepared the inquest report of Mohd. Noor and Zubeda Bano, Tripurari Diwakar (P.W.-7) who has conducted the investigation, S.I. Raj Narayan Dubey (P.W.-8) who has prepared the inquest report of Asfaq and H.M. Dharmpal Singh (P.W.-9), who has scribed the chick F.I.R. and General Diary. After prosecution evidence, the statement of accused was recorded u/s 313 Cr.P.C. in which he had denied the incident and the defence was taken that there was a family dispute and the deceased and his son intended to take forcible possession upon his house, therefore, he has been falsely implicated. In defence evidence Afaq Ali Khan, D.W.-1 has been produced who is the scriber of the F.I.R.

4. After appreciating the evidence on record, learned Additional Sessions Judge came to the conclusion that charges regarding offences punishable under Sections 302, 449 I.P.C. and Section 27 Arms Act are proved beyond any doubt and because the accused is being convicted for the offences punishable u/s 302 I.P.C., therefore, there was no need to punish him for the offences punishable under Sections 307, 326 and 304 I.P.C. Accordingly, after hearing the appellant on the point of sentence, he has been convicted for the offence punishable u/s 302 I.P.C. by capital punishment along with a fine of Rs. 50,000/- and for the offence punishable u/s 449 I.P.C. by rigorous imprisonment of ten years along with fine of Rs. 10,000/- and for the offence punishable u/s 27 Arms Act, by rigorous imprisonment of 7 years and fine of Rs. 7,000/-. It was also directed that all the sentences shall run concurrently and 1/2 of the amount of fine shall be paid to the complainant as compensation.

5. Heard Sri. V.M. Sharma and Mohd. Shabbir, learned counsel appearing for the appellant and Sri R.K. Singh, learned A.G.A., assisted by Km. Meena and Sri Anand Tiwari, Advocates.

6. Learned counsel for the appellant has submitted that there are material contradictions in the statements of the witnesses. It has also been submitted that no independent witness has been produced while both the witnesses of fact are relative witnesses. It has also been submitted that there was no reason for the appellant to have climbed over the water tank which makes the prosecution story doubtful. It has also been submitted that learned court below has not taken into consideration the evidence of Afaq Ali Khan, D.W.-1 who has stated in his statement that the Police Inspector had dictated the F.I.R. and he has reached the Police Station at 09:00 in the night, therefore, the lodging of report at 17:30 O''clock is doubtful. It has also been submitted that no motive has been assigned by the prosecution for the said occurrence and the expert report has not been put in the statement u/s 313 Cr.P.C.

7. Learned A.G.A. has submitted that it was a case of brutal murder of three persons in the day light without any provocation and the prosecution had succeeded in proving the guilt beyond reasonable doubt, therefore, the appellant has been rightly convicted and sentenced to death.

8. The incident had taken place on 8.1.2007 at 3:30 in the evening and the report was lodged on same day at 5:30 in the evening. There is no delay in lodging the F.I.R. As far as the statement of Afaq Ali, D.W.-1 is concerned, he has stated in his statement that on 8.1.2007 the incident took place in which Mohd. Noor and his wife Zubeda were murdered. He has further stated that in the said incident Mohd. Asfaq got injuries who also expired after about one and half month. This witness has further stated in his statement that he has reached the hospital of Dr. Waseem at 4:00 in the evening and at 9:00 in the night he had gone to Kotwali along with Municipality Member Afsar Ali where Mohd. Mobin and the Police Inspector asked him to scribe the report. Mohd. Mobin was narrating the incident and Police Inspector was dictating the report. He has also stated that Mohd. Mobin had signed the F.I.R. which is in his handwriting. It appears that this witness was won over by the accused due to which he was not examined as prosecution witness. Moreover this witness has supported the incident but has stated that the report was lodged at 9:00 p.m. upon the dictation of Police Inspector. As per evidence, the report was lodged at 5:30 p.m. and it appears that this witness has made false statement regarding the time of lodging of the F.I.R. as well as the time of incident because he has admitted in his statement that he had gone to the hospital of Dr. Waseem at about 4:00 p.m. where Mohd. Asfaq was admitted in the hospital. The incident is said to have been taken place at 3:30 p.m. and as per prosecution story Mohd. Asfaq was brought to hospital of Dr. Waseem immediately, therefore, the time of reaching of this witness at the hospital of Dr. Waseem appears to be correct. As far as the statement of this witness that he had gone to Police Station at 9:00 p.m. and the report was dictated by the Police Inspector is concerned, it appears to be concocted and afterthought just to extend benefit to the accused. By all the evidence on record it is proved that the report was lodged at 5:30 p.m. and complainant Mohd. Mobin

had signed the F.I.R. Further more the so called member of Municipality Afsar Ali has not been examined. In these circumstances there appears to be no reasonable doubt about the time of incident and time of lodging the F.I.R.

