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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Reference No. 1 of 2014****Judgment Reserved on: 23/08/2016****Judgment Delivered on : 01/12/2016**

State of Chhattisgarh, Through Police Station Bhilai Nagar,
District Durg, Chhattisgarh.

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1. Ishwari Lal Yadav S/o Shri Kewal Ram Yadav, aged about 38 years, R/o Ruwabandha, Bajrang Chowk, PS Bhilai Nagar, District Durg, (Chhattisgarh)
2. Rajendra Kumar S/o Shri Tukaram Mahra, aged about 24 years, R/o Ajad Chowk, Ruwabandha, PS Bhilai Nagar, District Durg, (Chhattisgarh)
3. Nihaluddin @ Khan Baba S/o Shri Noor Mohammad, aged about 65 years, R/o Govinda Chowk, Ruwabandha, PS Bhilai Nagar, District Durg, (Chhattisgarh)
4. Hemant Sahu S/o Shri Gandhi Sahu, aged about 28 years, R/o Bajrang Chowk, Ruwabandha, PS Bhilainagar, District Durg, (Chhattisgarh)
5. Sukhdev Yadav S/o Shri Lohan Ram Yadav, aged about 35 years, R/o Ajad Chowk, Ruwabandha, PS Bhilai Nagar, District Durg, (Chhattisgarh)
6. Mahanand Thethwar S/o Shri Janaklal Thethwar, aged about 31 years, R/o village Hanauda, PS Utai, District Durg, (Chhattisgarh)
7. Smt. Kiran Bai W/o Ishwari Lal Yadav, aged about 35 years, R/o Bajrang Chowk, Ruwabandha, PS Bhilai Nagar, District Durg, (Chhattisgarh)

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Criminal Appeal No. 511 of 2014

1. Ishwari Lal Yadav aged about 38 years, son of Shri Kewal Ram Yadav, resident of Ruwabandha Bajrang Chowk, Police Station Bhilai Nagar, District Durg, Civil and Revenue District Durg, Chhattisgarh.
2. Rajendra Kumar, aged about 24 years, son of Shri Tukaram Mahra, resident of Ajad Chowk, Ruwabandha, Police Station Bhilai Nagar, District Durg, Civil and Revenue District Durg, Chhattisgarh.
3. Nihaluddin @ Khan Baba, aged about 65 years, son of Shri Noor Mohd. Resident of Govind Chowk, Ruwabandha, Police Station Bhilai Nagar, District Durg, Civil and Revenue District Durg, Chhattisgarh.
4. Hemant Sahu, aged about 28 years, son of Shri Gandhi Sahu, resident of Bajrang Chowk, Ruwabandha, Police Station Bhilai Nagar, District Durg, Civil and Revenue District Durg, Chhattisgarh.
5. Sukhdev Yadav, aged about 35 years, son of Shri Lohan Ram Yadav, resident of Ajad Chowk, Ruwabandha, Police Station Bhilai Nagar, District Durg, Civil and Revenue District Durg, Chhattisgarh.
6. Mahanand Thethwar, aged about 31 years, son of Shri Janak Lal Thethwar, resident of village Hanauda, Police Station Utai, District Durg, Civil and Revenue District Durg, Chhattisgarh.
7. Smt. Kiran Bai aged about 35 years, wife of Shri Ishwari Lal Yadav, resident of Bajrang Chowk, Police Station Bhilai Nagar, District Durg, Civil and Revenue District Durg, Chhattisgarh.

---- Appellants

Versus

State of Chhattisgarh, Through the Station House Officer,
Police Station Bhilai Nagar, District Durg, Civil and Revenue
District Durg, Chhattisgarh.

---- Respondent

For Accused	: Shri B.P.Singh, Shri A.N.Bhakta and Shri Vivek Bhakta, Advocates.
For State	: Shri Prafull N Bharat, Additional Advocate General and Shri Vinod Deshmukh, Deputy Government Advocate.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Justice Sanjay K. Agrawal.

C.A.V. Judgment

Per Deepak Gupta, Chief Justice

1. Criminal Appeal No.511 of 2014 and Criminal Reference No.01 of 2014, are being disposed of by this common judgment since they both arise out of the same judgment and relate to the same incident.
2. Criminal Appeal No. 511 of 2014 filed by the Accused/ Appellants is directed against the judgment dated 27.03.2014, passed in Sessions Trial No. 61 of 2011 whereby the learned Sessions Judge Durg, has convicted and sentenced the Appellants as follows:

Conviction Under Section	Sentence
364/34 read with Section 120B IPC	Imprisonment for life and fine of Rs 5000/- each, In default of payment of fine, further rigorous imprisonment for four months.
302/34 read with Section 120B IPC	Death sentence and fine of Rs. 5000/- each. In default of payment of fine, further rigorous imprisonment for four months.

201 IPC	Rigorous imprisonment for five years and fine of Rs. 2000/- each. In default of payment of fine, two months rigorous imprisonment.
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3. Since the Accused/Appellants were sentenced to death, the Sessions Judge also made a reference to this Court in terms of Section 366 of the Code of Criminal Procedure, 1973 for confirmation of death sentence.
4. This case relates to a gruesome murder of a small two year old boy as human sacrifice. It is alleged that the two main accused, Smt. Kiran Bai and her husband Ishwari Lal Yadav indulge in *Tantrism*. Smt. Kiran Bai wanted to attain *siddhi*. She is also known and addressed as '*Gurumata*'. To propitiate the god, she asked her husband and disciples, the other co-accused to get a small child for human sacrifice. Deceased-Chirag Rajput, a two year old child was the son of their immediate neighbours, namely, Savitri Bai (PW-5) and Poshan Singh (PW-3). This child was kidnapped and thereafter a ceremony was conducted inside the house of Smt. Kiran Bai and Ishwari Lal Yadav when this child was killed in a gruesome manner. Thereafter, the child was buried within the precincts of the house. To avoid sound of cries coming out, loud music was played on a music system (deck). The parents of the child, family members and other people of the neighbourhood were all searching for the child and they became suspicious of the loud music emanating from the house of the two main accused. Thereupon, a crowd of people entered the house of Kiran Bai and Ishwari Lal Yadav and found

mounds of freshly dug earth. There was a leaf bowl (*Dona*), one small bowl (*Katori*), one small round metal pot (*Lota*) a Trident (*Trishul*), idols & pictures of Gods and other items of pooja lying there. There was blood on some of these items. When the crowd asked the Accused what had happened, Smt. Kiran Bai and Ishwari Lal Yadav confessed that they had sacrificed Chirag with the help of the other co-accused and begged for mercy. The crowd started digging the freshly dug earth and the body of Chirag was taken out. The police also came in the meantime and thereafter, the report was lodged. The investigation was carried out. The body of Chirag was sent for postmortem. Further investigation was carried out. The accused were questioned on which they made some disclosure statements and on the basis of those statements, recoveries of certain incriminating articles were made. On the basis of the material collected during investigation, the police filed a report under Section 173 CrPC against all the accused and one other accused-Krishna Tambi son of Ishwar Rao. However, that accused absconded and his trial was separated. All the Accused/Appellants have been convicted and sentenced as aforesaid. Hence, this reference and appeal.

