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IN THE HIGH COURT OF DELHI

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Judgment reserved on: 27.07.2009

Judgment delivered on: 06.08.2009

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CRL. APPEAL 635/2007

RAJESH KUMAR

...Appellant

Through : Ms.Vasudha V.Indurkar, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) ...Respondent

Through : Mr.Pawan Sharma, APP.

DEATH SENTENCE REF. NO.2/2007

STATE : Through : Ms.Richa Kapoor, APP.

AND

RAJESH KUMAR : Through : Ms.Vasudha V.Indurkar, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. This Court has received a Death Reference for confirmation of the death sentence inflicted upon the accused Rajesh Kumar. Rajesh Kumar has also filed an appeal challenging the judgment and order dated 12.3.2007

convicting him for the offence of having murdered Master Anshul aged 4½ years and Master Harshit aged 9 months. The unfortunate boys were the children of Mukesh Sethi and Sangeeta Sethi. We shall refer to Rajesh Kumar as 'The appellant'. The appellant is the husband of Alka who is the unfortunate sister of Mukesh Sethi. In other words, the appellant has been convicted for murdering the nephews of his wife.

2. The entire evidence against the appellant finds mention in the statement Ex.PW-1/A of Sangeeta PW-1, which is the First Information given to the police on the basis of which the FIR has been registered, as also the endorsement Ex.PW-32/A made by Inspector Ram Chander PW-32 under the said statement, which was dispatched from the place of occurrence at 6:30 PM for the FIR to be registered.

3. The statement Ex.PW-1/A reads as under:-

"I have been residing at 2/129, II floor, Subhash Nagar, New Delhi with my family members for last 7-8 months. Before that I was residing in a flat provided by the corporation at Ashok Nagar. Smt.Alka Dhingra was also residing there in the neighbour hood. Smt Alka Dhingra and her husband Rajesh Dhingra often visited us even after our shifting to the present address. Today i.e.28.7.2003, I was present at my house and both my children Anshul aged 4 ½ years and Harshit aged about 9 months had slept around 2.30PM. at about 3:00 PM my brother-in-law(husband of the sister of my husband) Rajesh Kumar s/o Raj Kumar, r/o 53/16 Ashok Nagar came to my house and demanded water from me. I gave him water whereupon he asked for more water and requested me to cook food for him as

he was feeling hungry. When I was about to go to the kitchen for cooking food when my younger son got up and I held him in my arms whereupon Rajesh suggested me to give him the child and asked me again to cook food quickly. Then I went to kitchen but my son kept on crying. Then I came back to bedroom from kitchen and witnessed that Rajesh had lifted my son by securing his feet and hit him against the floor. I took away my child from him. Though he attempted to snatch my son from me but I managed to take him to my neighbour and raised an alarm. My neighbour Pinki who resides in House no.2/130, took my son downstairs. Then, Rajesh bolted the door of the bed room from inside. I could only hear the scream of my elder son to the effect "maa, maa". But, subsequently I could not hear anything. In the meantime, our neighbours Bahadur Singh, Preetam Das Negi and other persons had come up stairs. The police also arrived there. They tried to get the door open but Rajesh did not open. On peeping inside the bed room through the ventilator, Rajesh was found standing in the room whereas my son Anshul was found lying in a pool of blood. Then the police broke open the door and overpowered Rajesh. Rajesh broke the glass of dressing table and slit open the throat of my son with a piece of the glass. My son died on the spot. My younger son has been removed to the hospital for treatment. Rajesh committed the murder of my son in order to teach a lesson to my sister-in-law (husband's sister)."

4. The endorsement Ex.PW-32/A reads as under:-

"While on official duty and on getting wireless message, I, inspector Ram Chander alongwith my staff SI Vijay Pal and Ct. Kamal reached house number 2/129, Subhash Nagar, New Delhi i.e. the place of occurrence by an official vehicle and found ASI Jagpal Singh already present there alongwith HC Naresh and Ct. Dinesh. After going upstairs on the second floor of the house, Ct. Dinesh and Ct. Sukhbir Singh produced to me one person namely Rajesh Kumar, son of Raj Kumar, resident of 53/16, Ashok Nagar, Delhi who was already nabbed just on the spot. They also stated that they have broken open the door of the bed room, overpowered Rajesh and the dead body of a boy named Anshul is lying there. At this I the inspector moved

ahead and saw inside the room from its door and found the dead body of a boy namely Anshul lying in a pool of blood on the floor near the door. His throat was found slit open and he was wearing a white vest. The glass of the dressing table which was kept near the dead body was also found broken and the pieces thereof were found scattered near the dead body. Some of the pieces were stained with blood. Blood stains were also splattered over the wall. It appears from the scene of crime that the accused having broken the glass of dressing table committed the murder of child Anshul by slitting his throat with a piece of glass. The other child Harshit aged 1 year has already been removed to the hospital. After having left the staff at the spot, I, the inspector alongwith SI Inder Singh reached Chanan Devi hospital, Janak Puri and found a small kid, Harshit son of Mukesh Sethi, resident of 2/129 Subhash Nagar admitted in the hospital vide MLC No. 593 dated 28.7.2003. after obtaining MLC, I the inspector returned to the spot where the complainant Smriti Sangeeta Sethi came across me and got her foregoing statement recorded. The contents of the aforesaid statement, inspection of the dead body, perusal of MLC and the spot reveal the commission of an offence punishable under Section 302/307 IPC. Hence, the writing is being got sent to the police station through Const.Kamal No.1619/W for the purpose of the registration of a case (FIR). After registration of a case, its number may please be communicated. The higher authorities and crime team have already arrived at the spot. The special report may be sent to the concerned officers through special messenger. I, the inspector am busy with the investigation at the spot.

Date and hour of occurrence : 28.7.2003
At 3:15 PM."

5. We commence our narratives from the beginning. As recorded in the PCR Form Ex.PW-27/A, the duty officer in the Police Control Room received a call from a number 20056630 at 15:38 hours on 28.7.2003 informing that a man has entered a house in Subhash Nagar and had assaulted two

children and had locked the door from inside. Another call was made to the Police Control Room over mobile No.9810458303 as recorded in the PCR Form Ex.PW-31/A noting that the informant had informed that a man had murdered two children inside House No.2/129 Subhash Nagar near Arya Samaj Temple.

6. Each time, on receipt of afore-noted information, the duty officer at the police control room relayed the information to the concerned police station i.e. PS Rajouri Garden, where the duty constable recorded the said information by way of entries in the daily diary register, being DD No.11, Ex.PW-16/A at 3:35 PM and DD No.12, Ex.PW-16/B at 3:50 PM.

7. ASI Jagpal PW-22 was handed over a copy of both the DD entries and was deputed to investigate. He took along with him HC Naresh PW-19 and Const.Sukhbir PW-24. The three police officers reached House No.2/129 Subhash Nagar. A crowd had gathered outside the house. Mr.Bahadur Singh PW-4 a resident of House No.2/130 Subhash Nagar i.e. the immediate neighbour and one Mr.Negi (not examined as a witness), were present in the gathering and told the police officers that the assailant had locked himself in a room on the second floor of House No.2/129 Subhash Nagar. The officers climbed up the staircase and reached the second floor and

knocked at the door. The man inside did not oblige. The three police officers had a peep inside through the ventilator above the door and were horrified to see the body of a male child, smeared with blood and the neck badly cut. Blood was splattered all over the room. They had no option but to break open the door and apprehend the man inside who was none else but Rajesh Kumar, the appellant.

8. Inspector Ram Chander PW-32, the SHO of PS Rajouri Garden, was conveyed the information about a man killing two children on the second floor of House No.2/129 Subhash Nagar. He reached the house and by that time the appellant had been apprehended by ASI Jagpal Singh, HC Naresh and Const.Sukhbir.

9. The scene at the house was chaotic. The lady of the house Sangeeta Sethi was dumbfounded. She was hysterical and crying bitterly. She was in no state to be questioned. Except to grieve over the death of her young son and be concerned about the life of the other who had been removed to the hospital, the unfortunate mother could render no immediate assistance to the police. Of course, she was not expected to be concerned with the procedures of the law. Her concern was her younger son Harshit who had already been removed to the hospital by Sanjeev Narula PW-5, who is the

elder brother-in-law of Mukesh Sethi, the husband of Sangeeta Sethi.

10. On learning that Harshit had been removed to Chanan Devi Hospital, Insp. Ram Chander went to the hospital and learnt that Harshit was in an unconscious state. He collected the MLC Ex.PW-8/A of Harshit and returned to the spot.