9. Complainant Mohd. Mobin has categorically stated in his statement that on 8.1.2007 at about 3:30 p.m. when his father Mohd. Noor were talking with uncle Mohd. Asfaq and, maternal uncle Sajeed Ali and Mubarak Ali and then accused Ali Mohd. had came and he was wearing shawl in which the revolver was concealed. Due to dispute in the children, accused Ali Mohd. had shot down his father Mohd. Noor and has also shot down Mohd. Asfaq. He has further stated that when he and his brother ran away towards house of maternal uncle then Ali Mohd. entered into the house and shot down his mother Zubeda and then climbed over the water tank. This witness has been cross examined at length but in the cross examination also he has supported his statement in examination-in-chief that accused Ali Mohd. had shot down his father, uncle and mother due to which his father and mother had expired on the same day while his uncle had expired after some days. This witness has further stated that whole of the incident was committed by only Ali Mohd., the accused. He has further stated that his mother was shot down in the courtyard of the house and not at the shop. This witness has been cross-examined at length but nothing adverse has come in his statement so as to create any doubt regarding his presence on the spot or the commission of alleged offence by the appellant.

10. Mubarak Ali, P.W.-2 who is also the eye witness has also stated in the same way that on 8.1.2007 at about 3:30 in the evening when they were talking with Mohd. Noor, Ali Mohd. came with his licensee revolver and opened fire on the skull of Mohd. Noor and on his brother Mohd. Asfaq. He has further stated that after that he had run away chasing Mohd. Mobin and Mohd. Nairn who had entered to their home and accused Ali Mohd. also entered into their home and had shot down his sister Zubeda by his revolver. He has further stated that when he was carrying away his sister and brother-in-law towards hospital, then his sister Zubeda expired on the way and brother-in-law Mohd. Noor was admitted in the hospital who had also expired in the same night. He has further stated that Mohd. Asfaq, the other injured was admitted to hospital of Dr. Waseem who had expired on 22.2.2007 due to the injuries of the said incident. He has also stated that after the incident Ali Mohd. had climbed over the water tank and had created terror. This witness has also been cross examined at length and in the cross examination he has admitted that he had also signed the inquest report. This witness has also admitted in his statement that there was no dispute regarding plot of Mohd. Noor and the accused Ali Mohd. had no concern with the said plot.

11. Both these witnesses have narrated the incident in a very natural way and there is no material contradiction in the statements of both these witnesses of fact. The presence of these witnesses is also not doubtful and these witnesses have no enmity with the appellant Ali Mohd. Both these witnesses have supported the

prosecution version in a natural way and it does not appear that they are telling a lie or they are concealing any material fact.

12. It has been submitted by learned counsel for the appellant that there were two other eye witnesses one of whom was younger brother of the complainant and the other was another maternal uncle of the complainant who have not been examined. In the criminal prosecution the quality of evidence is to be seen and not the quantity of evidence, therefore, non-production of these two witnesses do not create any doubt regarding testimony of P.W.-1 and P.W.-2.

13. It has further been submitted that both these witnesses are related to deceased and no independent witness has been examined, therefore, the statement of these witnesses cannot be relied upon. As far as the relationship is concerned, the accused is also ''Khandani'' uncle of the complainant and resides in the same vicinity. No enmity or previous dispute has been proved between the parties.

14. The question relating to partisan witnesses has been examined by Hon''ble the Supreme Court in the following case law:

In the matter of Rizan and Another Vs. State of Chhatisgarh, through The Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh, , and Mano Vs. State of Tamil Nadu, , Hon''ble Supreme Court has held that:--

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon has no substance. This theory was repelled by this Court as early as in Dalip Singh and Others Vs. State of Punjab, in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:--

We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in -'' Rameshwar Vs. The State of Rajasthan, . We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.