5. We have carefully gone through the evidence and shall refer to the same in detail.
6. Admittedly, Chirag Rajput was the son of Poshan Singh (PW-3) and Savitri Bai (PW-5). The mother-Savitri Bai (PW-5) works as a domestic help, whereas, Poshan Singh (PW-3) was working in Bhilai. Smt. Vandana Rajput (PW-21), sister of Savitri Bai (PW-5)

was at home alongwith minor child Chirag on 23.11.2010. She stated that her sister and brother-in-law had gone out of the house for work. In the afternoon, Chirag went outside the house to play while she was working inside. After sometime, when she went out of the house, she could not find Chirag. She searched for Chirag but when she could not find him, she rang up her sister and brother-in-law, who then came back to their house. They all started searching for Chirag. She states that in the evening at about 6:30 pm, she came to know that Accused-Ishwari Lal Yadav and Smt. Kiran Bai had sacrificed her nephew. She also stated that she knows Accused-Smt. Kiran Bai, Ishwari Lal Yadav, Khan Baba @ Nihaluddin, Hemant Sahu and Sukhdev. However, as far as Rajendra Kumar and Mahanand are concerned, she knew them by face but did not know their names. She also stated that she had often seen the other Accused going to the house of Ishwari Lal Yadav and Smt. Kiran Bai. Though, she has been cross-examined at length, but there is no effective cross-examination.

7. Savitri Bai (PW-5), mother of deceased child states that after receiving phone call from her sister Smt. Vandana Rajput (PW-21), she came home. When she reached home, her husband, Poshan Singh (PW-3) had already reached there. She and her husband alongwith other persons living in the locality searched for Chirag but could not find him anywhere. At that time, they heard a loud music coming from the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. This witness further states that she alongwith her husband went to lodge a report in the Sector-6 Police Station at

Bhilai regarding their missing son. They came back after lodging the report. Then, the other residents of the locality told them that loud music was continuously being played in the house of Smt. Kiran Bai and Ishwari Lal Yadav and they should check their house also. Thereafter, all of them entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. According to this witness, as soon as they entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, both these Accused folded their hands and begged for mercy. They confessed that they had killed Chirag in the form of human sacrifice. Then, all the people who had gathered saw that there was a place made out for worship where in front of picture of gods, there was some wet mud. Thereafter, somebody in the crowd suggested that the mud be dug up. On digging, the body of Chirag was brought out. His head was separated from the body. Both cheeks had deep cuts and the tongue of the child had also been cut off. On seeing her child in this condition, she became unconscious. She also states that Accused-Ishwari Lal Yadav and Smt. Kiran Bai are known *Tantriks* and all other Accused used to come regularly to their house alongwith fruits and flowers. She also states that when they entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, all other Accused were also present at the place of worship. There was one idol and picture of gods. Knives were also there. She, in her cross-examination, was confronted with her statement under Section 161 CrPC where she has not mentioned that the other Accused used to bring fruits and flowers to the house of two main Accused-Ishwari Lal Yadav and Smt. Kiran Bai. In

paragraph 9 of the statement, she states that when they entered the house, the police officials had not come with them. After they entered the house of the Accused, the police officials came to the spot. Thereafter, the police officials remained on the spot. In further cross-examination, she has stated that they had entered the house of the Accused-Ishwari Lal Yadav and Smt. Kiran Bai before sunset. She also stated that by the time she regained consciousness, police had arrived. She also stated that she does not know as to what had happened in between the time she became unconscious till she regained consciousness. On a suggestion put to her, she admits that before the police reached the spot, the people of the locality had beaten the Accused persons. She however states that the beating was not very severe. She also states that she cannot name the persons who dug up the place and took out the body. According to her, the police reached the spot at about 5:30 pm. On a suggestion being put to her in cross-examination, she admitted that when the Accused-Ishwari Lal Yadav and Smt. Kiran Bai stated that they had sacrificed the child and begged for mercy, some of the persons present there had slapped them. Thereafter, they started digging the place. She also states that when the police came at about 5:30 pm, they took away the Accused from the spot.

8. Poshan Singh (PW-3) is the father of the deceased child. He states that Accused-Ishwari Lal Yadav and Smt. Kiran Bai are his neighbours and he knows them. He also knows all other Accused because they used to regularly visit the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai but he could not tell their names.

According to him, after he received the information from his sister-in-law, Smt. Vandana Rajput (PW-21) that Chirag was missing, he came home. Thereafter, he, his wife and other people of the locality, searched for Chirag but in vain. According to him, at 7:00 pm, he and his wife went to police station to lodge a report that Chirag was missing. He further states that loud music was being played in the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai and this aroused suspicion in the minds of people of the locality. Thereafter, he alongwith his wife and other residents of the locality entered into the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. A place of worship had been prepared there. The ground around the place of worship was wet and a knife was also lying at that place. On digging up the wet place, body of Chirag was found. The body was in two parts and had been severed from the neck. Both the cheeks had been cut. At the place of worship, pictures of Gods had been placed. According to him, on seeing the child in that condition, he became unconscious. Later, the police came and conducted the investigation. They prepared a sketch map and also sent the body of Chirag for postmortem. He clearly states that when they entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, all the Accused were present inside the house. In cross-examination, he states that he knew the names of Ishwari Lal Yadav and Smt. Kiran Bai, prior to the occurrence but he came to know the names of the other Accused after the occurrence, and in fact Ishwari Lal Yadav had told their names when the crowd had entered his house. He also states that he had seen all the Accused.

9. Suraj Singh Rajput (PW-2) is the brother of Poshan Singh (PW-3). He states that he knows all the Accused because earlier, he was residing in Ruabandha area where all the Accused also used to reside. He states that on the date of occurrence at about 2:00 pm, he received a telephonic call from Poshan Singh (PW-3) that Chirag was missing. He then went to Ruabandha. Thereafter, he alongwith his brother, sister-in-law and other persons of the locality searched for Chirag, but could not find him. Then, they went to the police station of Sector-6, Bhilai and lodged a report. After lodging the report, when they returned to their locality, they found that loud music was still being played in the house of the *Tantriks*-Ishwari Lal Yadav and Smt. Kiran Bai and this aroused their suspicion. Then, he alongwith Poshan Singh (PW-3) and other persons of the locality including Rajendra Rajak (PW-10), Shiv Kumar Rajak (PW-16), Parasnath Bhuarya (PW-9) and S. Samar entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. At the place of worship, they found one leaf bowl (*Dona*), one small round metal pot (*Lota*), and one small bowl (*Katori*) in which there was blood. Blood was also sprinkled around. They then questioned Accused-Ishwari Lal Yadav from where the blood has come. On questioning, Ishwari Lal Yadav confessed that he had asked Accused-Hemant Sahu to kidnap Chirag for the purpose of human sacrifice. Thereafter, pooja was done at the spot and Chirag was sacrificed and buried there. According to this witness, Ishwari Lal Yadav also stated that at the time of human sacrifice, his wife Smt. Kiran Bai, their three children, all other Accused persons and one other child whose name he did

not know, were present. Till that time, the police had not arrived at the spot. The place of worship was dug up and on digging, head of Chirag was found. The head had been severed from the body at the neck. Both parts of the body were taken out. The tongue of Chirag had been cut and separated. Thereafter, the police reached the spot and took the body of Chirag for postmortem. In cross-examination, he states that he reached Ruabandha at about 2:30 pm. When they could not find Chirag for about 2 hours, he rang to other members of the family and at about 6:30 pm, they lodged a report at the police station. A suggestion has been put to him which he denied that the police had reached the place of occurrence at 4:00 pm and the crowd had already gathered at the house of Accused-Ishwari Lal Yadav. He states that the police reached the spot between 7:00 and 7:30 pm.