11. By this time Sangeeta had somewhat regained her composure. She told as to what had happened. Her statement Ex.PW-1/A was recorded. If correct, which evidences that being the husband of her sister-in-law, Sangeeta welcomed the appellant when he reached her house and as he demanded water to quench his thirst, she gave him a glass of water and on his expressing a desire to feed his hunger, she proceeded to the kitchen to bring food. Her two sons Master Anshul and Master Harshit were sleeping in the room. As the mother left, Master Harshit awoke from his sleep and started crying. Rajesh Kumar told her that he would comfort the child. Assured that her young son was in the safe, warm and loving hands of his uncle, unaware of the impending danger to her children, Sangeeta proceeded to the kitchen but returned without the food because the cries of her child Harshit did not stop and probably she thought that she should first comfort her son. What she saw when she took the first

step inside her living room was horrific. Rajesh Kumar had her son Harshit in his hands, but not in the comforting hands of an uncle but the destructive hands of a demon. Rajesh Kumar was holding the child from the feet and within a flash smashed the child, head down, on the floor. The child yelled, howled and screamed. Sangeeta rushed to snatch her child from the destructive hands of Rajesh Kumar, who made an attempt to once again smash the head of the child on the floor. Sangeeta managed to snatch Master Harshit from the hands of Rajesh Kumar. Instinctively, she rushed to the door. She yelled and cried for help. Pinki PW-3 a resident of the second floor of the neighbouring building was the first person to be seen by Sangeeta. The child i.e. Master Harshit was handed over by Sangeeta to Pinki. Events continued. The devil in the appellant was at work. To the utter disbelief, horror and shock of Sangeeta and Pinki, the door of the living room was locked from inside and Sangeeta could hear the frantic and desperate cries of her second son viz. Anshul who was crying 'Ma Ma' (mother mother). Suddenly, there was a deafening silence. The cries of the young child were heard no more. He was killed inside the room. The weapon was a broken piece of glass picked up after breaking the dressing table glass inside the living room.

12. Inspector Ram Chander recorded the statement Ex.PW-1/A of Sangeeta Sethi and made an endorsement Ex.PW-32/A on the same. He sent the same through Const.Kamal at 6.30 PM for registration of an FIR. HC Rajesh Tyagi PW-17, the duty officer at PS Rajouri Garden, recorded the FIR Ex.PW-17/A at 6:50 PM on basis of the statement of Sangeeta Sethi and sent a copy of the FIR back to the spot with Const.Kamal. Const.Amarender PW-8 was handed over the FIR to be delivered to the Area Magistrate and he left the police station at around 7:20 PM and returned at 10:10 PM.

13. At the spot, the crime team, consisting of SI Manoj Kumar PW-15 (a finger print expert) and Const.Ram Niwas PW-14, a photographer also reached. SI Manoj Kumar inspected the site and lifted three chance prints Q-1, Q-2 and Q-3 from a broken pieces of glass in the room. Const.Ram Niwas took 27 photographs Ex.PW-14/A-1 to Ex.PW-14/A-27 of the spot from different angles; negatives whereof are Ex.PW-14/B-1 to Ex.PW-14/B-27.

14. From the room in which the dead body of Anshul was lying, Inspector Ram Chander seized a broken piece of glass Ex.P-1 which was lying on the chest of Anshul, as recorded in Ex.PW-2/A. He further seized glass pieces Ex.P-3 scattered near Anshul, a pair of blood stained chappals Ex.P-2 and the blood lying on the spot on a gauze as recorded in the

seizure memo Ex.PW-2/B. A titan make wrist watch Ex.P-8 lying in the room stated to be belonging to the accused as also a Bajaj Chetak scooter having registration No.DL-4SL-2434 parked outside the house also stated to be belonging to the appellant were seized as recorded in Ex.PW-2/C and Ex.PW-2/D. The rough site plan Ex.PW-32/B was prepared noting the spots from where pieces of broken glass, the dead body of Master Anshul were lifted as also the dimensions of the room.

15. Even police officer who had reached for investigation and were men of steel with strong emotions, found their composure abandoning them. So horrifying and diabolic was the manner of the crime that even they thought that no sane person was capable of acting with such extreme brutality, cruelty and bestiality. The appellant is the son-in-law of the family. They could never imagine that sharing such a close bond with the family, the appellant could act thus if he was in his senses. In all fairness to the appellant the investigating officer called for a psychiatrist namely Dr.Rajat Mishra PW-7, who did not find an abnormality in the behavior of the appellant wherefrom he could be certified as an insane person. His report pertaining to the mental condition of the appellant, Ex.PW-7/A was furnished.

16. The dead body of Master Anshul was seized and sent to the mortuary of DDU Hospital where Dr.Lalit Kumar

PW-13 conducted the post-mortem and gave his report Ex.PW-

13/D recording therein the following external injuries:

“1. Incised wound (1 x 0.5 cm x chip to bone) Lt. to midline on forehead 2 cm above the medial end of Lt eyebrow and is place vertically and its margin is clear, regular and sharp.

2. Bluish red contusion (4 cm x 2 cm) on Lt side of forehead 1.5 cm above Lt eyebrow.

3. Incised wound linear immature (2.5 cm) placed vertically oblique.

4. Incised wound (4 cm x 1.5 cm x chip to bone) on occipital region of head (occipital protuberance) and is placed horizontally and margins are regular.

5. Incised wound (1 x 0.5 cm x chip to bone) on Lt parietal protuberance and placed vertically and margins are regular and clear.

6. Incised wound (2 cm x 0.5 cm x chip to bone) 2 cm above the injury No.5 in Lt parietal region and margins are regular, sharp and clear.

7. Incised wound (9 cm x 7.5 cm x chip to cervical spine) on Lt side of neck in front and is place obliquely and extending from angle of mandible on Lt side to suprasternal mortem expansion all underlying muscle/vessel/arms.

8. Incised wound (3 cm x 1 cm x chip to bone) on back of Lt elbow joint.

9. Linear incised wound (2 cm in length) on Rt shoulder in front and is placed obliquely.

10. Incised wound (2.5 cm x 1.5 cm x 1 cm) 1.5 cm below the linear border of mandible on Lt side and in front and below the chin nave on Lt side and is placed horizontally. The margin of wound are clear, regular and sharp.

11. Bluish red contusion (6 cm x 6 cm) on Lt side of mear anterior axillary fold on Lt axilla.”

17. He opined that Anshul had died due to haemorrhagic shock occasioned by the cutting of his jugular vein and blood vessels. He opined that injuries 4 to 7 were collectively sufficient to cause instant death. After the post-mortem Dr.Lalit Kumar handed over the white sandoz vest on the body of Harshit as also his blood sample on a piece of gauze which were seized as recorded in the memo Ex.PW-30/A.

18. The investigation being complete; the appellant being found not to be insane, the police personnel left for the police station. The appellant was formally arrested as recorded in the arrest memo Ex.PW-32/F at 10:00 PM. His shirt Ex.P-5 and his pant Ex.P-4 which were stained with blood were seized as recorded in the memo Ex.PW-12/A.

19. At the police station the investigating officer obtained the specimen finger prints Ex.PW-23/C of the appellant.

20. Unfortunately Master Harshit could not survive and died the same night. This information being made available to the investigating officer he proceeded to the hospital where Harshit died. The dead body was seized and sent for post-mortem to DDU Hospital where Dr.Lalit Kumar conducted the

post-mortem and prepared the report Ex.PW-13/C recording therein the following 6 injuries on the body of the young boy:-

“1. Contusion bluish red in colour (4 cm x 3 cm) on Rt side of forehead.

2. Bluish red contusion (3 cm x 2 cm) on Lt side forehead.

3. Bluish red contusion (5 cm x 3 cm) on Rt temporal region.

4. Bluish red contusion (1.5 x 1 cm) in uppermost part of Rt ear pinna.

5. Bluish red contusion (5.5 cm x 3.5 cm) on Lt temporal region.

6. Bluish red contusion (3.5 x 2.5 cm) on Rt side of occipital region.”

21. He opined that death was caused due to laceration of the brain and internal haemorrhage. After the post-mortem a sandoz vest worn by Anshul and his blood sample on a piece of gauze was handed over as recorded in the memo Ex.PW-30/B.

22. The investigating officer recorded the statement of Pinki PW-3, Bahadur Singh PW-4, Sanjeev Narula PW-5, Mukesh Sethi PW-2, Charanjeet Singh PW-11 and Sukhvinder Singh PW-10. Each informed the police officer of the time they reached the house where the crime took place and the circumstances under which they reached as also what they saw.