In Masalti Vs. State of U.P., Hon''ble Supreme Court observed:--

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses...The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be

cautious in dealing with such evidence: but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

In the case of Tukaram and others v. State of Karnataka, AIR 2008 SCW 2319 : (AIR 2008 SC 339) and Gali Venkataiah Vs. State of Andhra Pradesh, , Hon''ble Supreme Court has held that:--

Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

In Dalip Singh and Others Vs. State of Punjab, it has been laid down as under:--

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

The above decision has since been followed in Guli Chand and Others Vs. State of Rajasthan, in which Vadivelu Thevar Vs. The State of Madras, was also relied upon.

In the matter of Kapildeo Mandal and Others Vs. State of Bihar, , Hon''ble Supreme Court has again reiterated the same principles and has held that:--

The credibility of a witness cannot be judged merely on the basis of his close relation with the deceased and as such cannot be a ground to discard his testimony, if it otherwise inspires confidence and, particularly so, when it is corroborated by the evidence of independent and injured witnesses.

In Nallabothu Venkaiah Vs. State of Andhra Pradesh, , Hon''ble Supreme Court held:--

The test, in such circumstances, as correctly adopted by the trial court, is that if the witnesses are interested, the same must be scrutinized with due care and caution in the light of the medical evidence and other surrounding circumstances. Animosity is double-edged sword and it can cut both sides. It can be a ground for false

implication. It can also be a ground for assault.

In Ramanand Yadav Vs. Prabhu Nath Jha and Others, , Hon''ble Supreme Court held:--

But at the same time if the relatives or interested witnesses are examined, the court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence is biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused, foundation for the same has to be laid.

In State of Himachal Pradesh Vs. Mast Ram, , Hon''ble Supreme Court said:--

The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not the requirement of Law.

15. In the light of the above judgments of Hon''ble the Supreme Court, it is clear that the evidence cannot be discarded only on the ground that the witness is a related witness. Certainly the testimony of such witnesses must, be examined carefully and should not be rejected mechanically.

16. Upon critical and careful examination of statements of both the witnesses namely Mohd. Mobin and Mubarak Ali, it cannot be said that they are implicating the appellant in the said incident due to any otherwise reason. Further more admittedly three murders have been committed and it does not appear probable that the complainant, whose father, mother and uncle have been murdered, will falsely implicate the appellant and save the real culprit. Therefore, the statement of both these witnesses cannot be doubted in any way.

17. Dr. K.V. Jain, P.W.-3, in his statement has proved the post-mortem of Mohd. Noor and Smt. Zubeda Banc. Following injuries were found on the body of Mohd. Noor:--

Fire arm wound of entry 0.9 cm. X 0.8 cm. in brain cavity deep margin inverted. 7 cm. Behind left ear. No blackening & tattooing present. Direction left to right.

In the internal examination one metallic piece was recovered from the right side of brain matter and the cause of death was due to fire arm head injury.

18. The following anti-mortem injuries were found on the body of Smt. Zubeda Bano:--

(i) Fire arm wound of entry 0.9 cm. X 0.8 cm. through & through X left scapular region. Blackening & tattooing were present and margin invented.

(ii) Fire arm wound of exit 1 cm. X 1 cm. Connecting wound No. 1.

(iii) Fire arm wound of entry 0.9 X 0.8 cm. X skin deep through & through pituatical.

(iv) Fire arm wound of exit 1 cm. X 0.9 c.m. connecting to wound No. 3.

(v) Fire arm wound of entry 0.9 c.m. X 0.8 c.m. into chest cavity.

(vi) Abrasion 1 c.m. X 1.5 c.m. on chin.

(vii) Abrasion 1.5 c.m. X 1.7 c.m. on right frontal region. The cause of death was due to fire arm injury.

19. This witness has been cross-examined at length and nothing adverse has come in the cross-examination so as to disbelieve the statement of this witness.

20. Dr. M.P. Gangwar (P.W.-4), Radiologist has proved the post-mortem report of Mohd. Asfaq and has found the following anti-mortem injuries:

(i) Healed operated scar 11 c.m. on right side back of lower chit.

(ii) Healed wound 7 c.m. around left side back of lower chit.

(iii) Healing wound on back of right scapular region.