10. Ram Avtar Gada (PW-6) is a neighbour of the Accused-Ishwari Lal Yadav and Smt. Kiran Bai, and Savitri Bai (PW-5) and Poshan Singh (PW-3). According to him, on the date of occurrence, when Chirag was missing, he alongwith others also searched for Chirag and an announcement was also made on the loudspeaker of the mosque. Thereafter, people of the locality gathered at the spot. He states that Accused-Ishwari Lal Yadav and Smt. Kiran Bai were known *Tantriks* and other Accused were their followers (*chelas*). Since loud music was being played in the house of Accused-Ishwar Lal Yadav and Smt. Kiran Bai, they became suspicious and entered their house. When they entered, they found that the ground was wet. There was an idol and picture of gods. When they dug up the

wet area, they found the body of Chirag in two parts severed at the neck. Both cheeks were cut. At that time, Accused-Ishwari Lal Yadav and Smt. Kiran Bai confessed that they had sacrificed Chirag and begged for mercy. This witness admitted in his cross-examination that he had not made any statement to the police nor he was ever examined by the police. He also admitted that for the first time, he was making revelation of these facts in the Court.

11. Statement of Ashok Sahu (PW-8) is not very relevant except to the fact that he states that he lives in Nevaibhata and that till the end of the year 2006, Accused-Ishwari Lal Yadav and Smt. Kiran Bai used to live in Nevaibhata, therefore, he knows them. According to him, they used to indulge in witchcraft. The rest of his statement is totally unreliable.
12. Parasnath Bhuarya (PW-9) states that he knows all the Accused since they all reside in the locality of Ruabandha. He further states that on the date of occurrence, everybody in the locality had come to know that Chirag was missing. Thereafter, they all were searching for Chirag from about 2:00 – 2:30 pm. Since loud music was coming from the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, they entered their house. According to him, he could only recognize Accused-Ishwari Lal Yadav and since it was dark, he could not recognize other Accused. When they questioned the Accused, the Accused-Ishwari Lal Yadav and Smt. Kiran Bai confessed that they had sacrificed Chirag and begged for mercy. He states that Accused-Ishwari Lal Yadav and Smt. Kiran Bai also named the other persons involved but he did not remember those

names. In cross-examination, he states that an announcement was made on a loudspeaker of the mosque that Chirag was missing and therefore, all the people of the locality gathered and searched for Chirag.

13. Rajendra Rajak (PW-10) is an important witness. He is the Corporator of Ward No. 54 of Ruwabandha. He knows Accused-Ishwari Lal Yadav and Smt. Kiran Bai by name and face and all other Accused by face. According to him, Chirag's grandmother came to his house and informed that her grandson-Chirag was missing. This happened at about 2:00 - 2:30 pm. He then states that he had given a suggestion that an announcement be got made in this regard from the loudspeaker of the mosque. Thereafter, an announcement was made and all the people of the locality were searching for Chirag. The house of Poshan Singh (PW-3) adjoins the house of Accused-Ishwari Lal Yadav. A loud music was being played in the house of Accused-Ishwari Lal Yadav and this made the people who had gathered suspicious as a child was missing from the locality and an announcement had been made but these people were continuously playing music. Thereafter, he alongwith number of other persons went inside the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai and saw that Ishwari Lal Yadav and his companions were preparing mounds of earth. Thereafter, some of the persons who entered the house, questioned those persons who were preparing mounds of earth as to what they were doing. He saw some utensils at the place of worship in which there was blood. The crowd then questioned Accused-Ishwari Lal Yadav and

Smt. Kiran Bai about the blood. Some of the persons gave few slaps to both of the Accused and then Accused-Ishwari Lal Yadav and Smt. Kiran Bai stated that Chirag had been sacrificed in pursuance to their *Tantrik* activities and had been buried on the spot. They also admitted that all the other Accused were also involved. This witness further states that he cannot clearly identify the other Accused persons, but states that some people were present there who, on being beaten up by the crowd, ran away. The persons of the locality dug up the ground and the body of Chirag was found in two parts. Thereafter, the police came and he gave the information about the incident at the spot and on the basis of his information, the police recorded *Dehatinalishi* (Exhibit P/7). This witness admits in cross-examination that a press conference was held in the police station late at night. He, in cross-examination has stated that he alongwith others entered the house of Accused-Ishwari Lal Yadav at about 6:00 pm. He however further states that when he entered the house of Accused-Ishwari Lal Yadav some persons had already gathered there. Thereafter, the Presiding Officer has noted that on a suggestion of the defence, this witness first stated that before he had reached the house of Accused-Ishwari Lal Yadav, the police had reached but when the Public Prosecutor asked him whether he had understood the question, he stated that police reached there later and he had reached earlier. In further cross-examination on behalf of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, he states that when the earth was being dug up at the place of occurrence from where Chirag's body was recovered, at that time he had

informed the police on telephone. According to him, he had at that time informed the police that the severed head of Chirag has been uncovered from the earth. According to him, he rang up the police on 100 number. He states that he cannot say that at what time, the police reached the spot. But according to him, the police reached the spot within 10 minutes of the body coming out. He was confronted with the statement (Exhibit D/2) in which it was mentioned that when the ground was being dug up and Chirag's body was visible, at that time, police reached the spot alongwith the police dog. He states that both his statements are correct. He again reiterates that he could only name the Accused-Ishwari Lal Yadav and Smt. Kiran Bai but does not know the names or identity of the other Accused who were present on the spot. However, when cross-examined further, he stated that all other Accused are the followers (*chelas*) of Accused-Ishwari Lal Yadav and Smt. Kiran Bai and were present in the house when they entered the house.

14. Dilip Thakur (PW-12) states that he heard the announcement that Chirag was missing. Then he also started searching for Chirag alongwith others. They heard loud music coming from the house of Accused-Ishwari Lal Yadav. Therefore, the crowd became suspicious as to why such loud music was being played in the house. They then entered the house of the Accused-Ishwari Lal Yadav. They saw that mounds of earth were prepared and there was one Katori with blood in it. The earth had been freshly dug up. Thereafter, the crowd again dug up the earth and the body of Chirag was found. He also described the condition of the body. According

to him, all other Accused persons were present at the spot when this happened. In further cross-examination, he stated that announcement on a loudspeaker was made at 11:00 – 12:00 noon. However, at that time, he did not join the search. He came back after work at about 5:00 pm and joined the search. He states that when he reached the place of occurrence, a crowd had already gathered and the police had already reached. It is obvious that this witness is not telling the truth and he reached the place of occurrence much later and as such much reliance cannot be placed on his statement.