23. The blood stained vests of Harshit and Anshul as also their blood sample handed over by Dr.Lalit Kumar after

the post-mortem; the blood stained shirt and pant of the appellant as also the blood stained articles which were lifted from the room were sent to a serologist at the Forensic Science Laboratory and the report Ex.PW-34/B was obtained by the investigating officer as per which blood group of Anshul was opined to be of group 'AB'. The glass pieces and the swab containing the blood lifted from the room were detected with the presence of human blood of group 'AB'. Human blood of same group was detected on the pant and shirt of the appellant as also on the vest of Master Anshul. The blood group of Master Harshit was detected as group 'B' and blood of said group was detected on the vest of Master Harshit.

24. The chance fingerprints Q-1, Q-2 and Q-3 as also the specimen fingerprints Ex.PW-23/C of the appellant taken by the investigating officer when the appellant was in police custody were sent to a fingerprint expert, Kalpana Sharma PW-23, who opined vide report Ex.PW-23/A, that the chance fingerprint Q-1 matched the specimen fingerprint S-1 pertaining to the right hand middle finger of the accused.

25. The appellant was sent to trial. He was charged with the offence of murdering Anshul and Harshit.

26. At the trial, Sangeeta PW-1, the unfortunate mother of the two children, deposed that she was a housewife and was living on the second floor of house No.2/129, Subhash Nagar at

the time of the occurrence. Her elder son was named Anshul and the younger was named Harshit. Their age was 4½ years and 8 months respectively. The incident took place at around 3:00 PM on 28.7.2003 when she was present in her house and her sons were sleeping in the bed room. Appellant came and asked for water. She gave him water. Appellant wanted a meal. She went to the kitchen and heard cries of Harshit. She returned and picked up Harshit. Appellant told her to give the child to him and cook meals for him. She gave her child to the appellant and went to the kitchen. Her son cried continuously even in the arms of the appellant and suddenly the crying stopped. She went to the bed room and saw that her son was being held from his legs by the appellant who was hitting the child on the floor. Her other son was sleeping on the bed in the same room. She snatched her son from the appellant and rushed to Pinki's house and handed over her unconscious son to Pinki and rushed back, by which time the appellant had bolted the door. She raised an alarm. She heard her son crying 'Ma Ma'. Suddenly the cries died down. By that time her neighbour Pritam Singh and Bahadur as also a few other persons gathered. The police arrived and a police person climbed a table and through a ventilator saw the dead body of her son and the appellant standing nearby. They pushed opened the door. She saw her son with his throat slit. A piece

of glass, stained with blood, was lying on the chest of her son. The dressing table glass was broken. The walls were stained with blood. Her statement Ex.PW-1/A was recorded by the police. The site plan was prepared by the police. Sangeeta was cross examined and during cross examination firstly stated that her statement was recorded at around 4:00 PM and then went on to say that it was around 5:30 PM. She admitted that there was no quarrel between her husband and the appellant qua the demand of any money, but volunteered that the appellant used to demand money from her husband. We note that many questions have been put to Sangeeta during cross examination but none are relevant for the purposes of the inquiry pertaining to the crime and hence we do not note the same. We hasten to record that learned counsel for the appellant, during argument of the appeal, had referred to aforesaid two facts stated by Sangeeta when she was subjected to cross examination and hence we have noted the same.

27. Mukesh Sethi PW-2, the husband of PW-1, deposed that on the day of the incident i.e. 28.7.2003, he was residing with his wife and children on the 2nd floor of house No.2/219, Subhash Nagar that the appellant was the husband of his sister Alka, and was unemployed for the last 2½-3 years and during this period used to demand money for setting up

business and that he gave him Rs.15,000/- and Rs.20,000/- on two occasions. 15-20 days prior to the date of the incident the appellant had demanded more money which he refused because he did not have money to spare. On 28.7.2003 at around 4-4:15 PM he was sitting in his house and received a call from his wife who rang up from a neighbour's house at 4:45 PM. He reached his house and saw a crowd and the police. His wife was crying. His children had been killed. His younger son had been removed to the hospital and the other was lying dead inside the house. When he went inside the house he saw blood stains all over. He saw blood stained palm prints on an almirah. Crime team came and lifted finger prints from broken piece of glass as recorded in the memo Ex.PW-2/A which was signed by him at point A. Pair of chappals and broken pieces of glass as also blood soaked gauze were lifted from the room as recorded in the memo Ex.PW-2/B. A wrist watch was lifted from the dressing room as recorded in the memo Ex.PW-2/C. Scooter of the appellant was seized as recorded in the memo Ex.PW-2/D. The dead body of his son was removed to the mortuary. His son Harshit died at around 8:30 PM. His body was sent to the mortuary. That the shirt Ex.P-5 and the pant Ex.P-4 worn by the appellant were stained with blood.

28. PW-2 was cross examined and he admitted that relations between him and the appellant were normal. He stated that he saw the appellant for the first time after the incident in the police station only. He denied that the appellant was mentally sick. We note that PW-2 has been subjected to a lengthy cross examination, but as conceded by learned counsel for the appellant, nothing has been brought out in the cross examination to discredit him and hence we do not note the sweep and span of the cross examination of PW-2, save and except what has been noted in the preceding part of this paragraph, since learned counsel for the appellant had urged submissions predicated thereon.

29. Pinki PW-3, deposed that at 3:00 PM on 28.7.2003 she was inside her house No.2/130, 2nd Floor, Subhash Nagar. Sangeeta, her immediate neighbour, knocked the door of her house and she saw Harshit in her arms. Sangeeta told her to save her son and that he is killing them. Handing over Harshit to her, Sangeeta went back. She crossed from the front of her house and saw Sangeet shouting at the door of her bed room which was closed. Harshit was unconscious. She ran down and rang the bell of the house of Bahadur Singh and narrated the incident. Sanjeev Narula took Harshit from her arms and left for the hospital. She went up to the second floor and learnt that the appellant had killed Anshul. On being cross

examined she admitted that when Sangeeta came to her house with Harshit she did not tell the name of the person insider her house.

30. Bahadur Singh PW-4, deposed that on 28.7.2003 at about 3:30 PM when he was present on the 1st floor of his house No.2/130, Subhash Nagar his neighbour Pinki came shouting down yelling that someone is killing/beating the children of Sangeeta who was living on the 2nd floor of the house. Pinki had a child in her arms. He rushed to the house of Mukesh Sethi at the 2nd floor and saw the door closed. Police arrived. The door was not closed. It was forcibly opened. Appellant was caught inside. Dead body of the son of Mukesh with blood splattered all over was seen by him. Glass of the dressing table was broken. A piece of glass was lying on the chest of the dead body of the child.

31. Since no submissions were urged during hearing of the death reference and the appeal pertaining to the cross examination of PW-4; noting that nothing has been brought out in the cross examination to discredit the testimony of PW-4, we do not note the cross examination of PW-4.

32. Sanjeev Narula PW-5, deposed that Mukesh is his brother-in-law and Sangeeta is the wife of Mukesh. Rekha, sister of Mukesh, is his wife. Alka, the other sister of Mukesh was married to the appellant who was unemployed for the last

2-3 years. The appellant was not financially sound and used to borrow money. Even he had lent Rs.40,000/- to the appellant. On 28.7.2003, he learnt about the incident in his office at 3:45 PM and reached Mukesh's house by 4:15 PM. A lady handed over Harshit to him. Harshit had a head injury. He took Harshit to Chanan Devi Hospital where he expired in the evening.

33. Sanjeev Narula was cross examined very briefly. A suggestion was given to him that the appellant was not in any financial distress and that the appellant never took any money from him. Both suggestions were denied.

34. Sukhvinder Singh PW-10, deposed that Bahadur Singh is his neighbour. That he i.e. Sukhvinder Singh resides on the ground floor of house No.2/130, Subhash Nagar. He learnt that a child had been killed in the house of Mukesh Sethi who resided on the 2nd floor of house No.2/129, Subhash Nagar. He informed the police on his mobile phone having No.9810458303 and the police arrived after sometime. The appellant was arrested at the spot. No arguments were advanced pertaining to the cross-examination of this witness and hence we do not note the same.

35. Charanjit Singh PW-11, deposed that he was a resident of house No.6/107, Subhash Nagar and he was present in the house of Bahadur Singh who was his uncle. He

learnt that the children of Mukesh were killed and he informed said fact to the police through his number 20056630 (a mobile number provided by MTNL under its Garuda Scheme). That the appellant was arrested at the spot itself by the police. We may note that during cross-examination Charanjit Singh PW-11 stated that when he saw Sangeeta who was crying, she did not name the appellant as the assailant of her children.