21. This witness has proved the postmortem report as Exhibit Ka-4 and has found mat there were septic wound on right shoulder of the deceased and there were also bedsore. Nothing has come in the cross-examination so as to disbelieve his statement.

22. Dr. Waseem Ahmad Khan (P.W.-5) has proved the injuries of Mohd. Asfaq and has stated that on 8.1.2007 he was brought in injured position. The following injuries were found on his body:--

(i) entry wound of 1 X 1 cm. left to the 12th vertebra - 1 cm. lateral to spine.

(ii) entry wound of 1 X 1 cm. below right scapular region.

(iii) Exit wound 1 X 1 c.m. below right nipple region. Wounds bleeding patient''s condition unstable and the impression was that it was a fire arm injury from back side of body from the distance of about 10-12 feet.

23. This witness has also been cross-examined at length but nothing adverse has come regarding the admission of patient in his hospital and the injuries.

24. S.I. Om Prakash Pathak, P.W.-6 has proved the inquest report of Mohd. Noor and Zubeda Bano as Exhibits 7-10.

25. Inspector Tripurari Diwakar, P.W.-7 has stated mat the case was registered in his presence and the investigation was done by him. He has also stated that he had taken the statement of Head Constable Dharmpal Singh and the statement of complainant Mohd. Mobin and had also arrested the accused. He has further stated that revolver and cartridges were recovered from the possession of accused by him

and the memo was prepared by S.I. R.N. Dubey which has been proved as Exhibit Ka-9. Spot map Exhibit Ka-10, Memo of taking plain and blood stained mud Exhibits Ka-11 and 12, memo of recovery of blank cartridges from the spot where Smt. Zubeda Bano was murdered has been proved as Exhibit Ka-13. This witness has also proved that during investigation he has recorded the statement of Mohd. Nairn, Sajeed Ali, Mubarak Ali, Aftab Ali, Hafeej Ahmad, Afsar Ali, Constable Raghuraj Singh, Constable Kamendra Singh and has also recorded the statement of injured Mohd. Asfaq. He has further stated that after the investigation he has filed the charge-sheet which has been proved as Exhibit Ka-14. The recovered revolver, blank cartridges, plain mud and blood stained mud was sent to Forensic Sciences Laboratory, Agra. This witness has also proved the material exhibits relating to the crime. This witness has been cross-examined at length but nothing adverse has come so as to create any doubt regarding the investigation and the proceedings conducted by this witness.

26. S.I. Rajnarayan Dubey (P.W.-8) has stated that upon receipt of information of death of Mohd. Asfaq, he had executed the inquest report and the dead body was sent for postmortem. This witness has proved various papers of prosecution.

27. The then Head Muharrir Dharmpal Singh has been examined as P.W.-9 who has proved the registration of the case and scribing the chik F.I.R. and making entry in the general diary. This witness has also been cross-examined at length and has clearly stated in his statement that the case was registered on 8.1.2007 at 17:30 p.m. and it was narrated in the general diary at 17:30 p.m. Nothing adverse has come in his statement so as to create any doubt regarding registration of the case at the aforesaid time.

28. The revolver of the appellant was also taken into custody which was also sent to Forensic Science Laboratory, Agra and the disputed cartridges were found to have been fired by .32 bore Revolver No. E.G. 29608. Admittedly, the appellant is the license holder of the said .32 bore revolver. The report of the Forensic Science Laboratory is a public document and if the said report has not been referred to in the statement u/s 313 Cr.P.C., It is not fatal to the prosecution because it has been proved that the revolver and "Khokha" of cartridge were sent for forensic examination regarding which the report dated 23.1.2007 was received and the firing pin was matched with the recovered revolver of the appellant.

29. Learned sessions Judge has appreciated the evidence on record at length and has not found any material contradiction in the statements of the witnesses. The ocular evidence is supported by medical evidence. The findings are based on cogent reasons and supported by evidence on record. We do not find any error of law or error of fact in the impugned judgment and we are of the opinion that learned trial court has rightly held that the appellant has committed the alleged offences.