15. Arvind Singh (PW-13) states that on the date of occurrence, he came to know that Chirag, son of Poshan Singh (PW-3) was missing from the locality and at about 2:00 pm, search for the child started. At about 6:00 pm, the crowd found a loud music was coming from the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. The house of the Accused is adjacent to the house of Poshan Singh (PW-3) and Savitri Bai (PW-5) the parents of Chirag. They then entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai and they found freshly dug up mounds of earth. People of the locality entered the house and in a copper vessel, there was some fresh blood. Accused-Ishwari Lal Yadav and Smt. Kiran Bai were questioned about Chirag where their followers were also present, out of whom one is absconding. On questioning, Ishwari Lal Yadav and Smt. Kiran Bai had stated that they had sacrificed the child and body of the child had been buried there. Then the place was dug up and body of Chirag was found in two

parts. His both cheeks had been cut and his tongue had also been totally cut. He states that Ishwari Lal Yadav and Smt. Kiran Bai were known *Tantriks* and rest were their followers. He states that except for one Accused, all others are resident of his locality.

16. Shiv Kumar Rajak (PW-16) states that on 23.11.2010, Chirag son of Poshan Singh (PW-3) was missing. An announcement in this regard was made from a loudspeaker of mosque. Thereafter, all the people of the locality started searching for Chirag. He also joined them. At about 5:00 – 5:30 pm, loud music was being played from the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. An announcement had already been made that a child was missing and all the people of the locality were searching for the child. But music was still being played from their house and therefore, the crowd became suspicious. Number of people (men and women) entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai and found that worship was going on. Smt. Kiran Bai was praying and in front of her, there was a *Shivling* made of mud. They asked for Chirag. First she did not answer. He saw that there was a lead bowl (*dona*) containing blood. There was also a knife and a Trident (*Trishul*). The ground was wet. When they touched the mud *Shivling* which had been prepared, it fell down. They then removed the mud and saw the body of Chirag in two separate parts. Some ash had been smeared on the head of Chirag. Both his cheeks had been cut till the hair and tongue was missing. Thereafter, the police was informed. Accused-Ishwari Lal Yadav was questioned by the police at the spot itself and he confessed that he had asked Accused-

Hemant Sahu to kidnap a child and thereafter they had worshiped the child, put *tilak*, touched the feet and then sacrificed the child. At that time, the Accused-Ishwari Lal Yadav confessed that about 6 months earlier, they had sacrificed one girl also. This witness is also a witness to the recovery of clothes (Exhibit P/21) of Accused-Ishwari Lal Yadav. He is also a witness to the recovery of amulet (*tabij*), *Lungi*, trident (*trishul*). A motorcycle was also seized at the instance of Accused-Ishwari Lal Yadav. He is also a witness to various recoveries which we shall deal with later on.

17. The aforesaid are the witnesses who searched for Chirag. These are the witnesses, except Smt. Vandana Rajput (PW-21) who entered the house of Accused-Ishwari Lal Yadav. According to them, when they entered the house, some *Tantrik* activities were going on. One idol and picture of god were there. The ground was wet and there were freshly dug up mounds of earth. According to one of the witnesses, the mound of earth was in the shape of *Shivling*. Further, the statements of these witnesses is that when they questioned Accused-Ishwari Lal Yadav and Smt. Kiran Bai, they confessed they had sacrificed Chirag. The Accused-Ishwari Lal Yadav and Smt. Kiran Bai made an extra-judicial confession to the entire crowd in presence of these witnesses that they had, with the help of the other co-accused, kidnapped Chirag and thereafter sacrificed him by slitting his throat. After killing Chirag, his body was buried at the spot. Thereafter, the earth was dug up and the body of Chirag was recovered.

18. The first intimation with the police was recorded by Domar Singh Thakur (PW-19) who at the said time was Sub Inspector in Bhilai Nagar Police Station. He states that on 23.11.2010 at about 09:15 pm, on the basis of the statement made by Rajendra Kumar Rajak (PW-10), he recorded the merg intimation (Exhibit P-5). In this merg intimation, it is stated that on the basis of the information given by Rajendra Kumar Rajak (PW-10), while searching for Chirag, they entered the house of *Tantrik* Ishwari Lal Yadav and Smt. Kiran Bai in Ruabandha and inside the house, on digging up the earth, body of Chirag was found. Chirag had been sacrificed by Accused- Ishwari Lal Yadav and Smt. Kiran Bai @ Gurumata, Hemant Sahu, Tambi Krishna, Ajay Raut, Khan Baba and Mahanand Thethwar. He then recorded *Dehatinalishi* (Exhibit P-7) at the place of occurrence itself. Thereafter, he prepared application (Exhibit P-2) for postmortem of the body of Chirag. The body was sent for postmortem and the postmortem was conducted.
19. Anil Yadav (PW-1) is the Constable who took the application for postmortem to the hospital. Gopalram Ratre (PW-4) Assistant Sub Inspector, recorded merg intimation (Exhibit P-6) on the basis of Dehati merg (Exhibit P-5) in the police station.
20. Dr. Lal Mohammad (PW-14) conducted the postmortem on the body of Chirag on 24.11.2010, at about 11:45 am. The postmortem report is Exhibit P-13. The head had been severed from the body at the neck. He states that the body was of a child aged about 2 - 2½ years and the same was in two parts. Most of the tongue has been cut and was not present with the body. There were incised wounds

on the head at the mandible and maxilla, just below the left ear. There was a big cut of 7 cm long on the cheek. All these injuries were antemortem. According to him, the death had occurred due to shock and haemorrhage because of the aforesaid injuries.

21. Statement of Patiram Bareth (PW-11) is also relevant. He is the Patwari of the area and he in his statement has clearly stated that the house from which the body of the child was recovered belongs to Accused-Ishwari Lal Yadav.
22. Ramnarayan Yadu (PW-7) took the documents (Exhibit P-5 and Exhibit P-7) to the police station at Bhilai and thereafter, FIR (Exhibit P-8) was recorded.
23. Dr. M.K.Sinha (PW-15) has stated that he runs a nursing home in Bhilai. On 24.11.2010, at 00:30 hours, Accused-Mahanand Yadav, Nihaluddin, Ajay Yadav, Ishwari Lal, Hemant Sahu, Rajendra Kumar and Smt. Kiran Bai were brought to him for examination. They had suffered some injuries and he prepared their MLCs-Exhibit P-14, P-15, P-16, P-17, P-18, P-19 and P-20, respectively. He also stated that on that day, the Government Hospitals were closed because there was a strike by the Government Doctors. In cross-examination, he admitted that in the certificate, he has not mentioned anything about the strike.
24. Lakhan Lal Tandan (PW-17) was the Assistant Sub Inspector in Police Station, Bhilai. at the relevant time. He states that on 24.11.2010, at 10:00 am, after taking Accused-Sukhdev into custody, he recorded his disclosure statement (Exhibit P-25). He

also states that on the same day, at about 1:00 pm, he went to the house of Accused-Sukhdev alongwith the witnesses and recovered incriminating evidence and made seizure memo (Exhibit P-26). He also states that on the same day, at about 11:30 am, he recorded the statement of Khan Baba @ Nihaluddin, which is Exhibit P-31 and on the basis of this statement, recovery of incriminating evidence was made vide Exhibit P-32. It would be pertinent to mention that in cross-examination, he stated that in the documents, there is no mention that the articles which were recovered were sealed. Even specimen seal is also not available.