36. We are not noting the testimony of the various police officers who were associated with the investigation as they simply proved the various memos prepared by them pertaining to the various seizures effected and the investigation conducted. We do so for the reason hardly any investigation needed to be conducted to crack the crime, since the appellant, as claimed by the police, was apprehended at the spot.

37. We note that that ASI Jagpal Singh PW-22, HC Naresh PW-19 and Const.Sukhbir PW-24 have deposed and proved that they apprehended the appellant after breaking into the living room of the house of Mukesh Sethi on the 2nd floor of house No.2/129, Subhash Nagar. Various other police officers who had recorded the daily diary entries proved the same. Const.Amrandar PW-28 deposed that he delivered a copy of the FIR to the learned Metropolitan Magistrate at Dwarka and returned to the police station by 10:00 PM. HC

Rajesh Tyagi PW-17 deposed that he received the rukka at 6:50 PM and registered the FIR Ex.PW-17/A and made a corresponding DD Entry vide DD No.16-A recording said fact and sent Const.Amrandar at about 7:20 PM as noted in DD No.17-A, to deliver copy of the FIR to the Area Magistrate and that Const.Amrandar returned at 10:10 PM and recorded his return in the daily diary register, vide DD No.19-A. Dr.Rajat Mitra PW-7 deposed that the report Ex.PW-7/A was given by him after examining the appellant who was examined by him at the asking of the police officer of PS Rajouri Garden. SI Manoj Kumar PW-15 deposed that he lifted chance finger prints from a piece of glass inside the room and that the glass pieces were lying around the body of Anshul. Dr.Lalit Kumar PW-13, proved the post-mortem reports Ex.PW-13/C and Ex.PW-13/B.

38. The appellant simply denied each and every incriminating circumstance put to him, save and except gave an evasive reply of his being present in the house of Mukesh Sethi. What happened in the house on the day of the incident was also evasively answered by him. Question No.1 to 18 and the answers given by the appellant are as under:-

“Q1. It is in evidence against you that you are Jija (brother-in-law) of PW-2 Mukesh Sethi R/o 129/2, Second Floor, Subhash Nagar, Delhi. What you have to say?

A. It is correct.

Q2. It is in evidence against you that on 28.7.03 at about 3.15 PM you came to the house of Mukesh Sethi and committed murder of his two sons Anshul aged about four and a half years and Harshit aged about 8 months. What you have to say?

A. I do not know. It may be that on that day I have gone to the house of Mukesh Sethi but I cannot say if the murder of the two children had been done by him. I was not knowing the nature of my action.

Q3. It is in evidence against you that at that time PW-1 Smt.Sangeeta Sethi Wife of Mukesh Sethi was present in the house alongwith Anshul and Harshit. What you have to say?

A. As far as I remember on 28.7.2003 I was totally all right upto 8:00 AM in the morning when I drop my wife and children to the office and school. Thereafter from 10:00 AM onwards I found myself uneasy and was not able to judge my actions. So I cannot say if Sangeeta Sethi was present in the house of Mukesh Sethi alongwith Anshul and Harshit in the house at about 3:00 PM on 28.7.2003.

Q4. It is in evidence against you that at the time of your visit both sons of Mukesh Sethi were sleeping in the bed room of the flat. What you have to say?

A. I do not remember if both sons of Mukesh Sethi were sleeping in the bedroom of their flat or not.

Q5. It is in evidence against you that you asked for the water from PW-1 Smt.Sangeeta Sethi and she gave the water to you. What you have to say?

A. I do not remember if I had asked for the water from Sangeeta.

Q6. It is in evidence against you that thereafter you asked Smt.Sangeeta Sethi to cook the meal for you. What you have to say?

A. Due to my mental condition of which I was having my treatment from last about two years I was

not able to know the condition of myself and my acts and even today I do not remember if I had asked Smt.Sangeeta Sethi to cook the meal for me.

Q7. It is in evidence against you that Smt.Sangeeta Sethi went to the kitchen and when she was there she heard the cries of her younger son Harshit. What you have to say?

A. I do not remember.

Q8. It is in evidence against you that Smt.Sangeeta Sethi came back and picked up Harshit. What you have to say?

A. I do not remember.

Q9. It is in evidence against you that at that point of time you were standing outside the bed room. What you have to say?

A. I do not remember.

Q10. It is in evidence against you that you asked Smt.Sangeeta Sethi to give Harshit to you and to cook the meal. What you have to say?

A. I do not remember.

Q11. It is in evidence against you that Smt.Sangeeta Sethi gave Harshit to you and she went in the kitchen. What you have to say?

A. I do not remember.

Q12. It is in evidence against you that Harshit was still continuously crying even in your arms. What you have to say?

A. I do not remember.

Q13. It is in evidence against you that after sometime Harshit stopped crying and when Smt.Sangeeta Sethi came to see him again in the bedroom she found you holding Harshit from the legs and hitting him on the floor. What you have to say?

A. It is wrong. I cannot do this.

Q14. It is in evidence against you that Smt.Sangeeta Sethi snatched away Harshit from you. What you have to say?

A. I do not remember.

Q15. It is in evidence against you that at that time Anshul the second son was sleeping on the bed in the same room. What you have to say?

A. I do not remember.

Q16. It is in evidence against you that when Smt.Sangeeta Sethi along with Harshit went outside the bedroom you pulled Anshul from his legs. What you have to say?

A. It is wrong. It appears to be some other person had done this and this story has been set up to implicate me.

Q17. It is in evidence against you that Smt.Sangeeta Sethi alongwith Harshit immediately ran to the house of Pinki a next door neighbour. What you have to say?

A. I do not remember.

Q18. It is in evidence against you that Smt.Sangeeta Sethi left Harshit with Pinki. What you have to say?

A. I do not remember."

39. To the other incriminating circumstances put to him, the appellant replied: '*I do not know*'.

40. When questioned at the end of his examination, whether he had anything to say, the appellant responded:-

"I am unwell since childhood. I am on medicine since then. The problem with me is that I fell anywhere while walking. I also start shouting. I become unaware about myself. My treatment was undergoing in jail and of late now I have left my treatment as doctor is not going to change my medicine. The

problem which I was facing in the past has re-surfaced. Even in the past while I use to drive my eyes use to get closed of its own. Mukesh and his relations know about my medical problem.

I do not know how Anshul and Harshit have expired. I am innocent. I have been falsely implicated. My medical documents have been torn apart by my wife and for that reason out of having a sense of guilt she has not come to see me even in jail. I cannot produce these medical papers.”

41. The appellant did not lead any evidence in defence. No attempt was made either by the appellant or his parokar, who happened to be his mother, to lead any evidence to show that the appellant was mentally sick and was under treatment of any psychiatrist.

42. We may note that the jail record of the appellant shows his undergoing treatment for '*mixed anxiety and depression disorder*'. But, the reports submitted to the learned Trial Judge categorically record that the appellant was mentally stable and was fully conscious of the nature of allegation against him; the offence of which he was charged of.

43. Even during the pendency of the murder reference and the criminal appeal, full indulgence has been shown to the appellant in terms of settling at rest the question whether the appellant is an insane person. Vide order dated 4.5.2009, it was directed that a medical board be constituted by the Director, All India Institute of Medical Sciences to ascertain

whether the appellant was of sound mind and mentally fit to instruct his counsel regarding the appeal and the death reference. A board comprising Dr.R.K.Chaddha, Professor of Psychiatrist, Dr.Manju Mehta, Professor of Clinical Psychology, Dr.Rajesh Sagar, Associate Professor of Psychiatry and Dr.P.Kumar, Department of Hospital Administration was constituted under the chairmanship of Dr.R.K.Chaddha. A report dated 27.5.2009 was submitted to this Court informing that the appellant was clinically examined on 22.5.2009. A psychological test was conducted on him on 25.5.2009. The board members examined him on 27.5.2009. That the appellant was found to be of sound mind and mentally fit to give instructions and that was fully aware of the nature of his offence.

44. The learned Trial Judge has convicted the appellant for the offence of having murdered Master Anshul and Master Harshit. The motive for the crime has been held to be revenge against Mukesh Sethi. The foundation of the motive is that Mukesh Sethi did not give money to the appellant who was in a financial stress. It has been held that the testimony of Sangeeta Sethi PW-1 was without blemish and she was an eye witness to the assault on Master Harshit. Her evidence pertaining to the death of her other son, which needles to state, was committed when the room was locked inside, was

held without any blemish. So was the testimony of the other witnesses who deposed being neighbours and saw the door of the living room closed and when opened, the appellant being inside, with blood on his shirt and pant and Master Anshul lying dead with his throat slit.