30. During the trial, two defences were taken regarding false implications of the appellant. One defence has been taken that the deceased and his son intended to take possession of his house and he has been falsely implicated due to family enmity. It has come in the evidence mat there was no enmity between the parties and there was no dispute regarding the plot upon which the deceased and the witnesses were engaged in talking. No such evidence has been adduced which may give any impression that accused persons wanted to take possession on his house. The incident was committed without any provocation from the side of the complainant of the deceased persons, therefore, we do not find any force in the said defence.

31. Another defence has been taken that on the place of incident, the persons were gambling in whose dispute the incident has taken place. No names of any such persons has been told as to who were gambling on the spot. The prosecution witnesses have categorically stated that appellant had caused shot by his licensed revolver due to which mother of the complainant died on the way when she was being carried away to hospital and father of the complainant expired in the night due to injuries of the incident. It is not probable that the complainant will implicate the appellant falsely and will save the actual culprits. Moreover it has also been found in the report of Forensic Science Laboratory that the pin of the blank cartridges were matching with the revolver of the appellant.

32. For the facts and circumstances mentioned above, it is proved beyond any reasonable doubt that on 8.1.2007 at about 3:30 p.m., appellant committed murder of Mohd. Noor and Smt. Zubeda Bano by his revolver and also caused injuries to Mohd. Asfaq who had expired after 1 1/2 months of the incident due to said injuries. We are of the view that the appellant has committed murder of aforesaid three persons and learned sessions Judge has rightly found him guilty for the offences punishable under Sections 302, 449 I.P.C. and Section 27 Arms Act.

33. Learned counsel for the appellant has submitted that the mental condition of the appellant was disturbed due to quarrel in between the children, therefore, the sentence of death is not warranted and taking into consideration the mental condition of the accused, a lenient view may be taken.

34. It appears from the factual scenario of the incident that the murder was not done in a planned manner but it appears that it has been committed due to impulsive act.

35. Hon''ble the Apex Court in Bachan Singh Vs. State of Punjab, , considering the aggravating circumstances has held that in following cases the penalty of death in its discretion may be imposed.

Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (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 u/s 43 of the Cr.P.C., 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance u/s 37 and Section 129 of the said Code.

36. In the aforesaid judgment it has been held that in exercise of its discretion, the court shall take into account the following mitigating circumstances;--

Dr. Chitaley has suggested these mitigating factors:--

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

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

(2) The age of the accused. It 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 unpaired his capacity to appreciate the criminality of his conduct.

37. In Gopalan Nair Vs. The State of Kerala, , Hon''ble the Apex Court has held as under:--

But we are unable to appreciate why the extreme penalty of death should have been inflicted on the appellant in the circumstances of this case. Firstly there can be no manner of doubt that he had some sort of mental trouble prior to the date of the occurrence. There is nothing to show that he was not suffering from a mental obsession which may not amount to insanity but which would affect a person''s mind in a way quite different from that of a normal person. The appellant seemed to harbour some sort of grudge that his trouble was due to the evil influence of Gouri Amma. If he had been quite normal his reactions might have been different. He was in all likelihood not in a position to weigh and analyse in a rational manner whether his trouble could be due to the reason mentioned before. Nor is it clear from the prosecution evidence as to what transpired between Gouri Amma and the appellant before he started stabbing her. In other words, the origin of the incident is not known. In our judgment this is not a case in which the penalty of death should have been inflicted.

We are, therefore, of the view that the lesser penalty for an offence u/s 302, Indian Penal Code, should be imposed. The sentence will thus stand reduced to that of life imprisonment.

38. In Srirangan Vs. State of Tamil Nadu, , Hon''ble the Apex Court has held as under:--

In the agonisingly sensitive area of sentencing, especially in the choice between life term and death penalty, a wide spectrum of circumstances attracts judicial attention; since they are all inarticulately implied in the penological part of S. 302 I.P.C. read with S. 354(3) Cr.P.C. The plurality of factors bearing on the crime and the doer of the crime must carefully enter the judicial verdict. The winds of penological reform notwithstanding, the prescription in S. 302 binds and death penalty is still permissible in the punitive pharmacopoeia of India. Even so, the current of precedents and the relevant catena of clement facts, personal, social and other, persuade us to hold that, even as in Nemu Ram Bora Vs. The State of Assam and Nagaland, , the lesser penalty of life imprisonment win be a more appropriate punishment here.

We set aside the death sentence and award imprisonment for life to the appellant under S. 302 I.P.C. The appeal is disposed of accordingly.