25. Ram Shiromani Tripathi (PW-18) is the Assistant Sub Inspector. He states that on 23.11.2010, at about 9:40 pm, he took Accused-Ishwari Lal Yadav into custody and recorded his statement (Exhibit P-21). On the next day, i.e. 24.11.2010 at about 12:45 pm, one motor-cycle, CG-07-ZE-1634, one iron Trident (*Trishul*) on which a red cloth was tied, one copper amulet (*tabij*) with a black thread in which the blood stained mud from the site of worship had been filled, one *Lungi* of green, blue and white colour having blood stains on it, one old light yellow coloured shirt with blood on it, were recovered vide (Exhibit P-22) and sealed. He also identified these articles in Court. He also states that on 24.11.2010, at about 9:25 am, after taking Accused-Hemant Sahu into custody, he was questioned and his statement (Exhibit P-23) was recorded. On the basis of his statement, at 2:50 pm, one old T-Shirt, one pair of Jeans which appeared to have blood stains on it, one copper amulet (*Tabij*) which contained blood stained earth from the place of

occurrence, were seized vide Exhibit P-24. This witness also states that on 24.11.2010, at 10:00 am, Accused-Smt. Kiran Bai was questioned in the Police Station, Bhilai and her statement was recorded vide Exhibit P-27. On the same day, at about 1:35 pm, in the presence of the witnesses, one sword type knife measuring 13.5" bearing blood stains, one saree, one amulet (*tabij*) and one sword were recovered vide seizure memo (Exhibit P-28). In cross-examination, this witness states that after the report regarding Chirag being missing was lodged, he went to the place of occurrence after about 30 - 45 minutes. According to this witness, when the body of Chirag was found, he was outside the house of Accused-Ishwari Lal Yadav. A large crowd had gathered outside the house of the Accused-Ishwari Lal Yadav. According to this witness, before the body was found, 3-4 police personnel were standing outside the house of Accused-Ishwari Lal Yadav. He then states that they were informed about the body of Chirag being recovered about 10 minutes after it was actually recovered. He then immediately entered the place of worship. According to him, when he went there, body of Chirag had already been taken out from the earth. He then rang up his senior officials, who came at the spot. He further states that before the body was found, he was searching for Chirag for more than half an hour. According to him, since the public was enraged and they were suspecting Accused-Ishwari Lal Yadav, he was standing outside the house of Ishwari Lal Yadav. His version is that he wanted to prevent any physical altercation which

could take place. He further states that the other police officials reached the place of occurrence 10 minutes later.

26. We may again refer to the statement of Domar Singh Thakur (PW-19). He states that on 23.11.2010, Accused-Mahanand, Nihaluddin, Ajay Yadav, Ishwari Lal Yadav, Hemant Sahu, Rajendra Kumar and Smt. Kiran Bai were sent for medical examination alongwith application. On the back side of the applications, the Doctor has given his report vide Exhibit P-14 to P-20. He took Rajendra Kumar into custody and questioned him and recorded his statement vide Exhibit P-29. On the basis of the statement (Exhibit P-29), one Blue T-Shirt with a green and white collar bearing blood stains and one copper amulet (*tabij*) containing mud were recovered. He further states that on 24.11.2010, at 10:30 am, after taking Accused- Mahanand into custody, questioned him and his statement (Exhibit P-33) was recorded. On the same day, at about 3:50 pm, from the house of Mahanand, one sharp iron knife measuring 9.5", one copper amulet (*tabij*) containing mud were also recovered vide Exhibit P-34. He also states that all the accused persons were arrested on 24.11.2010 at 7:00 pm in the police station itself. It is important to note that Shri Domar Singh Thakur (PW-19) in his statement, in cross-examination has admitted that on 23.11.2010, the Accused were taken into custody for questioning and other purposes.
27. The prosecution relies on the recoveries of incriminating articles allegedly made on the basis of statement of the Accused under Section 27 of the Evidence Act.

28. The Court below as well as the prosecution relies upon the statement of the witnesses who reached the spot immediately after the occurrence. The prosecution submits that recovery of the body from the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai within few hours of Chirag having gone missing, is itself sufficient to hold these two Accused persons guilty. With regard to other Accused persons, it is urged that they were also present inside the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai when the crowd went to that house. They have been identified by most of the witnesses, and therefore, it is proved beyond reasonable doubt that they are also guilty of the ghastly murder of Chirag. The prosecution also relies on the recovery of the body and other incriminating articles at the instance of the Accused.
29. As far as evidence regarding recovery of incriminating articles, such as a dagger, trident (*trishul*), saree, clothes of the Accused, amulet (*tabij*) etc. is concerned, we are of the considered view that no reliance can be placed on the same. As far as the statements of the main witnesses namely Suraj Singh (PW-2), Poshan Singh (PW-3), Savitri Bai (PW-5), Ram Avatar Gada (PW-6), Rajendra Kumar Rajak (PW-10), Arvind Singh (PW-13) and Shiv Kumar Rajak (PW-16) are concerned, they have all stated that when they entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, all the Accused were present there. It is true that one or two witnesses have not been able to identify all the Accused persons, but remaining witnesses have clearly stated that all the Accused persons were present there. It is also apparent from the statement

of these witnesses, especially Domar Singh Thakur (PW-19) that the Accused were apprehended at the spot itself. It is more than apparent that as soon as the crowd went in, they caught hold of the Accused, some of the Accused were beaten up and thereafter, the Accused were handed over to the police. This is also apparent from the facts that all the Accused including Accused-Ishwari Lal Yadav and Smt. Kiran Bai were produced before Dr. M.K.Sinha (PW-15) at his nursing home at midnight. It is also the prosecution case that recovery statement of Accused-Ishwari Lal Yadav was recorded in the night of 23.11.2010 and recovery statements of all the other Accused were recorded in the next morning and recoveries were made. However, the Accused have been shown to be formally arrested only at 7:00 pm next day. This is highly improper. Once a person is apprehended, he should be shown to be arrested because it is the duty of the police officials to produce any person who has been arrested before the Magistrate within 24 hours. The police cannot be permitted to circumvent the provisions of Section 167 CrPC by not showing that the Accused have been arrested.

30. If we take the view that the Accused were apprehended at the spot, then the question of the accused hiding their clothes, amulet (*tabij*), trident (*trishul*), and knife does not arise. The statements of the police officials who reached the spot soon after the crowd had uncovered the body is that things were lying there and all the Accused were present. The police should have immediately arrested all the Accused persons and the police could have immediately seized the clothes which the Accused persons were

wearing as well as the knife which they used to kill Chirag. They could have also seized the vessels which were lying on the spot and all other items which are now shown to have been recovered at the instance of the Accused. Since we are of the view that the Accused were apprehended at the spot itself, there is no question of the Accused hiding their clothes, amulet (*tabij*) etc. The police had shown recovery from the Accused other than Accused-Ishwari Lal Yadav and Smt. Kiran Bai from their respective houses. If the Accused were apprehended at the spot, question of their going home did not arise. Therefore, the recoveries on the face of it cannot be relied upon.