45. Life is precious and therefore everybody desires to live. Freedom is precious and everybody desires not to be sent to prison. The appellant also so desires. Hence he challenges his conviction in Crl.Appeal No.635/2007.

46. During course of consideration of the death reference and arguments in appeal, we were taken through the entire record. The only blemishes (so called), in the testimony of the witnesses of the prosecution and the evidence led, pointed out to us by learned counsel for the appellant were as under:-

(i) The PCR call Ex.PW-27/A records the time as 15:38 hours, whereas the daily diary entry Ex.PW-16/A, at the police station, records the time 3:35 PM. Thus, learned counsel for the appellant urged that the police has obviously manipulated the record. Counsel urged that PCR call is received at the No.100 and entered in a form and only thereafter the duty constable at the police control room relays the same to the local police station concerned. Counsel urges that by its very nature, an entry in the PCR form must precede an entry in the

daily diary at a police station. Counsel submitted that if Ex.PW-27/A and/or Ex.PW-16/A could be fabricated by the police, there was every possibility that everything was fabricated.

(ii) With reference to the testimony of PW-1 and her cross-examination, learned counsel urged that in cross-examination, PW-1 admitted that there was no quarrel between her husband and the appellant. Thus, counsel urged that there was no motive proved against the appellant to commit the crime. Another argument addressed pertaining to the testimony of Sangeeta PW-1 was that she admitted that her statement Ex.PW-1/A was recorded at 5:30 PM in spite of the crime being committed at around 3:30 PM, and the police arriving at the spot soon after. Counsel urges that the delay in recording the statement of Sangeeta meant that Sangeeta was thinking of what to say. Counsel submitted that if everything was so crystal clear, as was thought to be projected by the prosecution, the first thing Sangeeta would have done was to immediately tell the police officers that the appellant had fatally injured her son Harshit and had murdered her son Anshul. Counsel urged that in that view of the matter no credence can be given to the testimony of Sangeeta.

(iii) With reference to the FIR Ex.PW-17/A and the endorsement thereon by the Area Magistrate that the FIR had

been received: '*At midnight*', learned counsel urged that two things automatically flow therefrom. Firstly, that the police officers had fabricated DD No.16A as also DD No.19A pertaining to the registration of the FIR and reporting back by Const.Amrandar at 10:10 PM after having delivered the FIR to the Area Magistrate. Secondly, according to the learned counsel it shows that the FIR was not registered at 6:50 PM as claimed by the prosecution, but much thereafter. From said inference, counsel submitted that a further inference has to be drawn that in all probability, Sangeeta's statement Ex.PW-1/A, was recorded not around 5:00 PM but much thereafter.

(iv) Raising a further challenge to the credibility of Sangeeta, learned counsel urged that as deposed by Sangeeta, a piece of glass stained with blood was seen by her on the chest of her son Anshul whereas according to SI Manoj Kumar PW-15 the piece of blood stained glass from which he lifted the chance finger prints of the appellant was noted by him next to the body of Anshul. Thus, counsel urged that Sangeeta stood further discredited.

(v) Picking on the testimony of Mukesh Sethi PW-2, learned counsel urged that Mukesh Sethi deposed that when he went inside the room where his children were murdered he saw a blood stained palm print inside the room. Counsel urged that no such palm print was lifted from within the room by

Manoj Kumar PW-15. Thus, counsel urged that Mukesh Sethi was an untruthful witness.

(vi) In his examination-in-chief, Mukesh Sethi stated that on 28.7.2003 at about 4-4:15 PM, he was sitting at his house in Rohini where he received a call from his wife. Picking on said statement, learned counsel for the appellant urged that it was apparent that Mukesh Sethi was maintaining two residences; one being the house at Subhash Nagar where his children were murdered and the other at Rohini. Counsel submitted that it is apparent that all was not well in the house of Mukesh Sethi and his relations with Sangeeta were strained. Counsel submitted that who knows, in a fit, Sangeeta may have committed the offence.

(vii) With reference to the testimony of Mukesh Sethi PW-2 who stated that when he returned home he learnt from his neighbour that his children were murdered and that he returned home on receiving a telephone call from his wife, counsel submitted that this shows that PW-1 i.e. Sangeeta, did not know the offender when she rang up her husband, for had she known the appellant to be the offender, she would have told her husband that the appellant had killed their children.

(viii) Learned counsel very forcefully submitted that the nail in the coffin of the case of the prosecution about appellant being apprehended at the spot is belied by the fact that the

arrest memo Ex.PW-32/F shows that the appellant was arrested at 10:00 PM; drawing attention to the cross-examination of Mukesh Sethi where he stated that after the incident he saw the accused for the first time at the police station, learned counsel urged that this was just not possible if the appellant was present in the house as claimed by the other witnesses of the prosecution. Counsel urged that the admission of Mukesh Sethi during cross-examination, as afore-noted, proved the absence of the appellant in the house. Counsel urged that it is apparent that the appellant was subsequently arrested and falsely implicated as an accused.

(ix) With reference to the testimony of Pinki PW-3, learned counsel urged that on being cross-examined, Pinki admitted that when Sangeeta PW-1 handed over Harshit to her, she i.e. Sangeeta, did not name the appellant as the person who had assaulted Harshit. Counsel submitted that during cross-examination, even Charajit Singh PW-11, admitted that Sangeeta did not name the appellant as the assailant of her children. Thus, counsel urged that the contemporaneous conduct of Sangeeta shows that she did not know the offender.

(x) With reference to the testimony of Sanjeev Narula PW-5, learned counsel urged that he was the first relative to reach the house and deposed that he received the information

pertaining to Harshit and Anshul being fatally attacked at 3:45 PM. With reference to the testimony of Mukesh Sethi the husband of Sangeeta, learned counsel urged that Mukesh Sethi stated that he received information from his wife of his children being attacked at around 4/4:15 PM. Counsel urged that it was most unnatural conduct of Sangeeta to first ring up a relative and then her husband.

(xi) Counsel submitted that the FSL report Ex.PW-34/B shows the presence of human blood of group 'B' on the vest of Harshit. Counsel urged that no external injury of a kind where blood oozes out has been noted on the body of Harshit in the post-mortem report Ex.PW-13/C. Counsel urges that the presence of blood of group 'B' i.e. the blood group of Harshit on his vest casts a suspicion as to wherefrom the blood came. Counsel urged that the only place wherefrom said blood could spill/fall on the vest of Harshit is from the hand of he who cut the neck of Anshul with the broken piece of glass which was retrieved by smashing the mirror of the dressing table in the living room of the house. Counsel urged that the prosecution has led no evidence that the blood group of the appellant was 'B'.

(xii) Summing up her challenge, learned counsel submitted that no discount needs to be given with reference to the circumstance of Sangeeta being traumatized because her

statement, as claimed by her, was recorded by the IO at 3:30 or 4:00 PM. Counsel urged that it shows that Sangeeta was composed enough, to narrate her version soon after her children were assaulted. Counsel urged that PW-2 and PW-5 are the relatives of PW-1, being her husband, and the brother-in-law of her husband. Counsel urged that PW-3, PW-4, PW-10 and PW-11 are neighbours of PW-1 and the possibility of they being motivated, compelled or threatened to depose falsely by Sangeeta and her husband cannot be ruled out.

47. Learned counsel urged that there is good evidence that the appellant was an insane person. The said good evidence relied upon by the learned counsel was the fact that Dr. Rajat Mitra PW-7 was called at the spot by the investigating officer to opine about the mental health of the appellant as also the record of the jail hospital which showed that the appellant remained under treatment for mixed anxiety and depression disorder. Thus, counsel urged, being insane, no mens rea can be attributed to the appellant. Whatever be his acts, in the absence of a guilty mens rea, the appellant cannot be held responsible for his acts, urged the counsel.

48. Lastly, learned counsel submitted that the facts of this case do not put the case in the category of the rarest of the rare case, attracting the penalty of death. Listing the mitigating circumstances, learned counsel urged that there are

five in number. The first is that the appellant is a first time offender. The second is that he has two sons, a wife and a widowed mother to support. The third is the fact that financial hardship created stress in the mind compelling the appellant to commit the crime. The fourth is the young age of the appellant who was aged 37 years when he committed the crime. The fifth is the chance of the appellant's rehabilitation in the society being not ruled out.

49. Before dealing with the submissions urged by learned counsel for the appellant it needs to be noted that the photographs Ex.PW-14/A-12 to Ex.PW-14/A-14 show that the two houses bearing No.2/129 and 2/130, Subhash Nagar are not only adjacent to each other but have a functional unity inter se the floors making it convenient and possible for the residents on the second floor of the two buildings to cross over to the floor on the other building without undertaking the cumbersome process of going down the stairs of their building and climbing up the stairs of the other.