39. In Absar Alam @ Afsar Alam Vs. State of Bihar, , Hon''ble the Apex Court placing reliance on various pronouncement has held as under--

In Lehna Vs. State of Haryana, , the facts were that there was a quarrel between the accused and other members of his family, namely, his father, his brother and sister-in-law, over a piece of land and in the assaults that followed the quarrel, the accused killed his mother, his brother and sister-in-law. While upholding the conviction of the accused u/s 302, IPC, this Court held that the mental condition of the accused, which led to the assault, cannot be lost sight of and while such mental condition of the accused may not be relevant to judge culpability, it is certainly a factor while considering the question of sentence. This Court further held that the factual scenario gave impressions of impulsive act of the accused and not of planned assaults and in this peculiar background, death sentence would not be proper.

7. In Gyasuddin Khan @ Md. Gyasuddin Khan Vs. The State of Bihar, , the facts were that in the morning hours of 09.04.1996, in the precincts of a police camp stationed near a village in Bihar, a policeman deployed in the police picket to contain the terrorist activities, unleashed terror by indulging in a firing spree, killing three of his colleagues instantaneously and this Court, relying on Shamshul Kanwar Vs. State of U.P., , Om Prakash Vs. State of Haryana, , held that the mental condition or state of mind of the accused is one of the factors that can be taken into account in considering the question of sentence and in the facts of the case, the killing of two other policemen without premeditation and without any motive whatsoever was an act done out of panic reaction and in a state of frenzy and it was not one of the rarest of rare cases where death sentence could be awarded.

8. For the aforesaid reasons, we convert the sentence of death to one of life imprisonment for the offence u/s 302, IPC, committed by the appellant and allow the appeal in part.

40. Hon''ble the Apex Court in Sangeet and Another Vs. State of Haryana, , dealing with the leading judgments on the death penalty has again considered the ratio of Jagmohan Singh Vs. The State of U.P., , and Bachan Singh Vs. State of Punjab, and other leading cases and has held that the aggravating circumstances as mentioned in Bachan Singh case (supra), refer to the crime while the aggravating circumstances refer to the criminal and has held as under:--

Despite Bachan Singh, the "particular crime" continues to play a more important role than the "crime and criminal" as is apparent from some of the cases mentioned above. Standardization and categorization of crimes was attempted in Machhi Singh for the practical application of the rarest of rare cases principle. This was discussed in Swamy Shraddananda. It was pointed out in paragraph 33 of the Report that the Constitution Bench in Jagmohan Singh and Bachan Singh "had firmly declined to be drawn into making any standardization or categorization of cases for awarding death penalty". In fact, in Bachan Singh the Constitution Bench gave over half a dozen reasons against the argument for standardization or categorization of cases. Swamy Shraddananda observed that Machhi Singh overlooked the fact that the

Constitution Bench in Jagmohan Singh and Bachan Singh had "resolutely refrained" from such an attempt. Accordingly, it was held that even though the five categories of crime (manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder) delineated in Machhi Singh provide very useful guidelines, nonetheless they could not be taken as inflexible, absolute or immutable.

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

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

41. In the present case the appellant has no criminal history and while hearing on the point of sentence by the trial court, has submitted that he has three daughters aged about 21, 18 and 16 years and one son aged about 10 years and there is none else to take care of him. It is also relevant to mention that the appellant also belongs to the family of complainant and it was not a planned assault. It also appears from the factual scenario that after assaulting the three persons, the appellant had climbed over the water tank and had not escaped from the spot In view of Lehna Vs. State of Haryana, and Gyasuddin Khan @ Md. Gyasuddin Khan Vs. The State of Bihar, , the mental condition or state of mind of the accused is one of the factors that can be taken into account in considering the question of sentence. It appears that killing of father and mother of the complainant and shooting of uncle of complainant was without premeditation and without any motive whatsoever and it appears to be an act done out of panic reaction due to quarrel in between the children, therefore, it is not one of the rarest of rare cases where death sentence should be awarded.

42. For the facts and circumstances mentioned above, the conviction of appellant for the offences punishable under Sections 302, 449 I.P.C. and Section 27 Arms Act is upheld but the death penalty awarded to the appellant is converted into sentence of life imprisonment. All the sentences shall run concurrently. As Reference is rejected. The appeal is partly allowed.