31. One of the main argument raised by Shri B.P.Singh, learned Counsel for some of the Accused is that there is no clarity about the time when the occurrence took place. He submits that though the date of occurrence is 23.11.2010, exact point of time when the murder was committed is not proved. This, in our view, is of no consequence. However, the further argument of Shri B.P.Singh is that there is a dispute with regard to the time when the people of the locality entered the house of the Accused creates doubt about the statements of the witnesses. In this regard, he has stated that the missing report with regard to child was recorded at 7:00 pm and therefore, obviously, the persons must have entered the house after 7:00 pm. He submits that in this regard, two of the witnesses namely Suraj Singh (PW-2) and Poshan Singh (PW-3) have stated that they went to the house after 7:00 pm, but Smt. Savitri Bai (PW-5) has stated that they entered the house of Accused-Ishwari Lal Yadav

before sunset. She has also stated that they had entered the house at about 5:30 pm. The statements of most of the other witnesses is that they had entered the house much before the sunset. There is some merit in the argument of Shri Singh. But we cannot give the Accused any benefit of the same. It is more than obvious that the police has changed the time of entry to 7:00 pm to cover up its own negligence and incompetence. From the evidence on record, it is obvious that at about 2:00 pm, Chirag was found missing and at around 3:30 - 4:00 pm, an announcement had been made on the loudspeaker of the mosque. Large number of people had gathered looking for Chirag. Thereafter, parents of Chirag went to lodge a missing person report in the police station and after they came back, they were told by the crowd that they are suspicious why loud music is being played in the house of Accused-Ishwari Lal Yadav even after making of an announcement on the loudspeaker from the mosque regarding missing of Chirag. This is the natural course of things and we are of the view that since Savitri Bai (PW-5) is stating the truth when she states that they had entered the house of Ishwari Lal Yadav at 5:30 pm much before it was dark. We have also no doubt in our mind that when the crowd entered the house, the police was not with them. It was only after Rajendra Kumar Rajak (PW-10) rang up the police that they arrived at the spot and by that time, it may be about 7:00 pm. To cover up the lapse in recording missing person report earlier the police appears to have put the time of 7:00 pm, in the report Exhibit P/50. In our view, the people of the locality had entered the house of Accused-Ishwari Lal Yadav latest

by 5:30 - 6:00 pm. This is evident if we read and analyse the statements of all the witnesses carefully.

32. If the police is negligent or fails to perform its duty properly, it does not mean that justice should not be done. It is the duty of the Court to ascertain the truth. In this behalf reference may be made to judgment of the Apex Court in the matter of *Vinod Kumar v. State of Punjab* {(2015) 3 SCC 220} has held in no uncertain terms that the fundamental purpose of the trial is to arrive at truth on basis of evidence on record and interest of not only accused but societal interest is to be also protected. It was succinctly held as under :

"57.3 There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial is to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material on record"

33. In the matter of *State of Karnataka v. Suvarnamma and another* {(2015) 1 SCC 323}, the Apex Court has held that any lapse on part of the investigating agency cannot *per se* be a ground to throw out the prosecution case. The Apex Court held as follows:

"10. The Court dealing with a criminal trial is to perform the task of ascertaining the truth from the material before it. It has to punish the guilty and protect the innocent. Burden of proof is on the prosecution and the prosecution has to establish its case beyond reasonable doubt. Much weight cannot be given to minor discrepancies which are bound to occur on account of difference in perception, loss of memory and other invariable factors. In the absence of direct evidence, the circumstantial evidence can be the basis of conviction if the circumstances are of conclusive nature and rule out all reasonable possibilities of accused being innocent. Once the prosecution probablises the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though

Article 20 (3) of the Constitution incorporates the rule against self incrimination, the scope and the content of the said rule does not require the Court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused.

11. It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence.

14. Does the alleged suppression or unfair conduct of the investigating agency absolve the Court of its duty to find out the truth? Though we are governed by the adversarial system, the Court cannot be a mute spectator, particularly in criminal cases and shun its primary duty of finding out the truth from the material on record. Thus merely showing that the prosecution withheld dying declaration (Exhibit D-7) could not be a ground for the Court not finding out the cause of death from the material on record and inferring that the death was accidental. "

34. Similarly, in the matter of *Bablu Kumar and others v. State of Bihar and another* {(2015) 8 SCC 787}, the Apex Court has held that criminal court cannot be silent spectator or observer and defined the role of the court as under :

"22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the Court, it can irrefragably be stated that the Court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. Law does not countenance a 'mock trial'. It is a serious concern of the society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been

examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial, has a statutory duty to perform. He cannot afford to take things in a light manner. The Court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial."

35. Recently, the Apex Court in the matter of *Ajay Kumar Singh v. Flag Officer, Commanding-In-Chief and other* {AIR 2016 SC 3528}, in a robbery case, where fingerprints were lifted from the entrance glass doors of bank, but neither the photographer was examined nor negatives of photographs of chance fingerprints were produced, the Apex Court held that such a lapse on the part of the prosecution cannot result in acquittal of accused persons. It was succinctly held as under :

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

36. In this case, we are of the view that the manner in which the investigation was carried out by the police shows that the police officials in the State of Chhattisgarh are not properly trained to carry out the investigation. This was an extra-ordinary case where a small child had been killed as an offering to the gods. It is evident that number of senior officials reached the spot. It is also evident

from the statements of Rajendra Kumar Rajak (PW-10) as well as police officials that a press conference was held in the police station. It appears that the police officials were more interested in conducting the press conference than in dealing with the offenders. As held by us above, all the accused were apprehended on the spot. Nothing prevented the police from itself recovering the material found at the spot, asking the persons who had been arrested to change their clothes and they could have seized the clothes which the accused were wearing in presence of the witnesses who had gathered there. Only Accused- Ishwari Lal Yadav is shown to have been questioned at night. Was it more important to hold a press conference or to question the witnesses? The answer is simple. The investigation of the case cannot be stalled or delayed only because the police officials and big-wigs wanted to hold a press conference. Nothing prevented the police from showing the Accused to be formally arrested and making recoveries on the spot itself in presence of the independent witnesses. Instead of doing that the police has shown arrest after 24 hours and has tried to show that incriminating articles were recovered on the basis of the disclosure statements made by the accused. We therefore cannot rely upon the same. We may add that this occurrence took place in the year 2010 and the police after collecting the material, such as, clothes, Amulet (*tabiz*), Trident (*Trishul*), knife, which all are stated having blood stains, should have sent them for DNA profiling to match the blood on the articles with blood group of the deceased. If the matching had been done, no other evidence would be required.

The witnesses can lie, ocular evidence may be believed or not, but if cases are investigated in a scientific manner following the principles of forensic science, then this was an open and shut case. Unfortunately, due to total ineptness of the police officials, we cannot now rely upon this evidence. That leaves us with the ocular evidence i.e. evidence of the witnesses.