50. The first contention urged pertaining to a hiatus between the time recorded in the first DD Entry Ex.PW-16/A i.e. 1538 Hours and the time recorded in the daily diary entry at the police station being Ex.PW-16/A at 3:35 PM, is not of a kind, wherefrom an inference of manipulation in the record has to be drawn. Though desirable, people do not synchronize

their watches with the standard national time. Some people deliberately fix their watches 5 to 10 minutes ahead of time as they desire to be always punctual. Be that as it may, the hiatus is explainable on the premise that watches, clocks etc. are seldom kept synchronized to the national standard time and thus the time difference recorded by 2 persons receiving the information. In the instant case the first telephone call to the PCR has been made by Charanjit Singh PW-11. He has deposed of having made the call. Ex.PW-27/A notes that the caller has rung up from the number 20056630. Charanjit Singh PW-11 has deposed that he was the subscriber of the number and that it was a Garuda number. Thus, in view of the fact that the maker of the telephone call has been examined and has proved having given the information to the police control room further corroborates that the call was indeed made and that the time factor in respect whereof the submission has been made is the result of the watch of the duty constable at the police control room being not in sync with the watch of the duty constable at police station Rajouri Garden.

51. Submission at serial No.(ii), (vii), (ix) and (x) are inter-related and impinge upon the contemporaneous conduct of Sangeeta PW-1. Her state of mind and mental condition is best described in the words of Charanjit Singh PW-11. On

being cross examined whether Sangeeta told the name of the person who was inside her house and had seriously injured her children, Charanjit Singh stated:-

"I was told by wife of Mukesh about killing of her two children as she was crying and raising alarm. She was saying that the person who has killed her children is inside the house and thereafter we immediately rang up the police. It is correct that wife of Mukesh while crying and running here and there was not taking name of the accused as the person who killed her children."

52. What normal behaviour would a rational and a reasonable person expect from a young mother who has seen, in front of her eyes, the younger son being virtually smashed on the floor and the assailant locking the room with the other child inside and the cries of the child calling out to his mother piercing the ears of the mother? The conduct has to be of a person dumbfounded and except for shouting and shrieking and hoping that somebody would rescue her second child, doing no more. The appellant is the son-in-law of the family. He is the husband of the sister of Sangeeta's husband. In India there is a tradition of female members of the family not referring to, by name, the male members of the family. Wives refusing to call their husbands by name; the lady members of the family not calling by name the son-in-law of the family are not unknown in Indian society. Besides, the scared mind and the trembling body of the mother would render her fairly speechless. In the

situation in which Sangeeta was, it is but natural that there was a disconnect between her mind and her tongue. Thus, her simply uttering that the killer was inside and not naming the killer does not evidence that Sangeeta fabricated the name of the appellant as the killer of her children. It assumes importance to note PW-10 Sukhvinder Singh and PW-11 Charanjit Singh are the two persons who gave information to the police through their respective mobile telephone and Garuda telephone. Their presence at the spot cannot be doubted as they being the informants, with reference to their telephone number, finds a mention in Ex.PW-27/A and Ex.PW-31/A. Both of them have deposed that the appellant was arrested by the police from a room inside the house of Sangeeta Sethi. The traumatic condition of Sangeeta is good enough justification for the investigating officer to delay recording the statement of Sangeeta to await the presence of her husband so that Sangeeta could regain her composure. We may note that at one stage, during cross examination, Sangeeta did say that her statement was recorded at around 3:30 or 4:00 PM but later on she has corrected herself by saying that her statement was recorded at 5:30 PM. Similarly, Sangeeta simply telling her husband over the phone to return back immediately as a tragedy had be fallen without telling the name of the antagonist is not unnatural. As held

hereinabove, Sangeeta being dumb fold and the right words and expression eluding her, cannot be ruled out. Her circumstances was such that she spoke inchoate. Her conduct of simply telling her husband to hurry back home without divulging anything more is not unnatural. Similarly, Sangeeta not naming the appellant when she handed over Harshit to Pinki or to anyone else is not unnatural. Fear had overcome her and she was dumb fold. That Sangeeta rang up Sanjeev Narula PW-5, the other brother-in-law of her husband and then her husband is also not unnatural. The first number of a close relative which flashes the mind of a person in distress is the one which is contacted. It is possible that in Sangeeta's mind the first number which flashed was of Sanjeev Narula. It may have happened that she rang up her husband first but could not connect through. We need not speculate for the reason Sangeeta has not been cross examined as to why is it that the first call was made to Sanjeev Narula and the second to her husband. We also do not know for sure, whether the first call was made to Sanjeev Narula and the second to her husband. The argument of learned counsel for the appellant is premised on the fact that Sanjeev Narula has stated that he received the information at 3:45 PM and Sangeeta's husband, Mukesh Sethi, has stated that he received a call from his wife at 4:15 PM. The incident took place on 28.7.2003. The husband of

Sangeeta deposed on 27.1.2004. Sanjeev Narula deposed in Court on 27.2.2004. Fringe events or facts at the fringe of an event tend to blur with the passage of time because memory fades. When called upon to disclose a particular time of an event in the past, one usually resorts to a guesstimate. Thus, Sanjeev Narula and Mukesh Sethi giving inconsistent/wrong time; unrelated to the actual time when they received the information cannot be ruled. That Sangeeta has stated that there was no quarrel in the past between her husband and the appellant only means that there were no physical or verbal duels between the two. Therefrom, it cannot be said that motive for the crime has not been established. A clear motive of vengeance/revenge has emerged, being retribution against Mukesh Sethi for not advancing a friendly loan to the appellant who thought that as the son-in-law of the family he had a right to have his demand satisfied. We need not refer to volumes and volumes of literature on human psychology as to how a mind poisoned with hate starts reacting.

53. This takes care of the (xii)th summing up submission made by learned counsel pertaining to how should the testimony of Sangeeta be viewed, weighed and appreciated. The other limb thereof that PW-2 and PW-5 are the relatives of PW-1, and PW-3, PW-4, PW-10 and PW-11 being neighbours could be manipulated by PW-1, has to be noted and thrown in

the dustbin for the reason the appellant is the son-in-law of the family and nobody would make him into a son-in-law without a reason. Why should the neighbours be telling a lie? Why should Sangeeta, her husband and the co-brother of the appellant contrive to ensnare him by falsely deposing against him? Besides, the presence of PW-2 and PW-5 at the place of the incident, soon after the crime, is natural. Pinki, Bahadur Singh and Sukhvinder Singh reside in the adjoining houses and their presence at the spot is natural. Charanjit Singh has given the reason as to why he was present at the spot. Bahadur Singh is his maternal uncle and Charanjit Singh was visiting his maternal uncle.

54. We have gone through the testimony of said witnesses and the same inspires confidence. The learned Trial Judge has justifiably accepted their testimony.

55. It is no doubt true that the Area Magistrate has recorded on the FIR Ex.PW-17/A that he has received the same at midnight. It is also true that DD No.19-A records the return of Const.Amrandar at the police station at 10:10 PM after having delivered the FIR to the Area Magistrate. What does this show? In all probability a wrong time noted when DD No.19-A was recorded; or probably 10:00 PM was treated as midnight by the learned Area Magistrate. Be that as it may, it is too trivial a matter wherefrom it has to be inferred that the

FIR was ante-timed. We may look at the matter from another angle. Why are FIRs ante-timed? Obviously to gain time so that evidence can be fabricated or statements contrived by the maker of the FIR or sufficient time being available with the maker of the FIR to consult others or think about what to tell to the police. The promptness in lodging complaints lends an assurance to the truthfulness of the facts stated for the reason anything said spontaneously by a person is presumably the truth for the reason to create and spin lies the evil mind has to be put to work and fed on the malice inside, which needs time. The manner in which events transpired and the presence of independent persons and in particular PW-3, PW-4, PW-10 and PW-11 who have clearly nailed the appellant is a circumstance which rules out any foul play by the police requiring the investigating officer to ante-time the FIR.

56. That SI Manoj Kumar PW-15 has deposed that the piece of blood stained glass wherefrom he lifted the chance fingerprints was lying next to the body of Anshul and Sangeeta having deposed that she saw a glass piece on the chest of her son does not render Sangeeta to be an untruthful witness. Indeed, the photographs Ex.PW-14/A-17 to Ex.PW-14/A-20 show a broken piece of glass, stained with blood, on the chest of the dead body of Master Anshul. Besides, we find no factual foundation for said submission because PW-15 has

categorically deposed that he saw a glass piece on the chest of Anshul. The fallacy in the argument of learned counsel for the appellant is that it is based on the assumption that the chance fingerprints were lifted from the said glass piece. PW-15 has only deposed that he lifted chance fingerprints from a piece of glass lying next to the body of Anshul.

57. The (v)th submission urged is also fallacious and is premised as if whenever a blood stained print is created by a palm and is seen, it must necessarily lead to the lifting of a chance fingerprint. A chance fingerprint is lifted when there is no smudging and there is clarity in the print. It does happen that a person, with stained hand, touches a surface and with the hand moving on the surface or shaking, the print gets smudged. In this situation, if it happens, the fingerprint expert would obviously not lift a fingerprint. Whereas a layman would see a fingerprint, the expert would not.

58. The (vi)th submission urged is equally preposterous. One refers to the house of one's parents as one's own house. Mukesh Sethi stating that he was sitting at his house in Rohini where he received a call from his wife contains a reference to the house of the parents of Mukesh Sethi, as told to us at the bar by learned counsel for the State. We note that there is no evidence to establish the same. But, by not cross examining Mukesh Sethi on the point, the appellant cannot be permitted

to create a mountain out of a mole. Said statement of Mukesh Sethi does not lead to any inference that he was maintaining two separate residences; much less that his relations with his wife Sangeeta were strained. We find that no suggestion of any kind of strained relationship between Sangeeta and Mukesh have been put to the two when they were cross examined.

59. That the appellant has been shown apprehended at 10:00 PM as per the arrest memo Ex.PW-32/F and that Mukesh Sethi has deposed that after the incident he saw the appellant for the first time at the police station is the foundation of the (x)th submission made. As noted above, the conclusion sought to be projected is that if Mukesh Sethi is to be believed, it is obvious that the appellant was not apprehended at the spot but somewhere else at 10:00 PM.

60. There is always an interval of time between the apprehension of an accused and his being arrested. An arrest memo is drawn up as a formal document showing the accused being apprehended and arrested. Yes, it is expected that the moment an accused is apprehended his arrest memo should be drawn up without any time gap. But, in the facts and circumstances of the instant case where there is overwhelming evidence against the appellant, the said lapse by the investigating officer has to be ignored as a procedural lapse,

not affecting the purity of the investigation. It is settled law that if otherwise proved by good and clinching evidence, lapses by the investigating officer cannot be allowed to become an escape route by an accused. As noted above the arrest of the appellant from the living room of the residence of Mukesh Sethi and his being found inside the room when the door was forcibly opened has been proved to the hilt through the testimony of PW-1, PW-3, PW-4, PW-10 and PW-11 out of whom, PW-3, PW-4, PW-10 and PW-11 are unrelated to PW-1 and PW-2 and no animus qua the appellant of theirs has been brought out.

61. It appears to be a case where when he stated that after the incident the accused was seen by him at the first time in the police station PW-2 intended to convey that after everything was over he saw the accused thereafter for the first time at the police station. Be that as it may, the testimony of the other witnesses of the prosecution being PW-1, PW-3, PW-4, PW-10 and PW-11 as also HC Naresh PW-1, Const.Sukhbir PW-24 and ASI Jagpal PW-22, the three police officers who reached the house, and have deposed that the door of the living room had to be pushed/broken open when the person inside did not respond to the request to open the door and that the appellant was apprehended from the room inside concludes the issue decisively against the appellant.

62. The learned Trial Judge has noted that the FSL Report Ex.PW-23/A evidences that the chanced print Q-1 matched the specimen fingerprint S-1 of the appellant and that the chanced print Q-1 was blood stained. The learned Trial Judge has thus concluded that even said fact shows the presence of the appellant inside the house. We eschew reference to the FSL Report for the unfortunate reason that the investigating officer has not complied with the provisions of Section 5 of the Identification of the Prisoners Act 1980, in that, the permission of neither the Magistrate nor the Court concerned was obtained before obtaining the specimen fingerprints of the appellant and even the prisoner was not identified as required by law. Unfortunately, a very incriminating piece of evidence has been rendered sterile. But, from the answers given by the appellant to questions 1 to 18 and in particular the answer to question No.2, shows the admission by the appellant of being present in the house of Mukesh Sethi i.e. the 2nd Floor of House No.2/129, Subhash Nagar.

63. The submission that blood of group 'B' being detected on the Sandoz vest removed from the body of Master Harshit evidences that blood of said group fell on his vest and since the injury on Master Harshit did not show external bleeding required an inference to be drawn that the said blood

stain was the result of the blood of the assailant falling on the vest of Master Harshit. Learned counsel urged that the neck of Master Anshul was cut with a piece of glass and in the process it was but natural that the hand of the assassin would receive some cut and as a result blood would flow out. Counsel urged that the prosecution has not established that the blood group of the appellant was 'B'. The submission is by ignoring the evidence on record. Firstly, the testimony of PW-1 establishes that Anshul was injured after PW-1 had removed her son Harshit from the clutches of the appellant. Thus, blood from the hand of the assailant soiling the vest of Harshit does not arise. Further, the report of the serologist i.e. Ex.PW-34/B clearly shows that the blood group of Master Harshit was 'B'. The post-mortem report Ex.PW-13/C of Master Harshit shows contusions over the forehead, temporal region, occipital region and ear pinna. Internal injuries show laceration of the brain. Nasal bleeding would certainly have resulted. It is obvious that the vest of Master Harshit was soiled with his own blood. Besides, after death of a person, medico-legal jurisprudence tells us, in case of internal injuries, blood starts oozing out from the orifices of the body. Harshit had sustained cerebral injuries and on his death blood oozing out from his eyes, nostrils and the mouth was natural.

64. The plea of insanity of the appellant has been raised very half heartedly. Its foundation is the act of the investigating officer calling a psychiatrist i.e. Dr.Rajat Mitra PW-7 to the spot to examine the appellant as also the record of the jail hospital which shows that the appellant was treated for mixed anxiety depression disorder.

65. The appellant was the son-in-law of the Sethi family. The relationship is a pious relationship. The depravity, brutality and cruelty with which Master Harshit and Anshul were killed and the attendant circumstances would have led anyone to suspect that only an insane person would do the act. The investigating officer so thought and to reassure himself summoned Dr.Rajat Mitra. But, the report Ex.PW-7/A of Dr.Rajat Mitra does not establish the insanity of the appellant. Each and every mental disorder cannot be equated with insanity. A mental imbalance by itself does not mean that the person is insane. Insanity contemplated by Section 84 of the Penal Code is such unsoundness of mind which renders the person of unsound mind incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law. Anger or hatred certainly blurs rational thinking. Can this be equated with insanity? Obviously not. The reason is that every human being is expected to control his emotions and remain in his senses, for the contrary view would justify, on

the plea of temporary insanity, the most depraved crimes. As held in the decision reported as AIR 1972 SC 2443 Seralli Wali Mohammad Vs. State of Maharashtra, it would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. A plea of insanity has to be proved by cogent evidence and to succeed it must be shown that the accused was so bereft of himself and his faculties that no mens rea could be attributed to him. Indeed, every person is presumed to be sane unless proved to the contrary.

66. There is no evidence that at the time when the offence was committed the appellant was under medical treatment pertaining to his mental health. No medical record has been produced. No doctor has been examined in defence. As noted in para 43 above, even during the pendency of the Death Reference and the Appeal, full indulgence was shown to the appellant and he was got examined by a Board of Experts at the All India Institute of Medical Sciences, a premier medical institute in India; the appellant has been certified as a sane person.

67. We reject the plea of insanity.

68. Having concurred with the view taken by the learned Trial Judge that the evidence on record establishes,

beyond a shadow of doubt, that the appellant murdered Master Anshul and Master Harshit, and that the appellant was not an insane person when he committed the offence, the further question which requires consideration is: Whether the instant case attracts the levy of death penalty.

69. The constitutional validity of Section 302 IPC, insofar it sanctions levy of a penalty of death for the offence of murder, has been upheld by a Constitution Bench of the Supreme Court, in the decision reported as AIR 1980 SC 898 Bachan Singh vs. State of Punjab.

70. Courts have taken a consistent view that imprisonment for life as the penalty for the offence of murder is the rule and imposition of death penalty is the exception. The dictum of *rarest of rare* has been evolved by the Courts. As held in the decision reported as JT 2009 (7) SC 248 Santosh Kumar Satish Bhushan Bariyar & Anr. vs. State of Maharashtra:-

“63. *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. The background analysis leading to the conclusion that the case belongs to *rarest of rare* category must

conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception.

64. 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.”

71. Therefore, in cases, where the imposition of death penalty is under consideration, it becomes the duty of the Court to draw up a balance sheet of aggravating and mitigating circumstances as observed in the decision reported as 1983 (3) SCC 470 Machhi Singh vs. State of Punjab:-

“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.”