37. As far as the ocular evidence is concerned, we are clearly of the view that the statements of the important witnesses namely Suraj Singh (PW-2), Poshan Singh (PW-3), Savitri Bai (PW-5), Ram Avatar Gada (PW-6), Rajendra Kumar Rajak (PW-10), Arvind Singh (PW-13) and Shiv Kumar Rajak (PW-16) referred to above proves beyond any manner of doubt that when these witnesses entered the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai, they found that a place for worship had been prepared, the ground was wet and mounds of earth had been prepared. According to some of the witnesses, the mounds were in the shape of *Shivling*. All the witnesses have stated that there were idol and picture of gods. They have stated that there was leaf bowl (*dona*), a small round metal pot (*lota*), a small bowl (*katori*) containing blood. Some blood was sprinkled at the spot. A knife was lying at the spot itself and when the Accused-Ishwari Lal Yadav and Smt. Kiran Bai were questioned, they admitted that they alongwith the co-accused had sacrificed the young child-Chirag. We are also of the view that it stands proved beyond doubt that the other Accused persons were present inside the house when the crowd entered the house. It is also apparent that the Accused were beaten up but as is clear from the reports

(Exhibit P-14 to Exhibit P-20) prepared by Dr. M.K.Sinha (PW-15) that the injuries are minor in nature. One can understand that the crowd must have been furious and angry.

38. Rajendra Kumar Rajak (PW-10) informed the police which came within 10 minutes. During this period of 10 minutes, the crowd had dug up the earth and already recovered the body of Chirag from the worship area within the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai. Even if we do not rely on the recovery memos and other documents, we are clearly of the view that the statements of the witnesses and the following circumstances are sufficient to hold the Accused-Appellants guilty:

- (i) While the whole locality was searching for Chirag, neither the Accused-Ishwari Lal Yadav nor Smt. Kiran Bai nor any of the other co-accused bothered to come out even though an announcement had been made on a loudspeaker of the mosque;
- (ii) These Accused persons continued to play extremely loud music in the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai;
- (iii) When the crowd entered the house, it found that a place of worship had been prepared, blood was lying in some of the vessels and blood was also sprinkled on the ground and all the Accused as well as three minor children of the main Accused and the absconding Accused were present. When the crowd questioned the Accused as to what was going on,

Accused-Ishwari Lal Yadav and Smt. Kiran Bai admitted that with the help of Accused-Hemant Sahu, they had kidnapped Chirag and thereafter sacrificed him in the form of human sacrifice to attain "*siddhi*". This extra-judicial confession made by the accused was itself sufficient to hold that the accused are guilty because this confession is corroborated by recovery of the body of minor Chirag.

- (iv) All the other Accused were present at the spot and have given no explanation as to what they were doing there;
- (v) The crowd dug up the earth and body of Chirag was recovered within the house of Accused-Ishwari Lal Yadav and Smt. Kiran Bai within a few hours of Chirag having gone missing.

39. The prosecution has proved beyond doubt from the statements of the witnesses that Smt. Kiran Bai, who was treated as *Gurumata* and her husband Ishwari Lal Yadav, both use to indulge in *Tantrik* activities. The prosecution has also been able to prove that all the other accused were their followers (*chelas*).

40. In our view, the above circumstances are more than sufficient to hold the Accused-Appellants guilty of having conspired to murder Chirag with intention of sacrificing him to propitiate gods. It is also more than apparent that all of them entered into a conspiracy to kidnap and sacrifice Chirag and they also buried his body with a view to hide evidence of murder. We, therefore, uphold the

conviction of the Accused-Appellants under Sections 364/34 read with Section 120B, 302/34 read with Section 120B and 201 IPC.

41. That brings us to the issue of sentence to be imposed. It has been urged that the Accused-Appellants were not provided proper legal assistance and all the Accused-Appellants including Accused-Ishwari Lal Yadav and Smt. Kiran Bai are illiterate, belong to a poor background and have no source of income. With regard to Accused-Ishwari Lal Yadav and Smt. Kiran Bai, it has been urged that they have three minor children and therefore, the sentence of death be not imposed upon them.
42. The issue is whether we should uphold the sentence of death as imposed by the learned Trial Court or not?
43. The law in this regard is now fairly well settled. The Apex Court in a large number of cases has laid down principles which must be considered while deciding whether capital punishment should be awarded or not. The Court is required to consider the aggravating and mitigating circumstances. The Court is also required to take into consideration other factors, such as, age of the Accused, possibility of reformation, lack of intention etc.
44. In *Bachan Singh v. State of Punjab* {AIR 1980 SC 898} the Apex Court dealing with the issue of death penalty held that the provisions providing for death penalty do not violate either the letter or the ethos of Article 19 of the Constitution of India. The Apex Court however laid down certain guidelines and held that the death

penalty should only be imposed in the rarest of rare cases. The aggravating circumstances have been set down as follows:

“179. Soon after the decision in Furman, the Georgia Legislature amended its statutory scheme. The amended statute retains the death penalty for six categories of crime: murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statutory aggravating circumstances, the existence of any of which may justify the imposition of the extreme penalty of death, as provided in that statute, are:

- (1) The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions).
- (2) The offence of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offence of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
- (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- (4) The offender committed the offences of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
- (7) The offences of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
- (8) The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
- (9) The offence of murder was committed by a person in, or who has escaped from, the lawful confinement.
- (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.”

The Supreme Court further considered what can be considered to be the mitigating circumstances in paragraph 204 of the said judgment as under:

“204. Dr. Chitale has suggested these mitigating factors:

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

1. That the offence was committed under the influence of extreme mental or emotional disturbance.
2. The age of the accused. If the accused is young or old, he shall not be sentenced to death.
3. The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
4. The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
5. That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
6. That the accused acted under the duress or domination of another person.
7. That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.”

45. Thereafter, the Apex Court after referring to *Bachan Singh (Supra)* in *Machhi Singh v. State of Punjab* {(1983) 3 SCC 470} held as follows:

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

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be

taken into consideration along with the circumstances of the 'crime'.

(iii) Life Imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

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

46. This view was followed in *Sushil Murmu v. State of Jharkhand* {2003 AIR SCW 6782}. The Apex Court gave certain further guidelines and summarized the law in the following terms:

“15. The following guidelines which emerge from Bachan Singh case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38)

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

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

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

the aggravating and the mitigating circumstances before the option is exercised.

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

1. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
2. When the murder is committed for a motive which evinces total depravity and meanness e.g. murder by a hired assassin for money or reward or a cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.
3. When murder of a member of Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of “bride-burning” or “dowry deaths” or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
4. When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
5. When the victim of the murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-à-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.”

47. In *Asharfi Lal & Sons v. State of UP* {AIR 1987 SC 1721}, the Apex Court held that it is duty of the Court to impose proper punishment depending upon the degree of criminality and in the case of gruesome murder of two innocent girls, the Court imposed death penalty. The relevant portion of the judgment reads as follows:

“3. We have heard learned counsel for the appellants mainly on the question of sentence but we are not impressed with his submission. The two appellants Ashrafi Lal and Babu were guilty of a heinous crime out of greed and personal vengeance and deserve the extreme penalty. This case falls within the test ‘rarest of rare cases’ as laid down by this Court in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 : (AIR 1980 SC 898) as elaborated in the later case of *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 : (AIR 1983 SC 957). The punishment must fit the crime. These were cold-blooded brutal murders in which two innocent girls lost their lives. The extreme brutality with which the appellants acted shocks the judicial conscience. Failure to impose a death sentence in such grave cases where it is a crime against the society particularly in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by S. 302 of the Penal Code. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellants deserve for having committed the reprehensible and gruesome murders of the two innocent girls to wreak their personal vengeance over the dispute they had with regard to property with their mother Smt. Bulakan is nothing but death. As a measure of social necessity and also as a means of deterring other potential offenders the sentence of death on the two appellants Asharfi Lal and Babu is confirmed.”

48. In *Subhash Ramkumar Bind @ Vakil & Another v. State of Maharashtra* {AIR 2003 SC 269}, the Apex Court held that in every incident of murder, brutality is involved but that brutality by itself will not bring it within the ambit of rarest of rare cases for imposition of death penalty. The prosecution must prove and the Court must hold that the brutality exceptionally falls within the category of rarest of rare cases before it can impose death sentence.

49. In *Dhananjay Chatterjee v. State of W.B.* {(1994) 2 SCC 220}, the Apex Court upheld the award of death sentence and held as follows:

“14. In recent years, the rising crime rate—particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh

sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

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

50. While dealing with the question of imposition of death sentence affirmed by the Supreme Court, the Supreme Court in the matter of *Sonu Sardar v. State of Chhattisgarh* {(2012) 4 SCC 97}, in which case death sentence upon young male had been imposed, held that the appellant though young but having no consideration for human lives and his criminal propensities being beyond reform, is a menace to the society, death sentence is proper being a case of rarest of rare, and observed as follows: -

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

the appellant as contended by the learned counsel for the appellant.

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

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

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

22. The facts in the present case are no different. Five members of a family including two minor children and the driver were ruthlessly killed by the use of a knife, an axe and an iron rod and with the help of four others. The crime was obviously committed after premeditation with absolutely no consideration for human lives and for money. Even though the appellant is young, his criminal propensities are beyond reform and he is a menace to the society. The trial court and the High Court were therefore right in coming to the conclusion that this is one of those rarest of rare cases in which death sentence is the appropriate punishment.”

51. In *Ramnaresh & Others v. State of Chhattisgarh*, {(2012) 4 SCC 257} the Apex Court summarized the aggravating and mitigating circumstances in the following terms:

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

Aggravating Circumstances:

- (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
- (2) The offence was committed while the offender was engaged in the commission of another serious offence.
- (3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
- (4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
- (5) Hired killings.
- (6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
- (7) The offence was committed by a person while in lawful custody.
- (8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

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

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

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

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

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

Mitigating Circumstances:

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

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

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

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

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

morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

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

The Supreme Court has summarized following principles for consideration for imposition of capital sentence: -

- (1) The Court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.
- (2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.
- (3) Life imprisonment is the rule and death sentence is an exception.
- (4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.
- (5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.”

The Apex Court, in para 79 further went on to hold as follows:

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

52. In *Shankar Kishanrao Khade v. State of Maharashtra* {(2013) 5 SCC 546}, the Apex Court held that there could be no exhaustive list aggravating and mitigating circumstances. It held that the test which should be satisfied is that the Court should be fully satisfied that it is a 100% case for award of death penalty and there are no mitigating circumstances favouring the Accused and R-R test (rarest of rare case test) must also be applied. It laid down certain guidelines in the following terms :

"52. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

53. We are required to consider what punishment is to be imposed keeping in view the aggravating and mitigating circumstances, crime test, R-R test (rarest of rare case test) etc.

54. At the outset, we may observe that the crime in question is not an ordinary murder. It is an extraordinary murder where a two years old child of immediate neighbour is kidnapped, worshiped and then sacrificed. A small child was sacrificed only to obtain "*siddhi*" which is nothing more than a lust for power. The crime was committed in presence of the followers (*chelas*) which would spread such practices. The crime was committed for getting more power and salvation. The victim was an innocent and helpless child who would

have trusted his neighbours and must have gone to neighbours' house expecting a sweet not knowing that he would be brutally murdered. Killing of the child was without any provocation and was a cold blooded murder. The child was killed in a most brutal manner. As is apparent from the report of Dr. Lal Mohammad (PW-14) the child had many antemortem injuries. This shows that when the child was alive, his tongue was cut off, then his cheeks were brutally cut and thereafter, his head was severed from the neck. This is a most brutal crime which shocks the conscience of this Court. The offence is extremely brutal, grotesque, diabolical, revolting and definitely falls within the category of rarest of rare cases.

55. As far as the two main Accused, namely Ishwari Lal Yadav and Smt. Kiran Bai are concerned, we may mention that after the body of Chirag was recovered, on the statement made by Accused-Ishwari Lal Yadav, body of another six year old girl was also recovered from their compound who had also been murdered by Accused-Ishwari Lal Yadav and Smt. Kiran Bai. We, vide judgment dated 30.11.2016 in Criminal Appeal No.1068 of 2014 have convicted Accused-Ishwari Lal Yadav and Smt. Kiran Bai for the offence of murder and sentenced them for life imprisonment in the said case. We find no mitigating circumstances as far as Accused-Ishwari Lal Yadav and Smt. Kiran Bai are concerned. Though they belong to the poorest section of the society and are illiterate, they are intelligent and diabolical human beings. They know how to wield power. They wanted to attain a higher level of power and therefore we are clearly

of the view that as far as Accused-Ishwari Lal Yadav and Smt. Kiran Bai are concerned, the crime committed by them is a cruel, diabolical, brutal and depraved crime, which gives rise to public abhorrence and shocks the judicial conscience of the society, community and the Court. If human sacrifice, that too of an innocent and helpless two year old child is not dealt with strictly, then others may also be encouraged to perform human sacrifice. Most importantly, these two Accused have already been held guilty of murder of a six years old girl and therefore, so far as the Accused-Ishwari Lal Yadav and Smt. Kiran Bai are concerned, we are of the firm view that they deserve no mercy. Therefore, we uphold and confirm the sentence of death awarded by the learned trial Court.

56. So far as the prosecution case against the other Accused namely Rajendra Kumar, Nihaluddin @ Khan Baba, Hemant Sahu, Sukhdev Yadav and Mahanand Thethwar is concerned, we do not feel that this case falls under the rarest of rare case. There is evidence to support the prosecution case that the Accused were engaged in witchcraft (*tantra-mantra*). These Accused were followers (*chelas*) and followed what was told to them by their *Gurumata* and *Guru*. Therefore, we feel that it is not a fit case to impose death sentence upon them. Accordingly, the death sentence imposed under Section 302/34 read with Section 120-B IPC upon the Accused-Appellants namely Rajendra Kumar, Nihaluddin @ Khan Baba, Hemant Sahu, Sukhdev Yadav and Mahanand Thethwar is converted to one of imprisonment for life.

57. The conviction and sentences of all the Accused-Appellants under other Sections are upheld. It is however made clear that keeping in view the nature of offence, the Accused namely Rajendra Kumar, Nihaluddin @ Khan Baba, Hemant Sahu, Sukhdev Yadav and Mahanand Thethwar shall not be entitled to any remission or parole.
58. In view of the above, the reference is answered in the aforesaid terms and the appeal filed by the Appellant-Ishwari Lal Yadav and Smt. Kiran Bai is dismissed, whereas, the appeal of the other Accused-Appellants is allowed in part.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

Sd/-

(Sanjay K. Agrawal)
JUDGE