72. A bird’s eye view of various judicial decisions reveal that Courts have considered the undernoted circumstances, as mitigating: lack of any prior criminal record as held in the decision reported as 2006 EWHC 1555 (QB) In Re. Butters’; the age of the offender being too young or too old as held in the decision reported as AIR 1974 SC 799 Ediga Anamma vs. State of Andhra Pradesh; the character of the offender i.e. how the offender is perceived in the society by men of social standing; the probability of the offenders’ rehabilitation, reformation and re-adaptation in the society; whether the offence was committed under a belief by the assailant that he was morally

justified in doing so; or that the accused acted under the duress or domination of another person as held in the decision reported as 1982 (3) SCC 24 Bachan Singh Vs. State of Punjab; commission of the offence at the spur of the moment without any pre-meditation; or the offender being provoked (for instance by prolonged stress) in a way not amounting to the defence of provocation, as held in the decisions reported as 2008 EWHC 36 (QB) Re. Rahman and AIR 1998 SC 2821 A.Devendran vs. State of Tamil Nadu; a belief by the offender that the murder was an act of mercy as held in the decision reported as 1994 (Supply) 3 SCC 143 Janki Dass Vs. State (Delhi Administration); a guilty plea by the offender or his voluntarily surrendering before the authorities and his being genuinely remorseful as held in the decisions reported as (2008) EWHC 92 (QB) In Re. Rock and (2006) EWHC 1555 (QB) In Re. Butters; that the offender acted to any extent in self defence; that his intention was merely to cause serious bodily harm rather than to kill; that the victim provoked or in any way contributed to the crime, as held in the decision reported as AIR 1999 SC 1699 Kumudi Lal vs. State of U.P. Lastly, in the decisions reported as AIR 2007 SC 2531 Swami Shradhanand @Murali Manohar Mishra vs. State of Karnataka and 2007 Cri.L.J. 1806 Shivu & Anr. vs. High Court of Karnataka & Anr. it was held that in cases of conviction being based on

circumstantial evidence a lenient view should be taken on the issue of sentence.

73. Aggravating factors/circumstances have been opined to be; the accused having undergone previous convictions and his proving to be a future danger/threat or menace to the society considering aspects like criminal tendencies, vagabond lifestyle, drug abuse etc. as per the decision reported as (2008) EWHC 719 (QB) In Re. Miller; offender being in a dominating position to the victim or in a position of trust and has abused the trust; anti social or socially abhorrent nature of the crime i.e. where the offence arouses social wrath and shakes the confidence of the people in any social institution; a crime committed for a motive which evinces total depravity and meanness for instance, a financial gain; where the magnitude of the crime is large i.e. there are more than one victims; where the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse extreme indignation of the community as held in the decision reported as 1983 (3) SCC 470 Machhi Singh Vs. State of Punjab; significant degree of planning or premeditation and lack of remorse as held in the decision reported as AIR 2005 SC 2059 Holiram Bordoli Vs. State of Assam; the victim being vulnerable due to age or physical infirmity as held in the decision reported as 2008 (110)

Bom.LR. 373 State of Maharashtra Vs. Haresh Mohandass Rajput; mental or physical suffering inflicted on the victim before the death; victim being a public service provider or performing a public duty at the time when the crime was committed, as held in the decision reported as (1977) 431 US 633 Roberts Vs. Louisiana. Lastly, the offender attacking sovereign democratic institutions as held in the decision reported as 2003 (6) SCC 641 Navjyot Sandhu @ Afsan Guru Vs. State.

74. Having summarized above, the various circumstances held to be aggravating or mitigating the culpability of the offender, by the Courts in India as well as abroad, we proceed to make a balance sheet of the mitigating and aggravating circumstances which are emerging in the instant case.

75. The counsel for the appellant had urged five mitigating circumstances, which have been noted in para 48 above. The third mitigating circumstance urged by the counsel of the appellant being under stress due to financial hardship, compelling him to commit the crime is not a mitigating circumstance. The stress contemplated as a mitigating circumstance is a prolonged stress of the kind which impairs rational thinking with reference to the act committed by the person under stress. If stress caused by financial hardships is

taken as a mitigating circumstance, unrelated to anything else, then the same would apply in almost all criminal cases as in the fast developing and competitive world of today, everyone desires not only to be financially sound but to be financially better off than those around him and the urge to satisfy this desire keeps many a person under a mental stress. A person in the lower income group would be considered under stress as in comparison to a person in the middle income group. Similarly, a person in a middle income group may claim to be under a financial stress while looking up to a person in a higher income group. In the instant case there is no evidence that the appellant was in such a pitiable state of penury that his family was starving and on said account he was under an extreme mental stress.

76. The appellant was aged 37 years when the crime was committed. The age is neither too young, or too old. It is middle age. It is an age where mental faculties are the best and most stable. The contention that the appellant was too young and therefore his youth is a mitigating circumstance, is accordingly repelled.

77. We have no evidence that the appellant is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance.

78. Thus, we find only two mitigating circumstances in favour of the appellant, being, his being a first time offender and circumstances personal to him i.e. his having a wife, two sons and a widowed mother to support.

79. The aggravating circumstances may be noted. What strikes out with repulsion to the mind is the brutal, grotesque, diabolical, revolting and dastardly nature of the assault on Master Anshul and Master Harshit. The head of Master Harshit was smashed in front of the eyes of his mother. The trauma of the mother would haunt her all her life. We remember our near and dear ones who have departed company by the fond memories of their sweet and smiling faces etched in our memory. On closing our eyes we can picturise these smiling faces in our minds. Sangeeta, the unfortunate mother of Harshit would remember him last as what she saw him in his last i.e. the crying and traumatized child of hers being battered on the ground. Similarly, the memory of Master Anshul as a disfigured child would continue to haunt the mother. The crime has been committed with utmost cruelty towards the children and even their mother. The victims are two innocent children. Thus, two more aggravating circumstances emerge being the magnitude of the crime i.e. number of victims being two and that the victims were vulnerable due to their age. Harshit was aged 8 months.

Anshul was aged 4½ years. The 4th aggravating circumstance which emerges is the breach of trust by the appellant. He went to the house of his brother-in-law and wanted to satisfy his hunger requiring Sangeeta PW-1 to cook food for him. Harshit and Anshul were sleeping in the living room when Sangeeta went to the kitchen. The appellant was entrusted with the security of the two children, in that, Sangeeta would obviously be reassured that no harm would be caused to her children by the appellant. The trust was breached. The 5th aggravating circumstance emerges from the close relationship enjoyed by the appellant and the victims. The appellant was the uncle of the victims. Family bonds and kinship bonds are valued and cherished in every civil society. Family is a social institution. The appellant has breached the same. Those who gained knowledge of the crime would certainly fear for the safety of their children from within the family members. Thus, the offence committed by the appellant would shake the confidence of the people in a social institution. The nature of the crime is anti social and socially abhorrent. The 6th aggravating circumstance is the motive which evinces total depravity and meanness i.e. revenge for not being extended a financial aid by the father of the two unfortunate victims. We find no remorse on the part of the appellant and this becomes the 7th aggravating circumstance. The 8th aggravating

circumstance is the fact that the appellant was not provoked by the two young children to so act. Indeed, as per the testimony of the mother of the two unfortunate children, they were sleeping when they were attacked. The 9th aggravating circumstance is the evidence of the appellant committing the crime with a prior intention and premeditation. The 10th aggravating circumstance is the pain inflicted upon the two unfortunate young boys, one of whom had his skull bashed up by striking the body of the young boy on the ground and the other had the throat cut with a piece of glass. The crude weapon of offence i.e. a piece of glass retrieved by breaking the mirror of the dressing table would certainly have caused excruciating pain to Master Anshul aged 4½ years.

80. The instant case certainly falls in the category of rarest of the rare cases. In a somewhat similar circumstance where the accused was a close family member and the number of victims were 3; the crime was committed in a most diabolical and horrendous manner showing extreme depravity and monetary gain being the motive, notwithstanding the circumstances personal to the accused being aged parents and minor daughters to look after and possibility of his being rehabilitated, and he was a first time offender, in the decision reported as 2003 (9) SCC 310 Dayanidhi Bisoi Vs. State of

Orissa, the accused Dayanidhi Bisoi aged 35 years when he committed the crime, was sentenced to death.

81. Accordingly, we dismiss Crl.A.No.635/2007 and answer the death reference, in terms of our findings above, by confirming the sentence of death imposed upon the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

August 06, 2009
mm/ dharmender